THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2019-000009

Tyrin S. Young, Sr., Individually,
as PR of the Estates of Tyrin Young, Jr.
and Micah A. Young and as Legal
Guardian of J.Y., a minor under the age of 14. . . . . Appellant,

v.

USAA General Indemnity Company . . . . . Respondent.

APPELANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

South Carolina Cases

Other Cases

STATUTORY PROVISIONS

RULES

STATEMENT OF ISSUES ON APPEAL

I. THE CIRCUIT COURT ERRED IN FINDING THE CALIFORNIA POLICY SHOULD NOT BE REFORMED UNDER S.C. CODE ANN. § 38-61-10 TO PROVIDE UIM COVERAGE

II. THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT WAS IN ERROR BECAUSE IT WAS PREMATURE AND BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE

STATEMENT OF THE CASE

On July 26, 2017, Plaintiff Tyrin Young filed this declaratory judgment action seeking to reform a USAA automobile policy to conform to the South Carolina Insurance Code pursuant to S.C. Ann. §38-61-10 to provide underinsured motorist coverage in the amount of $50,000.00[1]. (R. pp. 14-18). USAA timely answered and asserted counterclaims against the Plaintiffs, its insureds, and raised numerous defenses based on California law against stacking UIM coverages and other arguments based on California law. (R. pp. 19-55). Plaintiff timely filed its Reply to Answer and Counterclaim of USAA General Company on November 3, 2018. (R. pp. 56-62).

USAA took the depositions Tyrin and his wife Kamika Young on June 29, 2018. (R. p. 241; p. 354). Plaintiff served its Notice of Rule 30(b)(6) Deposition of Defendant USAA General Indemnity Company on July 6, 2018. (R. pp. 193-196). In response, on July 25, 2018, USAA filed a Motion for Summary Judgment and a Motion for a Protective Order seeking to prevent Plaintiff from deposing USAA. (R. pp. 63-65; pp. 180-190). Plaintiff filed a Motion to Compel Attendance at Rule 30(b)(6) Deposition on September 5, 2018. (R. pp. 191-196). All motions were heard on September 24, 2018 by the Honorable Perry H. Gravely.

The Order Granting USAA's Motion for Summary Judgment and Dismissing Cross Motions Related to Discovery Disputes as Being Moot was entered on October 8, 2018 (the "October 8, 2018 Order"). (R. pp. 1-10). On October 17, 2018, Plaintiff timely filed its Motion to Reconsider seeking to alter, amend or reconsider the October 8, 2018 Order. (R. pp. 202-209). On December 6, 2018, the Trial Court issued and entered an Order Denying Plaintiff's Motion to

[1] It is stipulated by the Parties that Plaintiffs' damages resulting from the death of the two children and injuries to the surviving minor child in the accident were sufficient to meet and exceed the available coverage of $50,000.00 under the California Policy including any applicable setoff.

Reconsider (the "December 6, 2018 Order"). (R. pp 11-13). Plaintiff timely filed and served a Notice of Appeal of both orders on December 31, 2018.

SEPARATE STATEMENT OF FACTS

On August 30, 2015, Kamika Young and her minor children, Tyrin Young, Jr., Micah Young and J.Y. (a minor) were involved in a tragic motor vehicle accident in Greenville, South Carolina (R. p. 15). Two of the children, Tyrin Jr. and Micah, died as a result of the accident and the minor child J.Y. was injured. (R. p. 16). Tyrin Jr. was 4 years old and Micah was 2 year old. (R. p. 132).

The accident was a heartbreaking and devasting event for the Young family. The underlying facts about the wreck are not in dispute. Kamika and the three (3) Young children were driving to church on the morning of the accident. Tyrin Young, Kamika's husband, was a career serviceman who served his country in the United States Navy and was on temporary duty in Guam at the time of the accident. (R. p. 133).

As Kamika was exiting the parking lot of a gas station attempting to cross over lanes of traffic, she pulled in front of an oncoming vehicle which struck her vehicle. As a result of the collision, she lost control of her vehicle and struck a bank across the street. The Ford Expedition and building caught fire. Kamika and J.Y. were able to exit the vehicle, and they desperately attempted to free Tyrin Jr. and Micah from the burning vehicle and building. They were able to free one of the boys from the vehicle; however, he became disoriented and tragically ran into the burning building where he died. The flames overwhelmed Kamika and J.Y., and they were unable to free the other boy before they were forced to leave him behind where he died in the fire.

The vehicle Kamika was driving, a 2001 Ford Expedition, was insured under a USAA policy at the time of the accident. (R. p. 133). USAA tendered the liability limits of $50,000.00

and $50,000.00 UIM limits to settle claims made on behalf of the estates of the deceased children and the minor child under that policy. (R. p. 133). The court order approving the settlement of those claims preserved the right to pursue additional underinsured coverage under a second USAA policy. (R. p. 16).

At the time of the accident, Tyrin had a separate policy with USAA insuring a 2006 KIA Spectra (the "KIA"), which was not involved in the accident. (R. p. 133). The policy covering the KIA was issued in California while Plaintiff was on temporary duty in California under policy number 022260801G71030 (the "California Policy"). (R. p. 133). The California Policy provides multiple types of coverages, including UIM coverage at the time of the accident in the amount $25,000 each person/$50,000.00 each accident. (R. p. 133). The California Policy's listed address of the named insured at the time of the accident was 1409 Roper Mountain Rd. Apt 240, Greenville, SC. 29615. (R. p. 110). The KIA was registered and licensed in South Carolina at the time the policy was issued and at the time of the accident. (R. pp. 133-134; pp. 154-156). For all years of ownership of the KIA, including when the California Policy was issued, property taxes were paid in South Carolina in Greenville County. (R. pp. 133-134; pp. 157-159).

The Young Family has permanent and definitive contacts with the State of South Carolina. Tyrin and Kamika were born in South Carolina and were married in South Carolina. (R. p. 133; p. 251, lines 18-25; p. 361, lines 8-10). Although temporarily deployed at the time of the accident, Tyrin has continuously remained a legal citizen and permanent resident of South Carolina, including at the time the California Policy was issued and at the time of the accident. (R. p. 139; p. 396, lines 3-14; p. 339, line 14 – p. 340, line 20). The Youngs have always maintained South Carolina driver's licenses. (R. p. 133; pp. 148-150; p. 366, lines 5-10; p. 262, lines 19-21). The

Youngs claimed income in South Carolina and filed their tax returns in South Carolina, including in 2015, the year in which the accident occurred. (R. p. 133, pp. 151-153).

The KIA was registered and tagged in South Carolina at all times relevant to this action, including but not limited to, the date the California Policy was issued, the date of accident and throughout the entire policy period. (R. pp. 133-134). Taxes on the KIA have been paid in South Carolina since the vehicle was purchased new in South Carolina. (R. p. 134).

Kamika Young and the children were living in South Carolina at the time of accident. (R. p. 19; p. 138). The children, who would have also been insured under the California Policy, died in South Carolina and their estates were probated in South Carolina. (R. pp. 177-179). The insured's address listed on the policy at the time of the accident, and the address USAA used to mail policy documents and renewals, was their Greenville, South Carolina address. (R. p. 110; p. 165-176).

Tyrin received orders to ship from California to Guam in 2014 and arranged to have the KIA shipped there in late 2014. (R. pp. 160-164). The Youngs had been living in California for several years prior to that time. After Tryin received his Guam orders, Kamika and the children moved back to their permanent residence in South Carolina sometime in mid-2014. (R. p. 380, lines 14-18).

At the time of the accident, the KIA and Tyrin were physically located in Guam, a fact that the Youngs had notified USAA of on several occasions prior to the move. (R. p. 308, lines 9-22; p. 344, lines 9-14; p. 382, lines 5-22). Despite USAA's knowledge of the move and the KIA's and Youngs' significant connections with South Carolina, USAA did not change the coverage from California and continued to accept premium payments from the Youngs. (R. p. 134; p.176). The Youngs are not versed in or sophisticated in insurance law and underwriting. They were

simply relying on USAA to write the appropriate coverage based on the information they provided to USAA. (R. p. 134; p. 396, line 15 - p. 397, line 10).

Tyrin asserts that summary judgment should not have been granted because of the significant connections between South Carolina and the property, interests and residents insured under the California Policy. Further, summary judgment was erroneous and premature because genuine issues of fact are in dispute and because Plaintiff had not had the opportunity to depose USAA. Significantly, the Trial Court found significant contacts between South Carolina and the underlying controversy existed, but nevertheless erroneously granted summary judgment without allowing Plaintiff the opportunity to depose USAA. This appeal followed.

STANDARD OF REVIEW

Pursuant to Rule 56 (c), SCRCP, the trial court may grant summary judgment only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." "An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002). An appellate court "undertakes a de novo review of all issues of law, and is free to decide matters of law with no particular deference to the trial court." *Menezes v. WL Ross & Co., LLC*, 403 S.C. 522, 530, 744 S.E.2d 178, 182 (2013). In reviewing a motion for summary judgment, the facts and circumstances must be viewed in the light most favorable to the non-moving party. *City of Columbia v. Town of Irmo*, 316 S.C. 193, 447 S.E.2d 855 (1994). The non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment where the standard is a preponderance of the evidence. *Huffman v. Sunshine Recycling,*

LLC, 417 S.C. 514, 523, 790 S.E.2d 401, 406 (Ct. App. 2016), reh'g denied (Sept. 15, 2016), cert. granted (Sept. 29, 2017).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THE CALIFORNIA POLICY SHOULD NOT BE REFORMED UNDER S.C. CODE ANN. § 38-61-10 TO PROVIDE UIM COVERAGE

The California Policy does not contain a choice of law provision, which would mandate the application of California law or preclude South Carolina law from being applied. (R. pp. 35-55). "Historically, South Carolina courts have followed the rule of *lex loci contractus* and applied the law of the state where the insurance contract was formed." *Heslin-Kim v. CIGNA Grp. Ins.*, 377 F. Supp. 2d 527, 530 (D.S.C. 2005). However, the traditional rule of *lex loci contractus* was modified by the enactment of S.C. Code Ann. § 38-61-10. *Id.* "Where this statute applies, it governs as South Carolina's rule of conflicts." *Sangamo Weston v. Nat'l Surety Corp.*, 307 S.C. 143, 147, 414 S.E.2d 127, 130 (1992). The statute provides:

> All contracts of insurance on property, lives, or interests in this State are considered to be made in the State and all contracts of insurance the applications for which are taken within the State are considered to have been made within this State and are subject to the laws of this State. S.C. Code Ann. § 38-61-10.

Pursuant to *Sangamo*, the South Carolina Supreme Court set forth a two-fold analysis to determine the choice of law in the context of an insurance contract. *Heslin-Kim*, 377 F. Supp. 2d at 531. First, the court must determine whether S.C. Code Ann. § 38-61-10 applies. Second, the court must address whether South Carolina has sufficient contacts creating a state interest in the dispute. *Id.* at 531.

a. <u>The first prong of the *Sangamo* test is satisfied because the California Policy insured property, lives and interests connected to and located in South Carolina.</u>

The physical presence of the insured property in South Carolina is not a part of S.C. Ann. § 38-61-10 and is not required to trigger the broad application of the statute. Here, this is particularly significant considering the substantial contacts with South Carolina, the Youngs and the KIA. When applying the first prong of the *Sangamo* test, "the plain language of § 38–61–10 contemplates a **broad application** of South Carolina law to insurance contracts with any significant connection to South Carolina." *Heslin-Kim*, 377 F. Supp. 2d at 531 (emphasis added). When interpreting and applying the first prong of the *Sangamo* test, the Court is required to consider the connection between the property, interests or lives with South Carolina – not simply physical presence of any of the insured interests. *See Yeager v. Allstate Ins. Co.*, Civil Action No. 9:09-860-MBS, 2010 U.S. Dist. LEXIS 15843, at 13 (D.S.C. Feb. 22, 2010) (to answer the first question under the *Sangamo* test – whether property lives or interests are located in South Carolina –*Sangamo* and *Heslin-Kim* require that this court interpret § 38-61-10 broadly and determine whether there is a significant connection between the subject of the insurance contract and South Carolina.) Thus, the interpretive case law requires consideration of the connections between South Carolina and the controversy when determining whether Section 38-61-10 applies under the first prong of *Sangamo*.

The statute applies to all "contracts of insurance on property, lives, **or** interests in this State." S.C. Ann. § 38-61-10 (emphasis added). *See also Harris v. Anderson County Sheriff's Office*, 381 S.C. 357, 362, 673 S.E.2d 423, 425 (2009) (noting that the use of the word "or" in a statute is a disjunctive particle that marks an alternative). In this case, the inclusion of "or" in the statute is significant because it does not limit the statutes application exclusively to the KIA. Rather, it mandates broad consideration of all property, interests, persons and risks subject to the

California Policy which are located in or share a significant connection to South Carolina. *See Heslin-Kim,* 377 F. Supp. 2d at 531.

South Carolina exercises significant interests in the KIA. It requires registration of the vehicle to, among other important state interests, generate revenue through taxes, track ownership and licensure, and to ensure safety of its citizens on the roadway. (R. pp. 205-206). Kamika purchased the KIA new in South Carolina. (R. pp. 154-156). The KIA was continuously registered and tagged in South Carolina from the time the vehicle was purchased through the date of the accident. (R. pp. 133-134; pp. 154-156). The taxes on the KIA were always paid in South Carolina from the time the vehicle was purchased through the date of the accident. (R. pp. 133-134; pp. 157-159).

The Trial Court notes in the October 8, 2018 Order "that South Carolina's courts have held numerous times that automobile polices should not be reformed where the policies sole connection to the State of South Carolina is that the insured was injured in an accident while in the State of South Carolina." (R. p. 6). The Trial Court relies in part on *Bowman v. Cont'l Ins. Co.* No. 99-2540, 2000 U.S. App. LEXIS 20957, at 10 (4th Cir. 2000) (unpublished opinion) to support its finding that S.C. Ann. § 38-61-10 does not apply. (R. p. 6) However, the Trial Court's application of *Bowman* to the present case is in error.

In *Bowman*, the court declined to reform a Georgia policy related to an accident in South Carolina because the vehicle owners were Georgia citizens and the vehicle was registered, taxed and tagged in Georgia as opposed to South Carolina. *Bowman,* at 10 (4th Cir. 2000). *See also Yeager v. Maryland Casualty*, 868 F. Supp. 141, 144 (D.S.C. 1994) (location of accident and lawsuit alone are insufficient to trigger § 38-61-10 since the accident involved Georgia residents

and a vehicle registered in Georgia.)[2]. The *Bowman* and *Maryland Casualty* cases are clearly distinguishable from this case because they involve only transient connections, whereas the connections in this matter are permanent and definitive. Furthermore, the connections which the court found were lacking in *Bowman* and *Maryland Casualty* – registration of the vehicle in S.C. and ownership by S.C. residents – are satisfied in the present case. Considering the KIA was registered in South Carolina and owned by South Carolina residents, South Carolina has a significant interest in the property, thus triggering the broad application of Section 38-61-10.

In addition to the KIA, the California Policy also provided coverages concerning interests and citizens located in South Carolina and insured individuals (Kamika and Tyrin Young) with South Carolina driver's licenses. (R. pp. 148-150). Prior to the accident on August 30, 2015, Kamika was issued insurance cards for the KIA on January 3, 2015 and June 3, 2015. (R. pp.165-176). Kamika was specifically named on the declaration page and is listed as an operator and insured on the insurance cards issued and mailed to the family's permanent address in Greenville, South Carolina. (R. pp. 165-176). USAA did so knowing that Kimaka and the three (3) children were living in South Carolina at the time. As such, USAA knew that it was insuring persons, interests and risks located in South Carolina under the California Policy, which triggers the broad application of Section 38-61-10 and satisfies the first *Sangamo* prong.

The California Policy also contained bodily injury coverages which covered Kamika and the children located in South Carolina at the time of the accident. (R. pp. 35-55). These coverages included Medical Payments Coverage and UM/UIM coverage. (R. pp. 40-48) The California Policy and the South Carolina Policy generally define "family member" as "a person related to

2 Similarly, *see Hartsock v. Am. Auto. Ins. Co.*, 788 F. Supp. 2d 447, 451 (D.S.C. 2011) (the Court applied the Sangamo test and reformed a North Carolina automobile insurance policy to South Carolina. Critical to the court's analysis was the fact that Ms. Harstock's vehicle **was registered, taxed and tagged in South Carolina**.)

you by blood, marriage or adoption who is a resident of your household." (R. p. 37; p. 86). Relevant to this case, the California Policy generally defines "Covered person" as "you or any family member for the ownership, maintenance, or use of any auto or trailer." (R. p. 38). USAA considered Tyrin, his wife Kamika Young, and their children as part of the same household as indicated in the policy renewals addressed to their Greenville, South Carolina address on January 3, 2015 and July 3, 2015 (R. pp. 165-176). Tyrin and his family were considered residents of the same household by the IRS and the State of South Carolina as indicated on their South Carolina tax returns and South Carolina drivers' licenses. (R. pp. 148-153). The United States Military and Federal Government considered the Youngs to be a part of the same household with permanent residence in South Carolina. (R. pp. 151-153).

Turning to the specific coverages, the Medical Payments Coverage applied to "covered persons" defined as "You or your family member occupying while occupying any auto." (R. p. 40). This particular coverage also provided death benefit coverages to the "beneficiary" of a covered person. (R. p. 42). The term "beneficiary" includes "2. if the deceased is an unmarried minor, either of the surviving parents who had legal custody at the time of the accident;" or "3. the estate of the deceased." (R. p. 40).

The UM/UIM coverage[3] under the California Policy extended to "covered persons" defined as "You or your family member." (R. p. 44). In this case, Kamika was a legal custodian of the deceased children living in South Carolina at the time of the accident. (R. p. 380, lines14-18). The

[3] Under the California Policy, UIM coverage was in fact included as a part of the UM coverage and the Youngs paid premiums for this coverage. "Underinsured motor vehicle" means a land motor vehicle or trailer of any type to which a liability bond or policy applies at the time of the accident but its limit for bodily injury liability is less than the limit of liability for this coverage. UNINSURED MOTORISTS BODILY INJURY COVERAGE (referred to as UMBI). We will pay compensatory damages which a covered person is legally entitled to recover from the owner or operator of an uninsured motor vehicle or underinsured motor vehicle because of Bl sustained by a covered person and caused by an auto accident.

boys who died as a result of the accident involving an "auto" owned by the Youngs are buried in South Carolina and their estates were probated in South Carolina. (R. pp. 177-179). Thus, the broad application of § 38-61-10 is triggered because the California Policy insured South Carolina interests, lives and beneficiaries.

In sum, when interpreting and applying the first prong of the *Sangamo* test, the Court is required to consider the connection between the property, interests and lives with South Carolina – not simply physical presence. The connection between South Carolina and a vehicle taxed, tagged and registered under its laws, such as the KIA, is significant and permanent. This connection is not broken just because the vehicle is not physically present in this state. The significant connections acknowledged by the Trial Court in both Orders and the October 1, 2018 Letter[4] cannot be ignored. (R. pp. 1-10; pp. 11-13; p. 209). These significant connections must be considered when applying Section 38-61-10 under the first prong of *Sangamo.*

Since the California Policy was insuring property, interests, persons and lives located in and sharing significant connections with South Carolina at the time of the accident, the Trial Court erred by not applying Section 38–61–10 under the first prong of *Sangamo*. For this reason, this Court should reverse.

b. The second prong of the *Sangamo* test is satisfied because South Carolina has significant connections with the property, lives and interests insured under the California Policy.

This appeal and the application of Section 38-61-10 hinges on the connections with South Carolina. The Youngs, the KIA and the interests insured under the California Policy have significant, permanent and definitive connections with South Carolina. By contrast, in the cases

[4] In its October 1, 2018 letter, the Court specifically finds "the "contacts" with South Carolina are significant" but despite the admitted significant contacts declines to apply the first prong of *Sangamo*. Since the statute was intended to be broadly applied where contacts are significant, this finding is clearly erroneous because it contravenes applicable law. The significant connections are also noted in both Orders.

where courts have found Section 38-61-10 inapplicable, the courts determined there was a lack of connection, interest or nexus with South Carolina. *Yeager v. Allstate Ins. Co.* No. CIV.A. 9:09-860-MBS, 2010 WL 680429 (D.S.C. Feb. 23, 2010). In this case, the Trial Court acknowledges the significant contacts between the Youngs and South Carolina. (R. p. 12; p. 209). Despite this finding, however, the Trial Court erred in finding Section 38-61-10 did not apply.

In *Russell v. McGrath*, the court analyzed many factors regarding the applicability of Section 38-61-10 to determine whether a Florida automobile insurance policy should be conformed to South Carolina law. 135 F. Supp.3d 427 (D.S.C. 2015). *McGrath* involved an automobile accident in South Carolina where Brian McGrath and his three passengers lost their lives. *Id.* at 428. McGrath was a Connecticut citizen attending college at the University of South Carolina at the time of the accident. *Id.* at 429. McGrath's parents were paying out of state tuition *Id.* at 429. The subject vehicle was purchased in Florida, registered in Florida and had a Florida tag. *Id.* at 429. The taxes on the vehicle were paid in Florida. *Id.* at 429. The insurance policy at issue was a Florida policy and was purchased from a Florida agent. *Id.* at 429. The policy was mailed to McGrath's parents at their residence in Connecticut. *Id.* at 429. Brian had a Connecticut driver's license. *Id.* at 429. Brian never worked, owned property or paid taxes in South Carolina. *Id.* at 429. Brian's estate was probated in Connecticut. *Id.* at 429. Brian's mother stated that it was always his intent to return to Connecticut. *Id.* at 429.

In *McGrath*, the court ultimately declined to reform the policy due to insufficient contacts between Brian McGrath and South Carolina. In that respect, *McGrath* is distinguishable from this matter.

The factors which the *McGrath* court found to be absent and insufficient to trigger Section 38-61-10 are actually present here. The Youngs are and were South Carolina citizens driving South

Carolina vehicles at the time of the accident. (R. p. 138). The Youngs claimed income and filed tax returns in South Carolina. (R. pp.151-153). The Youngs have always maintained permanent legal residency in South Carolina throughout the policy period and at the time of the accident. (R. p. 139; p. 396, lines 3-14; p. 339, line 14 – p. 340, line 20). The 2006 KIA was purchased in South Carolina, and was taxed, tagged and registered in South Carolina at the time the Policy was issued and at the time of the accident in 2015. (R. pp. 133-134; pp. 154-156; pp. 157-159). The Youngs have always maintained South Carolina drivers licenses and were never licensed in any other state. (R. p. 133; pp. 148-150; p. 366, lines 5-10; p. 262, lines 19-21). The Youngs purchased and renewed the California Policy by phone and at least two policy renewals were addressed to and sent to Plaintiff at his South Carolina address. (R. p. 349, line 23 - p. 350, line 9; pp. 165-176). The payment of premiums under the California Policy would have originated and been paid from South Carolina. (R. p. 176). Kamika and the children were living in South Carolina at the time of the accident. (R. p. 138). The estates for both of the deceased children, Tyrin, Jr. and Micah, were probated in South Carolina. (R. p. 138; pp. 177-179). The Youngs have always considered South Carolina their permanent residence and it has always been their intent to return here. (R. p. 139; p. 396, lines 3-14; p. 339, line 14 – p. 340, line 20). This is further supported by the fact that the Youngs now own real property in South Carolina. (R. p. 347, lines 1-5).

Section 38-61-10 was also analyzed in *Yeager v. Allstate Ins. Co.* No. CIV.A. 9:09-860-MBS, 2010 WL 680429 (D.S.C. Feb. 23, 2010). There, the court was asked to determine whether an automobile policy issued in Georgia should be reformed to provided UIM coverage consistent with South Carolina law. *Id.* at 1. The insured was a Georgia resident living part time in South Carolina with her boyfriend at the time of the accident. *Id.* at 4. Her permanent address was in Georgia, and she had a Georgia driver's license. *Id.* at 4. She was working as a bookkeeper for

clients in South Carolina and was driving from a client's place of business in South Carolina to her part time residence in South Carolina at the time of her accident. *Id.* at 4-5. She filed income taxes in South Carolina and Georgia. *Id.* at 5.

In *Yeager*, The court declined to apply Section 38-61-10 finding the insured's connections with South Carolina were not significant enough because "although Plaintiff resided in South Carolina part-time and paid South Carolina income taxes, Plaintiff was a permanent resident of Georgia, Plaintiff held a Georgia driver's license, and the insured automobile was registered in Georgia." *Id.*at 15. By contrast, the Youngs meet all of the stated factors which apparently prevented the *Yeager* court from applying Section 38-61-10 and reforming the policy – residency, drivers licensure and registration of the vehicle in South Carolina.

In *Heslin-Kim*, Section 38-61-10 was applied to conform a life insurance policy to provide coverage for a South Carolina resident. 377 F. Supp. 2d at 532. The court found a significant connection because the Plaintiff was a resident of South Carolina in the years leading up to his death, he died in South Carolina, his estate was probated here, and premiums were paid from South Carolina. *Id.* at 532. The court found that "insuring the life of a South Carolina citizen presents a more permanent and definitive connection to this state." *Id.* at 532.

This matter is analogous to *Heslin-Kim*. The California Policy provides coverage to the Youngs who have always been permanent residents of South Carolina. (R. p. 139; p. 396, lines 3-14; p. 339, line 14 – p. 340, line 20). The California policy covered their resident children who died in South Carolina as a result of the accident and whose estates were probated here. (R. pp. 177-179). Finally, the premiums for the policy would have been initiated and paid from South Carolina. (R. p. 176).

Due to the overwhelming permanent and definitive contacts between the Youngs and the State of South, the Trial Court erred by not applying Section 38-61-10 to reform the California Policy[5]. For this reason, this Court should reverse the grant of summary judgment.

II. THE CIRCUIT COURT'S GRANT OF SUMMARY JUDGMENT WAS IN ERROR BECAUSE IT WAS PREMATURE AND BECAUSE THERE WERE GENUINE ISSUES OF MATERIAL FACT IN DISPUTE

At the time the October 8, 2018 Order was entered, Plaintiff had not been afforded the opportunity to complete discovery by deposing the opposing party – Defendant USAA. Plaintiff raised this issue in its memorandum in opposition to summary judgment and in its Motion to Compel and supporting memorandum. (R. pp. 135-136; pp. 191-201). Despite the absence of a full and fair opportunity to conduct discovery, the Trial Court granted summary judgment on all claims and issues. Such a grant of summary judgment contravenes long established South Carolina precedent as to when a court may properly grant summary judgment. For this reason, this Court should reverse.

It is well accepted that summary judgment is a "drastic remedy," which should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or

[5] The same result would most likely be reached under California law since California appears to apply the same factors and analysis as South Carolina to determine which state's law should apply. *See* California Cas. Indem. Exch. v. Pettis, 193 Cal. App. 3d 1597, 1606, 239 Cal. Rptr. 205, 211 (Ct. App. 1987), (In finding that California's choice of law provision applied over Hawaiian law, the court determined that California had the most significant contacts considering the Pettis's were citizens of California, earned income in California and the covered vehicles were registered in California.) *See also* Farmers Ins. Exch. v. Veveiros, No. A128444, 2011 WL 1535404, at 6 (Cal. Ct. App. Apr. 25, 2011) (unreported) (considering similar factors including that the insureds were California citizens and insured vehicles were registered in California).

inferences to be drawn from them, summary judgment should be denied. *Schmidt v. Courtney*, 357 S.C. 310, 319, 592 S.E.2d 326, 331 (Ct. App. 2003)

Because summary judgment is such a drastic remedy, it must not be granted until the opposing party has had a full and fair opportunity to conduct discovery. *Baird v. Charleston County*, 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999). This means, among other things, that summary judgment should not be granted until the non-moving party has a full and fair opportunity to complete discovery. *Doe v. Batson*, 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Schmidt*, 357 S.C. at 319, 592 S.E.2d at 331 (Ct. App. 2003); *Wallace v. Day*, 390 S.C. 69, 76-77, 700 S.E.2d 446, 450 (Ct. App. 2010); *Lanham*, 349 S.C. at 363, 563 S.E.2d at 333 (2002); *Baughman,* 306 S.C. at 112, 410 S.E.2d at 543 (1991).

South Carolina courts routinely reject motions for summary judgment when the opposing party has not had a full and fair opportunity to participate in discovery. For instance, in *Doe v. Batson*, the South Carolina Supreme Court affirmed the South Carolina Court of Appeals reversal of summary judgment on the grounds that the trial court abused its discretion in granting summary judgment before the Plaintiff had a full and fair opportunity to complete discovery. 345 S.C. at 321, 548 S.E.2d at 857 (2001). There, the trial court granted summary judgment finding no genuine issue of material fact existed on the issue of liability. *Id.* at 320, 548 S.E.2d at 856. The Plaintiff opposed the motion, in part, arguing that it was premature because he had not yet had the opportunity **to depose the defendant Batson**. *Id.* at 319, 548 S.E.2d at 856. (emphasis added). The Supreme Court agreed that "Doe should have been permitted to complete discovery" in deposing the defendant and other witnesses and, therefore, affirmed the Court of Appeals reversal of the trial court's order granting summary judgment. *Id.* at 322, 548 S.E.2d at 857.

Similarly, in *Baughman*, the court reversed a partial summary judgment order finding that it had been granted prematurely prior to the completion of discovery. 306 S.C. at 112, 410 S.E.2d at 543 (1991). The trial court granted summary judgment, in sum, because plaintiff failed to establish causation and the appropriate standard of care. *Id.* at 104, 410 S.E.2d at 539. The Plaintiff opposed the motion arguing that he should be allowed to complete discovery by deposing his expert on the issues of liability and causation. *Id.* at 105, 410 S.E.2d at 539. The South Carolina Supreme Court agreed that further discovery was necessary to develop the record prior to granting summary judgment and reversed, finding that Plaintiff should be afforded an adequate opportunity to complete discovery by deposing the witness. *Id.* at 114, 410 S.E.2d at 545.

The present case is analogous to both *Batson* and *Baughman*. Here, the Circuit Court prematurely granted summary judgment before Plaintiff had an opportunity to depose USAA – **a party and necessary witness**. Moreover, Plaintiff raised multiple disputed issues of material fact in opposition the USAA's motions. These issues include, but are not limited to, ambiguity in the policy language, disputes as to which state's law should apply (South Carolina or California), USAA's position on whether coverage should have been written in South Carolina as opposed to California, vehicle coverages, and whether additional UIM coverage was possible or available under the policy. (R. pp. 135-136; pp. 197-201; pp. 207-208). In addition, issues of material fact are in dispute as to USAA's claims and defenses and Plaintiff's waiver and estoppel arguments. (R. pp. 56-62; pp. 140-141). Plaintiff sought to address these issues in its Notice of 30(b)(6) Deposition. (R. pp. 188-190).

For example, in the October 8, 2018 Order, the court erroneously finds the "Plaintiff has not argued and the Court does not find there to be any ambiguity in the California Policy." (R. p. 4). Plaintiff raised ambiguity as a defense in its reply to USAA's counterclaim and in connection

with the subject motions and hearing. (R. p. 61; p. 136; pp. 207-208; p. 234, line 24 – p. 235, line 5). Further, there is ambiguity in the California Policy.

The term "garaged" as USAA attempts to apply it in this case is ambiguous. The term "garaged" is not defined in the policy documents and factual disputes exist as to its meaning and application in this case. (R. pp. 35-55). The term "location" is, however, defined in the California Policy documents as "where you garage your vehicle." USAA knew the KIA had been shipped to Guam in 2014. (R. p. 308, lines 9-22; p. 344, lines 9-14; p. 382, lines 5-22). Having notice of that fact, USAA sent policy renewal packages continuing coverage under the California Policy to Tyrin Young and his family addressed to their address at 4 Cross Club Dr., Greenville S.C. on January 3, 2015 and again on July 3, 2015. (R. pp. 165-176). The policy continued to note the KIA was "garaged" in California even though it was not "located" there. (R. pp. 165-176). The KIA was physically located in Guam at the time of the accident on August 30, 2015. (R. p. 3).

Under South Carolina law, a contract term is ambiguous when it is reasonably susceptible to more than one interpretation. *Wallace*, 390 S.C. at 75, 700 S.E.2d at 449. All ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in light most favorable to the Plaintiff and construed most strongly against the moving party. *Lanham,* 338 S.C. at 347, 526 S.E.2d at 255. Further, ambiguities in a contract for insurance are interpreted against the insurer. *McPherson v. Michigan Mut. Ins. Co.*, 310 S.C. 316, 426 S.E.2d 770, 771 (S.C. 1993).

USAA's purported use and application of the term "garaged" is not evident from the documents or discovery responses provided in the case and is susceptible to multiple interpretations. As such, Plaintiff should have been afforded the opportunity to depose USAA regarding the application and use of the term before the Trial Court granted summary judgment.

For instance, if "garaged" means the physical location of the vehicle, then the "garaged" label on the declaration page is meaningless since the vehicle was located in Guam. (R. p. 3). If "garaged" includes where the vehicle is taxed, tagged and registered, then South Carolina would be the proper state. California, as listed on the declaration page, would not fall under either interpretation because the KIA was not "located" there and was not registered, taxed or tagged in California. Since the California Policy is susceptible to more than one interpretation as to the use and application of the term "garaged," summary judgment was inappropriate because this creates a genuine issue of material fact. *See Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 245, 672 S.E.2d 799, 804 (Ct. App. 2009) (holding that summary judgment is improper when there is an issue as to the construction of a written contract and the contract is ambiguous).

Genuine issues of material fact exist regarding the issue of which state should coverage on the KIA should have been written. "Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Baugus v. Wessinger*, 303 S.C. 412, 415, 401 S.E.2d 169, 171 (1991). In Plaintiff's Notice of 30(b)(6) to USAA, Plaintiff identified topics to address why USAA continued to cover the KIA under the California Policy as opposed to a South Carolina policy, despite having knowledge that the KIA had been moved from California and knowledge of both the KIA's and the Youngs' significant connections with South Carolina. (R. pp. 188-190).

Plaintiff should be allowed to depose USAA to inquire into the facts, communications, underwriting notes, policy and procedures, documents and other information USAA relied upon in its coverage decision. (R. pp. 188-190). Ancillary to this particular inquiry, is also understanding whether USAA provided or offered coverage in Guam at the time the KIA was moved from California. If so, the types of coverages that would have been available to the Youngs in Guam

and whether these options were offered to the Youngs are relevant to the disputed issue of coverage.

USAA raised numerous defenses and claims in its Answer and Counterclaim, which are in dispute[6]. (R. pp. 19-34). USAA's defenses and claims at issue include Failure to Mitigate Damages, Accord and Satisfaction, No Coverage and Estoppel. (R. pp. 19-34).These are based, in part, upon allegations that the Plaintiffs failed properly communicate regarding the location of the KIA and other requirements under the California Policy. (R. pp. 19-34). USAA also relies upon deposition testimony that the Plaintiffs never asked for the KIA to be covered under a South Carolina policy. (R. p. 384, lines 14-24). USAA asserts that it relied upon Plaintiff's representations as to the location of the vehicle. (R. pp. 23-25; pp. 32-33). USAA claims that Plaintiffs did not properly communicate with USAA regarding changes in coverage. (R. pp. 23-25; pp. 32-33). Communications between USAA and Plaintiff regarding facts relevant to the issuance, renewal and payment for coverage are at issue in this action. Plaintiff should have the full opportunity to discover and refute the basis for USAA's position through a deposition, and in conjunction, also discover the location and existence of documents and communications regarding the renewal and any change in coverage. (R. pp. 193-201).

USAA's policies, procedures and factors utilized to write coverage in South Carolina are relevant to this coverage dispute. (R. pp. 193-201). In addition, USAA's policies and procedures regarding the purchase, renewal and changes to policies are relevant and appropriate to this dispute. (R. pp. 193-201). Counsel for USAA questioned the Plaintiffs extensively regarding the purchase, renewal and changes to the policy. The Youngs were also questioned extensively regarding their

6 In its Motion for Protective Order, USAA states that it is waiving the following claims and defenses: Failure to Comply with Conditions Precedent and Breach of Contract. However, USAA's remaining defense and counterclaims remain at issue. (R. pp. 185-186).

communications with USAA as well as their location and location of the vehicle. (R. p. 300, line 14 – p. 312, line 6; p. 371, line 17 – p. 389, line 21). Further, USAA disputes that the KIA should have been covered under a South Carolina policy. (R. pp. 19-34).

It is appropriate for Plaintiffs to understand the bases of the issues in dispute, in addition to USAA's defenses and claims in this matter. Thus, Plaintiff should have been allowed to depose USAA regarding the underlying facts, documents and reasons supporting its claims, defenses and position on coverage prior to summary judgment. For the same reasons stated in *Batson* and *Baughman*, it was erroneous for the Trial Court to prematurely grant summary judgment in this matter. Hence, this Court should reverse the Trial Court's grant of summary judgment.

There are genuine issues of material fact in dispute as to the issues of waiver and estoppel regarding USAA's claims and defenses. In *Leggett v. Smith*, the South Carolina Court Appeals found that the insurer waived certain policy provisions regarding residency and garaging of the vehicle under the policy because it continued to accept premiums after the insurer became aware of the insured's change in residency from New York to South Carolina. 386 S.C. 63, 80, 686 S.E.2d 699, 708–09 (Ct. App. 2009)[7]. *See also Pitts v. New York Life Ins. Co.*, 247 S.C. 545, 148 S. E. 2d 369 (1966) (insurance company was estopped from denying double-indemnity coverage under a life insurance policy after it demanded and retained premiums for such coverage).

USAA was on notice no later than December of 2014 that Tyrin and the KIA had been moved from California to Guam while Kamika and children were living in South Carolina. After receiving notice of the change in location of the insured and KIA, USAA decided to keep the California coverage in place under the Policy. USAA mailed two (2) additional policy renewals to Plaintiff on January 3, 2015 and July 3, 2015 and continued to accept Plaintiff's premiums without

[7] In *Leggett*, the court applied N.Y. law regarding waiver; however, South Carolina also recognizes the doctrine of waiver. *See e.g. Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 415 S.E.2d 384 (1992).

changing coverage from California. (R. pp. 165-176). Moreover, after receiving notice of the vehicle's and Plaintiff's change in location to Guam, USAA listed Plaintiff's address as 1409 Roper Mountain Rd, Apt. 240 and later 4 Cross Club Greenville, South Carolina and sent the renewal policies to those addresses. (R. pp. 165-176). At a minimum, genuine issues of material fact are in dispute regarding waiver and estoppel, and Plaintiff should be allowed to depose USAA regarding the underlying facts, communications and documents relevant to these issues. Thus, this Court should reverse the Trial Court's grant of summary judgment.

CONCLUSION

Based on the foregoing, this Court should reverse the Trial Court's Orders and remand this matter for further proceedings.

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August 13, 2019

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No. 2019-000009

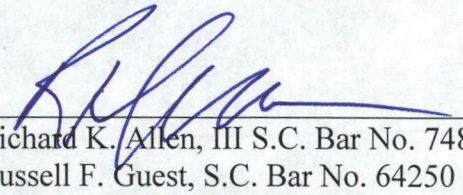
Tyrin S. Young, Sr., Individually,
as PR of the Estates of Tyrin Young, Jr.
and Micah A. Young and as Legal
Guardian of J.Y., a minor under the age of 14. . . . . Appellant,

v.

USAA General Indemnity Company . . . . . Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that the Appellant's Final Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules*.



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