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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY CIRCUIT COURT

Bentley D. Price, Circuit Court Judge

Appellate Case No.: 2020-000932

Miguel Oyuela-Martinez,..... Appellant,

v.

Kuhn & Kuhn, LLC and John Robert Kuhn, Defendants

Of which Kuhn & Kuhn, LLC.....Respondent.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2019-CP-10-0341

Miguel Oyuela-Martinez,
Plaintiff,
v.
Kuhn & Kuhn LLC, and John Robert Kuhn,
Defendant.

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT**

FILED
CLERK OF COURT
JUL 29 2019
PH 12:20

This matter came before me on June 18, 2019 pursuant to a Motion to Dismiss and Motion for Summary Judgment filed by the defendant Kuhn & Kuhn, LLC. Present at the hearing for the Plaintiff was Kevin B. Smith, Esq. Also present were the defendant John Robert Kuhn and his attorney Ronald B. Diegel, Esq. Attorney Jeffrey M. Crudup, Esq. was also present for the defense.

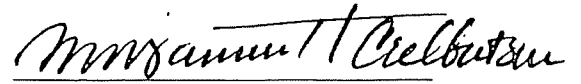
The lawsuit arises out of an automobile/pedestrian accident on October 24, 2018. In addition to the claims alleged against Mr. Kuhn individually as the owner and operator of the vehicle that caused the accident resulting in injuries to the Plaintiff, the Plaintiff has also alleged claims against the law firm of Kuhn & Kuhn, LLC contending that the law firm has vicarious liability for Mr. Kuhn's actions and/or negligently supervised Mr. Kuhn at the time of the accident.

The court has considered the materials submitted by counsel for the Plaintiff and Defendants, as well as the documents and pleadings which are part of the Court file. The Court denies the motion to dismiss and the motion for summary judgment as to the vicarious liability claim. However, as to the claim of negligent supervision the Court notes that Mr. Kuhn is the managing partner and owner of Kuhn & Kuhn, LLC. As such,

1 MKC

Mr. Kuhn cannot negligently supervise himself. Accordingly, the Court grants summary judgment as to the negligent supervision claim asserted by the Plaintiff.

And it is so ordered.



Benjamin H. Culbertson
Presiding Circuit Court Judge

July 15, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2019-CP-10-00341
)	
MIGUEL OYUELA-MARTINEZ,)	
)	
Plaintiff,)	
vs.	)	ORDER GRANTING SUMMARY
	)	JUDGMENT
KUHN & KUHN, LLC AND JOHN ROBERT)	
KUHN,)	
)	
Defendants.)	
_____)	

This matter came before me on the Defendant Kuhn & Kuhn, LLC’s (the “Firm’s”) motion for summary judgement. For the following reasons, the Firm’s motion is hereby GRANTED.

BACKGROUND FACTS AND PROCEDURAL POSTURE

This case arises out of an automobile/pedestrian accident on October 24, 2018. On or about January 10, 2019, Plaintiff signed a Covenant Not To Execute (“Covenant”) as to Mr. Kuhn, and consideration for the Covenant was paid on behalf of Mr. Kuhn.¹ Twelve days later, on January 22, 2019, Plaintiff filed the instant lawsuit against Mr. Kuhn and the Firm. In addition to the general negligence claims alleged against Defendant Kuhn, Plaintiff alleged the Firm was vicariously liable for Mr. Kuhn’s actions and negligently supervised him at the time of the accident.

On June 7, 2019, Defendants moved for summary judgment. In Judge Culbertson’s July 15, 2019 Order, the Firm was granted partial summary judgment as to the claims against it for

¹ The Firm made the Court aware of a second, supplemental covenant releasing Mr. Kuhn executed on or about November 29, 2019. Plaintiff’s counsel claimed this second covenant was not properly before this Court, but did not dispute its existence.

direct negligence (negligent supervision and hiring). Judge Culbertson declined to grant the remaining portion of the motion as to vicarious liability.

On January 22, 2020, the Firm filed a renewed motion for summary judgment on Plaintiff's vicarious liability claim. A hearing on the Firm's motion was held on May 5, 2020. At the hearing, the Firm argued the claims against it must be dismissed as the signed Covenant that releases Defendant Kuhn as an agent also releases the Firm as the principal. Plaintiff's counsel argued that it needed additional time to respond to this argument. The hearing was adjourned and Plaintiff was allowed additional time to prepare and file a brief in opposition to the Firm's motion. The hearing was reconvened on May 14, 2020. Plaintiff conceded that a covenant releasing the agent released the principal, but argued: (1) this Court is bound by Judge Culbertson's previous order denying summary judgment; and (2) the Covenant was induced by fraud.

I find that the previous order denying summary judgment does not bar this Court from ruling on the Firm's January 2020 motion for summary judgment. The Court agrees with the Plaintiffs that there potentially could be a scintilla of evidence to get past Summary Judgment as to the fraudulent misrepresentation. However, that should be brought in a separate action. As the Covenant is still currently in place and the consideration for the Covenant has been paid, I find that the executed Covenant, which releases Defendant Kuhn as the agent, also releases the Firm as the principal.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact for a jury's consideration and it is clear that the moving party is entitled to a judgment as a matter of law. S.C. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Sapp v. Ford Motor Co., 386 S.C. 143, 146, 687 S.E.2d 47, 48 (2009). In determining whether any triable

issues of fact exist, the evidence must be viewed in the light most favorable to the nonmoving party; however, summary judgment is appropriate when plain, palpable and indisputable facts exist on which reasonable minds cannot differ. Byerly v. Connor, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992).

ORDER

1. The Previous Order Denying Summary Judgement

As an initial matter, the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings. Ballenger v. Bowen, 313 S.C. 476, 477–78, 443 S.E.2d 379, 380 (1994); see also Weil v. Weil, 299 S.C. 84, 382 S.E.2d 471 (Ct.App.1989) (statement made while denying summary judgment is not the law of the case). It is for this reason that an order denying a motion for summary judgment is not appealable. Ballenger, 313 S.C. 146, 478. Accordingly, this Court is free to rule on the Firm’s January 22, 2020 motion for summary judgment.

2. The Covenant

In South Carolina, it is well-established that a release of an agent releases the principal as to all vicarious claims. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), rev'd on other grounds, 356 S.C. 238, 588 S.E.2d 588 (2003). In Andrade v. Johnson, a consumer sued a heating contractor and SCE&G, alleging (amongst other claims) the contractor negligently installed HVAC systems in the consumer’s home while working as an agent of SCE&G. After the consumer executed a Covenant² (“Andrade Covenant”) with the contractor,

² In Andrade, a claimant signed a Covenant Not To Sue. “A Covenant Not to Sue and a Covenant Not to Execute are so closely akin that the only major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit while the former is entered into before a lawsuit is filed.” Poston by Poston v.

the Circuit Court Judge granted summary judgment to SCE&G on all vicarious liability claims even though the Covenant specifically attempted to reserve the consumer's right to sue SCE&G. *Id.* at 222 (The Covenant states plaintiff retained: "all rights of action, claims, and demands against any and all persons other than [agent], including, but not limited to [SCE&G]"). The consumer appealed the decision and the Court of Appeals of South Carolina held the trial court properly granted SCE&G's Motion. *Id.* at 219. The court held firm to South Carolina common law in finding the Andrade Covenant, which released the contractor, also released the utility company as principal from vicarious liability. *Id.* at 226. The Court specifically found:

"When [the consumer] issued a covenant not to sue in [agent]'s favor, any claims she had against him were terminated. **Thus, SCE&G's derivative liability based upon Johnson's conduct was extinguished.** Were we to find the covenant released [agent] but not SCE&G, it would necessarily follow that SCE&G could seek indemnification from [agent] and recover the entire amount of any verdict against it from him. **This would effectively strip the covenant not to sue of any real meaning** and result in what the court in *Nelson v. Gillette* described as a "corrosive circle of indemnity."

Id.

The *Andrade* Court noted other jurisdictions at the time were split on whether a Covenant in favor of an agent released a principal, but found South Carolina law to be clear: "[A] covenant not to sue, which ordinarily does not release another joint-tortfeasor from liability, does operate as a release of the master, liable only under respondeat superior, if given to the servant responsible." *Id.*; see also *Seaboard Air Line R.R. v. Coastal Distrib.*, 273 F.Supp. 340, 343 (D.S.C.1967). In reaching its conclusion, it noted the key was "whether the liability arises *only* vicariously because of the negligence of another party, or whether the parties are true joint tortfeasors, both being independently negligent toward the third party." *Id.* at 669.

CONCLUSION

Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987); see also *Ackerman v. Travelers Indem. Co.* 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995).

As such, according to longstanding South Carolina common law and the principles adhered to in Andrade and Seaboard Air Lines, the executed Covenant given to agent Kuhn, operates as a release of the Firm who is only derivatively liable. The Firm's motion for summary judgment is hereby **GRANTED**.

IT IS SO ORDERED.

The Honorable Bentley Price
Circuit Court Judge

On this _____ day of May, 2020
Charleston, SC



Charleston Common Pleas

Case Caption: Miguel Oyuela Martinez VS Kuhn & Kuhn LLC , defendant, et al
Case Number: 2019CP1000341
Type: Order/Summary Judgment

IT IS SO ORDERED!

/s Hon. Bentley D. Price, Circuit Judge 2766

Electronically signed on 2020-05-27 14:36:42 page 6 of 6

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

MIGUEL OYUELA-MARTINEZ,

Plaintiff,

vs.

**KUHN & KUHN, LLC and JOHN
ROBERT KUHN,**

Defendants.

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

CASE NO: 2019-CP-10-0341

COMPLAINT
(Negligence Action)

Jury Trial Requested

FILED
2019 JAN 22 PM 12:12
JULIE J. ARMSTRONG
CLERK OF COURT

COMES NOW Plaintiff, MIGUEL OYUELA-MARTINEZ, by his undersigned attorney, alleges in his complaint against Defendants, KUHN & KUHN, LLC and JOHN ROBERT KUHN, and would respectfully show unto this Honorable Court:

1. Plaintiff Miguel Oyuela-Martinez is a resident of the County of Charleston, State of South Carolina.
2. Upon information and belief, Defendant, Kuhn & Kuhn, LLC. (hereinafter "Kuhn & Kuhn") is a corporation organized and existing under the laws of the State of South Carolina with its principal place of business located at 473 Savannah Highway, Charleston, South Carolina.
3. Upon information and belief, Defendant, John Robert Kuhn (hereinafter "John Kuhn") is a resident of the County of Charleston, State of South Carolina.
4. This Court has jurisdiction over the parties and matters in controversy, and venue is proper in Charleston County.

FACTUAL ALLEGATIONS

5. All preceding statements of Plaintiff's complaint are incorporated herein and re-alleged as if expressly set forth herein.
6. On October 24, 2018, at approximately 12:59 p.m., Defendant John Kuhn, was operating a 2017 Audi traveling west on Ashley Phosphate Road in County of Charleston, State of South Carolina.
7. At the time aforesaid, Plaintiff was a pedestrian sitting on a bus bench at the corner of Ashley Phosphate Road and Rock Street in County of Charleston, State of South Carolina.
8. At the time and place aforesaid, Defendant John Kuhn attempted to turn right from the middle lane of Ashley Phosphate Road onto Rock Street.
9. At the time and place aforesaid, Defendant John Kuhn, suddenly and without warning, collided with another motor vehicle to his right.
10. At the time and place aforesaid, Defendant John Kuhn caused the vehicle he collided with to drive into and over Plaintiff and the bus bench causing Plaintiff to suffer the personal injuries and bodily damages hereinafter alleged.
11. At the time and place aforesaid, Defendant John Kuhn made an illegal turn.
12. At the time and place aforesaid, Defendant John Kuhn failed to yield to another driver's right of way.
13. At the time and place aforesaid, Defendant John Kuhn was not paying attention to the road.
14. At the time and place aforesaid, Defendant John Kuhn was distracted.
15. At the time and place aforesaid, Defendant John Kuhn was driving aggressively.
16. At the time and place aforesaid, Defendant John Kuhn was operating his cellular device.
17. At the time and place aforesaid, Defendant John Kuhn was acting out of road rage.
18. Defendant John Kuhn never apologized to Plaintiff.

19. Defendant John Kuhn did not offer Plaintiff any assistance at the scene.
20. Defendant John Kuhn has never offered to drive Plaintiff to the grocery store.
21. Defendant John Kuhn has never offered to drive Plaintiff to the doctor.
22. Defendant John Kuhn has never requested to speak to Plaintiff.
23. Defendant John Kuhn has never attempted to communicate with Plaintiff.

VICARIOUS LIABILITY

24. Upon information and belief, at all times mentioned herein, Defendant John Kuhn was an agent, servant, and/or employee of Defendant Kuhn & Kuhn and acting within the course and scope of his employment.
25. At all times relevant hereto, Defendant Kuhn & Kuhn was acting by and through its employees/agents and are responsible for the acts of those employees and agents pursuant to *respondeat superior*, agency, apparent agency, and/or similar theory of law.

FOR A FIRST CAUSE OF ACTION – NEGLIGENCE OF JOHN KUHN
Negligence

26. All preceding statements of Plaintiff's complaint are incorporated herein and re-alleged as if expressly set forth herein.
27. At the time of the collision, Defendant John Kuhn failed to exercise due care by driving carelessly and aggressively, failing to maintain his lane, failing to yield to another driver's right of way, failing to keep his motor vehicle under control, failing to keep a proper lookout, and driving in a reckless manner.
28. Defendant Kuhn and Kuhn, their employees and/or agents, by acts or omissions, were negligent, negligent per se, grossly negligent, careless or reckless in at least one of the following particulars:

- (a) Operating a motor vehicle with reckless disregard for the rights and safety of other motorists and in particular the rights and safety of Plaintiff;

- (b) Failing to keep his motor vehicle under control;
- (c) Failing to keep a proper lookout so as to be able to avoid colliding with other motor vehicles lawfully using the highway;
- (d) Failing to timely apply his brakes, alter direction of travel, sound his horn, or take any other appropriate action when he, by exercise of due and reasonable care, should have seen the vehicle next to him;
- (e) In driving a motor vehicle in such a manner as to indicate either a willful or wanton disregard for the rights and safety of other persons lawfully using the highway, and in particular, the rights and safety of Plaintiff;
- (f) Failing to exercise that degree of care which a reasonable and prudent person would have exercised under the same or similar circumstances;
- (g) Failing to maintain his lane;
- (h) Turing right from the middle lane;
- (i) Driving too fast;
- (j) Driving aggressively;
- (k) Colliding with another motor vehicle;
- (l) Causing another vehicle to collide into Plaintiff;
- (m) Violating the applicable safety rules;
- (n) Violating the laws, statutes and ordinances, including, but not limited to, those as follows: S.C. Code Ann. §56-5-2350 and §56-5-2150;
- (o) Violating federal, state and municipal safety rules;
- (p) And such other and further reasons that the evidence may show at the trial of this case.

29. As a direct and proximate result of Defendants' negligence, Plaintiff suffered serious, painful injuries affecting his everyday activities and normal daily life.

30. As a direct and proximate result of Defendants' negligence, Plaintiff is entitled to recover damages past, present, and future medical bills; past, present, and future pain and suffering;

past, present, and future emotional and psychological harm; past, present and future employment; and other economic and non-economic loss. .

FOR A SECOND CAUSE OF ACTION – NEGLIGENCE OF KUHN & KUHN
Negligent Supervision

31. All preceding statements of Plaintiff's complaint are incorporated herein and re-alleged as if expressly set forth herein.
32. Defendant Kuhn & Kuhn had a duty to use reasonable care in supervising Defendant John Kuhn to protect the motoring public and negligently failed to do so.
33. Defendant Kuhn & Kuhn, through its agents and employees, knew, had reason to know, or should have known by exercising reasonable care that Defendant John Kuhn needed supervision.
34. Defendant Kuhn & Kuhn, through its agents and employees, knew, had reason to know, or should have known by exercising reasonable care that Defendant John Kuhn had a history of road rage and bad driving.
35. Defendant Kuhn & Kuhn, their employees and/or agents, by acts or omissions, were negligent, negligent per se, grossly negligent, careless or reckless in at least one of the following particulars:
 - (a) Failing to supervise Defendant John Kuhn;
 - (b) Failing to enact rules and policies to protect the safety of innocent motorists during the operation of a vehicle;
 - (c) Failing to enforce their own rules and policies regarding the operation of a vehicle;
 - (d) Failing to enact rules and policies regarding supervision;
 - (e) Failing to follow their existing rules, regulations, laws, and policies regarding supervision;
 - (f) Negligently supervising Defendant John Kuhn;

(g) And such other and further reasons that the evidence may show at the trial of this case.

36. As a direct and proximate result of Defendant Kuhn & Kuhn's negligence, Defendant John Kuhn was unsupervised which caused him to act in a negligent and/or reckless manner causing Plaintiff to suffer serious injuries.


DAMAGES

37. As a direct and proximate result of the aforesaid wrongful conduct on the part of Defendants, Plaintiff sustained the following injuries and damages:

- (a) Suffered injuries about various parts of his body, including but not limited to his ankles, legs, stomach, and nose;
- (b) Incurred medical bills and will incur medical bills in the future causally related to the injuries caused by Defendants' negligence and the negligence of their employees and agents;
- (c) Has experienced in the past and will experience in the future pain and discomfort;
- (d) Has experienced in the past and will experience in the future emotional and psychological injuries;
- (e) Has lost income and will lose income in the future;
- (f) Has been limited in his ability to perform his usual household duties and social activities.

38. Defendants' conduct constitutes a conscious disregard for the life and safety of Plaintiff and for the lives and safety of the motoring public, and Defendants are therefore liable to Plaintiff for exemplary or punitive damages.

WHEREFORE, Plaintiff demand a trial by jury and prays for judgment against the Defendants for such amount of actual and punitive damages exceeding the sum of TWENTY-FIVE THOUSAND AND NO/100 (\$25,000.00) DOLLARS as determined by the Trier of Fact; for the cost of this action; and for such other and further relief as may be just and proper.



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January 17, 2019

STATE OF SOUTH CAROLINA)
COUNTY OF CHARLESTON)

IN THE COURT OF COMMON PLEAS
FOR THE NINTH JUDICIAL CIRCUIT

MIGUEL OYUELA-MARTINEZ)

Case No.: 2019-CP-10-0341

Plaintiff,

DEFENDANT'S ANSWER
(JURY TRIAL REQUESTED)

v.

KUHN & KUHN, LLC and
JOHN ROBERT KUHN

(Pro Se)

Defendants.

FILED
2019 FEB 19 PM 4:40
JULIE J. ARMSTRONG
CLERK OF COURT
BY _____

The Defendants, above-named, Answering the Complaint of the above-named Plaintiff, alleges and says unto this honorable Court as follows:

1. The Defendant denies each allegation of the Plaintiff's Complaint not hereinafter specifically admitted or modified.
2. The Defendants are without knowledge to form a belief to the allegation in Paragraph 1 of the Complaint, therefore no response is required, and to the extent that it is required, it is denied.
3. The Defendants admit the residency allegations in Paragraphs 2 and 3 of the Complaint.
4. Paragraph 4 of the Complaint contains legal conclusions and the Defendants are not required to admit or deny, but to the extent a response is necessary, as to an attempt to allege any cause of action, error or omission, those are denied.
5. In response to Paragraph 5 of the Complaint, the Defendants repeat and reallege as if set forth herein, verbatim.
6. In response to Paragraphs 6, 7, 8, 9, and 10, of the Complaint, the Defendants admit only that the two parties were involved in the accident. Further, regarding the above-

mentioned paragraphs, in any attempt to allege a cause of action, claim, act, omission, or error, those are denied, and the Defendants demand strict proof of each allegation.

7. In response to Paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23, of the Complaint, the Defendants only admit that they were involved in the accident, and to the extent that the above-referenced Paragraphs attempt to allege any cause of action, claim, act, omission, or error as to the Defendants, those allegations are denied and the Defendants demand strict proof of each allegation.
8. In response to Paragraphs 24 and 25 of the Complaint, these allegations are statements and/or conclusions of law, and the Defendants are not required to admit or deny, but to the extent that Paragraphs 24 and 25 of the Complaint allege any cause of action, act, omission, or error as to the Defendants, those allegations are denied, and the Defendants demand strict proof of each allegation.
9. In response to Paragraph 26 of the Complaint, the Defendants repeat and reallege as if set forth herein, verbatim.
10. In response to Paragraphs 27, 28, 29, and 30 of the Plaintiff's Complaint, the Defendants deny the allegations contained in the above-referenced Paragraphs, and the Defendants demand strict proof of each allegation.
11. In response to Paragraph 31 of the Plaintiff's Complaint, the Defendants repeat and reallege as if set forth herein, verbatim.
12. In response to Paragraphs 32, 33, and 34 of the Plaintiff's Complaint, these allegations are statements and/or conclusions of law, and the Defendants are not required to admit or deny, but to the extent that Paragraphs 32, 33, and 34 of the Complaint allege any cause of action, act, omission, or error as to the Defendants, those allegations are denied, and the Defendants demand strict proof of each allegation.
13. In response to Paragraphs 35, 36, 37, and 38 of the Plaintiff's Complaint, the Defendants deny the allegations contained in the above-referenced Paragraphs, and the Defendants demand strict proof of each allegation.
14. In response to the "Whereof" paragraph of the Plaintiff's Complaint, the Defendants deny the allegations contained in the above-referenced Paragraph, and Defendants demand strict proof of each allegation.

FURTHER ANSWERING AND FOR A FIRST AFFIRMATIVE DEFENSE

(Failure to State a Claim)

15. Plaintiff fails to state facts sufficient to constitute a cause of action upon which relief can be granted, and therefore, the Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FURTHER FOR A SECOND AFFIRMATIVE DEFENSE

(Violation of Constitutional Guarantees)

16. To the extent Plaintiff seeks exemplary or punitive damages, is a violation of the Defendant's Constitutional rights and guarantees under the Constitution of the United States and the Constitution of South Carolina and has further failed to state a claim upon which these type of damages could be awarded.

FURTHER FOR A THIRD AFFIRMATIVE DEFENSE

(Improper Claim for Punitive Damages; S.C. Code Ann §15-32-510 et. seq.)

17. Defendants did not engage in malicious, wrongful, or intentional conduct, therefore there is no basis to award punitive damages, further, Plaintiff plead a specific amount of punitive damages, in violation of S.C. Code Ann. §15-32-510(B).

FURTHER FOR A FOURTH AFFIRMATIVE DEFENSE

(Requesting a Bifurcated Trial and Limitation on Damages; S.C. Code Ann. §15-32-510)

18. Defendants request a bifurcated trial should punitive damages be awarded, and further plead a limitation on such damages, as referenced in S.C. Code Ann. §15-32-510 et. seq.

FURTHER FOR A FIFTH AFFIRMATIVE DEFENSE

(Equitable Defenses of Release and Waiver)

19. The Plaintiffs are barred from bringing a claim against the Defendants, as Plaintiff signed an Agreement and Covenant Not To Execute, thus relinquishing the right to bring a claim against the Defendant, his agents, heirs, and assigns, and that Defendant will never be liable to Plaintiff beyond the consideration provided for in the Agreement.


FURTHER FOR A SIXTH AFFIRMATIVE DEFENSE

(Reliance on Other Defenses and Equitable Remedies)

20. The Defendants intend to rely upon other affirmative defenses as may become available during the course of discovery and reserve the right to amend their Answer in order to assert such defenses, including laches, unjust enrichment, consent, and waiver.

WHEREFORE, having fully answered the Plaintiff's Complaint, the Defendants Request that this Honorable Court Dismiss all the Plaintiff's Causes of Action in this Lawsuit, immediately, together with all costs and disbursements of this action and for such other and further relief that this Court may deem proper, and further prays for a trial by jury.

Respectively submitted,
John R. Kuhn, Esquire
Bar Number: 6901
Kuhn & Kuhn, LLC
473 Savannah Highway
Charleston, SC 29407


ATTORNEY FOR DEFENDANTS

Charleston, South Carolina

Dated: February 19, 2019

has no other insurance from which the Plaintiff could collect payment.

II. STATEMENT OF FACTS

Plaintiff initiated this action by filing the Complaint against both Kuhn & Kuhn LLC and John Robert Kuhn, after the Plaintiff and John Robert Kuhn had settled the original claim, executing both an “Agreement and Covenant Not to Execute” and an “Affidavit of No Other Insurance,” in which the Plaintiff was paid a total of \$469,884.60 for the injuries sustained in the accident. During the Discovery process of the original claim, the Plaintiff was made fully aware that the vehicle involved in the accident was John Robert Kuhn’s personal vehicle, registered in his personal name, and insured through his personal carrier. Further, Plaintiff was made aware that John Robert Kuhn was on vacation, and out on a personal lunch, and was in no way acting as an Agent for Kuhn & Kuhn LLC or within the scope of employment for Kuhn & Kuhn LLC. Lastly, the Plaintiff was made aware, through the “Affidavit of No Other Insurance” that John Robert Kuhn has no other insurance, including UIM or Umbrella Coverage, and cannot be held further personally liable to the Plaintiff, as it outlined in the “Agreement and Covenant Not to Execute.”

III. LEGAL ARGUMENT

Kuhn & Kuhn LLC and John Robert Kuhn’s Motion to Dismiss, for failure to state a claim, should be granted. First, because Kuhn & Kuhn LLC is not subject to liability under the theory of vicarious liability through the doctrine of *respondeat superior*, as the Plaintiff cannot establish that “[a] relationship [between master and servant] existed at the time of the injuries, and that the servant was about his master’s business and acting within the scope of his employment.” *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 639 S.E.2d 50 (2006) (citing *Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964)).

a. **John Robert Kuhn was not acting within the scope of employment.**

The Plaintiff bears the burden of proving the master-servant relationship in order to establish vicarious liability under *respondeat superior*. The Plaintiff must show (1) whether the Defendant was a servant and/or employee acting to benefit the employer and (2) whether the tortious act was committed within the scope of employment. *See Anderson v. West*, 270 S.C.

184, 187, 241 S.E.2d 551, 553 (1978); *Wade v. Berkley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998). In order for an agent/employee to be acting within the 'scope of employment', there must be a showing that the "act . . . [was] reasonably necessary to accomplish the purpose of his employment and [be] in furtherance of the master's business. *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 639 S.E.2d 50 (2006) (citing *Lane* S.E.2d at 713). Further, if the act of the employee is for an "independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, [the act] is not within the scope of his employment so as to render the master liable." *Id.* Additionally, the master is not liable for the actions of the servant if "[the] servant steps aside from the master's business for some purpose wholly disconnected with his employment, [and] the relation of master and servant is temporarily suspended; this is so no matter how short the time"

Here, while John Robert Kuhn is an employee of Kuhn & Kuhn LLC, the Plaintiff cannot establish the Defendant was acting to benefit his employer or that the act was within the scope of employment. At the time of the accident, John Kuhn was driving his personal vehicle to a personal lunch while on personal vacation day, a trip that was not connected to Mr. Kuhn's employment with Kuhn & Kuhn LLC whatsoever. The vehicle is titled to John Kuhn and insured through Mr. Kuhn's personal insurance company. The act was for an independent purpose, not connected in any way to his employment, and was wholly disconnected from his employment and did not in any way further or benefit Kuhn & Kuhn LLC.

Therefore the Plaintiff's Complaint incorrectly states that John Robert Kuhn, at the time of the accident, was acting as an agent, servant, and/or employee of Kuhn & Kuhn LLC and was within the scope of employment.

b. Kuhn and Kuhn LLC is not subject to liability under the theory of Negligent Supervision of John Robert Kuhn.

The theory of Negligent Supervision arises out of contract. In order for an Employer to be liable for the actions of his employee under the theory of Negligent Supervision, the Plaintiff must establish that the Employer had a duty of care in the supervision of the employee.

Degenhart v. Knights of Columbus, 420 S.E.2d 495 (1992). This duty arises, even outside of the

scope of employment, where the employee intentionally harms another and is “(1) on the employer’s premises, or (2) using chattel of the employer, and (3) employer knows or has reason to know he has the ability to control the employee, and (4) knows or should know of the necessity and opportunity for exercising such control over the employee.” *Id.*

Again, it is conceded that John Robert Kuhn is an employee of Kuhn & Kuhn LLC, however, the act that resulted in Plaintiff’s injuries was not intentional and at the time of the accident Mr. Kuhn was neither on Kuhn & Kuhn LLC’s premises nor using chattel belonging to Kuhn & Kuhn LLC, as the accident occurred in North Charleston on a public road. Further, the vehicle involved in the accident belonged to Mr. Kuhn, not Kuhn & Kuhn LLC. Additionally, Kuhn & Kuhn LLC did not have the ability to exercise control over Mr. Kuhn, as he was on a personal vacation day, using his personal vehicle, to go to a personal lunch. It would be highly inequitable and unconscionable to set a precedent in which employers are held liable for every act of their employees, wholly and completely unrelated to the employer’s business and property. This argument purports an absurd scenario in which employers would be held to have a duty of care in the supervision of their employees and forced to enact policies and rules to dictate how their employees can go about their private lives, while they are out of the office or on vacation and in no way acting within their capacity as an agent of the employer or “utilizing the premises or chattel [of the employer].” *Id.* Further, a Federal Court in South Carolina held in *Bowman*, that a Plaintiff cannot both assert theories of vicarious liability and negligent entrustment/supervision. *Bowman v. Norfolk Southern Ry. Co.*, 832 F.Supp. 1014 D.S.C. (1993).

Therefore, the Plaintiff does not have sufficient grounds to establish a claim of Negligent Supervision as John Kuhn was not on or using Kuhn & Kuhn LLC’s property and Kuhn & Kuhn LLC was under no duty to supervise John Kuhn as his actions were in no way related to his contractual employment.

c. John Robert Kuhn was improperly named as a Defendant.

As stated above and attached hereto as Exhibits A and B, John Robert Kuhn and the Plaintiff signed an Agreement and Covenant Not to Execute (“Agreement”), absolving Mr. Kuhn of any personal liability to the Plaintiff. Further, at request of the Plaintiff, Mr. Kuhn signed an

Affidavit of No Other Insurance, stating that Mr. Kuhn did not have UIM or Excess, Umbrella Coverage. While the Agreement provides that the Plaintiff retains the ability to bring suit for the purpose of collecting against UIM or excess, umbrella coverage, the provided documents clearly show that the Plaintiff is fully aware that no such coverage exists.

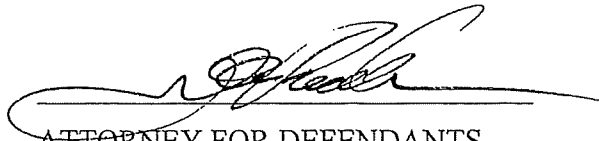
Lastly, the suit is wholly improper, due to the fact that even if, hypothetically, Kuhn & Kuhn LLC were found to be vicariously liable under the theory of *respondeat superior*, Kuhn & Kuhn LLC as the employer has the right of indemnity, as a matter of law, against Mr. Kuhn personally, as the employee, which would further violate the Agreement, which provides that he is never at any time to be liable to the Plaintiff beyond the consideration provided for in the Agreement. *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971).

IV. CONCLUSION

For the foregoing reasons, Kuhn & Kuhn LLC and John Robert Kuhn respectfully requests this Court dismiss Plaintiff's Complaint against Kuhn & Kuhn LLC and John Robert Kuhn, for failure to state a claim upon which relief can be granted, under South Carolina Rule of Civil Procedure 12(b)(6).

WHEREFORE, based on the grounds and reasons set forth herein, Defendants pray that the Court grant its Motion to Dismiss, with prejudice.

Respectively submitted,
John R. Kuhn, Esquire
Bar Number: 6901
Kuhn & Kuhn, LLC
473 Savannah Highway
Charleston, SC 29407



ATTORNEY FOR DEFENDANTS

Charleston, South Carolina

Dated: February 19, 2019

EXHIBIT A

RECEIVED

AGREEMENT AND COVENANT NOT TO EXECUTE JAN 12 2019

PL 034 12 19

This AGREEMENT AND COVENANT NOT TO EXECUTE [hereinafter "COVENANT"] made this ____ day of _____, 2019, entered and agreed between Miguel Oyuela-Martinez, hereinafter sometimes referred to as "Covenantor;" John R. Kuhn, hereinafter sometimes referred to as "Covenantee;" and Progressive Northern Insurance Company, hereinafter sometimes referred to as "Insurer."

WHEREAS, on October 24, 2018 in Charleston County, South Carolina, Covenantor was involved in an automobile-pedestrian accident with Covenantee at or near Ashley Phosphate Road in North Charleston, South Carolina; and

WHEREAS, the automobile being owned and driven by John R. Kuhn, at the time of the aforementioned accident was insured by Insurer under Policy Number 42096969, and had Five Hundred Thousand (\$500,000.00) Dollars in available combined single limit coverage under said policy; and

WHEREAS, the damages sustained by Covenantor in the aforementioned accident may exceed the liability limit of the said insurance policy, and the Covenantor is desirous of protecting his right to proceed to suit against Covenantee for purposes of collecting underinsured/uninsured motorist benefits, or against any other Defendants or insurers who may provide liability, excess or umbrella coverage; and

WHEREAS, claimants other than the Covenantor have also asserted property damage and/or bodily injury claims as a result of the accident of October 24, 2018 and Covenantor has demanded payment of the remaining policy limit after those claims are addressed;

NOW, FOR AND IN CONSIDERATION OF the payment to Covenantor of the total sum of Four Hundred Sixty-Nine Thousand Eight Hundred Eighty-Four and 60/100 (\$469,884.60) Dollars by Insurer on behalf of the Covenantee, the sufficiency and receipt of which is hereby acknowledged, Covenantor, Covenantee and Insurer agree as follows:

1. If and in the event Covenantor is unable to resolve by agreement and settlement of his claim with the underinsured/uninsured motorist insurer or such other Defendants or insurers who may provide liability, excess or umbrella coverage, Covenantor shall have the right to bring suit against Covenantee and/or said underinsured/uninsured motorist or liability insurers or Defendants, in accordance with South Carolina law, and prosecute the same to final judgment, including any declaratory judgment action regarding coverage.

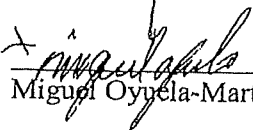
2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that Covenantor, his agents, representatives, heirs and assigns, shall never at any time, be liable to Covenantee, his agents, subrogees, representatives, heirs or assigns, beyond the consideration expressed herein and paid, except to the limits of all available underinsured/uninsured motorist coverage and/or other excess liability or umbrella coverage, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the

payment to Covenantor of the aforementioned sum, Covenantor, his subrogees, agents, representatives, heirs or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against Covenantee, by execution or otherwise, any judgment that may be rendered in any such lawsuit except as herein stated. Covenantor also agrees that he will never seek to collect any such judgment from the personal assets of the Covenantee. Further, immediately upon reduction to judgment of any such lawsuit, Covenantor, his subrogees, agents, representatives, heirs or assigns, will provide Covenantee with an executed satisfaction of said judgment. Moreover, this COVENANT or copy hereof shall be considered and serve as a satisfaction of any such judgment in any claim or lawsuit presented by Covenantor against Covenantee for the aforementioned automobile accident, and can be recorded as such should Covenantor, his subrogees, agents, representatives, heirs or assigns fail to execute a Satisfaction of Judgment.

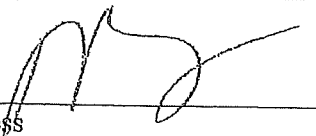
3. Covenantor acknowledges and understands that certain liens may exist on these settlement proceeds, such as liens arising from medical services and/or treatment rendered by various medical providers. In further consideration of the sum paid, Covenantor agrees that any and all outstanding liens will be satisfied out of these proceeds, specifically including but not limited to any lien held by the Government of the United States or by the State of South Carolina, pursuant to any Medicare or Medicaid program or by any workers' compensation carrier. Covenantor hereby agrees to and accepts responsibility to pay all valid liens, subrogation claims and/or assignments relating to this claim. Covenantor also specifically agrees and understands that Covenantee is in no way liable to any one or responsible for any of the aforementioned claims. Covenantee has settled this claim and has no further responsibility whatsoever to any third party by virtue of said third party's rights flowing through Covenantor's claims against Covenantee.

4. Covenantor understands that should CMS (Medicare) find that a Medicare Set-Aside Allocation should have been established and that Medicare's interests were not adequately protected, CMS (Medicare) may require Covenantor to expend up to the entire settlement amount on Medicare covered expenses related to the injury before Medicare will provide coverage for the injury. Covenantor voluntarily accepts this risk and waives any and all claims of any nature and/or damages against Covenantee should Medicare take such action, including, but not limited to a Private Cause of Action against the Insurer (as defined in the preceding paragraphs of this Covenant) under the Medicare Secondary Payer Act (MSP) pursuant to 42 USCA Section 1395y(b)(3)(A).

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10 day of January, 2019.


Miguel Oyuela-Martinez

Signed, sealed and delivered in the presence of:


Witness

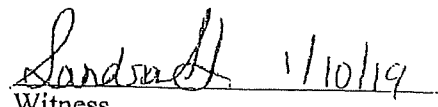

Witness

EXHIBIT B

AFFIDAVIT OF NO OTHER INSURANCE

I, JOHN R KUHN, hereby certify that on October 24, 2018 the only applicable insurance policy I had was with Progressive Northern Insurance Company under policy number 42096969.

I, JOHN R KUHN, hereby declare that on October 24, 2018, I did not possess, nor was I insured under any other policies of insurance, either automobile or general, which would indemnify or compensate me in case of an automobile accident resulting in property damage, personal injury, or medical expense payments either to myself or another. I declare, under penalty of perjury, that the foregoing is true and accurate.

The undersigned being first duly sworn, hereby affirms that all statements made herein of his or her own knowledge are true and all statements made herein on information and belief are believed to be true.

Signed: *John R. Kuhn*
Signature of individual completing affidavit

Witness Signature:

Michaela Mayfield

Witness Address:

473 Savannah Hwy
Charleston, SC 29407

Subscribed, and sworn to, before me, this *9th* day of *January*, year *2019*.

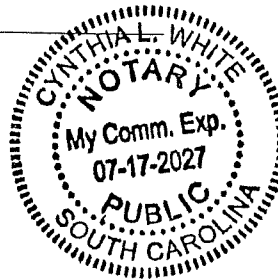
John R. Kuhn and Michaela Mayfield who are personally known to me.

Licensed Notary – State of *South Carolina*

Identification Produced *Drivers Licenses*

Cynthia L. White
Identification (seal) *Cynthia L. White*

Form 2576 (11/14)



STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2019-CP-10-0341

Miguel Oyuela-Martinez,
Plaintiff,

v.

Kuhn & Kuhn LLC, and John Robert Kuhn,
Defendant.

**ANSWER OF DEFENDANT JOHN
ROBERT KUHN TO PLAINTIFF'S
COMPLAINT**

(Jury Trial Demanded)

**TO: KEVIN SMITH, ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO THE
PLAINTIFF ABOVE NAMED:**

The Defendant John Robert Kuhn herein files his Answer to the Plaintiff's Complaint and would respectfully show as follows:

FOR A FIRST DEFENSE

1. Each and every allegation of the Plaintiff's Complaint not hereinafter admitted is expressly denied.

FOR A SECOND DEFENSE

2. The Defendant John Robert Kuhn would admit that on or about October 24, 2018 an accident occurred when the Defendant Kuhn was operating his personally owned vehicle and collided with a vehicle which was in the lane to Mr. Kuhn's right and that as a result of this collision the Plaintiff, who was a pedestrian sitting on a bus bench at the corner of Ashley Phosphate Road and Rocks Street in Charleston, South Carolina was injured; the Defendant John Robert Kuhn admits simple fault (duty and breach of duty) and would admit that he was a contributing cause of certain injuries sustained by the Plaintiff in the accident; all remaining allegations of the Plaintiff's complaint are again denied.

FOR A THIRD DEFENSE

3. The Defendant John Robert Kuhn would herein show that the Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action upon which relief might be granted to the Plaintiff as to one or more of the causes alleged by the Plaintiff and therefore the Plaintiff's Complaint must be dismissed in whole or in part pursuant to *South Carolina Rule of Civil Procedure* 12(b)(6).

FOR A FOURTH DEFENSE

4. The Defendant John Robert Kuhn reserves the right to move to amend his answer based upon motion timely made once the process of discovery and depositions has been completed should additional defenses become known or warranted.

FOR A FIFTH DEFENSE

5. The Defendant John Robert Kuhn would herein show that the venue of this matter must be situated in a county consistent with South Carolina statutory and case law.

FOR A SIXTH DEFENSE

6. The Defendant John Robert Kuhn would herein show that prior to the commencement of this litigation by the Plaintiff the Plaintiff executed a Covenant Not to Execute in favor of the Defendant John Robert Kuhn and accordingly any and all defenses available pursuant to the language of that Covenant Not to Execute and pursuant to the law of South Carolina are raised herein.

FOR A SEVENTH DEFENSE

7. Pursuant to S.C. Code Ann. §15-32-520, any proceeding to determine punitive damages should be bifurcated from any trial to determine liability and compensatory damages.

FOR AN EIGHTH DEFENSE

8. Any award of punitive damages should not exceed the greater of three (3) times the amount of compensatory damages as provided for in S.C. Code Ann. §15-32-530.

FOR A NINTH DEFENSE

9. The Defendant would show, upon information and belief, that the Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that the Defendant could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because this Defendant can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates this Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills this Defendant's exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

Wherefore, having fully answered the Plaintiff's Complaint, the Defendant John Robert Kuhn would pray that the same be dismissed with costs being granted to him. The Defendant

John Robert Kuhn also prays for such other and further relief as the court deems just and proper,
and also demands a trial by jury.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



Ronald B. Diegel, Esquire – Bar No. 65076

4406-B Forest Drive (29206)

P.O. Box 6648

Columbia, South Carolina 29260

(803) 782-4100

Attorneys for Defendant John Robert Kuhn

Columbia, South Carolina
February 26, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2019-CP-10-00341
)	
MIGUEL OYUELA-MARTINEZ,)	
)	
Plaintiff,)	
vs.	)	DEFENDANT KUHN & KUHN, LLC'S
	)	MOTION FOR SUMMARY JUDGMENT
KUHN & KUHN, LLC AND JOHN ROBERT)	
KUHN,)	
)	
Defendants.)	

COMES NOW Defendant Kuhn & Kuhn, LLC (“Defendant”), by and through the undersigned counsel, respectfully submits this Motion for Summary Judgment as to Plaintiff Miguel Oyuela-Martinez’s (“Plaintiff”) claims against it. In support of this Motion, Defendant shows Plaintiff cannot meet his burden and this lawsuit must be dismissed pursuant to Rule 56 of the South Carolina Rules of Civil Procedure (“SCRPC”). Defendant relies upon the pleadings and such other memorandum of law, which may be submitted hereafter.

This 22nd day of January, 2020.

Respectively Submitted,
 CLARKSON, WALSH, & COULTER, P.A.,
s/Jeffrey Crudup
 Jeffrey M. Crudup, Esq.
 State Bar No.: 100281
 1233 Ben Sawyer Blvd., Suite 900
 PO Box 2219
 Mt. Pleasant, SC 29465
 T: 843.981.5180
 E: jcrudup@clarksonwalsh.com
Counsel for Defendant Kuhn & Kuhn, LLC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	THE NINTH JUDICIAL CIRCUIT
COUNTY OF CHARLESTON	)	CASE NO.: 2019-CP-10-00341
)	
MIGUEL OYUELA-MARTINEZ,)	
)	
Plaintiff,)	
vs.	)	DEFENDANT’S MEMORANDUM IN
	)	SUPPORT FOR SUMMARY JUDGMENT
KUHN & KUHN, LLC AND JOHN ROBERT)	
KUHN,)	
)	
Defendants.)	
_____)	

INTRODUCTION AND MOTION

COMES NOW Defendant Kuhn & Kuhn, LLC, (hereinafter the “Firm”) by and through its undersigned attorney, and respectfully submits this Memorandum in Support of the Firm’s Motion for Summary Judgment as to Plaintiff’s claims against them.

STATEMENT OF FACTS

This case arises out of an automobile/pedestrian accident on October 24, 2018. Plaintiff filed the instant lawsuit against Mr. Kuhn and the Firm on January 22, 2019. In addition to the general negligence claims alleged against Defendant Kuhn, Plaintiff also alleged the Firm was vicariously liable for Mr. Kuhn’s actions and negligently supervised him at the time of the accident.

Eventually, Plaintiff signed a Covenant Not to Execute as to the claims against Defendant John Kuhn, an agent of Kuhn and Kuhn LLC, but proceeded against the Firm. See the Covenant attached herewith as “**Exhibit A**”. On June 7, 2019, the Defendants moved for summary judgment. In an Order signed by Judge Culbertson on July 15, 2019, the Court granted partial summary judgment as to the direct claims against the Firm (negligent supervision and hiring).

See Order attached herewith as “**Exhibit B**”. The Court declined to grant the remaining portion of the Motion as to vicarious liability because, at the hearing, Plaintiff’s counsel argued extensively that these vicarious claims must remain because Defendant Kuhn was **in the course and scope of his work and therefore an agent** of the Firm. In his most recent brief, Plaintiff has again argued extensively Defendant was in the course and scope of his employment.

Plaintiff needs to make this argument to maintain his vicarious claims against the Firm. However, as discussed below, South Carolina is unequivocal that a signed Covenant which releases Defendant Kuhn as an agent also releases the Firm as the principal.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact for a jury's consideration and it is clear that the moving party is entitled to a judgment as a matter of law. S.C. R. Civ. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Sapp v. Ford Motor Co., 386 S.C. 143, 146, 687 S.E.2d 47, 48 (2009). In determining whether any triable issues of fact exist, the evidence must be viewed in the light most favorable to the nonmoving party; however, summary judgment is appropriate when plain, palpable and indisputable facts exist on which reasonable minds cannot differ. Byerly v. Connor, 307 S.C. 441, 445, 415 S.E.2d 796, 799 (1992); Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994); S.C. R. Civ. P. 56(c).

ARGUMENT

The signed Covenant Not to Execute, which releases Mr. Kuhn from any liability, also operates as a release of Plaintiff’s claims of vicarious liability against Kuhn and Kuhn, LLC.

In South Carolina, it has been well-established that a release of an agent releases the principal as to all vicarious claims. Andrade v. Johnson, 345 S.C. 216, 546 S.E.2d 665 (Ct. App. 2001), rev'd on other grounds, 356 S.C. 238, 588 S.E.2d 588 (2003). In Andrade v. Johnson, a consumer sued a heating contractor and SCE&G, alleging (amongst other claims) the contractor negligently installed HVAC systems in the consumer's home while working as an agent of SCE&G. After the consumer executed a Covenant¹ ("Andrade Covenant") with the contractor, the Circuit Court Judge granted summary judgment to SCE&G on all vicarious liability claims **even though the Covenant specifically attempted to reserve the consumer's right to sue SCE&G.** Id. at 222 (The Covenant states plaintiff retained: "all rights of action, claims, and demands against any and all persons other than [agent], including, but not limited to [SCE&G]"). The consumer appealed the decision and the Court of Appeals of South Carolina held the trial court properly granted SCE&G's Motion. Id. at 219. The court held firm to South Carolina common law in finding the Andrade Covenant, which released the contractor, also released the utility company as principal from vicarious liability. Id. at 226. The Court specifically found:

"When [the consumer] issued a covenant not to sue in [agent]'s favor, any claims she had against him were terminated. **Thus, SCE&G's derivative liability based upon Johnson's conduct was extinguished.** Were we to find the covenant released [agent] but not SCE&G, it would necessarily follow that SCE&G could seek indemnification from [agent] and recover the entire amount of any verdict against it from him. **This would effectively strip the covenant not to sue of any real meaning** and result in what the court in Nelson v. Gillette described as a "corrosive circle of indemnity."

Id.

¹ In Andrade, a claimant signed a Covenant Not To Sue. "A Covenant Not to Sue and a Covenant Not to Execute are so closely akin that the only major distinguishing factor is that the latter is normally executed when a settlement occurs after the filing of a lawsuit while the former is entered into before a lawsuit is filed." Poston by Poston v. Barnes, 294 S.C. 261, 363 S.E.2d 888 (1987); see also Ackerman v. Travelers Indem. Co. 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995)

The Andrade Court noted other jurisdictions at the time were split on whether a Covenant in favor of an agent released a principal, but found South Carolina law to be clear: “[A] covenant not to sue, which ordinarily does not release another joint-tortfeasor from liability, **does operate as a release of the master, liable only under *respondeat superior***, if given to the servant responsible.” Id.; see also Seaboard Air Line R.R. v. Coastal Distrib., 273 F.Supp. 340, 343 (D.S.C.1967). In reaching its conclusion, it noted the key was “whether the liability arises *only* vicariously because of the negligence of another party, or whether the parties are true joint tortfeasors, both being independently negligent toward the third party.” Id at 669.

To defeat Andrade and Seaboard Air Lines, it appears Plaintiff is attempting to make the same argument as the consumer in Andrade. He relies upon reservation language in his Covenant allowing him to sue “other Defendants.” See Pages 5-6 of Plaintiff’s Brief. However, as highlighted above, the language in Plaintiff’s Covenant is even weaker than the reservation found in Andrade. The language in this Covenant is a general reservation and does not even name Defendant Kuhn & Kuhn. The Court in Andrade considered language which attempted to reserve the right to sue a specifically named principal and **still** found it released the very party it purported to not.

As such, according to longstanding South Carolina common law and the principles adhered to in Andrade and Seaboard Air Lines, the executed Covenant given to agent Kuhn, operates as a release of the Firm who is only derivatively liable.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that its Motion for Summary Judgment be granted, and Plaintiff’s remaining claims against Defendant Kuhn & Kuhn, LLC be dismissed.

This 4th day of May, 2020.

Respectively Submitted,

CLARKSON, WALSH, & COULTER, P.A.,

*s/*Jeffrey Crudup

Jeffrey M. Crudup, Esq.

State Bar No.: 100281

497 St. Andrews Boulevard

Charleston, SC 29407

T: 843.981.5180

E: jcrudup@clarksonwalsh.com

Counsel for Defendants

RECEIVED

AGREEMENT AND COVENANT NOT TO EXECUTE

JAN 12 2019

FILED IN

This AGREEMENT AND COVENANT NOT TO EXECUTE [hereinafter "COVENANT"] made this _____ day of _____, 2019, entered and agreed between Miguel Oyuela-Martinez, hereinafter sometimes referred to as "Covenantor;" John R. Kuhn, hereinafter sometimes referred to as "Covenantee;" and Progressive Northern Insurance Company, hereinafter sometimes referred to as "Insurer."

WHEREAS, on October 24, 2018 in Charleston County, South Carolina, Covenantor was involved in an automobile-pedestrian accident with Covenantee at or near Ashley Phosphate Road in North Charleston, South Carolina; and

WHEREAS, the automobile being owned and driven by John R. Kuhn, at the time of the aforementioned accident was insured by Insurer under Policy Number 42096969, and had Five Hundred Thousand (\$500,000.00) Dollars in available combined single limit coverage under said policy; and

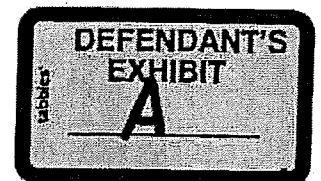
WHEREAS, the damages sustained by Covenantor in the aforementioned accident may exceed the liability limit of the said insurance policy, and the Covenantor is desirous of protecting his right to proceed to suit against Covenantee for purposes of collecting underinsured/uninsured motorist benefits, or against any other Defendants or insurers who may provide liability, excess or umbrella coverage; and

WHEREAS, claimants other than the Covenantor have also asserted property damage and/or bodily injury claims as a result of the accident of October 24, 2018 and Covenantor has demanded payment of the remaining policy limit after those claims are addressed;

NOW, FOR AND IN CONSIDERATION OF the payment to Covenantor of the total sum of Four Hundred Sixty-Nine Thousand Eight Hundred Eighty-Four and 60/100 (\$469,884.60) Dollars by Insurer on behalf of the Covenantee, the sufficiency and receipt of which is hereby acknowledged, Covenantor, Covenantee and Insurer agree as follows:

1. If and in the event Covenantor is unable to resolve by agreement and settlement of his claim with the underinsured/uninsured motorist insurer or such other Defendants or insurers who may provide liability, excess or umbrella coverage, Covenantor shall have the right to bring suit against Covenantee and/or said underinsured/uninsured motorist or liability insurers or Defendants, in accordance with South Carolina law, and prosecute the same to final judgment, including any declaratory judgment action regarding coverage.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that Covenantee, his agents, representatives, heirs and assigns, shall never at any time, be liable to Covenantor, his agents, subrogees, representatives, heirs or assigns, beyond the consideration expressed herein and paid, except to the limits of all available underinsured/uninsured motorist coverage and/or other excess liability or umbrella coverage, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the

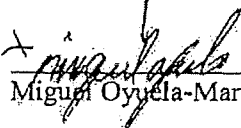


payment to Covenantor of the aforementioned sum, Covenantor, his subrogees, agents, representatives, heirs or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against Covenantee, by execution or otherwise, any judgment that may be rendered in any such lawsuit except as herein stated. Covenantor also agrees that he will never seek to collect any such judgment from the personal assets of the Covenantee. Further, immediately upon reduction to judgment of any such lawsuit, Covenantor, his subrogees, agents, representatives, heirs or assigns, will provide Covenantee with an executed satisfaction of said judgment. Moreover, this COVENANT or copy hereof shall be considered and serve as a satisfaction of any such judgment in any claim or lawsuit presented by Covenantor against Covenantee for the aforementioned automobile accident, and can be recorded as such should Covenantor, his subrogees, agents, representatives, heirs or assigns fail to execute a Satisfaction of Judgment.

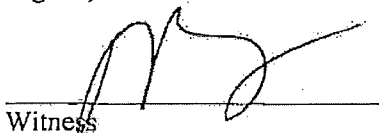
3. Covenantor acknowledges and understands that certain liens may exist on these settlement proceeds, such as liens arising from medical services and/or treatment rendered by various medical providers. In further consideration of the sum paid, Covenantor agrees that any and all outstanding liens will be satisfied out of these proceeds, specifically including but not limited to any lien held by the Government of the United States or by the State of South Carolina, pursuant to any Medicare or Medicaid program or by any workers' compensation carrier. Covenantor hereby agrees to and accepts responsibility to pay all valid liens, subrogation claims and/or assignments relating to this claim. Covenantor also specifically agrees and understands that Covenantee is in no way liable to any one or responsible for any of the aforementioned claims. Covenantee has settled this claim and has no further responsibility whatsoever to any third party by virtue of said third party's rights flowing through Covenantor's claims against Covenantee.

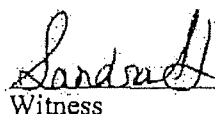
4. Covenantor understands that should CMS (Medicare) find that a Medicare Set-Aside Allocation should have been established and that Medicare's interests were not adequately protected, CMS (Medicare) may require Covenantor to expend up to the entire settlement amount on Medicare covered expenses related to the injury before Medicare will provide coverage for the injury. Covenantor voluntarily accepts this risk and waives any and all claims of any nature and/or damages against Covenantee should Medicare take such action, including, but not limited to a Private Cause of Action against the Insurer (as defined in the preceding paragraphs of this Covenant) under the Medicare Secondary Payer Act (MSP) pursuant to 42 USCA Section 1395y(b)(3)(A).

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10 day of January, 2019.


Miguel Oyuela-Martinez

Signed, sealed and delivered in the presence of:


Witness

 1/10/19
Witness

STATE OF SOUTH CAROLINA
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO: 2019-CP-10-0341

Miguel Oyuela-Martinez,
Plaintiff,

v.

Kuhn & Kuhn LLC, and John Robert Kuhn,
Defendant.

**ORDER GRANTING PARTIAL
SUMMARY JUDGMENT**

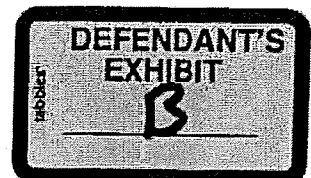
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This matter came before me on June 18, 2019 pursuant to a Motion to Dismiss and Motion for Summary Judgment filed by the defendant Kuhn & Kuhn, LLC. Present at the hearing for the Plaintiff was Kevin B. Smith, Esq. Also present were the defendant John Robert Kuhn and his attorney Ronald B. Diegel, Esq. Attorney Jeffrey M. Crudup, Esq. was also present for the defense.

The lawsuit arises out of an automobile/pedestrian accident on October 24, 2018. In addition to the claims alleged against Mr. Kuhn individually as the owner and operator of the vehicle that caused the accident resulting in injuries to the Plaintiff, the Plaintiff has also alleged claims against the law firm of Kuhn & Kuhn, LLC contending that the law firm has vicarious liability for Mr. Kuhn's actions and/or negligently supervised Mr. Kuhn at the time of the accident.

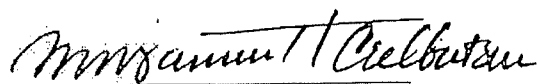
The court has considered the materials submitted by counsel for the Plaintiff and Defendants, as well as the documents and pleadings which are part of the Court file. The Court denies the motion to dismiss and the motion for summary judgment as to the vicarious liability claim. However, as to the claim of negligent supervision the Court notes that Mr. Kuhn is the managing partner and owner of Kuhn & Kuhn, LLC. As such,

1 MAC



Mr. Kuhn cannot negligently supervise himself. Accordingly, the Court grants summary judgment as to the negligent supervision claim asserted by the Plaintiff.

And it is so ordered.



Benjamin H. Culbertson
Presiding Circuit Court Judge

July 15, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

JUN 22 2020

SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY CIRCUIT COURT

Bentley D. Price, Circuit Court Judge

Civil Action No.: 2019-CP-10-0341

Miguel Oyuela-Martinez,..... Appellant,

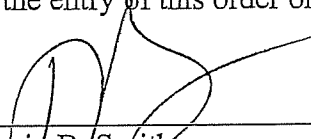
v.

Kuhn & Kuhn, LLC,.....Respondent.

NOTICE OF APPEAL

Miguel Oyuela-Martinez appeals the order of the Honorable Bentley D. Price dated May 27, 2020. Appellant received written notice of the entry of this order on May 28, 2020.

June 19, 2020



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Attorneys for Respondent

1 STATE OF SOUTH CAROLINA)
) Court of Common Pleas
 2 COUNTY OF CHARLESTON) Case No. 2019-CP-10-0341
)
 3)
 4 MIGUEL OYUELA-MARTINEZ,)
)
 Plaintiff,)
 5)
 vs.) Transcript of Record
 6)
 7 KUHN AND KUHN, LLC and)
 JOHN ROBERT KUHN,)
)
 8 Defendant.) DATE: June 18, 2019
)

9

10

11 B E F O R E:

12 THE HONORABLE BENJAMIN CULBERTSON

13

14

A P P E A R A N C E:

15

KEVIN B. SMITH
Attorney for the Plaintiff

16

17

RONALD BARTON DIEGEL
Attorney for the Defendant, John Robert Kuhn

18

19

JOHN ROBERT KUHN
Attorney for Kuhn and Kuhn, LLC and Pro se

20

Original transcript ordered by:
Hoffman Law Firm, LLC

21

22

Stenographically recorded and transcribed by:

23

Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter
Certified Shorthand Reporter

24

25

1 THE COURT: First up is 2019-CP-10-0341, Miguel
2 Oyuela-Martinez v. Kuhn & Kuhn, LLC, and John Robert Kuhn.
3 Please give the court reporter your names and who you
4 represent.

5 MR. DIEGEL: Yes, ma'am. My name is Ron Diegel. I
6 practice law with the law firm of Murphy & Grantland in
7 Columbia. I'm here on behalf of John Kuhn.

8 MR. SMITH: I'm Kevin Smith. And I represent the
9 plaintiff.

10 THE COURT: All right. I see I have a defendant
11 motion to dismiss and a plaintiff motion to compel. What
12 order do we want to take them in?

13 MR. DIEGEL: Yes, sir. We could perhaps address the
14 motion to dismiss, which should also now be considered a
15 motion for summary judgment. We -- both sides have filed
16 materials with Your Honor and with the court, which would
17 take the motion outside of the realm of just a motion to
18 dismiss. I did file a motion for summary judgment as well on
19 the 7th of June.

20 THE COURT: Let me ask first, Mr. Smith, is that
21 agreeable with you, convert it to a motion for summary
22 judgment?

23 MR. SMITH: Yes, Your Honor.

24 THE COURT: All right.

25 MR. SMITH: Your Honor, we contend it's probably not

1 time to address some of the issues on summary judgment, but I
2 have no objection to it being converted as such.

3 THE COURT: All right. Mr. Diegel, let me hear from
4 you.

5 MR. DIEGEL: And I would like to approach, Your
6 Honor, if I could. Hand up a few exhibits for
7 consideration.

8 Again, I represent John Kuhn. This is a motion for
9 summary judgment on behalf of Kuhn & Kuhn, who is a named
10 defendant in a lawsuit arising out of an automobile accident
11 that took place October 24th, 2018.

12 There are essentially two claims that are being made
13 in the plaintiff's complaint against Kuhn & Kuhn, the law
14 firm. And those are a claim for vicarious liability and also
15 a claim for negligent supervision.

16 It's our position on the defense side of the case
17 that there is no valid claim for vicarious liability against
18 the law firm, nor is there a valid claim in law or fact for
19 the negligent supervision claim now asserted against the law
20 firm.

21 Let me briefly touch on the background of the case.
22 The facts, I believe, Your Honor, are relatively
23 straightforward and uncomplicated. And they are set forth in
24 detail in an affidavit, which I handed up to the Court, which
25 has been filed with the Court. It is the affidavit of John

1 Kuhn.

2 Basically, Your Honor, on October the 24th of 2018,
3 Mr. Kuhn was driving his personally owned automobile, which
4 is a little Audi automobile, by himself. And he decided that
5 he wanted to stop for lunch. He had been in his law firm
6 earlier that morning. He made what was, unfortunately, a
7 careless lane change to the right in an effort to get over to
8 what I believe is a little Mexican or taco stand restaurant.
9 And when he made that lane change to the right, it resulted
10 in a collision with another vehicle.

11 The cars sort of careened off the road. And,
12 unfortunately, the plaintiff, who was sitting on a bench near
13 the establishment where Mr. Kuhn was trying to go to lunch,
14 he was injured.

15 In our answer on behalf of Mr. Kuhn, we have
16 admitted simple fault, duty and breach of duty.

17 As a result of the accident, obviously, a claim was
18 made against Mr. Kuhn's personal automobile liability
19 insurance carrier, which is Progressive. As a result of the
20 injury sustained by the plaintiff, Progressive paid the
21 remaining policy limits of approximately \$470,000 to the
22 plaintiff. And in return, a covenant not to execute was
23 given in favor of Mr. Kuhn individually.

24 Shortly thereafter, the plaintiff commenced a
25 lawsuit against Mr. Kuhn individually and also against

1 Mr. Kuhn's law firm, Kuhn & Kuhn. Kuhn & Kuhn is a firm here
2 in Charleston which primarily practices -- specializes, in
3 fact, in the area of wills, probate and trust.

4 Again, as I've said, Your Honor, two claims that are
5 made against the law firm, first is for vicarious liability;
6 the second is for negligent supervision.

7 With regard to the vicarious liability claim, the
8 plaintiff in a case such as this has to show that a
9 master-servant relationship existed, and that the servant, in
10 this case that would be Mr. Kuhn, was about his master's
11 business and was acting within the scope of his employment
12 and in furtherance of the master's business at the time of
13 the alleged event.

14 I've handed up two cases. One is the *Armstrong v.*
15 *Foodlion* case, which discusses that black letter law, as well
16 as the claim of *Lane vs. Modern Music*. As Your Honor will
17 see when you review the affidavit of Mr. Kuhn, Mr. Kuhn
18 explains in detail that he was not coming from a client at
19 the time of the accident. He was not with a client. He was
20 not going to see a client. He was not servicing a client.
21 He was not even thinking about a client. He was not going to
22 or from courthouse. He was going to get lunch.

23 Nothing about his activity or his purposes at the
24 time of the accident was connected in any way to the business
25 of his law firm. He wasn't accomplishing anything on behalf

1 of the law firm. Again, he was by himself driving a
2 personally owned automobile insured under personal auto
3 policy with Progressive.

4 Importantly, the law firm did not furnish the
5 automobile. The automobile is not expensed through the firm.
6 It's not titled or registered to the firm. It's registered
7 and titled solely in Mr. Kuhn's name as his personal
8 automobile. The declarations page on the insurance company
9 policy, which I've also attached, even describes the purpose
10 of the automobile, and that is described as commute. And
11 again, this is a personal auto policy.

12 Further, in his affidavit, Mr. Kuhn sets forth those
13 details and some additional context in paragraph 9. And then
14 in paragraph 10 of his affidavit, he describes a conversation
15 that he was having with a friend of his named Norena (ph) at
16 or around the time of the accident. That conversation
17 involved Mr. Kuhn's interest in a wine shop purchase
18 completely unrelated to the law firm. There is a text
19 message or two, which we have provided to opposing counsel,
20 where there is an exchange between Mr. Kuhn and this lady
21 named Norena where Mr. Kuhn reports there has been an
22 accident, but he thinks everything is going to be okay.
23 Again, no connection to the law firm.

24 In paragraph 11 of Mr. Kuhn's affidavit, he
25 describes a decision that he and his wife -- his wife's name

1 is Shea. After this accident, you can imagine there was some
2 chaos at the scene. Investigating personnel arrived. Of
3 course, EMS came to the scene. Mr. Kuhn's vehicle was
4 wrecked. His wife had to come to the scene as well, because
5 his car had crashed and needed to be towed and couldn't be
6 driven from the scene.

7 So at some point after the accident, he and his wife
8 decided -- and this is in his affidavit in paragraph 11.
9 They decided that they would go look at some office furniture
10 at OfficeMart, because I believe that at that time or around
11 that time, they were in the process of considering a change
12 from one building to another, a change in location.
13 Important point I want to make, Your Honor, is this is a
14 decision that was made after the accident took place.

15 Again, the reason for the accident was Mr. Kuhn's
16 desire to try to get over to a taco stand where he wanted to
17 get something to eat. And, unfortunately, his carelessness
18 in causing the accident resulted in this event. But, again,
19 it had nothing to do with the law firm.

20 The second claim that is asserted against Kuhn &
21 Kuhn in this lawsuit is a claim for negligent supervision.
22 Your Honor, I know you are well aware with the fact that the
23 law ordinarily imposes no duty on a person to act. So,
24 initially, a claim can only exist if there is a duty of the
25 law firm to the plaintiff.

1 The Supreme Court of South Carolina has addressed
2 the cause of action for negligent supervision in the
3 *Degenhart* case. And I also handed a copy of that up to Your
4 Honor for your consideration.

5 And there are four elements for negligent
6 supervision claim to be stated: First of all, the employee
7 needs to be upon the premises of the employer at the time of
8 the event; number two, the employee needs to be using a
9 chattel of the employer; number three, the employer has to
10 know or have reason to know that the employer has the ability
11 to control his employee; and fourthly, the employer knows or
12 should know of the necessity and opportunity for exercising
13 such control.

14 It's our position, Your Honor, that the claim fails
15 as a matter of law because elements one and two can't be met.
16 There's no dispute that this accident was not upon the
17 premises of the employer. And there's also no dispute,
18 regardless of how much discovery might be sought to be
19 pursued in this case, that the chattel was not provided by
20 the employer. This was a personally owned automobile with
21 Mr. Kuhn. Additionally, Your Honor, Mr. Kuhn is the managing
22 partner of Kuhn & Kuhn. And he can't negligently supervise
23 himself.

24 We've given over copies of Mr. Kuhn's office
25 calendar for the day. We've provided some text messages from

1 the time of the accident. We've provided photographs from
2 the scene. We've provided any and all accident investigation
3 materials which we've been able to acquire from the City of
4 Charleston. We've also turned over a copy of Mr. Kuhn's
5 recorded statement given to the insurance company shortly
6 after the time of the accident that afternoon. And all of
7 those materials clearly set forth the events for the date and
8 time of the accident.

9 Again, Your Honor, it's our position on the defense
10 side of this case that both of these claims should fail as a
11 matter of law. There's simply no basis in fact to support a
12 claim for vicarious liability, nor is there a basis in fact
13 to support a claim for negligent supervision.

14 In this particular instance, the plaintiff, who did
15 sustain significant injuries, he did not have to sign the
16 covenant not to execute in favor of Mr. Kuhn. He could have
17 pursued Mr. Kuhn personally for additional damages above and
18 beyond the insurance policy. But he elected not to do that.
19 He took the policy limit, signed it, gave it in favor of
20 Mr. Kuhn. And then after that was done, instituted this
21 lawsuit against Kuhn & Kuhn and Mr. Kuhn individually
22 claiming that there was this vicarious liability situation or
23 negligent supervision basis.

24 It's our position, Your Honor, that Mr. Kuhn's firm
25 should not have to defend this, what we believe to be a

1 baseless claim on the vicarious and negligent supervision
2 theory. This, to me, Your Honor, seems to be an additional
3 effort by the plaintiff in this case to create some sort of a
4 claim or theory where additional money could be pressured
5 from Mr. Kuhn or from his law firm, when it's clear we
6 believe under the facts and the evidence that we presented
7 and materials that have been provided, that there just is no
8 basis in law or fact for either of those claims.

9 So it's our position, Your Honor, based on the
10 materials that we've submitted and based on what I've just
11 said here this morning, that this claim should be dismissed
12 pursuant to summary judgment.

13 THE COURT: All right. Thank you.

14 All right. Mr. Smith, let me hear from you.

15 MR. SMITH: Your Honor, there have been -- have you
16 had a chance to review my memorandum?

17 THE COURT: No.

18 MR. SMITH: There's a history in this case. And
19 there are -- well, I will start where he started. For the
20 purpose of vicarious liability, you've got to prove two
21 things: Number one, that there was a master-servant
22 relationship, and number two, that the servant was about the
23 business of the employer.

24 Mr. Kuhn, in his filings he has made to the Court on
25 this very matter in his exact motion, Mr. Kuhn states, again,

1 it is conceded that John Robert Kuhn is an employee of Kuhn &
2 Kuhn, LLC. So there's the master-servant relationship.

3 Next question is, was the servant about the
4 business, about the business of the business? Mr. Kuhn,
5 before Mr. Diegel got involved, gave a recorded statement to
6 his insurance company. And, Judge, they asked him just that
7 same question. They said, okay, what was the purpose of your
8 trip? I was going to OfficeMart for my work.

9 So what was the purpose of your trip? For my work.

10 And, Judge, if you are familiar with this area at
11 all, the way you get from Mr. Kuhn's office to OfficeMart,
12 you come up on 26, you take a left on Ashley Phosphate, and
13 you go on to Ashley Phosphate, here's OfficeMart.

14 THE COURT: Mr. Kuhn gave that statement saying that
15 was for his business before the wreck occurred?

16 MR. DIEGEL: Yes. Yes. And so you've got OfficeMax
17 (sic) down here. We know it's right here on the way. It's a
18 taco shop. Mr. Kuhn is in the middle lane. He decides at
19 the last minute he's going to recklessly pull from the middle
20 lane at a high rate of speed, hit the car that is directly to
21 his right, send that car directly to a park bench to run over
22 my client, who has pretty horrific injuries.

23 With regards to the first question of vicarious
24 liability, he admits he was an employee. And he admits in
25 his recorded statement the purpose of his trip was "for my

1 work".

2 THE COURT: That is a recorded statement given to
3 whom?

4 MR. SMITH: Given to his own insurance company.

5 THE COURT: He says that prior to the accident he
6 was going to get furniture?

7 MR. SMITH: They asked him, what was the purpose of
8 your trip? They are asking him all kinds of background.
9 We've attached the recorded statement as part of our exhibits
10 as well. But they are asking him, what were you doing that
11 day? Were you going to work? Were you coming from work?
12 What was the purpose of your trip? And that's when he
13 responds, I was going to OfficeMart for my work.

14 THE COURT: All right.

15 MR. SMITH: Judge, shortly after this lawsuit was
16 filed -- well, directly after this lawsuit was filed,
17 Mr. Kuhn actually filed bar complaints against me and my
18 business partner, David Hoffman. David Hoffman works in my
19 office. He has nothing to do with this case whatsoever, but
20 he also filed complaints against him.

21 Judge, to read the rambling bar complaints, you
22 probably can understand why they got dismissed very quickly.
23 But you see the exact same arguments that you see here. You
24 see statements that it was a personal day, I wasn't even at
25 work that day. Yet, we got a copy of his calendar. It shows

1 he had morning appointments. And it shows he had afternoon
2 appointments.

3 In the answers to discovery Mr. Diegel filed for
4 him, it says: 8:30 a.m., defendant was at Kuhn & Kuhn,
5 Savannah Highway, meeting with Brooks Sign. And then he, at
6 10 a.m., was at Kuhn & Kuhn, Savannah Highway, meeting with
7 Justin Tapp and Cindy White, two other people.

8 So, Judge, we've got a history and a pattern of some
9 pretty egregious misrepresentations to the Court about what
10 was going on that day.

11 And so, Judge, listen, Mr. Martinez, he doesn't have
12 a whole lot in this world. And he signed a covenant not to
13 execute. It was a right thing to do. The covenant to
14 execute left open basically two scenarios or three scenarios.
15 Right? It left open, one, the scenario we can always file
16 that case in court, because if it turns out he has more
17 insurance than he's letting on, then we are entitled to that
18 insurance.

19 And, Judge, I can tell you as a business owner and a
20 partner in a law firm, I've got a lot more insurance and
21 different kinds of insurance than what Mr. Kuhn had just
22 simply a personal automobile.

23 I mean, what if one of his employees is going to the
24 post office and gets into a wreck and they hurt somebody?
25 What he's telling us is, he doesn't have a policy that would

1 cover that. And I find that hard to believe from a
2 business-owner perspective.

3 But be that as it may, we filed a lawsuit to
4 investigate whether any other policies apply? Secondly, we
5 filed a lawsuit to find out if he was on the job or not. It
6 was Wednesday afternoon, one o'clock in the afternoon. We
7 kind of assumed he was. I'm on the job 24 hours a day. I
8 don't know how it is in the wills and trust world, but my
9 cell phone is on me at all times. You can ask my wife.

10 But that's what we did. We filed it to figure out
11 if he's on the job. And he has so much in his pleadings to
12 the Court and in his recorded statement admitted the elements
13 of vicarious liability.

14 So, Judge, we would ask that the motion be denied
15 because of the recorded statement, Judge, that says, what was
16 the purpose of his trip, it was for my work.

17 I would ask for fees in preparing for this motion,
18 Judge, because I don't think, whether it's 12(b)(6) or
19 whether it's a motion for summary judgment, doesn't seem like
20 it's much of an issue out there, Judge.

21 THE COURT: All right. Anything else in reply?

22 MR. DIEGEL: Your Honor, in the recorded statement,
23 which we do not allege he made this statement to the
24 insurance company after the accident --

25 THE COURT: I know he made the statement after the

1 accident. But in his response, what did he say his business
2 was at the time? I mean, the question -- I understand his
3 argument. You are saying he was going to get lunch. Well,
4 when they asked what were you doing, he said, I was going to
5 get furniture. He doesn't say, I was going to get lunch.

6 MR. DIEGEL: He does later in the statement, but let
7 me --

8 THE COURT: Go ahead.

9 MR. DIEGEL: What was the purpose of the trip? Were
10 you, like, were you going to work? Were you going -- that's
11 the question from the claims representative.

12 THE COURT: Okay.

13 MR. DIEGEL: The answer given is, I was going to
14 Wilcox OfficeMart for my work. Okay?

15 And then she asked a couple of other questions about
16 the intersection where this takes place. And he goes on to
17 say, I was traveling east on Ashley Phosphate. And I thought
18 I was in the far right lane, but I was not in the far right
19 lane. So I thought I was in the far right lane. And I was
20 going to the taco shop there at the corner of rocks tree and
21 Ashley Phosphate. I turned right into rocks street and it
22 turns out I wasn't in the far right lane. I was in the
23 middle lane. And I went right in front of another lady who
24 was in a Jeep Explorer. I don't know what kind of car, it
25 was Ford Explorer or something like that. Anyway, I crossed

1 right across her front and she plowed into the side of my
2 car. She deflected on to Rock Street and hit another car
3 there. This is my fault, because I shouldn't have been
4 turning from the right lane like I thought I was.

5 The context of this entire trip and his effort to
6 get to the taco stand at the time of the accident, I think is
7 the crucial inquiry for the Court. And, again, if the Court
8 will leave the discussion of master-servant furtherance of
9 the business requirement in the *Armstrong* and *Modern v. Lane*
10 cases, both of those cases involve situations where you
11 actually had employees who were on the clock, in uniform,
12 servicing clients, but did actions outside the scope of their
13 employment with that employer such that in both cases, the
14 Court concluded that there was no master-servant relationship
15 at that time.

16 And I think analogous to our case, this is a
17 situation where Mr. Kuhn was attempting to go get something
18 for lunch. But even if it was in his mind when he gave the
19 recorded statement to Progressive after the accident occurred
20 and he's asked, where were you going, and he's thinking about
21 the time that he went -- his plan to go to OfficeMart with
22 his wife, none of that is in furtherance of the business of
23 his firm, which is wills, trusts and probate.

24 That is -- in our view, Your Honor, it is the
25 context of what was going on that day as he's driving his

1 personal automobile and as he's going to get something to
2 eat. That, along with the rest of the information in his
3 affidavit, just clearly shows that this was not being done in
4 furtherance of the business purposes of his office.

5 I want to point to this, because he gives a recorded
6 statement where he makes this comment in passing and then he
7 goes on to talk about the fact that he was really trying to
8 go get some lunch. I understand that that's something that
9 the Court has to consider. It has to look at that, but I'm
10 asking the Court to look at it in the context of the entire
11 events of the accident sequence.

12 THE COURT: All right.

13 MR. SMITH: Judge, if I could just --

14 THE COURT: No.

15 MR. SMITH: Thank you.

16 THE COURT: All right. I'm going to deny the motion
17 as to the vicarious liability, simply because of the
18 statement he gave to the insurance adjuster that he was on
19 his way to look for furniture. I am not saying that was the
20 case. But I think it shows or it is evidence as to why he
21 left the office, that he wasn't just leaving to go to lunch.
22 And then later, even though his affidavit says something
23 different, his statement to the adjuster says it was a
24 business of buying furniture at the office.

25 I'm going to grant your motion as to the negligent

1 supervision cause of action, because he is the managing
2 partner. He's charged with supervising himself. So I'm
3 going to grant it as to that cause of action.

4 All right. Do you all want formal orders or will a
5 Form 4 suffice?

6 MR. DIEGEL: Judge, I would be glad to prepare
7 something and submit it to Your Honor for consideration after
8 I let Kevin take a look at it as well.

9 MR. SMITH: Sure.

10 MR. DIEGEL: It won't be long.

11 THE COURT: If you will prepare an order to that
12 effect.

13 All right. Now, on the motion to compel.

14 MR. SMITH: Judge, I don't know if there was some
15 wires crossed. The discovery motion was actually set for
16 Thursday. It's pretty simple, though. I could probably take
17 ten minutes and be prepared for it. I just need to get it
18 from my office. They could probably e-mail it to me.

19 THE COURT: However you want to do it. It's on my
20 roster for today. Let me check with the clerk.

21 Is it for Thursday or is it for today?

22 THE CLERK: I have it for today.

23 MR. SMITH: We got e-mails setting it for Thursday.
24 But, honestly, I think -- Mr. Diegel, I think, has submitted
25 a bunch of extra stuff. There's just probably one or two

1 issues at this point, Judge.

2 THE COURT: All right. So you are going to need to
3 get those?

4 MR. SMITH: Yes, sir.

5 THE COURT: Let's stand this down and go ahead with
6 these other motions and then we will come back.

7 (Whereupon, a recess takes place.)

8 THE COURT: Let's go back on the record for
9 2019-CP-10-00341, Martinez vs. Kuhn & Kuhn, LLC and others.
10 The matter is before the Court on a motion to compel by the
11 plaintiff.

12 Mr. Smith, this is your motion?

13 MR. SMITH: Yes, Your Honor.

14 THE COURT: All right. Let me hear from you.

15 MR. SMITH: Thank you, Your Honor. This is a motion
16 to compel. We originally filed our discovery -- for Your
17 Honor's knowledge, Mr. Diegel represents Mr. Kuhn personally.
18 He was hired by the insurance company. And Mr. Kuhn is
19 representing the business Kuhn & Kuhn. So I say that because
20 this is a motion to compel against Kuhn & Kuhn.

21 THE COURT: All right.

22 MR. SMITH: And so I filed discovery request for
23 production, interrogatories, to Mr. Kuhn, who filed a pro se
24 answer himself for Kuhn & Kuhn, as the attorney of record.
25 So those were served on him. I didn't get any answers

1 whatsoever. So we filed the motion.

2 After the motion was filed, I got some answers. And
3 I've been able to reduce what I'm looking for down to three
4 requests for production. The first request for production
5 that I would raise before the Court is request for production
6 No. 10. And that states, any and all e-mails sent or
7 received by Defendant John Robert Kuhn on the day of the
8 collision from twelve o'clock to two o'clock, p.m. And I've
9 asked to redact client names and client-related information.

10 THE COURT: E-mails by who?

11 MR. SMITH: By Mr. Kuhn and e-mails sent by him or
12 e-mails sent to him, between those two hours. Right? The
13 wreck was one o'clock in the afternoon. I'm looking for a
14 two-hour window. I want the e-mails that were sent to you
15 and I want the e-mails you sent out. I don't need to have
16 any client information on those.

17 THE COURT: But, I mean, did you send the same
18 request to his personal attorney, Mr. Diegel?

19 MR. SMITH: Yes, sir.

20 THE COURT: And did he provide that information?

21 MR. SMITH: No, sir.

22 THE COURT: Okay.

23 MR. SMITH: But we are working through some other
24 issues. He's provided a majority of what I've asked for in
25 addition. So I'm still working through those issues. I

1 don't imagine a motion to compel will be necessary for Mr.
2 Diegel.

3 THE COURT: But, I mean, so your motion to compel,
4 is it as to both defendants?

5 MR. SMITH: No, sir. It's only as to Kuhn & Kuhn.

6 THE COURT: Okay. All right. Go ahead.

7 MR. SMITH: I also request for production No. 11,
8 any and all text messages sent or received by Mr. John Robert
9 Kuhn on the day of the collision, again, for those two hours
10 between noon and two o'clock, p.m.

11 They sent us the text messages he was having with
12 the girl he was on the phone with at the time of the wreck.
13 We would like any other text messages he either sent or
14 received in that two-hour block between noon and two, with
15 the wreck being at one.

16 THE COURT: All right.

17 MR. SMITH: And, finally, No. 12, records of hourly
18 or transactional billing for work performed by Mr. Kuhn on
19 the date of the collision. So if he billed any time for any
20 work with any clients, I believe we are entitled to that
21 information.

22 Judge, I'm sensitive to client-related information.
23 I have no interest in figuring out who his clients are or
24 things like that. But, you know, we are down a road of
25 figuring out what was going on that day. And, again, he's

1 made several assertions to the bar and to the Court that he
2 was on a personal day that day, that he wasn't even at work
3 that day. We know that not to be true. So I think we need
4 to dig into these issues and figure out the real truth.

5 THE COURT: Problem I'm having is, you are wanting
6 the e-mails, the texts and the billing records from John R.
7 Kuhn, who is an individual defendant in this case.

8 MR. SMITH: Yes, sir.

9 THE COURT: So why don't you go against Mr. Diegel
10 for his client personally rather than the law firm?

11 MR. SMITH: I think the law firm would have -- he
12 is -- the reason the whole negligent supervision was
13 dismissed today is because he is the law firm. Whether it's
14 Kuhn & Kuhn or John Robert Kuhn, the argument that they are
15 making to the Court is it's the exact same person.

16 THE COURT: Then why are you pursuing against Kuhn &
17 Kuhn, LLC only and not against him individually as a
18 defendant for this discovery?

19 MR. SMITH: Well, because Mr. Diegel has recently
20 supplemented some things that we were asking for and he asked
21 for an extension, and we gave them. I imagine I'm going to
22 be able to work through those issues with Mr. Diegel. Is
23 there anything left we are still waiting to get from Ronald?
24 I think there's one thing we are still waiting to get from
25 him. So once we take a look at that, we will figure out if

1 anything else needs to be done. But we would like to go
2 ahead and start discovery in this case.

3 THE COURT: Mr. Diegel, let me hear from you.

4 MR. DIEGEL: Your Honor, I have spoken with
5 Mr. Kuhn. And to the extent those e-mails and text messages
6 for those specific time periods, 12 to 2 on the day of the
7 accident, to the extent we can retrieve those and pull those
8 with the appropriate redactions, he's fine with doing that.
9 Mr. Kuhn is fine with doing that.

10 Same situation for the billing records, but just for
11 that day, again, with the appropriate redactions to be made.

12 THE COURT: Okay. Mr. Kuhn, do you have any
13 argument, since you are listed as attorney for Kuhn & Kuhn,
14 LLC?

15 MR. KUHN: No. I just, Your Honor, I appreciate
16 your being here and taking the time and listening to us.
17 And, actually, I'm looking forward to providing those things
18 that the plaintiff's counsel has asked me for, because they
19 really will help me. So, no problem.

20 THE COURT: All right. I will grant your motion.
21 How much time are you going to need?

22 MR. DIEGEL: Fifteen days, Your Honor. Is that
23 okay?

24 MR. SMITH: Yes, sir.

25 THE COURT: All right. I will grant it. Defendant

1 Kuhn & Kuhn, LLC to produce responses to request for
2 productions No. 10, 11 and 12 within 15 days.

3 All right. Thank you very much.

4 MR. SMITH: Thank you for your time, Judge.

5 MR. DIEGEL: Thank you.


6 (Whereupon, proceedings are adjourned.)
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CERTIFICATE OF REPORTER

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I, Karen V. Andersen, Registered Merit Reporter,
Certified Realtime Reporter for the State of South Carolina
at Large, do hereby certify that the foregoing transcript is
a true, accurate and complete Transcript of Record of the
proceedings.

I further certify that I am neither related to nor
counsel for any party to the cause pending or interested in
the events thereof.


Karen V. Andersen
Registered Merit Reporter
Certified Realtime Reporter

1 STATE OF SOUTH CAROLINA) COMMON PLEAS COURT
)
 2 MIGUEL OYUELA-MARTINEZ) CASE NO.
) 2019-CP-10-0 0341
 3)
)
 4)
)
 5) Transcript of Record
 Plaintiffs,)
 6)
 vs.) Date: May 5, 2020
 7)
 KUHN and KUHN, LLC)
 8 and JOHN ROBERT KUHN)
)
 9 Defendants.

10 * * * * *

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12 B E F O R E:

13 The Honorable Bentley Price

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16 Krista Nicole Carney, Stenographic
 17 Court Reporter, transcribed by a
 18 Stenographic Court Reporter

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A P P E A R A N C E S

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ALSO PRESENT: Roy Wills

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1 (These proceedings were had May 5,
2 2020, starting at 2:30 p.m., Charleston County
3 Common Pleas Court via Zoom.)

4 THE COURT: I'm Roy Willy. And I am
5 here as an observer.

6 I'm Kevin Smith. And I represent the
7 Plaintiff, Miguel Oyuela-Martinez. I will be
8 handling the motion to be relieved from the
9 mediation requirement, the motion to compel
10 discovery, the motion to determine sufficiency of
11 answers or objections, and the Plaintiff's motion
12 for summary judgment.

13 I'm Amanda Itterly. I'm cocounsel with
14 Kevin for Plaintiff, Miguel. And Kevin is going to
15 be arguing all those motions before you today. So
16 I'm just here, if I need to chime in.

17 MR. CRUDUP: I'm Jeff Crudup. I
18 represent Kuhn and Kuhn, L.L.C. And, I believe, as
19 cocounsel.

20 MR. KUHN: I'm John Kuhn. And Jeff is
21 my lawyer.

22 MR. SMITH: John, maybe we could -- if
23 you could state for the record who you're
24 representing. I know you are actually an attorney
25 on the case. There's two defendants. Yourself

1 personally and the business. If you could just
2 state for the record which or both you represent.

3 MR. KUHN: I represent -- well, Jeff
4 represents me, John Kuhn, personally.

5 MR. CRUDUP: Yes. And I believe I've
6 now entered an appearance as cocounsel for Kuhn and
7 Kuhn, L.L.C.

8 MR. KUHN: So I'm just cocounsel for
9 Kuhn and Kuhn, L.L.C. And then I'm, as you know,
10 the Defendant.

11 MR. SMITH: And you're representing
12 yourself personally, as well also?

13 MR. KUHN: Yes.

14 THE COURT: If you'll go ahead and mute
15 all of yourselves. It just makes the record
16 cleaner where she can hear a little bit better.

17 And, Mr. Smith, I'll just go ahead and
18 start with you. These are your motions. So just
19 kind of go down them in order. And I'll be happy
20 to hear from you.

21 MR. CRUDUP: I apologize. I didn't
22 mean to cut you off.

23 Madam Court Reporter, we also have a
24 motion for summary judgement, which I will be
25 arguing. We, being the Defendants. Sorry about

1 that.

2 THE COURT: All right. Not a problem.
3 I'll be happy to hear from everybody. We have
4 plenty of time.

5 MR. SMITH: Judge, as I stated, I'm
6 Kevin Smith. I'm here on behalf of the Plaintiff.
7 And we have several motions pending before you here
8 today. To help me a little bit, in terms of what I
9 need to explain, can I ask the Court, have you had
10 a chance to review the memorandum I submitted?
11 You're on mute, Judge.

12 THE COURT: Yes. I was talking to
13 Julie. Give me one second. Normally, we pass
14 notes back and forth that y'all can't see.

15 Yes. I was reading it earlier this
16 morning and I was putting it off. I'm having Julie
17 go and get it. So I have read it. And my
18 understanding is the motion to be relieved for
19 mediation, motion to compel discovery request,
20 motion to determine sufficiency of answers or
21 objections, and a motion for summary judgment; is
22 that correct?

23 MR. SMITH: Yes, sir.

24 THE COURT: I have them all right here.
25 So let's start with the first one.

1 MR. SMITH: Actually, Judge, I have the
2 -- we can just go in order. So the motion to be
3 relieved from the mediation requirement, Judge, you
4 know, I filed this because obviously there are
5 court rules and requirements for mediation. And I
6 don't want to get in trouble with the Court for not
7 having this done. So basically I've outlined what
8 has happened so far.

9 We had a mediation scheduled.
10 Mr. Kuhn, as you have heard is not only a named
11 Defendant in this matter, he is also a lawyer of
12 record.

13 So we had a mediation scheduled. We
14 decided to schedule that with Judge Harrington,
15 former Judge Harrington. And we were all set to
16 go. So the night before mediation, when Mr. Ron
17 Diegel, who was previously in Mr. Crudup's shoes,
18 had just sent Ms. Harrington an email with a brief
19 and some positions in preparation for the
20 mediation. And he copied all of us, I think, on
21 that, including Mr. Kuhn.

22 At that time, he got an automated
23 response from Mr. Kuhn. And that automated
24 response said something to the effect that I am
25 horribly sick with a vicious virus. I have had bad

1 stuffy body aches, canker sores, and fever.

2 And that all left us kind of wondering
3 what's going on. Not only do we potentially won't
4 have the Defendant, we won't have an attorney of
5 record. And so now we start to go back and forth,
6 everybody figuring up what are we going to do. Is
7 he showing up, is he not showing up. I don't
8 really know what this means. It's just an
9 automatic email response.

10 So we go back and forth. Finally,
11 Mr. Kuhn responds, I believe, at around 5:00 that
12 day. And then just says, I've been home sick all
13 week in bed. Still doesn't tell us whether or not
14 he plans on showing up. He does not tell us if he
15 wants to reschedule.

16 Finally, his lawyer say, well, we just
17 have to assume that he's not going to show up. So
18 I guess we should just cancel the thing. So the
19 feeling that we have got or the information that we
20 have got since was Mr. Kuhn didn't -- really
21 doesn't plan on offering any money anyway.

22 And I'm not going to argue with the
23 logic to that. I appreciate people being
24 straightforward with these issues.

25 So in light of that, we would just

1 simply request to be relieved of the mediation
2 requirement.

3 THE COURT: Do you want to address them
4 each one by one, Mr. Crudup? Is that the easiest
5 way for you?

6 MR. CRUDUP: I think so, Your Honor.
7 First of all, the way that the -- that issue with
8 the mediation played out, I do not think is
9 incorrect, that recitation, by and large.

10 However -- I mean, they are pretty
11 clear rules that we must mediate cases. Whether or
12 not we've indicated that we've planned on offering
13 something, or how much at mediation, I don't think
14 is really germane here.

15 Personally, as counsel, I think
16 mediation may be useful. And I don't think that a
17 late cancellation -- I mean, I don't believe anyone
18 is questioning whether or not Mr. Kuhn was sick or
19 not. I don't think a late cancellation somehow
20 makes mediation -- absolves us, as attorneys, or
21 anything else from the mediation rules.

22 So I think we should probably go
23 forward with mediation. We're happy to work to set
24 it up again. Obviously, now it's going to be a
25 little tougher, with everything going on. But even

1 if it's something like this, like a Zoom video, I
2 don't think there's anything wrong with that. I
3 just don't see how blanket can somehow skirt that
4 rule simply because Mr. Kuhn got sick and didn't
5 really communicate that with us until kind of late
6 in the game.

7 THE COURT: Well, Mr. Smith's what is
8 your position, saying that you don't believe that
9 Mr. Kuhn is going to offer any sort of money and so
10 you're just going to be throwing good money at bad,
11 is essentially what you're saying, at \$500 an hour
12 to start of?

13 Is there any rule that allows me to
14 forgo that requirement?

15 MR. SMITH: I can tell you, Judge, that
16 I have applied for this sort of relief several
17 times in the past and it's been granted. So that's
18 all I'm really going after.

19 I mean, you know, listen, in my mind
20 after what we went through and the indications that
21 I've gotten, I would be happy to mediate with them.
22 I just don't think it's going to go anywhere. I
23 think in light of what went on and all the wasted
24 time and Ms. Harrington's waste of time -- I think
25 it was finally called at like 10:00 at night the

1 night before. I would be happy to mediate. But my
2 personal condition would be they pay for it.

3 THE COURT: All right. Anything else,
4 Mr. Crudup, as to that situation or that motion?

5 MR. CRUDUP: No, Your Honor. I don't
6 think we should be paying for mediation. But it is
7 our position that we would like to move forward
8 with it, whether it's before former Judge
9 Harrington or not.

10 THE COURT: All right. Keep going,
11 Mr. Smith.

12 MR. SMITH: Yes, sir. So the second
13 issue, Judge, would be the motion to compel
14 discovery. And this was a set that we had filed
15 back in December of last year. And this is -- he's
16 asked for several different things. One, we're
17 trying to discover whether or not Kuhn and Kuhn has
18 assets. We're trying to further discover what
19 policies or insurance may be out there.

20 Judge, when we initially sent our
21 discovery requests out, one the questions we had
22 was to Kuhn and Kuhn what liability policies you've
23 got out there. And the answer was drafted to
24 Mr. Kuhn personally. And he sort of skirted the
25 issue by saying, there are none that applied.

1 Judge, just so you know, I guess
2 Mr. Kuhn's position and what we have been told,
3 prior to filing the lawsuit, prior to entering
4 discovery, was that there were no other policies
5 out there. Number one, he wasn't on the job. And,
6 two, even if he was there were no other policies
7 that would apply.

8 And, Judge, I should tell you this, as
9 a business owner, I find it very strange that a
10 lawyer that operates a law firm would not have a
11 policy to recover somebody from slipping and
12 falling in his lobby, would not have policy to
13 recover sending one of their employees to the post
14 office or to the court. And if they get into a
15 wreck, while their on the job, I just -- it's hard
16 to imagine.

17 But, anyway, that's what we've been
18 told. We've relied on that in the past. So part
19 of what's going on with this lawsuit is trying
20 to -- you know, now we've got the power of
21 discovery. We're trying to get to that.

22 So that was a little bit of background
23 in where that stuff goes. There's other questions
24 about assets and things like that. If there truly
25 is no insurance, we need to have that information.

1 Mr. Kuhn has a lot of L.L.C.s. He has
2 property. He has buildings. And this and that.
3 And he's got all of these things in all these
4 different sort of formats. And it's going to take
5 us some time to kind of work through all that.

6 But for the Court's purposes, we just
7 never received an answer to discovery. I don't
8 believe we received an objection, an answer,
9 nothing.

10 So, anyway, we would like that
11 information. I don't know that we've ever received
12 any sort of response. From my memory, I think,
13 Mr. Crudup may have just told me that Mr. Kuhn
14 isn't going to give that sort of thing out. We
15 would like that information.

16 And, Judge, you know, we can continue
17 on with these word games and these qualified
18 answers. But since Mr. Kuhn is here, he's an
19 attorney of record, he's a party in the case, I
20 would ask the Court to just simply ask him the
21 question: Does Kuhn and Kuhn have any liability
22 coverage.

23 THE COURT: All right. Mr. Crudup.

24 MR. CRUDUP: Two things, Your Honor.
25 Kevin, if I was mistaken I thought they were

1 answered. And I could be wrong. If I'm wrong,
2 then you're absolutely -- they should be answered.
3 And I apologize if that didn't happen yet. There's
4 no reason they shouldn't be answered at all.

5 But the larger point -- and I think
6 most of this is what we're getting at. First, I
7 think the answer was clear, that there are no
8 policies that apply. But beyond that, you already
9 started hearing Mr. Kuhn has this, or Mr. Kuhn has
10 that, or Mr. Kuhn has that. Well, this lawsuit, as
11 Your Honor will hear from our motion, there's a
12 covenant not to execute against Mr. Kuhn. So what
13 Mr. Kuhn has I don't think is relevant.

14 Regardless, that being said, if there
15 are questions out there that have not been
16 answered, I will absolutely answer them, or make
17 sure that Mr. Kuhn does. But I was under the
18 impression that they were all answered. Maybe
19 not -- they weren't getting what they were hoping
20 for. But I thought they were all answered. And if
21 they weren't, I apologize again. That must have
22 just slipped through the list there. I thought two
23 and three were the same thing. So if they are
24 answers that are not out there, we will certainly
25 proffer those answers and hopefully work to get you

1 whatever it is that you need.

2 THE COURT: Well, I think the issue
3 that Mr. Smith is having is not that the answers
4 are not given, but what he's alleging is that he is
5 hiding behind the work that apply. And he's asking
6 for all of them. He doesn't care whether Mr. Kuhn
7 believes if they apply or not. He just needs to
8 know them. And I think that's what Mr. Smith's
9 contention is. Is that correct?

10 MR. SMITH: Yes, sir.

11 MR. KUHN: All right. Thank you,
12 Judge. I'm glad to have an opportunity to clear
13 that up. Apparently, Attorney Smith, you can't
14 read English. Because it says point blank that we
15 don't have policies that cover that. We don't --
16 the only policy my law firm has -- the Kuhn and
17 Kuhn, L.L.C., the only policy it has is
18 malpractice, attorney malpractice insurance.
19 That's it.

20 Now, Attorney Smith, I don't know what
21 you have at your office or your situation, but
22 that's all we have.

23 MR. SMITH: So no liability coverage
24 whatsoever? If one of your employees is running an
25 errand for the business and gets into a wreck, or

1 somebody slips and falls in the lobby, there's no
2 liability insurance? Not liability insurance you
3 contend doesn't apply, but Kuhn and Kuhn does not
4 have liability insurance for anything other than
5 malpractice; is that what I'm hearing?

6 MR. KUHN: That is correct. That is
7 correct.

8 MR. CRUDUP: And maybe another way to
9 solve this problem, we can amend that answer to
10 take out that qualifier, that there are no
11 policies. Well, I guess there's malpractice
12 insurance. But assuming that you're okay with us
13 not disclosing that, we'll just take out that
14 qualifier and say there are no policies.

15 MR. SMITH: Sure. And we have the
16 record here.

17 All right. So I guess what I'm hearing
18 is that's an agreement to give answers to the
19 interrogatories. And, Jeff and Judge, I want to
20 make sure that y'all understand that these
21 interrogatories were not directed to Mr. Kuhn
22 personally. They were directed to Kuhn and Kuhn.
23 You know, I just want to make sure you know that's
24 the direction that we're going in.

25 MR. CRUDUP: Understood.

1 MR. SMITH: Next is the motion to
2 determine the sufficiency of answers or objections.
3 Judge, back in December, around the same time as
4 those interrogatories were served, we served
5 request for admissions. And what happened before
6 all this, soon after the case was settled and the
7 lawsuit was filed, Mr. Kuhn, along with his answer,
8 he filed two Bar complaints. He filed one against
9 me and he filed against my business partner, David
10 Hoffman, who never, you know, issued a letter or
11 had any involvement in this case whatsoever.

12 And it's a rather long -- our
13 complaint, and various pleadings that Mr. Kuhn
14 filed along with the answer were also attached, and
15 his answer was attached, I believe, as well.

16 And in that Bar complaint, Mr. Kuhn
17 makes several statements. And if you get right
18 through it, one of those things is that he was not
19 on any law firm business. That the purpose for his
20 trip that day had nothing to do with working. And
21 more importantly, he says that he was not even at
22 work that day. That's what he told the Bar.

23 And because -- the context here is
24 Kevin Smith never should have filed this lawsuit
25 because he knows that I wasn't on the job. He

1 knows that I wasn't working. He knows I wasn't
2 even at work that day. There's references in there
3 that he's been telling us this through Progressive
4 and their lawyer for the last three months, and all
5 of this is known. And he wants the court to levy,
6 you know, nearly \$200,000 fines against me and my
7 partner.

8 So we get in with this lawsuit. And
9 one of the questions I asked them to answer, in
10 terms to request to admit, is you made untruthful
11 statements to the Bar and you made untruthful
12 statements to the Court.

13 You see, Mr. Kuhn also filed affidavits
14 with the court where he says much of the same --
15 sort of information. He says he was on vacation.
16 He says the trip was not connected to his
17 employment whatsoever. He says the decision to go
18 to Office Mart was only made after the accident had
19 occurred and was not the reason for the personal
20 trip.

21 Well, Judge, I think it's fair to say,
22 at this point, we know all that's not true. We
23 know he was at work that day. His lawyer gave us a
24 copy of his calender, which showed he was there at
25 10 a.m. having some meetings. At 12 he leaves.

1 Then the wreck happens. He's got another
2 appointment on his calender for 3:00 that
3 afternoon.

4 Also discovered his cellphone records.
5 And what those cellphone records show is he made a
6 call to a fellow at Office Mart before -- when he
7 leaves the office. Then the wreck happens. He
8 makes another call to Office Mart. Then he
9 eventually goes.

10 We spoke to the fellow that he called.
11 He signed an affidavit for us stating the first
12 call was, I'm coming up to Office Mart to look for
13 office furniture. And then the next call after the
14 wreck was, I just got into a wreck, I'm going to be
15 a little bit late. And then he does go to Office
16 Mart.

17 So we know that he wasn't on vacation.
18 We know he was at the office that day. We know the
19 decision to go to Office Mart could not have been
20 made at the wreck scene, because he had just talked
21 to the guy before the wreck saying he's coming up
22 there.

23 Even if you throw out everything that
24 the affidavit says in terms of what the
25 conversation was, you still got those phone records

1 showing a call to Office Mart, the wreck, another
2 call to Office Mart, and then he shows up there.

3 So we sent a request that he's been
4 untruthful to the Bar and he's been untruthful to
5 the Court. And Mr. Crudup denies both of those on
6 Mr. Kuhn's behalf.

7 Judge, I don't know whether Mr. Crudup
8 actually read those -- the Bar complaint in those
9 pleadings. Mainly, the affidavit Mr. Kuhn filed
10 with the Court. But I can't see how anyone could
11 have read those and still deny that.

12 What I suspect happened is that
13 Mr. Kuhn just instructed Mr. Crudup to deny those.
14 And we would -- in light of what we've uncovered,
15 we would request the Court order Mr. Kuhn to
16 supplement these requests and admit untruthfulness
17 to the Bar and to the Court.

18 THE COURT: All right. Mr. Crudup.

19 MR. CRUDUP: Thank you, Your Honor. I
20 guess our position is pretty simple. We disagree
21 with their position. I think arguing that my
22 client was untruthful under oath, it's a fine trial
23 tactic, if they want to do that. The rules are
24 clear, if the request for admission is denied and
25 they have to go through costs to prove that -- a

1 request for admission as to the truthfulness to the
2 Bar, I think that is entirely -- it is not -- at a
3 minimum it is not an objective thing. It is a
4 thing that -- I mean, my client disagrees that he
5 was not truthful with the Bar. I mean, it's as
6 simple as that. And I think he has every right to
7 deny that.

8 I don't there's any -- you know, we're
9 not talking about is the sky blue, yes or no. He
10 disagrees that what he said to the Bar --
11 obviously, he wrote it to the Bar and he wrote an
12 affidavit to that affect, as well. And he
13 maintains that position. And I think he has every
14 right to do so. I think we've seen a lot of this
15 lately where request for admissions are used as a
16 sort of -- admit that I'm right and you're wrong.
17 And that's not what they're designed to do.
18 They're designed to either have my client admit
19 something he believes or not. It's as simple as
20 that.

21 I apologize. I'm having trouble
22 putting trouble putting my hands on what was said
23 specifically. But it's something like, you lied or
24 were untruthful to the Bar. My client does not
25 agree with that. He simply doesn't it.

1 And if Mr. Smith believes that he can
2 prove that at trial and then levy costs in the
3 matter of a request for admissions, that's fine.
4 But I don't see how the two are -- I don't see how
5 he can have the court order his opinion to be held
6 as the rule of law. It hasn't been proven. It
7 just hasn't, period.

8 That's why I don't understand how that
9 portion of this claim -- I don't even know what the
10 Court would have ordered him to do. Order him to
11 admit something would be essentially the Court just
12 taking judicial notice of a fact, which even at
13 trial that's something that could be done. But it
14 certainly is inappropriate right now. And there's
15 no evidence to that affect right now.

16 So I don't see how this -- it would be
17 appropriate at this time. And I think my client is
18 entitled to his opinion as to how he wishes to
19 answer those request for admissions.

20 THE COURT: All right. Mr. Smith, I
21 mean, I understand your position and you have done
22 your due diligence and I think you're entitled to
23 that compensation, if in fact it's proven at trial.
24 And I think you will be awarded that, if that's the
25 case if he's right, to the extent that there have

1 been a lot, a lot, a lot of collateral issues that
2 come about if I say, you know, you need to admit
3 that you lied to the Bar. And, I mean, I pretty
4 much just -- I mean, I'm putting him in a position
5 that's crazy. I mean, he's going to face all type
6 of disciplinary issues, financial issues. So I
7 don't think that that's something I can do.

8 And I agree with Mr. Crudup, that if
9 that's proven at trial, you ask the trial judge for
10 that compensation, I think you will be entitled to
11 it.

12 MR. SMITH: Yes, sir. I think the gist
13 of what I'm doing honestly, Judge, is just to try
14 and promote some truthfulness and honesty in the
15 pleadings.

16 THE COURT: All right.

17 MR. SMITH: We didn't ask if the sky
18 was blue. We asked, was it truthful when you told
19 the Bar you were not even at work that day. It's
20 just, were you at work or not. You told us in
21 discovery responses you were at work. You told the
22 Bar you were not at work. We're just trying to
23 encourage some truthfulness in these responses.

24 And if we keep going and going, and the
25 Defendants in this case are allowed to just

1 continue to file untruthful -- just blanketly
2 untruthful things and just no consequences, we just
3 feel like that's just going to continue.

4 So even if this, did you tell the truth
5 when you told the Bar that you were not at work
6 that day -- I mean, we're not asking if the sky is
7 blue. Credibility is an issue in all of these
8 cases. I mean, the scope and the reason we contend
9 for request to admit is to narrow issues.

10 And, you know, I can tell you I get all
11 the time request to admit from defendants, in your
12 deposition you said that you never had back pain
13 before, but records show that you had back pain
14 before. We get this all the time. The argument is
15 credibility is an issue for trial. And request to
16 admit, the purpose is to get the issues tighter,
17 figure out what we actually need to litigate and
18 remove certain issues. The jury just don't need to
19 decide if it's just in black and white.

20 And I don't know how else, Judge, to
21 get truthful answers out of this Defendant about,
22 were you at work that day. He tells the Bar he
23 wasn't. He tells us he was.

24 THE COURT: Well, what you do is you
25 put him on the stand, you put him under oath. And

1 whenever he denies those answers you get to utilize
2 all that information to cross-examine him. And
3 then the jury will be instructed at the close of
4 the trial, by the trial judge, that they can take
5 credibility of the witnesses under consideration.
6 And that's how that will work.

7 MR. SMITH: Yes, sir.

8 THE COURT: All right.

9 MR. SMITH: So our last issue is,
10 Judge -- and Mr. Crudup his on this -- is the
11 motion for summary judgment.

12 And let me just say, Judge, that before
13 either of these were summary judgement motions were
14 filed, that we're here about today, that a prior
15 motion for summary judgment was heard. It was
16 initially filed as a motion to dismiss. It was
17 converted to summary judgement by the court. And
18 it was heard on the issue of vicarious and
19 liability. And that was heard by Judge Culbertson.

20 That issue was denied by vicarious
21 liability. Summary judgement was denied. And
22 there was no request for consideration made.

23 Six months later -- and it's also
24 important to note that Mr. Crudup was there in
25 court sitting at the Defense table, at the time.

1 And six months later Mr. Crudup, on behalf of Kuhn
2 and Kuhn -- the last motion was filed on behalf of
3 Kuhn and Kuhn. This one is filed on behalf of Kuhn
4 and Kuhn. Exact same issue, vicarious liability.

5 There's nothing new. There's no new
6 evidence. They're relying upon the covenant not to
7 execute, which was obviously in place well before
8 even the lawsuit was filed.

9 And, Judge, the -- our position is the
10 black and white law does not allow the exact same
11 parties to file the exact same motion and get a new
12 judge, with the same exact evidence. This has been
13 decided. I believe our court will say that your
14 options are to file a request for reconsideration
15 or to have that heard as a directed verdict.

16 But multiple motions filed by the same
17 party -- or with the same issue, drawn on different
18 judges. What that does is pins circuit court
19 judges against each other. And we don't think it's
20 proper for this court to hear it.

21 Now, I have to say that, you know,
22 although the issue of vicarious liability was
23 already raised and ruled upon, yesterday was the
24 very first notice that we got that this motion --
25 they're now relying upon a specific case. It's the

1 exact same argument from before, that the covenant
2 and the signing of that covenant destroyed a case
3 for vicarious liabilities. But they've raised a
4 case for the first time. And that case basically
5 says -- the Defendant would argue it says, that if
6 you release the servant, you release the master.

7 Now, Judge, we have issues with that
8 case, especially because of the makeup of the
9 parties in that case. It wasn't a true
10 employee/employer situation. It was more like a
11 contractor and a subcontractor, or an independent
12 contractor. And there were issues of indemnity
13 clause. So if you then found the master
14 responsible, they've got an indemnity agreement,
15 how can they now go and now indemnify that there's
16 a covenant in place.

17 This is not that situation. This is
18 strictly employee/employer. We have issues with
19 this case. But I'll say this, since we were just
20 put on notice of that case, what we would ask is to
21 give us 10 days to brief that issue. You see the
22 covenant not to execute, Judge, was obtained under
23 fraud and misrepresentation.

24 Mr. Kuhn and Progressive, before the
25 covenant was signed assured us, number one, he was

1 not on any law firm business. We know that not to
2 be true now. Also, in that -- and that affected
3 our decision to sign this covenant not to execute.

4 Now, Mr. Kuhn's Bar complaint outlines
5 all of this, all of what was said. They know I
6 wasn't on the job, they know I wasn't even at work
7 that day. They know this, they know this.

8 And so meanwhile, Judge, I think it's
9 important to understand that while these
10 representations were being made to induce the
11 covenant, Progressive had in its possession a
12 recorded statement from Mr. Kuhn when he was asked,
13 what was the purpose for your trip. And he said, I
14 was going to Office Mart for my work. So while
15 they're telling us it had nothing to do with his
16 job, he wasn't even at the office that day, and he
17 was out there doing something else. They had a
18 recorded statement from his saying the purpose of
19 his trip was for work. So they induced us into the
20 signing the covenant not to execute through fraud
21 or misrepresentation.

22 So we would consent that any
23 consequences for doing so, right, including
24 releasing the servant is releasing the master, we
25 would contend that all of that is null and void.

1 And we need to brief this issue. And we would ask
2 for 10 days to do that.

3 And, Judge, just so we're not
4 sandbagging anybody, I want to let you know, we are
5 considering two additional avenues after that.
6 Number one, amending our complaint for fraud and
7 misrepresentation and adding Progressive Insurance
8 Company as a defendant, or simply filing a separate
9 lawsuit against Mr. Kuhn, Kuhn and Kuhn, and
10 Progressive for the fraud and misrepresentation.

11 So, anyway, that's what we're asking
12 for is another 10 days to brief that issue so it's
13 fully before the Court. And that would include --
14 so, likewise, we would ask that, you know, you hold
15 off on ruling on our motion for summary judgment.

16 THE COURT: All right. And that was
17 just your concern about their motion for summary
18 judgment that they have filed? Is that what you're
19 indicating?

20 MR. SMITH: Yes, sir.

21 THE COURT: And when did you get a copy
22 of it?

23 MR. SMITH: Yesterday.

24 THE COURT: All right. And,
25 Mr. Crudup, do you have any objection to allowing

1 him the opportunity to respond?

2 MR. CRUDUP: Yeah. I would like to be
3 heard on the issue, Your Honor, briefly because I
4 kind of disagree with some of his points.

5 THE COURT: Go ahead.

6 MR. CRUDUP: Thank you. First of all,
7 the motion that we got from them that we just
8 argued today, we got Sunday. So we filed ours when
9 we walked in the doors on Monday. I don't think
10 that that's inappropriate.

11 Obviously, as you can tell, Your Honor,
12 this has been a very contentious case on a lot of
13 levels. And I think we've done our best to kind of
14 work through some of these issues.

15 I do have a problem with some of this.
16 The arguments that Mr. Smith is making is in
17 reverse. First of all, the motion that he referred
18 to, the motion for summary judgement, which was
19 filed by my predecessor, Mr. Diegel, was as to all
20 counts. And Judge Culbertson granted our motion as
21 to direct liability claims.

22 They were claiming that Mr. Kuhn's own
23 law firm was not -- essentially negligent in hiring
24 or training or retention or supervision of
25 Mr. Kuhn. Judge Culbertson said, no, we're not

1 going to do that. And he denied those motions.

2 What he did leave in place were
3 vicarious liability -- were the vicarious liability
4 claims. Those are the only claims that are left in
5 this lawsuit.

6 When I looked at the case and the facts
7 in front of me, we looked at the covenant not to
8 execute. And frankly, Your Honor, it's pretty
9 black and white law. If you sign a covenant not to
10 execute as to the agent, you release the principle.
11 And it makes sense for two reasons. Obviously,
12 first, your liability is flowing from a party that
13 are released in. So how could there be other
14 liability.

15 The other thing is called -- I believe
16 the term was a corrosive cycle, is that if the
17 agent is released, the principle can then get sued
18 for the same problem, turn around and then just
19 essentially try to recover back from the agent,
20 making the covenant you. It doesn't do any good
21 because the principle, as far as the agent is
22 concerned, it doesn't help the agent because he's
23 just as exposed everywhere.

24 Now, I guess I'm going to hear a lot
25 more brief about a lawsuit against I don't know

1 who. But let's just take -- let's just accept for
2 a minute that that was the case. Either way,
3 whether Mr. Kuhn was or was not an agent -- and
4 there's an issue as to that, as you're starting to
5 hear. Mr. Kuhn says he was not in the course and
6 scope of his work. And, obviously, his law firm
7 agrees with that. And Plaintiff is claiming that
8 that is not the case, that he was in the course and
9 scope -- if you look, their motion that we got on
10 Sunday, says it over and over again, he wanted you
11 to fine Mr. Kuhn essentially to have lied to the
12 Bar about this very issue.

13 They are absolutely certain he was
14 working for his company at the time. Now, when
15 they signed the covenant not to execute, they --
16 either way, they didn't believe he was working for
17 his company. Okay, they did believe he was working
18 for his company. Either way, that covenant still
19 releases Kuhn and Kuhn, because they're releasing
20 the agent.

21 Now, at the time they signed it, it's
22 our position, Your Honor, that was always the plan.
23 Because they immediately filed suit against him and
24 continued the suit against his law firm. This was
25 always the plan. You're already hearing, well,

1 what does Mr. Kuhn have, what are his assets.

2 The plan was to get as much money from
3 Mr. Kuhn through a covenant and then kind of try to
4 get cute with it and say, well, we're actually
5 suing your company now. And it's not.

6 And that's the whole point of the
7 covenant. And that's why we want is to hold them
8 to it.

9 Now, what you originally -- it's in
10 their motion. And this is what I thought the
11 argument we would hear would be, there is language
12 in the covenant that says we can go after other UIM
13 and other defenses. And I think that's what
14 they're going to try and rely on. I think they
15 were thinking, hey, I got him now. I'm going to
16 get to go after other defendants for this same
17 thing and have other defendants.

18 And what the case law is quite clear
19 about, you can't even carve out a named injured.
20 So the case that we cited -- there's two of them.
21 They cite a bunch of them. There's a long line of
22 cases. But in Drawdy (ph), it says a customer has
23 something -- a HVAC put in by an agent. They try
24 to carve out the principle. They say we're going
25 to release the agent, but the specifics, SCE&G,

1 we're going to be allowed to go sue. In Drawdy
2 said, no, you can't do that. Once you release the
3 agent -- we understand you were trying not to
4 release the principle, but you still can't do that.
5 And then on top of that it happens again in another
6 case -- I forget the name. Seascape or something
7 like that. Same concept. The question is whether
8 or not there is vicarious liability.

9 They have been arguing non-stop from
10 the day this case began. It's on the record over
11 and over again that Mr. Kuhn is an agent of his law
12 firm. Now, when they find out, oh, there's case
13 law that says we can't do this, now apparently
14 they're telling me they're going to file a -- this
15 is the first that I've heard of this. They're
16 going to file lawsuits against everybody else and
17 everywhere else.

18 But they've already said on the record
19 repeatedly -- in fact, in the hearing with Judge
20 Culbertson, they said repeatedly -- that was the
21 whole argument. That's why Judge Culbertson didn't
22 grant vicarious liability of that summary judgment.
23 They said, no, no, no. He's working for his
24 company at the time. And if that's the case, so be
25 it. But they have to live with that decision.

1 So if they feel that he was vicariously
2 working -- there's vicarious liability here, the
3 covenant not to execute releases the principle.

4 Now, if that's not the case and it
5 doesn't -- and he is not working for his company --
6 so if they are wrong about that, then the case
7 still ends. And they know that. That's why they
8 have to keep arguing that there's vicarious
9 liability. Because they know if there is no
10 vicarious liability, Judge Culbertson has already
11 told them, there are no direct claims against the
12 law firm.

13 MR. SMITH: Judge, you know, I think
14 the arguments or the insinuation that we're being
15 tricky and stuff like that, in light of all the
16 statements Mr. Kuhn has made, Progressive made
17 before all this.

18 Listen, I'm trying to do the best job I
19 can for my client. I'm trying to validate certain
20 things. And it's very hard for me to do with
21 straight answers not being given and what's going
22 on in this case.

23 The simple fact of the matter is, if
24 that covenant was obtained under fraud and
25 misrepresentation -- there's fraud and

1 misrepresentation in the inducement -- and so any
2 consequences in signing that covenant are gone,
3 including this release of master, release of
4 servant.

5 And, Judge, the reason I'm asking for
6 10 days is because we're just now responding to
7 this argument. We were just put on notice, like I
8 said, yesterday of that case. I'm not saying Jeff
9 did anything bad or sandbagged anybody by telling
10 us yesterday. But he told us. But I think we need
11 to brief that with the Court.

12 Because if the Court is going to
13 consider this argument, that in signing that
14 covenant by releasing the master, I think the Court
15 should also hear the arguments about whether or not
16 the signing of that covenant was brought out by
17 fraud or misrepresentation. And if there was, our
18 position is that any consequences assigned,
19 including the master and release of servant are
20 gone.

21 Because, again, remember Mr. Kuhn
22 states in his Bar complaint makes it absolutely
23 clear and the representation he made to us before
24 signing that covenant. And now Mr. Crudup comes in
25 and says ah-hah, when you sign that covenant, you

1 ain't got anything left.

2 So, Judge, with all due respect to
3 Mr. Crudup, I'm just asking for an additional 10
4 days to brief the issue so that we can have that
5 before the Court and we just, you know, put it all
6 on the table.

7 MR. CRUDUP: And, Your Honor, just to
8 respond briefly. I just want to make sure that the
9 Court understands that my position is, when the
10 covenant was signed, they did believe he was not in
11 the course and scope of his work. So there can't
12 be fraud and misrepresentation.

13 We've never changed our position. All
14 we are saying is, if this is your position, then
15 you are barred from bringing an additional claim.
16 In the very beginning, they thought -- Mr. Kuhn has
17 always said, I was not working for the company, I
18 was not in the course and scope of my business.
19 And with that knowledge, they signed the covenant.

20 MR. SMITH: I was not even at work that
21 day and all that, yeah.

22 MR. CRUDUP: But they signed that
23 covenant. Now they have brought a claim saying,
24 no, no, no, you're work, you're wrong, you were at
25 work. So it's them who have decided there is

1 something else out there. If we are to be taken at
2 our word initially, then they sign the covenant
3 with all of the knowledge that is there. Either
4 way, even in their new theory -- and that's what I
5 meant. I'm not implying that Kevin is being tricky
6 either, but to do the best job that he could.

7 What he said was, oh, we have a theory
8 that you were at work after the covenant was
9 signed. Now they're saying, oh, if you are saying
10 that, then we need more time and this was
11 fraudulent. But I don't see how that could be.
12 Because whatever knowledge they had, my client has
13 never changed his position at any time.

14 And either way, that's the point of
15 my -- that's why I believe summary judgment is
16 appropriate now. Because either way, if you
17 believe my client, they're arguing under vicarious
18 liability claim. And if you believe their client
19 and their position, the covenant gets rid of that.

20 Now, if they want to bring another
21 lawsuit over fraud or something -- I mean, I can't
22 speak to that. I might not be involved in that. I
23 might be a witness, I guess. I don't know. But I
24 don't think it would be appropriate here to -- I
25 don't think there's a way to avoid summary judgment

1 by saying, oh, maybe we were wrong way back when.
2 All we have is the covenant in front of us. And it
3 is what it is.

4 MR. SMITH: And I'll make this very
5 brief. And I'm sorry to interject again. But I
6 think Mr. Crudup is sort of establishing the
7 elements for the fraudulent misrepresentation claim
8 at this point. So I kind of adopt some of that, to
9 be honest with you. Our reliance, our rights to
10 reliance, to all that. Those are all elements.
11 And I think we just hear Mr. Crudup admit to some
12 of those. And, like I said, we are just asking for
13 10 days.

14 THE COURT: All right. Here's what
15 we're going to do. As to all of the other motions
16 to seek relief for mediation requirement,
17 Mr. Crudup has said that they would be happy to
18 participate. I'm not going to force them to pay
19 for it yet. But I'm going to allow you the
20 leave --

21 Mr. Smith, if, in fact, you show up and
22 they don't show up again or in the alternative they
23 show up and offer nothing. You know, there's some
24 issue that you believe that they are there and are
25 not participating, completely or fairly, to try and

1 resolve it, then I will give you the opportunity to
2 come back into court and ask for those fees and ask
3 what you'd like to do. So we'll just kind of hold
4 that one out there.

5 Based on mediation, motion to compel
6 discovery, it sounds like mediation, motion to
7 compel discovery is due by Mr. Crudup. He
8 indicated that he would submit new answers to
9 those. And I think you said, Mr. Smith, it's okay
10 because we have the record now and Mr. Kuhn has
11 been on the record as to what they have or don't
12 have.

13 I've already ruled on the motion to the
14 sufficiency of the answer. I said I couldn't do
15 that. So I'll deny that motion. And as to the two
16 motions for summary judgment, I'm not going to hear
17 either one of them today. I'm going to give you
18 seven from today's date. So I'll give you until
19 next Tuesday. I will retain jurisdiction over
20 these hearings. And we'll have a hearing probably
21 next Thursday or Friday, after I've had an
22 opportunity to read both of your briefings. And
23 I'll hear both your motions for summary judgment
24 next week at the end of the week. That gives you 7
25 days to brief it.

1 MR. SMITH: That's fine. I understand,
2 Judge. Thank you, Judge.

3 THE COURT: I'll do a Form 4 for the
4 ones that I just denied. Nothing fancy. I'll just
5 do a Form 4. And then, obviously, for the motion
6 for summary judgment I'll wait to hear those before
7 I make a determination. Thank you so very much.
8 And I will see you next week. Once you submit the
9 brief make sure, if you don't mind, just in this
10 day and age send a copy either Word or an email
11 them to my law clerk just so I can have them.
12 Because if you not and you e-file them, they just
13 sit at the clerk's office and I never know that you
14 did it.

15 (The proceedings concluded at 3:16
16 p.m.)

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1 State of South Carolina)
2)
3 County of Charleston)

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5
6

7 I, Krista Nicole Carney, Official Court
8 Reporter for the Ninth Judicial Circuit of the
9 State of South Carolina do hereby certify that the
10 foregoing is a true, accurate and complete
11 Transcript of Record in the Court of General
12 Sessions for Charleston County, South Carolina, on
13 the May 5th of, 2020.

14 I do further certify that I am neither of
15 kin, counsel, nor interest to any party hereto.

16

17 August 14th, 2020

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19

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21

Krista Nicole Carney,

22

Official Stenographic Court Reporter

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No exhibits were introduced

PROCEEDINGS

1
2 THE COURT: Obviously, I know what this motion is
3 about; it's what I ordered. Go right ahead. So we'll
4 start with the Plaintiffs first.

5 MR. SMITH: I'm Kevin Smith and I represent the
6 Plaintiff Mr. Miguel Oyuela.

7 MS. ITTERLY: Amanda Itterly, I also represent the
8 Plaintiff Miguel Martinez.

9 MR. CRUDUP: Jeff Crudup; I represent Kuhn and
10 Kuhn, LLC.

11 MR. KUHN: And John Kuhn; I represent myself.

12 THE COURT: All right. Did we have dual motions
13 for summary judgment? Was that what it was because y'all
14 filed y'all's I remember because y'all got one on Friday
15 but you had to file on Monday because of the weekend and
16 we had the hearing on Tuesday.

17 So I gave them one week to this Thursday to get it
18 done. I was very complementary of Ms. Itterly for
19 getting it to you on Monday and working on a Sunday. And
20 I assume everyone has had a chance to look at the briefs.

21 MR. CRUDUP: Yes, Your Honor. And there was --
22 there were competing motions but I believe Plaintiff has
23 passed theirs so it's just ours left now I believe.

24 THE COURT: All right. I'll be happy to hear from
25 you.

1 MR. CRUDUP: Thank you, Your Honor. Obviously,
2 you've heard a little of this already and you've seen
3 their brief. Our motion is relatively straightforward.
4 I guess I will address primarily their brief at this
5 point because as I've said I think the law is pretty
6 clear.

7 One thing that they raise in their supplemental
8 brief was whether or not this had been decided. You'll
9 note there is obviously no case law supporting the idea
10 that we could not re-raise this if we wanted to.
11 However, we did not raise it.

12 The prior hearing with Judge Culbertson the argument
13 was that Mr. Kuhn has taken a position that he was not at
14 work. He was not in the course and scope of his business
15 or any of those things. What Judge Culbertson decided
16 was there was an issue of fact on that issue.

17 So we are not asking you to make that decision in
18 this motion at all. That's in fact is our point; it
19 doesn't matter. If he was in the course and scope of his
20 business as Plaintiff claims the covenant not to execute
21 ends their claim against the business. And if he was not
22 in the course and scope of his business then they don't
23 have a vicarious liability claim so then for the same
24 reason. We know that this stuff is new to them because
25 as you said they actually asked for ten days to brief it

1 as they had not heard it before, which makes sense.
2 Now that being said they also I think the larger issue
3 here is whether or not, and I'll let them speak for this,
4 but basically they are claiming that this covenant is
5 fraudulent; that Mr. Kuhn and apparently Progressive
6 Insurance, I don't know who specifically, but evidently
7 lied to them to obtain this covenant and now they're out
8 of luck. And I'd like to address that.

9 First of all, there is no affidavit supporting any
10 of this. And I think to even rise to the level of
11 creating an issue here I think there has to be an
12 affidavit. There is not. And what I think one of the
13 issues with that would be if Your Honor were to grant
14 what they wanted, which was to allow them to I think
15 implead Progressive and have new fraud claims against Mr.
16 Kuhn. Unfortunately, Kevin becomes a primary witness
17 because he's the one negotiating it.

18 So I don't even think that it's appropriate for this
19 case at all. I don't think it can be. And also if you
20 think about it would likely vitiate any attorney client
21 privilege because the first thing I'm going to ask their
22 client is in a fraud case is what did your lawyers tell
23 you about how did this work. But I don't think
24 practically it a thing that can be but more importantly
25 there is no affidavit supporting it. This is just a bald

1 allegation; we were lied to and they told us this stuff.
2 For what it's worth Mr. Kuhn has never changed his
3 opinion. He has always said he's not working. So I
4 don't -- actually don't agree with that.

5 But two, there is no -- I think parol evidence would
6 apply here. The four corners of this document say what
7 is says. Again, if they want to raise this issue later
8 in some other case that may be, they may have a right to
9 do that but it's not in this one. This one is about a
10 car accident and there is a valid covenant not to
11 execute.

12 Essentially, their new theory is not a defense.
13 It's just another claim that if they want to bring it
14 they can but not in this case. Now what they're really
15 doing is asking for a rescission out of the contract and
16 they -- so that's another issue they have they would have
17 to give back this money I suppose because you can't, it's
18 pretty black letter law you can't rescind a contract
19 without doing that.

20 Also, and this is kind of getting into the more
21 larger argument here, I believe they are estopped from
22 making this claim. And the reason is -- at the time --
23 and I alluded to this earlier in the original, in that
24 first hearing. The way this worked was, and I want to
25 get these numbers right, in -- on January 10, 2019, I

1 believe it was the 10th; they signed the original
2 covenant not to execute. Twelve days later they filed a
3 lawsuit against my client, Kuhn & Kuhn, as well as Mr.
4 Kuhn.

5 Since that time, since January of 2019 they have
6 never, they have never raised this issue until right now;
7 until they heard that all of a sudden a covenant might
8 affect them. In fact repeatedly during that hearing that
9 they talked about with Judge Culbertson and in their own
10 motion that they filed a week ago today I guess; or
11 almost a week ago today, they refer to the covenant not
12 to execute as allowing them to do -- they actually refer
13 to specific language in the covenant about how they are
14 allowed to sue other Defendants.

15 So if they were going to raise this issue it should
16 have been raised long ago. They should have filed a
17 lawsuit and immediately said okay, hey; we have a, we
18 think there is fraud here and we should do it. Now, to
19 that end the timing of it also shows that they had to
20 have known what they were doing when it happened because
21 what they're saying is Mr. Kuhn and/or Progressive lied
22 to them and that's how they obtained this covenant. And
23 had they known that Mr. Kuhn allegedly was driving or
24 whatever they want they wouldn't have signed this because
25 fraud obviously they would need to have relied on it to

1 their detriment. Now that means they understood that if
2 they signed the covenant they could not sue Kuhn & Kuhn;
3 they could not sue his employer vicariously.

4 So what we have is they signed the covenant on the
5 10th and 12 days later they sue Kuhn & Kuhn meaning they
6 obviously didn't care what he said because they still
7 sued Kuhn & Kuhn. Had they realized that they wouldn't
8 have sued, they would have signed the covenant, assuming
9 they understood the concept that I cannot sue their
10 employer and that would be it. They couldn't sue, they
11 couldn't then bring another lawsuit.

12 They didn't learn anything in those 10 days and if
13 they did there's obviously no affidavit about that
14 either. But they simply sued Kuhn & Kuhn. And what
15 they're telling you is had we known he was driving we
16 wouldn't have signed the covenant which by definition
17 means they didn't understand that; conceptually they
18 couldn't have understood that otherwise they wouldn't
19 have filed a lawsuit.

20 It couldn't have gone on. They could sue Mr. Kuhn
21 but they couldn't sue the company because they wouldn't
22 have a claim against the company. So I think just that
23 those actions tell you that whatever Mr. Kuhn said didn't
24 matter. It didn't stop them from suing the company which
25 means whatever was said doesn't really matter. So again,

1 Your Honor, that timing; the quick suit and then nothing
2 for a year tell me that they at worst had a sense of it.

3 Now, the last thing, and I think is probably the
4 most important or the most obvious portion. There is a
5 covenant not to execute in this case. You've seen it.
6 It's from January 10th, 2019. Since that time we've gone
7 through discovery, we've had hearings, they argued to
8 Judge Culbertson about this statement given by Mr. Kuhn
9 and his testimony and all of those things.

10 What apparently we have not talked about is there is
11 actually a second covenant. What Progressive did was
12 they basically told Plaintiff look, we are going to
13 tender our limits however we have competing claims.
14 There was I think maybe the city itself or one of the
15 other cars so we had to hold back some of this money
16 while we sort out those claims.

17 However, we know we're going to pay him at least X;
18 I believe it was 490 something like that. They knew
19 that. After that they then come back and say okay, we
20 have another 5,000 dollars for you. Will you sign a
21 supplemental agreement and covenant not to execute. And
22 that's exactly what they did. And they did that on
23 November 27th, 2019. It has identical language as the
24 first one. The only difference is it says supplemental
25 as opposed to agreement and covenant not to execute.

1 This was all done by an attorney. At this point everyone
2 has been represented. Discovery I believe at this point
3 has been concluded. There is since that time there has
4 been none.

5 And without question Plaintiff understood at that
6 point that whatever Mr. Kuhn was going to say he was
7 going to say and they already had all this discovery; all
8 the things they're claiming they didn't know when they
9 signed the original covenant they had and they still
10 signed another covenant not to execute; this time for
11 4,757 dollars and 59 cents.

12 So when Plaintiff says we would not have signed a
13 covenant had we known this stuff because then we would
14 have lost our right to do that they did it again. And I
15 don't think there could be any clearer evidence at least
16 in terms of fraud that there was none because they were
17 aware when they signed this the second time.

18 What it seems to be is that there was a
19 misunderstanding. Perhaps they don't understand exactly
20 how the covenant affects those rights going forward
21 because I guess no one looked. But regardless, it's
22 pretty clear that this covenant and the first covenant
23 both extinguish their rights against Kuhn & Kuhn, my
24 client. And we want to enforce those rights. So to the
25 extent that fraud has been raised in this again Your

1 Honor, at most I think it is something that if they want
2 to bring it up in another suit perhaps they can do that.
3 Again, I don't think so.

4 But regardless in this suit that is not an issue.
5 That can't be an issue here. And what we ask Your Honor
6 is for you to dismiss the vicarious liability claims
7 based on one or both of these covenants. And to the
8 extent that order, make that ruling to issue findings of
9 fact that both of these covenants are valid because they
10 are. And there is no evidence to the contrary.

11 If you could give me just one second Your Honor I
12 just want to make sure I don't have anything else.

13 [Whereupon, Mr. Crudup confers with Mr. Kuhn and
14 views documents]

15 MR. CRUDUP: That's all, Your Honor. Thank you.

16 THE COURT: All right. I'll be happy to hear from
17 the Plaintiffs.

18 MS. ITTERLY: Yes, Your Honor. First, I want to go
19 back to our primary argument that we made last time we
20 came together. And that's we don't believe this Motion
21 for Summary Judgment can be heard again.

22 And Mr. Crudup said there isn't case law that
23 supports it but in fact there is. The two remedies that
24 opposing counsel had to get a denial for summary judgment
25 which Judge Culbertson ordered is they can either file a

1 Motion to Reconsider with Judge Culbertson or there can
2 be, they can raise it on directed verdict. Neither of
3 those fit this situation so we feel like this shouldn't
4 be heard in front of you since it's already been decided
5 by Judge Culbertson.

6 Judge Culbertson just basically ruled yes, there --
7 he dismissed the direct claim against Kuhn & Kuhn, LLC
8 but he also dismissed the claim of vicarious liability
9 and said -- didn't say anything regarding it; he just
10 denied the summary judgment on it.

11 The arguments that were made in the Motion to
12 Dismiss it was labeled but was argued as a Motion for
13 Summary Judgment in front of Judge Culbertson talked
14 about this indemnification argument that Mr. Crudup has
15 raised in his motion. In fact, it's almost identical
16 language which shows that this same issue was already
17 discussed in an earlier summary judgment motion.

18 So Your Honor we don't believe that this is a
19 summary judgment hearing that should be heard again since
20 it has already been decided by another judge. That would
21 be pitting you against Judge Culbertson and I don't think
22 that's fair to do in this case. However, if we are going
23 to hear this case we did look at the case law that Mr.
24 Crudup has provided last week and I've done some research
25 to answer that. And we agree with the case law; I mean

1 it is what it is. The servant, you know releasing the
2 servant releases the master but we believe we have a
3 valid defense against that and we raised the defense of
4 fraud and misrepresentation.

5 There are a bunch of elements to this and I listed
6 them out in the supplemental brief that I handed in. I'm
7 going to go through them quickly but basically the
8 representation to us in settling the case was that Mr.
9 Kuhn was not on the job at the time of the wreck.

10 Now we haven't provided an affidavit that says that
11 but we've provided Mr. Kuhn's own words in the Bar
12 complaint that says that Progressive had told Plaintiff's
13 counsel for three months prior to that that we were told
14 he was not on business activity at the time.

15 Now, that was the representation made that he was
16 not on business activity. But the truth is Progressive
17 at that time also had a recorded statement by Mr. Kuhn
18 saying that he was on this trip for the purpose of his
19 work. That's the falsity that we're trying to decide
20 here.

21 THE COURT: Let me ask you a question about that.
22 That's, as I've read all this that is always the same
23 question that comes back in my head. And I don't, I've
24 read everything and I just can't find the answer which is
25 when did you find that out because I read the Bar

1 complaint. And in the Bar complaint against Mr. Smith it
2 specifically says that one sentence I was not even at
3 work that day. I saw that so I understand what your
4 position is as to that. I obviously have not heard any
5 video or audio recordings from Progressive. But when did
6 you find those two pieces of information out?

7 MS. ITTERLY: That he was for the purpose of his
8 work on the trip?

9 THE COURT: Well one, that he said -- when did you
10 receive the copy of the Bar complaint because that was
11 when you would find that out, and well, you got a copy of
12 the Bar complaint when Mr. Smith was served with it, I
13 guess. And when did you find out that Progressive had
14 known that for three months prior to y'all executing the
15 agreement? So when did you ultimately find out those two
16 just issues?

17 MS. ITTERLY: So the recording of the statement
18 where he says the purpose of his trip was for work we
19 received based off discovery responses from this lawsuit.
20 If I can quote the exact date but it was in response to
21 our discovery for the lawsuit.

22 And I'll touch on the reason we filed the lawsuit in
23 the first place was again, this was a covenant not to
24 execute. It was not a release so we are open to finding
25 umbrella coverages, underinsured motorist coverage; there

1 are other areas where we're allowed to explore for
2 coverage. So this was -- we filed this lawsuit to verify
3 that this was the only coverage available.

4 Our client experienced very severe injuries in this
5 case. He was in the hospital for two weeks. His medical
6 bills are very, very large and the amount that he
7 received from the covenant barely covered his medical
8 expenses then and some future damages.

9 So the reason it was filed was to explore those
10 options. When we sent discovery we then learned that
11 Progressive on the day this wreck happened took that
12 recorded statement and had it since the day the wreck
13 happened and never told us that that's what it stated.
14 Does that answer your question?

15 THE COURT: It does. Thank you. And obviously I
16 answered my own question. You found out just during the
17 Bar complaint information when Mr. Smith was given a copy
18 of the complaint.

19 MS. ITTERLY: Correct, Your Honor.

20 THE COURT: Okay. Go ahead; I'm sorry.

21 MS. ITTERLY: That's fine. We now have evidence
22 from the discovery that it's just not true that he wasn't
23 on work at the time. He says in the recorded statement
24 that he was on work at the time. We've got his cell
25 phone records that show he was calling the place that he

1 was going for his work. We have an affidavit from the
2 person at Wilcox Office Mart where he was headed for his
3 work. We have the evidence now to support that he was on
4 the job at the time that this collision happened.

5 Now, I know the position that opposing counsel takes
6 is different, that he wasn't, and that maybe that mere
7 second decision to grab lunch took him out of the scope
8 of employment. But we've provided you with case law that
9 says that that was just a mere detour. It doesn't
10 completely take him out of the scope of employment.

11 The purpose of his trip was to always go to Wilcox
12 Office Mart, which was 12 miles away from his house and
13 nearly a mile away from where this wreck happened. It
14 seems pretty obvious that this trip was for that purpose.
15 Whether he just quickly decided to grab some lunch
16 beforehand doesn't take him out of the purpose of the
17 trip.

18 I want to go back to so the reason we had filed this
19 case was to explore and verify additional coverage. Mr.
20 Kuhn is Kuhn & Kuhn, LLC. They are basically one in the
21 same and he's said that over and over again. That is
22 the -- and that's the reason for the intent behind not
23 giving this information up. Clearly, if Mr. Kuhn was
24 within the scope of his employment he's already agreed
25 that he was negligent in this wreck. And if he was in

1 the scope of his employment there would be vicarious
2 liability for Kuhn & Kuhn, LLC because he's admitted to
3 negligence. So that would go to the intent requirement.
4 And then knowingly Progressive had the statement from the
5 day the accident happened.

6 I think we meet all the elements of -- I strongly
7 believe we meet all the elements of fraud as a defense to
8 this case. We're asking that we can also bring this as a
9 cause of action to the lawsuit because I think it's going
10 to come up again if we go to a directed verdict on this.

11 So we would ask that you deny the summary judgment
12 primarily because it's already been heard by Judge
13 Culbertson and he's already made a decision on this. And
14 if that's not the case then we ask you to deny it because
15 there is a defense, a valid defense of fraud and the
16 inducement and the one piece of evidence that defense
17 counsel is relying on is the covenant. And if there is a
18 defense to the validity of that covenant then that needs
19 to be explored.

20 Secondly, we would ask, you know, we be allowed to
21 amend our complaint to include these allegations and to
22 include Progressive so that we are able to explore the
23 possibility of discovery with them and what they
24 represented.

25 THE COURT: All right. Mr. Crudup?

1 MR. CRUDUP: Very briefly, Your Honor, the first --
2 again to address what Judge Culbertson said ---

3 THE COURT: --- I want to talk about that. That is
4 a big concern of mine; I'll be honest with you Mr.
5 Crudup. You know that's, there is not a whole lot of
6 unwritten rules that we abide by but that's number one so
7 I am concerned about that.

8 MR. CRUDUP: I understand, Your Honor. And I --
9 I'm happy to provide you with the transcript if you would
10 like it. Judge Culbertson absolutely did not rule on the
11 validity -- certainly did not rule on the validity of
12 this covenant nor on its function. It's just that
13 simple.

14 I mean basically from what Plaintiff's counsel just
15 told you they agree with our position as to what this
16 does to their rights. And if they did that during Judge
17 Culbertson's hearing he would have granted it. I mean it
18 just never came up; the claim just never came up.

19 I don't -- I'm not sure how much clearer that could
20 be. If they're agreeing with my position right now then
21 they would have agreed with it back then. And if they --
22 I can't imagine Judge Culbertson saying well everybody is
23 in agreement but I'm still not granting it. He just
24 never saw this. He never saw this issue. The only thing
25 he said was I think there is a debate as to vicarious

1 liability. He dismissed the direct claims but he said
2 there is a debate in part because of the statement from
3 Mr. Kuhn that was given after the fact, after the
4 accident saying that raises -- I'm happy to provide the
5 transcript because I was there -- but I think he actually
6 says I think this raises an issue of fact or there is a
7 scintilla of fact I'm denying that motion.

8 Now at a minimum it's definitely not in any order.
9 There has never been an order that says this covenant
10 allows them to continue this suit based on what we are
11 talking about. It is a totally separate issue. There is
12 an overlap certainly that there is this -- it's called a
13 cycle. It would mean that the company could then go back
14 and sue Mr. Kuhn. But he never talked about that. I
15 mean we just never discussed it. As Plaintiff's counsel
16 pointed out to you they needed time to brief this because
17 it had never been raised before this point.

18 Now, we filed this motion quite a while ago. I
19 mean it's obviously bounced around for a while. But this
20 is the first time any judge has heard this and I would
21 invite you if need be we will go get the transcript from
22 that hearing. I'm not sure exactly what the -- we can
23 get that hearing and you can hear all of it. But the
24 order, which I'm happy to pull up as well, I don't think
25 they provided that. But hang on a second.

1 [Whereupon, Mr. Crudup reviews documents]

2 MR. CRUDUP: In doing so I can tell you that the
3 order that Judge Culbertson signed so I mean I think the
4 argument would actually be that this is the only thing in
5 there. I apologize, Your Honor.

6 [Whereupon, Mr. Crudup reviews documents]

7 THE COURT: Take your time.

8 MR. CRUDUP: The only language is to however, as to
9 the claim of negligent supervision and in accordance --
10 grant summary judgment. The Court considered the
11 materials on file. The Court denies the Motion to
12 Dismiss and the Motion for Summary Judgment as to
13 vicarious liability claim.

14 It does not discuss any findings of fact or why that
15 would be. These were totally separate grounds and we
16 absolutely can raise this issue, raise a separate issue
17 on separate grounds. There is nothing that says when we
18 raise, when we file a Motion for Summary Judgment we must
19 put every possible ground that we can find.

20 And that's all the order says. Then it goes on as I
21 said to discuss that he is granting the directed claims.
22 But that is what the order -- I'm reading the order here,
23 and I apologize for reading too fast, Joy -- the Court
24 has considered the materials submitted by counsel for the
25 Plaintiff and Defendants as well as the documents in

1 pleadings which are part of the Court file. The Court
2 denies the Motion to Dismiss and the Motion for Summary
3 Judgment as to vicarious, as to the vicarious liability
4 claim. And it doesn't discuss why but if you listen to
5 the transcript that's why. And the issue of whether or
6 not the covenant bars this claim was not discussed. So
7 that would be the one thing, Your Honor.

8 Also, for what it's worth as Plaintiff's counsel
9 correctly pointed out even if that were the case this
10 would be raised probably at the beginning of trial; I
11 think we would have to and then at a directed verdict
12 stage. And they have just said on the record they agree
13 with our position.

14 So even if the case went forward to that point it
15 would still go, it would still be granted. And it would
16 be, there would be no point to having a trial only to
17 know that at directed verdict because there will be no
18 additional evidence, the law is the law, it would go
19 away.

20 Now, in terms of what they -- Your Honor, did I
21 address that question for you?

22 THE COURT: Yes.

23 MR. CRUDUP: As to the second issue, as to this
24 fraud claim, one thing that Plaintiff's counsel has left
25 out is that they must rely on the representations to

1 obtain this. And I think that, as I said their actions
2 earlier but more importantly the second covenant is
3 pretty clear.

4 By the second covenant in terms of timing, the Bar
5 complaints had been filed. All discovery had been
6 completed. We had gone and argued in front of Judge
7 Culbertson so to the extent that they want to even argue
8 that this has been raised once in front of Judge
9 Culbertson it was already raised once.

10 They have since signed another covenant, another
11 covenant not to execute for the same, the same language.
12 The same language that they can explore whatever they
13 want. This all came after; after they knew everything.
14 So even if the first covenant for argument's sake was
15 somehow obtained fraudulently the second one was not.
16 There was no representations made. And I'll represent to
17 Your Honor again; there has been no evidence whatsoever
18 that there were any representations made.

19 But even if there were by November of 2019
20 Plaintiff's counsel had all the information they have
21 right now and they have not gained any more information
22 and they still signed that covenant. So that at a
23 minimum that covenant would be valid.

24 THE COURT: Okay. Address that Ms. Itterly.

25 MS. ITTERLY: The second covenant I haven't -- I

1 didn't see that it was submitted with the filings from
2 defense counsel so I don't know the exact date of it to
3 put in chronological order of when it is. But clearly we
4 relied on those representations that Mr. Kuhn made and
5 what Progressive told us because we didn't have the power
6 of subpoena or anything else to verify that it wasn't
7 true. The only way we've been able to verify that this
8 is not the truth has been through discovery and through
9 subpoena power through this lawsuit that has been filed.

10 I want to touch on Judge Culbertson's order because
11 what defense counsel read you is the Court has considered
12 the materials submitted by counsel for Plaintiff and
13 Defendant, the documents and the pleading. The document
14 is the Motion to Dismiss which the first exhibit is the
15 covenant and it discusses in there almost identical
16 language.

17 The Motion to Dismiss says has the right of
18 indemnity which would further violate the agreement. And
19 then Mr. Crudup has argued here indemnification would
20 effectively strip the covenant not to sue of any real
21 meaning. I mean its identical arguments. They were
22 before Judge Culbertson. Just because they weren't in
23 the dialogue that happened in the courtroom is not to say
24 that they weren't presented in front of him. He said he
25 considered the materials. They're in the materials; you

1 can see them clearly.

2 THE COURT: All right.

3 MR. CRUDUP: Your Honor, first of all I can't --
4 the order is Judge Culbertson's ruling. I can't appeal.
5 There would be nothing to appeal. That order is, if I
6 wanted to appeal that order or ask for a Motion to
7 Reconsider that order if I could; and I was not, at that
8 point I wasn't counsel so I'm speaking for prior counsel.

9 The order just says what it says. There is no -- it
10 doesn't discuss that there are no findings of fact as to
11 that. In terms of the timing of the second covenant Ms.
12 Itterly I think is doing the best she can saying they
13 relied on their subpoena power. They had subpoena power
14 for a year before they signed a second covenant. And
15 they had everything. This is dated November 27th, 2019
16 and it's signed by Mr...

17 MR. KUHN: --- Miguel Oyuela Martinez ---

18 MR. CRUDUP: --- Mr. Martinez and it is witnessed
19 by who I believe is their paralegal, Adriane ---

20 MR. KUHN: --- yes. It is actually witnessed by the
21 paralegal for the Hoffman Law Firm. That would be four
22 months ago; well after this lawsuit started and well
23 after everything. It's the same exact covenant. How do
24 you go back and say I didn't know. I'm the Hoffman Law
25 Firm but I didn't know. It's your own covenant.

1 MR. CRUDUP: So to the extent that would matter
2 Your Honor I didn't include it because I assumed they had
3 it; they signed it. But it's as I said I think the
4 important parts of that covenant is they couldn't have
5 relied on anything that was said at that point because as
6 they've told you they needed subpoena power.

7 Now, I would -- one other thing I would say Your
8 Honor as to the first covenant they keep telling you and
9 in their brief they actually say they had no choice.
10 They had to sign it and that's simply not true, Your
11 Honor. I mean if they wanted to pursue a lawsuit and
12 find all coverage available they absolutely could have
13 done that. They chose not to. They chose to sign a
14 covenant first, which is again their choice and then they
15 proceeded.

16 I think it is beyond the law to tell us that or to
17 tell Progressive or tell Mr. Kuhn they chose to sign a
18 covenant. Now whether or not there were other statements
19 there that we disagree with or not I think that is really
20 pushing what can be.

21 But again, I don't think it matters because I don't
22 think they relied on it. Ten days later they are filing
23 a lawsuit. They just said they had to find more
24 coverage. Well, it doesn't matter what coverage there is
25 if they're filing a lawsuit against a company they are

1 now telling you oh, we knew we couldn't sue them. We
2 knew that the covenant precludes us from suing them yet
3 we're doing it anyway to see if we can find other
4 coverage. It doesn't matter if there is other coverage.

5 If they don't think that the covenant, if they are
6 agreeing with you and saying we knew this covenant would
7 not cover this but we knew that it would keep the
8 principal from being sued then why are they suing? It's
9 because they didn't realize that they couldn't do it.

10 And that is not a defense. That does not create
11 fraud if they don't understand what the ramifications of
12 a covenant is that does not create a fraudulent -- that
13 means they did not rely upon what was said. In fact,
14 it's quite the opposite; they would not rely on it and
15 they went ahead and sued his company even though he said
16 I was not driving for them.

17 We can debate that. I mean that's as I said we all
18 agree Mr. Kuhn maintains I was not driving for my company
19 at the time and he will continue to do that. But at this
20 point it doesn't matter because the covenant has been
21 signed. It either precludes it one way or precludes it
22 the other way.

23 So, Your Honor, I think that's my, those are our
24 issues. As for the original as I said the Judge
25 Culbertson ruling on this I didn't, honestly I didn't

1 think it would be much of an issue for it because I
2 thought it was a separate issue but I'm happy if need be
3 to go back and look at the transcript.

4 But even if Judge Culbertson had tangentially looked
5 at this he obviously did not have this case law in front
6 of him because as the Plaintiff's counsel agreed it
7 didn't, it was not brought to his attention. At a Motion
8 for Directed Verdict stage that is the law. And I don't
9 think, I can't even imagine a trial in which Progressive
10 is involved. First of all the jury cannot hear about
11 insurance in a case like this so I don't even know how we
12 would structure a trial where there is an insurance
13 company sitting in the background but it's part of the
14 trial.

15 And two as I said Your Honor they would have to give
16 back this money because you would be invalidating a
17 covenant. And in all honestly Your Honor I don't even
18 know if there is even -- that's a separate trial into
19 itself. You have to invalidate a valid, an otherwise
20 valid covenant, two of them actually; one of them after
21 the fact.

22 And three this creates witnesses. I mean would
23 adjustors testify as to what was said because that's what
24 we're talking about? Would Mr. Diegel who was former
25 counsel he would be a witness? Kevin would be too; Mr.

1 Smith. There would be all kinds of issues with a globbed
2 on extra trial of this. But regardless, this covenant is
3 still valid. The second covenant is certainly valid,
4 which even if it is 4 or 5,000 dollars or 4,700 dollars
5 it has the same language and it has the same effect.

6 It's releasing Mr. Kuhn who is even if taking
7 Plaintiff's factual allegations as true is the agent it
8 still releases the principle. And there is no argument
9 they had every, all information there at that point. In
10 fact, at that point they believed quite fervently that
11 Mr. Kuhn was lying about what it was he was doing at that
12 time and they still signed a covenant.

13 MR. SMITH: Judge, can I add something here real
14 quick? We and I think it may be worthwhile to check the
15 transcript from our last motion hearing. Mr. Crudup
16 today is making a lot of arguments and presuming our
17 knowledge and our intentions and all these things, which
18 by the way is probably an issue of fact to be decided by
19 a jury, which is another reason to decide on this.

20 But anyway if you look back at the last motion
21 hearing we had I made a comment and I sort of regretted
22 that comment but because I made it I remember it now,
23 which was Mr. Crudup is sort of establishing some of
24 these elements for this fraud in the inducement. And one
25 of the things that Mr. Crudup said last week was of

1 course we relied on it and of course we had a right to
2 rely on it. His arguments now are there is no way we
3 could have relied on it. We're hearing just that in
4 combined with the procedures for trial and what would
5 happen with the money and the witnesses. None of that is
6 for the Court to determine, Judge.

7 You know this issue Jeff keeps going back and forth
8 to what was talked about at the hearing; he wants to get
9 the transcript. But the simple truth was that the motion
10 that started the summary judgment was based on the exact
11 issue that is before you here today.

12 It is this indemnity language. That was before the
13 judge because that was the motion. The judge considered
14 the motion; that was the basis for the motion. And when
15 the judge denied the motion he denied it for the basis
16 that were argued and he denied it for the basis that were
17 written. It was absolutely in front of the judge.

18 And for Jeff to say, I wrote this down, he never saw
19 the issue well, that presumes that Judge Culbertson never
20 read the motion. So I think that is absolutely false and
21 just a red herring. The simple truth is this issue was
22 raised. It was decided and it cannot be heard by someone
23 else. If you decide to hear it then you're going to get
24 into well, we've got this covenant and now they've got
25 this defense. Now while Jeff, Mr. Crudup, on one hand

1 admits to reliance, admits to rights of reliance and then
2 argues those opposite points today let's just throw all
3 that out. At best those are questions of fact, Judge.
4 And so in order to determine whether or not that case
5 throws this case out you've got to look at our defense.
6 And our defense as best I can tell what Mr. Crudup was
7 arguing those concern issues of fact.

8 We content that we have established those elements
9 and those elements defeat the covenant. And the case
10 that we cited the Farm Bureau specifically says fraud in
11 the inducement negates the covenant, negates the
12 settlement agreement.

13 But even if you were to not be persuaded that we
14 have proven to you all of the elements and you're
15 persuaded by some of Mr. Crudup's arguments then they are
16 questions of fact, Judge. And what happens with
17 questions of fact it's for the jury to decide.

18 And as Ms. Itterly pointed out in the beginning the
19 next time this will be raised is not before trial as Mr.
20 Crudup suggests. The procedure is raised at directed
21 verdict. And by the time that directed verdict happens
22 the jury will have heard all of the evidence. Assuming
23 we can amend our complaint to put all of this before them
24 the jury would have heard it and they can decide those
25 questions of fact so that when the judge on directed

1 verdict decides does this case, this master servant case
2 does it kill the case totally. Now the judge has all the
3 evidence for the -- at least the jury does as well, they
4 have the evidence from the testimony and the documents to
5 look at these questions of fact; whether or not we have
6 satisfied these elements. The law is absolutely clear
7 that if we establish fraud in the inducement it negates
8 the settlement agreement. Jeff's argument is the
9 settlement agreement throws out the case.

10 And so either we have established those elements
11 today to your satisfaction, and that equals denying the
12 summary judgment or there are questions of fact regarding
13 those elements that need to be determined by the jury.
14 Again, it's a denial of the Motion for Summary Judgment.
15 Or third, the ruling would simply be they raised this
16 indemnity before the judge, they're raising this
17 indemnity argument before me; it's the exact same
18 argument.

19 Mr. Crudup by the way, Judge, I think it's worth to
20 point out Mr. Crudup was at counsel table at the original
21 motion. He was sitting there. He announced himself. He
22 was there. And I remember very specifically because
23 Amanda and I we got a little excited when we saw Mr.
24 Crudup because we thought what carrier just hired him?
25 There is more coverage. And so obviously we learned it

1 wasn't a carrier. But Mr. Crudup was at that hearing.
2 And if my memory serves me correct the judge asked if he
3 had anything to add. So it's not just a failure of some
4 prior lawyer to argue these things Judge. I think it's
5 just fair to mention that Mr. Crudup was there.

6 But again, it's already been heard. It can't be
7 heard again. If it can be heard again we've either
8 proven those elements or there are questions of fact for
9 those elements. All of those things result in a denial
10 of their summary judgment claim.

11 THE COURT: Ms. Itterly you commented earlier you
12 said that Your Honor this is not a covenant not to
13 execute this is -- I mean this was a covenant not to
14 execute. This was not a release. So was it y'all's
15 position that regardless of what the covenant said you
16 could still attempt to try to find other coverage but
17 just not as to Progressive?

18 MS. ITTERLY: Correct, Your Honor. That's exactly
19 it. And I think we put the language in there in our
20 supplemental brief that it does open us up to other
21 carriers.

22 THE COURT: But just not as to Progressive?

23 MS. ITTERLY: Correct.

24 THE COURT: And y'all's position is Progressive was
25 like here, take this money, which was their limit ---

1 MS. ITTERLY: --- those other potential coverages.

2 THE COURT: Right, because they were out of the
3 case and whatever y'all did from there they didn't have a
4 dog in that fight.

5 MS. ITTERLY: Correct.

6 MR. CRUDUP: But, Your Honor, what our point --
7 yes, that is true. The problem with that is what the
8 covenant does is it extinguishes Mr. Kuhn's personal
9 liability. And so when that happens case law says it
10 also extinguishes his as a servant the master, the
11 master's liability.

12 THE COURT: Right. But their position is that they
13 were fraudulently induced into signing that covenant
14 which had that language in it.

15 MR. CRUDUP: No, it did not have it. The covenant
16 only has language that says they can look for other
17 Defendants or something to that effect; I can pull it
18 out. But what the law does is it stops them from suing
19 the master. It doesn't matter if there is more coverage
20 out there.

21 They're saying they're looking for coverage. But
22 they can't sue the master at all. They know, they're
23 telling you they knew that. They're telling you that
24 when Mr. Kuhn said what he said they knew that if he did
25 say oh, I was driving for my company they would say oh,

1 then we're not going to sign this covenant. But we know
2 that's not the case because they then sued the master.
3 But they're telling you oh, we knew we couldn't sue them
4 but we're going to do that anyway.

5 And then on top of that, and I think this is what is
6 so important, the second covenant they knew everything at
7 that point and they still sued the master. Well, they
8 continued to sue the master after signing a second
9 covenant which has the same effect.

10 I mean for what it's worth, Your Honor, Judge
11 Culbertson never saw the second covenant because this
12 second covenant was signed after Judge Culbertson; after
13 we had that entire hearing. It's because they didn't
14 understand that that's what it would do. But that is
15 what it does. It doesn't -- they can look for other
16 coverage but they have to find other Defendants to get
17 it.

18 THE COURT: But when you say they didn't understand
19 what the covenant was going to do you're insinuating Mr.
20 Smith and Ms. Itterly by telling their client you need to
21 sign this covenant because they were mistaken as to what
22 the covenant would actually allow and not allow them to
23 do. That is your argument?

24 MR. CRUDUP: Essentially -- it appears that way.
25 Your Honor let me put it this way. I'm not; I will not

1 tell you that that is what happened. I don't know.
2 That's part of the problem here is that in a fraud case
3 that's something that would be, that's something that
4 would come out. But, I'm not going to tell, I cannot
5 tell the Court that I know what their intention was.
6 What I know is that by signing this that is the effect of
7 it. By the second covenant they had all that
8 information. So I don't know what they wanted to do or
9 why they were doing it or what they instructed their
10 client to do.

11 But I do know that their client signed a covenant
12 which was witnessed by their paralegal which does
13 extinguish -- if you're listening, Your Honor they've
14 never addressed that. How did -- if they had -- if they
15 didn't have this knowledge and they were at this great
16 disadvantage why is it that they signed the second
17 covenant about this.

18 And to the extent that I made a comment in the first
19 -- I believe what I was trying to say was my client has
20 relied on that covenant ---

21 MR. KUHN: --- yes, I am ---

22 MR. CRUDUP: --- that is something that they -- not
23 that they -- not that it matters. But either way it was
24 in place. What my point was was that the covenant has
25 been in place for well over a year and up until last week

1 we had never heard not a single mention of this fraud;
2 not a single mention. The only time it got raised was
3 when they realized oh, we actually do agree with their
4 position.

5 The law is clear about a covenant. That is when the
6 fraud thing came up and if that's when it first became an
7 issue then they can't have relied on my client's decision
8 to do that or my client's representations because it
9 wouldn't have mattered. If he said I am driving for my
10 company by signing a second covenant they are saying we
11 still wouldn't -- that's literally what happened.

12 They are saying that eventually they found out my
13 client said yes, I was driving for my company. They
14 found that out in say June or July of last year, whenever
15 discovery went out; sometime in the summer or before.
16 After that point they still signed another covenant so
17 regardless ---

18 MR. KUHN: --- Hoffman Law Firm signed it with
19 their client ---

20 MR. CRUDUP: --- regardless ---

21 MR. KUHN: --- after all of this ---

22 MR. CRUDUP: --- but it was signed. So for that
23 reason the second covenant it cannot have been -- it
24 can't be fraudulent. But to the extent, even to the
25 extent that would matter Your Honor they are making an

1 argument, they are creating another cause of action that
2 is not a part of this case. My argument here before you
3 is that vicarious liability against Kuhn & Kuhn must be
4 extinguished based on this covenant.

5 If they think they have some other claim, this is
6 not a defense, this is another cause of action, some
7 other cause of action against -- not even against Kuhn &
8 Kuhn against Progressive Insurance then that may be
9 something they want to figure out. But in this case they
10 can't just add another claim and another party to avoid
11 summary judgment on this claim. I know they're saying
12 oh, well we have all these great arguments for why this
13 is fraudulent; I disagree with that.

14 As I said they have no argument as to the second
15 covenant. But to the extent they do that's another case.
16 That's not -- it can't be added here. You can't add
17 Progressive here. I mean just functional you can't have
18 -- I can't have -- how would we do it? How would we have
19 an insurance company sitting in a chair next to me?

20 THE COURT: All right. Anything else?

21 MR. KUHN: I'd like to just add one thing Your
22 Honor, to this that is really important that I think we
23 all have to understand too. Miguel Oyuela, the
24 Plaintiff, is a good guy and he right away hired the
25 Hoffman Law Firm to go after me personally and my

1 personal insurance for recovery because I said I was
2 going to personal lunch and on a personal phone call when
3 I had the accident.

4 So the Hoffman Law Firm and their client went after
5 me personally and my personal insurance, which is
6 Progressive. The case law clearly says you can't later
7 ever go back and say now; I'm going after Kuhn & Kuhn as
8 John Kuhn is a member of his law firm as a work capacity.

9 Either I was under personal recognizance driving
10 around and they collected the 500,000 on that, which is
11 what happened, but you can't then later point to the case
12 law ever and go back and say well Kuhn & Kuhn and now
13 it's the law firm. No, you're either on law firm
14 business or you're on personal business. You collect
15 500,000 from the personal insurance, mine. You can't
16 turn around and collect from the law firm period.

17 MR. SMITH: And Judge, can I just close with just a
18 brief comment. You know this talk about the second
19 covenant, Judge while Amanda has stated our position very
20 clearly that the reason that these were entered into was
21 to verify this coverage. You know Mr. Kuhn this may
22 later come out in other discovery there is lots of
23 different business entities that he's associated with
24 with his house and his office and you know there are all
25 these different things. But anyway the point of this is

1 just to say Judge that this second covenant and whatever
2 date it was and whether or not it was signed that ain't
3 properly before you at all. It's not been submitted.

4 I think last week you gave us time to brief it. You
5 gave Mr. Crudup time to respond. He requested extra time
6 so Amanda worked over the weekend to get our briefs
7 submitted so Mr. Crudup would have lots of time, even
8 more to respond. He still hasn't responded; not at all.
9 He did not include that covenant. It appears to be the
10 primary basis for his reliance argument at this point,
11 this second covenant. He didn't bother to file a brief.
12 He didn't bother to file the covenant.

13 Judge, it ain't before you. But I don't think
14 that's important because it's no different from signing
15 the first covenant. But anyway, I just wanted to add
16 that for you. I'm sorry to be long-winded about it.

17 THE COURT: That's all right. Ms. Itterly, do you
18 have anything else?

19 MS. ITTERLY: Your Honor, I think in what Mr. Kuhn
20 said it's still you know not clear; was he on the job or
21 was he not? We're still not very certain about what
22 happened. And these are the genuine issues of material
23 fact that need to go in front of a jury to decide. And
24 that's the basis of the case and it's the basis of the
25 fraud case. Yeah, we had the recorded statement but even

1 after the recorded statement was turned over Mr. Kuhn was
2 making representations that that wasn't the truth; that
3 he was off business that day. And it was only recently
4 that we were able to get cell phone records and
5 affidavits to corroborate that evidence that he gave the
6 recorded statement.

7 So the stories still aren't clear. So our reliance
8 on the initial representations that he was not on work
9 continued for a while. We still haven't gotten certainty
10 that he was on the job or not and I think a jury needs to
11 decide that.

12 THE COURT: All right. Well, again I appreciate
13 everybody working diligently as I had asked so we could
14 be prepared to have this heard today. I appreciate you
15 working over the weekend Ms. Itterly and getting it done.

16 If there is not anything else, I will take it under
17 advisement and you will have my answer by the end of the
18 day tomorrow.

19 MR. CRUDUP: Your Honor, the only thing I would add
20 to the extent Your Honor wants to see the covenant
21 frankly I assume they have the covenant but ---

22 THE COURT: --- I have it.

23 MR. CRUDUP: The second covenant.

24 THE COURT: Oh, the second. I don't recall it. I
25 have seen the first and have read the first.

1 MR. CRUDUP: You have not. I don't think you have
2 seen the second one; that's what I'm saying.

3 THE COURT: Right.

4 MR. CRUDUP: If the Court would like me to submit
5 it. If mean if we're in a courtroom I would hand it to
6 you right now but obviously I can't.

7 MR. KUHN: Can you ---

8 THE COURT: --- I trust if all it says is amended
9 or supplemental and all the language is the same that's
10 fine. I understand it. All right. Thank y'all so very
11 much. And if y'all need anything else from me just let
12 me know. And like I said I'll give you an answer by the
13 end of the day tomorrow.

14 MR. CRUDUP: Thank you, Your Honor.

15 MS. ITTERLY: Thank you.

16 MR. KUHN: Thank you.

17 MR. SMITH: Thank you.

18 THE COURT: You're more than welcome.

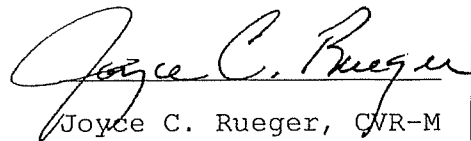
19 *****END OF TRANSCRIPT OF RECORD*****
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C E R T I F I C A T E

1
2 I, the undersigned, Joyce C. Rueger, Official
3 Circuit Court Reporter for the Ninth Judicial Circuit of
4 the State of South Carolina, do hereby certify that the
5 foregoing is, to the best of my ability, a complete
6 Transcript of Record of the proceedings had, using Zoom
7 videoconferencing, and evidence introduced in the trial
8 of the captioned case, relative to appeal, in the Court
9 of Common Pleas for Charleston County, South Carolina on
10 the 14th day of May, 2020.

11 I do further certify that I am neither of kin,
12 counsel, nor interest to any party hereto.

13
14 June 5, 2020

15
16
17 

Joyce C. Rueger, CVR-M

18
19 Court Reporter
20
21
22
23
24
25

Amanda Itterly

From: Price, Bentley <bpricej@sccourts.org>
Sent: Tuesday, May 26, 2020 9:49 AM
To: Amanda Itterly; Jeff Crudup; Price, Bentley Law Clerk (Juliana Beeks); Kevin Smith; John Kuhn
Subject: RE: Proposed Order - Oyuela v Kuhn and Kuhn, et al

All,
Since I am not making a finding of fact please include my exact language. Thanks in advance.
Bentley

From: Amanda Itterly <Amanda@hoffmanlawfirm.com>
Sent: Friday, May 22, 2020 5:04 PM
To: Jeff Crudup <jcrudup@clarksonwalsh.com>; Price, Bentley Law Clerk (Juliana Beeks) <bpricelc@sccourts.org>; Kevin Smith <KSmith@hoffmanlawfirm.com>; John Kuhn <jr@kuhnandkuhn.com>
Cc: Price, Bentley <bpricej@sccourts.org>
Subject: RE: Proposed Order - Oyuela v Kuhn and Kuhn, et al

*** **EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Judge Price:

We were mirroring the language that was in your email: *"Judge Price agrees with the Plaintiffs that there potentially could be a scintilla of evidence to get past Summary Judgment as to the fraudulent misrepresentation. However, that should be brought in a separate action."*

We tried to shorten the language in your email in our proposed order ("The Court believes there is evidence of fraud which should be handled in a separate action"), but would also be ok with your exact words: **The Court agrees with the Plaintiffs that there potentially could be a scintilla of evidence to get past Summary Judgment as to the fraudulent misrepresentation. However, that should be brought in a separate action.**

Thanks!

Amanda (*Stearns*) Itterly, Esquire



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***PLEASE NOTE MY EMAIL ADDRESS HAS CHANGED TO: amanda@hoffmanlawfirm.com
THE FIRM EMAIL ADDRESS HAS CHANGED TO contact@hoffmanlawfirm.com
THE FIRM WEBSITE ADDRESS HAS CHANGED TO www.hoffmanlawfirm.com

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From: Jeff Crudup <jcrudup@clarksonwalsh.com>
Sent: Friday, May 22, 2020 4:51 PM
To: Price, Bentley Law Clerk (Juliana Beeks) <bpricelc@sccourts.org>; Amanda Itterly <Amanda@hoffmanlawfirm.com>; Kevin Smith <KSmith@hoffmanlawfirm.com>; John Kuhn <jr@kuhnandkuhn.com>
Cc: Price, Bentley <bpricej@sccourts.org>
Subject: RE: Proposed Order - Oyuela v Kuhn and Kuhn, et al

Thanks Julie – I expect an Amanda/Kevin email shortly as well

Jeffrey M. Crudup
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From: Price, Bentley Law Clerk (Juliana Beeks) <bpricelc@sccourts.org>
Sent: Friday, May 22, 2020 4:50 PM
To: Jeff Crudup <jcrudup@clarksonwalsh.com>; Amanda Itterly <Amanda@hoffmanlawfirm.com>; Kevin Smith <KSmith@hoffmanlawfirm.com>; John Kuhn <jr@kuhnandkuhn.com>
Cc: Price, Bentley <bpricej@sccourts.org>
Subject: RE: Proposed Order - Oyuela v Kuhn and Kuhn, et al

Thanks Jeff! I'm going to CC Judge Price onto this thread so that he will be able to see all of this.

Julie Beeks
Law Clerk to the Honorable Bentley D. Price
Circuit Court Judge, 9th Judicial Circuit
100 Broad Street
Charleston, South Carolina 29401
Phone: (843) 958-4449
Email: bpricelc@sccourts.org

From: Jeff Crudup <jcrudup@clarksonwalsh.com>
Sent: Friday, May 22, 2020 4:45 PM
To: Price, Bentley Law Clerk (Juliana Beeks) <bpricelc@sccourts.org>; Amanda Itterly <Amanda@hoffmanlawfirm.com>; Kevin Smith <KSmith@hoffmanlawfirm.com>; John Kuhn <jr@kuhnandkuhn.com>
Subject: Proposed Order - Oyuela v Kuhn and Kuhn, et al

***** EXTERNAL EMAIL:** This email originated from outside the organization. Please exercise caution before clicking any links or opening attachments. ***

Good afternoon Julie,

Sorry it took us a little while to get this to you, but we have been trying to come to a compromise on this Order. Unfortunately, we could not quite do it. Thus, I am apologizing, in advance, for the somewhat lengthy explanation over one sentence on a Friday. Attached is are competing proposed Orders. The parties agree on all the language with the exception of one line.

Defendant's proposed Order reads: "The Court notes that no action has been instituted to rescind the Covenant and takes no position on Plaintiff's ability to file such a lawsuit."

Plaintiff wishes that line to be replaced with: "The Court believes there is evidence of fraud which should be handled in a separate action."

I offered a compromise of: "The Court takes no position on Plaintiff's ability to file a subsequent lawsuit regarding the validity of the Covenant," but compromise did not work either.

The disagreement is stems from your email explaining the ruling. I expect Amanda to respond to this email explaining their position.

Generally, I have concerns because I believe the Court is not taking a position on the issue of fraud or on any other "evidence" related to fraud because there was no evidence properly before the Court – merely allegations. I believe the Court is saying Plaintiff can pursue those *allegations* – just not in this lawsuit.

I am concerned that if the Order reads as Plaintiff requests, it will lead to several potential unintended consequences. First, that language could be read to suggest the Court is somehow recommending another lawsuit. I do not think the Court is endorsing a lawsuit, merely leaving Plaintiff the option to bring one. Second, I am concerned Plaintiff will attempt to use this language in a subsequent lawsuit to avoid summary judgment or otherwise argue a Court has ruled evidence of fraud exists. I do not think the Court is suggesting evidence exists because there is no such evidence before it. There are merely allegations of fraud which the Court is no commenting on. Lastly, I worry Plaintiff could use such a broad generalization to potentially apply it to *both* Covenants Not To Execute. I do not believe the Court is doing that either.

In short, I do not believe the Court intended to comment on whether fraud exists at all. Rather it is allowing Plaintiff to bring a future lawsuit. If the Order did not have some language to that effect, then Defendant could use it in a subsequent lawsuit against Plaintiff. Hence my language saying the Court does not comment on those issues.

However, I could certainly be wrong. As I mentioned, after speaking with Kevin, I expect Amanda to respond to this email shortly. However, please let us know if you have any questions or need any additional explanations. Again, sorry for the long email at 4:43 on a Friday.

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jcrudup@clarksonwalsh.com
d: 843.936.5039 | c: 732.939.6070
497 St. Andrews Blvd.
Charleston, SC 29407

~~~ CONFIDENTIALITY NOTICE ~~~ This message is intended only for the addressee and may contain information that is confidential. If you are not the intended recipient, do not read, copy, retain, or disseminate this message or any attachment. If you have received this message in error, please contact the sender immediately and delete all copies of the message and any attachments.

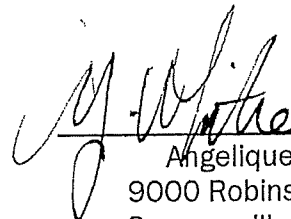
STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF CHARLESTON )

AFFIDAVIT

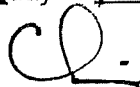
PERSONALLY APPEARED before me, Angelique White after first being duly sworn deposes and says the following:

At about 1 pm on the 24<sup>th</sup> of October 2018, I was driving on Ashley Phosphate Road in North Charleston. I was headed away from the direction of Interstate 26, toward the direction of Dorchester Road. I was behind a black Jeep Cherokee in the far right lane, and there was a silver or grey colored Audi in the lane to the left of the Jeep. The Audi sped up and made an aggressive lane change into the right lane and the Audi hit the Jeep. The Audi hit the Jeep very hard and forced the Jeep off to the right, and onto the curb at the corner of Rock Street. There was a man sitting on a bus stop bench at the corner of Ashley Phosphate Road and Rock Street. The Jeep continued onto the corner and ran over the man and the bench and hit some vehicles that were parked in a lot near the bench. I stopped and prepared myself for what I was about to see, because the man who got run over on the bench had his head under the Jeep, and I thought that the man had to be dead. Police and emergency crews came and took over the scene.

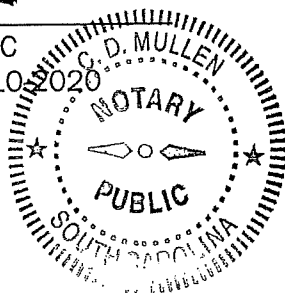
I have received a copy of this statement, which I give of my own free will to be true and accurate to the best of my knowledge.

  
27 Nov. 2018  
Angelique White  
9000 Robins Nest Way  
Summerville SC 29485

Sworn to before me  
This 27<sup>th</sup> day of NOVEMBER 2018



Notary Public for SC  
My comm. Ex. 2-10-2020



## AGREEMENT AND COVENANT NOT TO EXECUTE

This AGREEMENT AND COVENANT NOT TO EXECUTE [hereinafter "COVENANT"] made this \_\_\_\_ day of \_\_\_\_\_, 2019, entered and agreed between Miguel Oyuela-Martinez, hereinafter sometimes referred to as "Covenantor;" John R. Kuhn, hereinafter sometimes referred to as "Covenantee;" and Progressive Northern Insurance Company, hereinafter sometimes referred to as "Insurer."

WHEREAS, on October 24, 2018 in Charleston County, South Carolina, Covenantor was involved in an automobile-pedestrian accident with Covenantee at or near Ashley Phosphate Road in North Charleston, South Carolina; and

WHEREAS, the automobile being owned and driven by John R. Kuhn, at the time of the aforementioned accident was insured by Insurer under Policy Number 42096969, and had Five Hundred Thousand (\$500,000.00) Dollars in available combined single limit coverage under said policy; and

WHEREAS, the damages sustained by Covenantor in the aforementioned accident may exceed the liability limit of the said insurance policy, and the Covenantor is desirous of protecting his right to proceed to suit against Covenantee for purposes of collecting underinsured/uninsured motorist benefits, or against any other Defendants or insurers who may provide liability, excess or umbrella coverage; and

WHEREAS, claimants other than the Covenantor have also asserted property damage and/or bodily injury claims as a result of the accident of October 24, 2018 and Covenantor has demanded payment of the remaining policy limit after those claims are addressed;

NOW, FOR AND IN CONSIDERATION OF the payment to Covenantor of the total sum of Four Hundred Sixty-Nine Thousand Eight Hundred Eighty-Four and 60/100 (\$469,884.60) Dollars by Insurer on behalf of the Covenantee, the sufficiency and receipt of which is hereby acknowledged, Covenantor, Covenantee and Insurer agree as follows:

1. If and in the event Covenantor is unable to resolve by agreement and settlement of his claim with the underinsured/uninsured motorist insurer or such other Defendants or insurers who may provide liability, excess or umbrella coverage, Covenantor shall have the right to bring suit against Covenantee and/or said underinsured/uninsured motorist or liability insurers or Defendants, in accordance with South Carolina law, and prosecute the same to final judgment, including any declaratory judgment action regarding coverage.

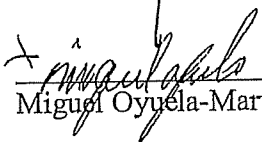
2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that Covenantee, his agents, representatives, heirs and assigns, shall never at any time, be liable to Covenantor, his agents, subrogees, representatives, heirs or assigns, beyond the consideration expressed herein and paid, except to the limits of all available underinsured/uninsured motorist coverage and/or other excess liability or umbrella coverage, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the

payment to Covenantor of the aforementioned sum, Covenantor, his subrogees, agents, representatives, heirs or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against Covenantee, by execution or otherwise, any judgment that may be rendered in any such lawsuit except as herein stated. Covenantor also agrees that he will never seek to collect any such judgment from the personal assets of the Covenantee. Further, immediately upon reduction to judgment of any such lawsuit, Covenantor, his subrogees, agents, representatives, heirs or assigns, will provide Covenantee with an executed satisfaction of said judgment. Moreover, this COVENANT or copy hereof shall be considered and serve as a satisfaction of any such judgment in any claim or lawsuit presented by Covenantor against Covenantee for the aforementioned automobile accident, and can be recorded as such should Covenantor, his subrogees, agents, representatives, heirs or assigns fail to execute a Satisfaction of Judgment.

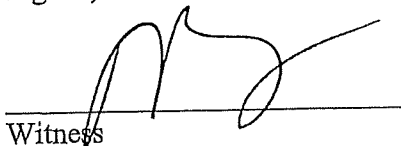
3. Covenantor acknowledges and understands that certain liens may exist on these settlement proceeds, such as liens arising from medical services and/or treatment rendered by various medical providers. In further consideration of the sum paid, Covenantor agrees that any and all outstanding liens will be satisfied out of these proceeds, specifically including but not limited to any lien held by the Government of the United States or by the State of South Carolina, pursuant to any Medicare or Medicaid program or by any workers' compensation carrier. Covenantor hereby agrees to and accepts responsibility to pay all valid liens, subrogation claims and/or assignments relating to this claim. Covenantor also specifically agrees and understands that Covenantee is in no way liable to any one or responsible for any of the aforementioned claims. Covenantee has settled this claim and has no further responsibility whatsoever to any third party by virtue of said third party's rights flowing through Covenantor's claims against Covenantee.

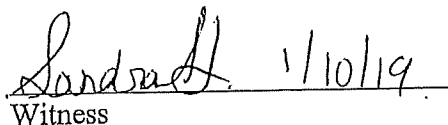
4. Covenantor understands that should CMS (Medicare) find that a Medicare Set-Aside Allocation should have been established and that Medicare's interests were not adequately protected, CMS (Medicare) may require Covenantor to expend up to the entire settlement amount on Medicare covered expenses related to the injury before Medicare will provide coverage for the injury. Covenantor voluntarily accepts this risk and waives any and all claims of any nature and/or damages against Covenantee should Medicare take such action, including, but not limited to a Private Cause of Action against the Insurer (as defined in the preceding paragraphs of this Covenant) under the Medicare Secondary Payer Act (MSP) pursuant to 42 USCA Section 1395y(b)(3)(A).

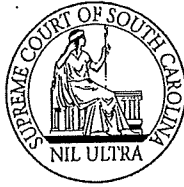
IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10 day of January, 2019.

  
Miguel Oyuela-Martinez

Signed, sealed and delivered in the presence of:

  
Witness

 1/10/19  
Witness



# The Supreme Court of South Carolina

## OFFICE OF DISCIPLINARY COUNSEL

John S. Nichols  
Disciplinary Counsel

C. Tex Davis Jr.  
Senior Assistant Disciplinary  
Counsel

Post Office Box 12159  
Columbia, South Carolina 29211

Telephone: (803) 734-2038  
Facsimile: (803) 734-1964

March 5, 2019

### PERSONAL AND CONFIDENTIAL

Kevin B. Smith, Esquire  
7087 Rivers Avenue  
North Charleston, SC 29406

RE: NOTICE OF INVESTIGATION  
Complainant: John R. Kuhn, Esquire  
Matter Number: 19-DE-L-0220

Dear Mr. Smith:

We have received information indicating possible professional misconduct on your part. A copy of the information received is enclosed. We are required by the provisions of the Rules for Lawyer Disciplinary Enforcement (RLDE), Rule 413, SCACR, to investigate this matter.

You are hereby notified that the Office of Disciplinary Counsel will investigate the allegations in the enclosed complaint.

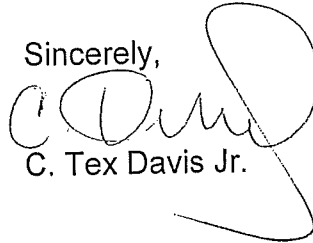
The grounds for discipline under RLDE relevant to this matter are found in Rule 7(a). The specific provisions of the Rules of Professional Conduct, Rule 407, SCACR, that we believe are relevant to our investigation at this time are Rules 3.1 and 8.4(e). We do not allege at this time that you violated any of the Rules, but, instead, list those Rules relevant to this investigation to afford you notice thereof. This investigation may be expanded, as provided in RLDE, if we deem appropriate.

You are required to file a written response with this office within fifteen days of the date of this letter. Your written response must address separately and with specificity whether any of the events mentioned occurred, whether you acknowledge violating the Rules of Professional Conduct, or other rules of this jurisdiction regarding professional conduct of lawyers, and, if so, which rules. Your response must also include your verification that it is complete and accurate to the best of your knowledge and belief. A form is enclosed for your convenience.

You are further notified that RLDE provides that either the Office of Disciplinary Counsel or you may request that you appear to give a statement concerning this matter on the record and under oath or affirmation. If we request that you appear, we must give you twenty days' notice of the date, time, and place of the required appearance. If you request an opportunity to appear, your written response to this notice must be served on our office prior to or contemporaneously with any such request.

If you have any questions regarding this notice or if you require an extension of time to respond, you should contact our office. Please refer to the matter number set out above on all correspondence and inquiries concerning this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "C. Tex Davis Jr.", with a large, stylized flourish extending from the end of the signature.

C. Tex Davis Jr.

CTD/  
Enclosures

STATE OF SOUTH CAROLINA  
BEFORE THE SUPREME COURT  
COMMISSION ON LAWYER CONDUCT

In the Matter of Kevin B. Smith, Esquire,  
Lawyer.

Matter Number: 19-DE-L-0220

---

VERIFICATION

---

I, Kevin B. Smith, Esquire, am the responding lawyer in the above-captioned matter. The response to the Notice of Investigation, dated \_\_\_\_\_, is complete and accurate to the best of my knowledge and belief. I am admitted in the following jurisdictions: \_\_\_\_\_  
\_\_\_\_\_.

\_\_\_\_\_  
Kevin B. Smith, Esquire

SWORN TO AND SIGNED in my presence

on \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Signature of Notary Public for the State of \_\_\_\_\_

\_\_\_\_\_  
Printed Name

My commission expires: \_\_\_\_\_

RECEIVED

FEB 26 2019

OFFICE OF  
DISCIPLINARY COUNSEL

**The Supreme Court of South Carolina  
Office of the Disciplinary Council**

RECEIVED

FEB 26 2019

COMMISSION ON  
LAWYER CONDUCT

**Date:** February 23, 2019

**Complaint Against:** Kevin Smith, Esq.  
David Hoffman, Esq.  
HOFFMAN LAW FIRM, LLC

**Complainant:** John Kuhn, Esq.  
KUHN & KUHN, LLC (law firm)

I am John Kuhn, and I am directly complaining to the Office of Disciplinary Council that the following lawsuit filed against me (and against my law firm, Kuhn & Kuhn, LLC) in the Court of Common Pleas in the 9<sup>th</sup> Judicial Circuit in South Carolina is completely frivolous and completely out-of-line and designed to intentionally harm me personally, by the Hoffman Law Firm, LLC, and by Kevin Smith, personally, and by David Hoffman personally. This matter was 100% settled between me and my insurance company on January 10, 2019. In fact, my personal insurance company, Progressive Insurance Company, hired a fine attorney (Ron B. Diegel, Esq. of Murphy & Grantland law firm in Columbia) represent me in the personal claim the Hoffman Law Firm brought against me for this exact same accident. And, attorney Ron Diegel representing me to the exact same Kevin Smith, attorney for the plaintiff with the Hoffman Law Firm for 3 months on the claim against me for the exact same accident, they 100% settled this claim and avoided this lawsuit with a Settlement Agreement signed by the injured Complainant below, Miguel Oyuela- Martinez on January 10, 2019, which expressly eliminates this lawsuit against me. Moreover, Progressive Insurance company paid Miguel Oyuela-Martinez \$469,884.60 for his two broken feet and all other minor injuries to him caused by me in this accident. Therefore, this claim was 100% settled though the two attorneys (Kevin Smith for the injured party and Ron Diegel) for me.

Therefore, this whole lawsuit filed by Kevin Smith and David Hoffman of the Hoffman Law Firm, LLC, is completely bogus. It is completely frivolous. Because these two attorneys have been practicing law for a long time in this same field, they know exactly what they are doing: They are filing a frivolous and completely disallowed (by the Settlement Agreement) lawsuit against me and my law firm in order to force me to waste my time answering and defending. And, furthermore, they know this is nothing by a fishing exhibition because they know it is bogus and already settled. Not only that, judging by a comment or two Kevin Smith made to my attorney, Ron Diegel, I know that they are just trying to go after me, personally,



**DETAILED COMPLAINT TO THE SUPREME COURT OF SOUTH CAROLINA  
OFFICE OF DISCIPLINARY COUNSEL**

This is literally a frivolous law suit, intentionally designed to harm the Defendant and his business in Charleston County and has nothing to do with repairing and “making whole” the Plaintiff, which has already been 100% accomplished through extensive monetary insurance payments (\$469,884.60) from John Robert Kuhn, personally, and through all other monetary and legal means possible. This lawsuit should be immediately dismissed, *prima facie*. Furthermore, the Defendants Counter-Claim for Intentional Misuse of the Legal System in South Carolina, for Intentional Infliction of Emotional Distress, and for Attorney’s fees.

**FIRST CAUSE OF ACTION – NEGLIGENCE OF JOHN KUHN**

Already Admitted and Resolved and Paid for by John Kuhn’s Personal Insurance.

**ALSO, CLAIM OF VICARIOUS LIABILITY**

False, as Stated Immediately Below and Known by the Plaintiff and the Plaintiff’s Attorney.

**However, one of the most important items has immediately been left off the Complaint and not admitted by the Plaintiff:** John Robert Kuhn (“John Kuhn”) was driving his personal Audi A5 Car registered in his name only, and not in the name of any LLC, including Kuhn & Kuhn, LLC. Furthermore, John Kuhn exited I-26 onto Ashley Phosphate road to go to his favorite taco shop for lunch, a personal lunch stop that had nothing to do with working.

Attorney Kevin Smith and attorney David Hoffman and the Hoffman Law Firm are being dishonest in not admitting this (and therefore bringing this lawsuit) because the Plaintiff and his Attorney already know this unequivocally. This is because shortly after the Accident happened at lunch-time on October 24, 2018, the Plaintiff and his attorney contacted John Kuhn’s personal insurance company and demanded that Progressive Insurance Company pay for the physical damages that John Kuhn personally caused to the Plaintiff, and to which John Kuhn admitted from the very beginning in front of the Plaintiff, and other parties involved and to the Police immediately thereafter.

**Therefore, the Plaintiff and his Attorney have already spent numerous hours**

**inquiring of the Defendant the facts in this case, and they already know for a fact that:**

- A. John Kuhn's 2017 Audi A5 was registered in his name only, and not in the name of any Corporation or LLC, including Kuhn & Kuhn, LLC. In fact, they even have a copy of John Kuhn's Registration in his name only, on the Audi A5 involved.
- B. John Kuhn was going to lunch at his favorite taco shop on Ashley Phosphate Road and was, indeed turning into the taco shop, when the accident he admitted was his fault from the beginning, occurred. Thus, he was not on law firm business, nor any other business when he caused the accident.
- C. John Kuhn never re-pays himself mileage on his personal vehicle (this exact 2017 Audi A5 registered in his name only) from Kuhn & Kuhn, LLC, nor any other corporation or LLC he might own. He has never paid himself mileage on his personal vehicle since he has owned it.

**Interestingly, the Plaintiff and his Lawyer already know facts A-C because they have been working with John Kuhn's personal insurance company, Progressive Insurance Company, by speaking continually back and forth for the past three months with Laura A. Masel, Claims Representative for Progressive Insurance Company, and Ron B. Diegel, Esquire, of Murphy and Grantland, PA, my personal attorney for this incident, hired to represent me by Progressive Insurance just as soon as Attorney Kevin Smith of Hoffman Law Firm, LLC, brought this claim against me in November, 2018, on behalf of this exact Plaintiff. This means that the Plaintiff's Claim for Vicarious Liability brought in his Complaint under Items 24-25 are actually fully-known by the Plaintiff and his attorney, Kevin Smith, Esquire, and his Law Firm, The Hoffman Law Firm, LLC, to be manifestly false.**

Therefore, the Claim for Negligence against John Kuhn has already been admitted by John Kuhn and fully concluded and paid for by his Insurance Company before the filing of this lawsuit and fully-settled by John Kuhn, personally, and the Plaintiff. Therefore, this Claim of Negligence in this Lawsuit is already fully-settled and the S.C. Office of Disciplinary Counsel should sanction the Hoffman Law Firm and its attorneys for intentionally bringing this frivolous lawsuit.

Also, because of the Facts Known to the Plaintiff and his law firm and his attorney, this claim of Vicarious Liability is already known to be false and this lawsuit should not have been filed and this claim should be dismissed, *prima facie*.

INTENTIONAL MISUSE OF THE SOUTH CAROLINA JUDICIAL SUSTEM  
and INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS  
against KEVIN SMITH, ESQUIRE, AND HOFFMAN LAW FIRM, LLC

Attorney Kevin Smith of Hoffman Law Firm, LLC, and his Plaintiff, Miguel Oyuela-Martinez, cannot possibly claim they did not know A-C above because they asked my attorney, Ron Diegel, Esquire, all of these facts again and again during the past three months. Not to mention they know with absolute certainty that John Kuhn's 2017 Audi A5 Registration is in his sole name because they have that Registration in their possession.

**These facts make this a frivolous lawsuit. In fact, these facts make this an intentional Misuse of the Judicial System in South Carolina by Kevin Smith, Esquire, of the Hoffman Law Firm, individually, and by the Hoffman Law Firm, LLC, as an LLC.** Because of all of their questions to Laura Masel of Progressive Insurance Company and Ron Diegel, Esquire, attorney for John Kuhn, and because of the due diligence by the Plaintiff and by the Hoffman Law Firm *over the past three months* concerning the personal claim against John Kuhn, they already know Facts A-C above to be true: That John Kuhn was driving his car for personal use to go to lunch, and that John Kuhn had his car registered solely in his personal name, and that John Kuhn did not ever pay himself mileage from any of his companies (especially named Defendant in this case, Kuhn & Kuhn, LLC). Therefore, the Kuhn & Kuhn, LLC (the "law firm") is requesting that The S.C. Office of Disciplinary Counsel fully sanction and punish Kevin Smith, Esquire, individually, and the Hoffman Law Firm, LLC, for Intentional Misuse of the Judicial System in South Carolina and for Intentional Infliction of Emotional Distress against John Kuhn, personally, for filing this frivolous and unnecessary Lawsuit.

By filing this Lawsuit in the South Carolina Court of Common Pleas, already knowing the facts above (because of their own due-diligence in their prior, fully-settled claim) and that this Action has no chance whatsoever to gain more money for the Plaintiff (whom has already been made whole by receiving \$469,884.60 from John Kuhn, thorough his personal auto liability insurance company in South Carolina. Because of the three months of diligent efforts of Attorney Kevin Smith, Esquire, and the Hoffman Law Firm, LLC for this exact same accident, the Plaintiff and Kevin Smith and Hoffman Law Firm, LLC, know these facts about the

registration of John Kuhn's auto solely in his name and that he was solely on personal lunch break to be true, this Lawsuit becomes solely designed to harass the Defendant, John Kuhn. Therefore, this an utter waste of the precious time of this Honorable Court, and of John Kuhn, personally (by having to answer this lawsuit) and of Kuhn & Kuhn, LLC ("law firm"). Moreover, John Kuhn has now spent many sleepless nights worrying about this frivolous lawsuit that is intentionally filed by the Plaintiff and his law firm to harass and bother and upset the Defendant. **This is exactly why the Plaintiff has personal insurance, so that this law suit will not be filed.** Kevin Smith, Esquire, actually knows that he is bringing a frivolous lawsuit designed to harass John Kuhn and the Kuhn & Kuhn Law Firm because he is a long-standing, currently-licensed attorney in the South Carolina Bar, and because he told John Kuhn's attorney (Ron Diegel, Esquire) that "he was going to go after John Kuhn any way possible because he is in a position to pay a lot." That is not the purpose of this Honorable Court, for Kevin Smith, Esquire, to bring a frivolous lawsuit to simply "go after John Kuhn any way possible." This Office of Disciplinary Counsel should sanction Kevin Smith and the Hoffman Law Firm on this basis alone! This is absolutely not the purpose of our Judicial System in South Carolina.

Therefore, this Lawsuit is a textbook example of a Plaintiff and an Attorney's Intentional Misuse of the South Carolina Judicial System. And, because the lawsuit is intentionally filed to simply "go after John Kuhn any way possible," and the Plaintiff has already been made 100% whole by John Kuhn's personal insurance company, Progressive Insurance Company, this Lawsuit is Intentional Infliction of Emotional Distress against John Kuhn, personally, and as the Managing Member of the Kuhn & Kuhn, LLC.

John Kuhn, personally, and Kuhn & Kuhn, LLC, request the S.C. Supreme Court Office of Disciplinary Counsel sanction and the Hoffman Law Firm, LLC, and Kevin Smith, Esquire, and require them to pay to John Kuhn \$25,000.00 for the unnecessary pain and suffering they have intentionally brought upon him. Furthermore, the Claimant also demands another \$25,000.00 from the Hoffman Law Firm, LLC, for the Intentional Misuse of the South Carolina Judicial System. The Defendants in this action Pray that this Honorable Court award Kuhn & Kuhn, LLC, and/or John Kuhn, personally, the above \$50,000.00, plus all and any attorney fees to Answer and resolve this frivolous Lawsuit. This should help stop these types of frivolous and intentional lawsuits from the Hoffman Law Firm, LLC, in the future.

SECOND CAUSE OF ACTION – NEGLIGENCE OF KUHN & KUHN, LLC  
This Negligent Supervision Action Does Not Even Make Sense, and Should be Immediately  
Dismissed Outright

Items 31 – 36, literally make no sense whatsoever. There is no logic in this Claim. It is literally impossible for John Kuhn to negligently supervise himself, especially when he was going to lunch in his own personal automobile on his own personal lunch time. He was not even at work that day. What is upsetting about this claim, is that it is another lightly-veiled attempt at a fishing expedition by the Hoffman Law Firm, LLC, and its attorneys (David Hoffman and Kevin Smith): As fully stated above, they already knew, before bringing this Cause of Action, that the 2017 Audi Q was registered solely in John Kuhn's name, individually, and they already knew John Kuhn was going to lunch at his favorite taco shop when he admitted he personally caused this accident. So, this claim that Item 33, "Defendant Kuhn & Kuhn, through its agents and employees, knew, had reason to know, or should have known by exercising reasonable care that the Defendant John Kuhn needed supervision" is manifestly false.

What is upsetting to John Kuhn is that The Plaintiff and his attorney, Kevin Smith, Esquire, and his law firm, the Hoffman Law Firm, LLC, already knew from their personal claim against John Kuhn that John Kuhn was the only person on the Title and Registration of the 2017 Audi Q5 and that John Kuhn was going to lunch on his own time, as stated above. Again, this action has already been fully paid, and dismissed and fully-executed, between the Plaintiff, by the Plaintiff, and by the Hoffman Law Firm and the Defendant, John Kuhn and his personal attorney, Ron Diegel, Esquire, and John Kuhn's personal insurance company, Progressive Insurance Company. Therefore, allow me to re-state that the Hoffman Law Firm and attorney Kevin Smith, and the Plaintiff already knew this claim to be false before filing this lawsuit. Again, this is an Intentional Misuse of this Honorable Court, *and* this is an Intentional Infliction of Emotional Distress upon the Defendant, John Kuhn. Therefore, this Second Cause of Action, Negligence of Kuhn & Kuhn, LLC, should be Dismissed outright, on it's face. And, the Plaintiff and his attorney and his law firm, should pay to John Kuhn, and/or Kuhn & Kuhn, LLC, \$50,000.00 for these frivolous causes of action. The Defendants Pray that this Office of Disciplinary Counsel do so immediately, without further ado, because this lawsuit, *prima facie*, should never have been filed and served on the Defendants. It is already fully settled outside this Honorable Court, between John Kuhn and the Plaintiff, personally, though our respective law

firms, and fully paid \$469,884.60 for the Plaintiffs two broken feet, by my personal insurance company regarding this exact accident on this exact day.

#### TRUE FACTUAL ALLEGATIONS

Items 5-9, as to John Kuhn, personally traveling west on Ashley Phosphate Road and making the mistake of turning right from the middle lane to go to the Taco Shop for lunch and causing the accident and immediately admitting fault to everyone involved and the police when they came is correct. John Kuhn immediately realized that he caused the accident and that he was in the wrong and immediately told everyone he harmed how very sorry he was and immediately admitted fault to everyone, including the Plaintiff and including to the Police when they arrived.

#### ALL OTHER FACTUAL ALLEGATIONS

Items 6-23, titled factual allegations in the Complaint, are neither admitted nor denied by the Defendants, because as stated above, the two causes of action stated by the Plaintiff have already been fully adjudicated outside this Honorable Court between the Plaintiff, his attorney Kevin Smith, and his law firm The Hoffman Law Firm, and the Defendant, the named John Kuhn, by and thorough his attorney Ron Diegel, and fully settled and signed off on by the Plaintiff and his law firm on January 10, 2019, in their AGREEMENT AND COVENANT NOT TO EXECUTE. (Exhibit A)

#### DAMAGES Already Paid in Full

Again, the Damages listed under Items 37 and 38 are 100% irrelevant because they have already been paid 100% in full to the Plaintiff in this action in the amount of cash \$469,884.60, to make the Plaintiff whole for this exact accident, by John Kuhn's Personal Auto Liability Insurance Company, Progressive Insurance and fully-settled and signed off on by the Plaintiff and his law firm on January 10, 2019, in their fully executed AGREEMENT AND COVENANT NOT TO EXECUTE. (Exhibit A)

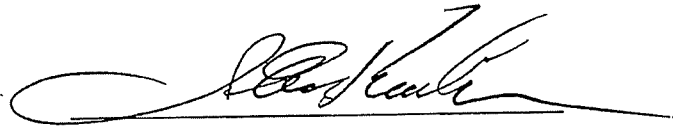
**WHEREFORE**, attorney John Kuhn Requests that this Office of Disciplinary Counsel immediately sanction attorney David Hoffman, attorney Kevin Smith, and the Hoffman Law Firm for bringing this unlawful and frivolous lawsuit. The sanctions should be Monetary and Suspension of both attorneys' licenses so that they learn never to mis-use the South Carolina Judicial System again for harassment and double jeopardy towards another human being.

Please remember that Kevin Smith and the Hoffman Law Firm know that this is an already fully-settled Cause of Action, because the Plaintiff's Causes of Action in the Lawsuit, immediately, prima facie, have already been fully resolved and fully-settled and signed off on by the Plaintiff and his law firm on January 10, 2019, in their fully executed AGREEMENT AND COVENANT NOT TO EXECUTE. We pray that this fully sanction the attorneys and the law firm to the fullest extent possible under South Carolina Attorney Ethics law.

**MOREOVER**, For the reasons stated clearly above, John Kuhn and the Kuhn and Kuhn Law Firm request that this Honorable Disciplinary Counsel Penalize the Hoffman Law Firm, LLC, and/or Kevin Smith, Esquire, individually, the amount of \$25,000.00 for Intentional Misuse of the South Carolina Judicial System by bringing this lawsuit, AND, this Honorable Court Penalize the Hoffman Law Firm, LLC, and/or Kevin Smith, Esquire, individually, the amount of another \$25,000.00 for Intentional Infliction of Emotional Distress against John Kuhn, personally. This lawsuit is a complete waste of this South Carolina Judiciary, and a complete waste of the Claimants time and work and energy. These requested sanctions are absolutely merited in this case and would help remind the Plaintiff's law firm not to do this again.

**LASTLY**, Defendants Request this Honorable Court assess attorneys' fees, as it sees just and proper, against the Hoffman Law Firm, LLC, and in favor of Kuhn & Kuhn, LLC, and/or John Kuhn, for the time and work John Kuhn has had to put into defending this manifestly frivolous lawsuit that should never have been filed with this Honorable Court and never should have to be brought to the Supreme Court of South Carolina Office of Disciplinary Counsel.

Respectively submitted,  
John R. Kuhn, Esquire  
Kuhn & Kuhn, LLC  
473 Savannah Highway  
Charleston, SC 29407

A handwritten signature in black ink, appearing to read "John R. Kuhn", written over a horizontal line.

THE CLAIMANT TO THE  
S.C. OFFICE OF DISCIPLINARY COUNSEL

Charleston, South Carolina

Dated: February 23, 2019



has no other insurance from which the Plaintiff could collect payment.

## II. STATEMENT OF FACTS

Plaintiff initiated this action by filing the Complaint against both Kuhn & Kuhn LLC and John Robert Kuhn, after the Plaintiff and John Robert Kuhn had settled the original claim, executing both an "Agreement and Covenant Not to Execute" and an "Affidavit of No Other Insurance," in which the Plaintiff was paid a total of \$469,884.60 for the injuries sustained in the accident. During the Discovery process of the original claim, the Plaintiff was made fully aware that the vehicle involved in the accident was John Robert Kuhn's personal vehicle, registered in his personal name, and insured through his personal carrier. Further, Plaintiff was made aware that John Robert Kuhn was on vacation, and out on a personal lunch, and was in no way acting as an Agent for Kuhn & Kuhn LLC or within the scope of employment for Kuhn & Kuhn LLC. Lastly, the Plaintiff was made aware, through the "Affidavit of No Other Insurance" that John Robert Kuhn has no other insurance, including UIM or Umbrella Coverage, and cannot be held further personally liable to the Plaintiff, as it outlined in the "Agreement and Covenant Not to Execute."

## III. LEGAL ARGUMENT

Kuhn & Kuhn LLC and John Robert Kuhn's Motion to Dismiss, for failure to state a claim, should be granted. First, because Kuhn & Kuhn LLC is not subject to liability under the theory of vicarious liability through the doctrine of *respondeat superior*, as the Plaintiff cannot establish that "[a] relationship [between master and servant] existed at the time of the injuries, and that the servant was about his master's business and acting within the scope of his employment." *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 639 S.E.2d 50 (2006) (citing *Lane v. Modern Music, Inc.*, 244 S.C. 299, 136 S.E.2d 713 (1964)).

### a. **John Robert Kuhn was not acting within the scope of employment.**

The Plaintiff bears the burden of proving the master-servant relationship in order to establish vicarious liability under *respondeat superior*. The Plaintiff must show (1) whether the Defendant was a servant and/or employee acting to benefit the employer and (2) whether the tortious act was committed within the scope of employment. See *Anderson v. West*, 270 S.C.

184, 187, 241 S.E.2d 551, 553 (1978); *Wade v. Berkley County*, 330 S.C. 311, 498 S.E.2d 684 (Ct. App. 1998). In order for an agent/employee to be acting within the 'scope of employment', there must be a showing that the "act . . . [was] reasonably necessary to accomplish the purpose of his employment and [be] in furtherance of the master's business. *Armstrong v. Food Lion, Inc.*, 371 S.C. 271, 639 S.E.2d 50 (2006) (citing *Lane* S.E.2d at 713). Further, if the act of the employee is for an "independent purpose of his own and not with reference to the service in which he is employed, or while he is acting as his own master for the time being, [the act] is not within the scope of his employment so as to render the master liable." *Id.* Additionally, the master is not liable for the actions of the servant if "[the] servant steps aside from the master's business for some purpose wholly disconnected with his employment, [and] the relation of master and servant is temporarily suspended; this is so no matter how short the time . . . ."

Here, while John Robert Kuhn is an employee of Kuhn & Kuhn LLC, the Plaintiff cannot establish the Defendant was acting to benefit his employer or that the act was within the scope of employment. At the time of the accident, John Kuhn was driving his personal vehicle to a personal lunch while on personal vacation day, a trip that was not connected to Mr. Kuhn's employment with Kuhn & Kuhn LLC whatsoever. The vehicle is titled to John Kuhn and insured through Mr. Kuhn's personal insurance company. The act was for an independent purpose, not connected in any way to his employment, and was wholly disconnected from his employment and did not in any way further or benefit Kuhn & Kuhn LLC.

Therefore the Plaintiff's Complaint incorrectly states that John Robert Kuhn, at the time of the accident, was acting as an agent, servant, and/or employee of Kuhn & Kuhn LLC and was within the scope of employment.

**b. Kuhn and Kuhn LLC is not subject to liability under the theory of Negligent Supervision of John Robert Kuhn.**

The theory of Negligent Supervision arises out of contract. In order for an Employer to be liable for the actions of his employee under the theory of Negligent Supervision, the Plaintiff must establish that the Employer had a duty of care in the supervision of the employee. *Degenhart v. Knights of Columbus*, 420 S.E.2d 495 (1992). This duty arises, even outside of the

scope of employment, where the employee intentionally harms another and is “(1) on the employer’s premises, or (2) using chattel of the employer, and (3) employer knows or has reason to know he has the ability to control the employee, and (4) knows or should know of the necessity and opportunity for exercising such control over the employee.” *Id.*

Again, it is conceded that John Robert Kuhn is an employee of Kuhn & Kuhn LLC, however, the act that resulted in Plaintiff’s injuries was not intentional and at the time of the accident Mr. Kuhn was neither on Kuhn & Kuhn LLC’s premises nor using chattel belonging to Kuhn & Kuhn LLC, as the accident occurred in North Charleston on a public road. Further, the vehicle involved in the accident belonged to Mr. Kuhn, not Kuhn & Kuhn LLC. Additionally, Kuhn & Kuhn LLC did not have the ability to exercise control over Mr. Kuhn, as he was on a personal vacation day, using his personal vehicle, to go to a personal lunch. It would be highly inequitable and unconscionable to set a precedent in which employers are held liable for every act of their employees, wholly and completely unrelated to the employer’s business and property. This argument purports an absurd scenario in which employers would be held to have a duty of care in the supervision of their employees and forced to enact policies and rules to dictate how their employees can go about their private lives, while they are out of the office or on vacation and in no way acting within their capacity as an agent of the employer or “utilizing the premises or chattel [of the employer].” *Id.* Further, a Federal Court in South Carolina held in *Bowman*, that a Plaintiff cannot both assert theories of vicarious liability and negligent entrustment/supervision. *Bowman v. Norfolk Southern Ry. Co.*, 832 F.Supp. 1014 D.S.C. (1993).

Therefore, the Plaintiff does not have sufficient grounds to establish a claim of Negligent Supervision as John Kuhn was not on or using Kuhn & Kuhn LLC’s property and Kuhn & Kuhn LLC was under no duty to supervise John Kuhn as his actions were in no way related to his contractual employment.

**c. John Robert Kuhn was improperly named as a Defendant.**

As stated above and attached hereto as Exhibits A and B, John Robert Kuhn and the Plaintiff signed an Agreement and Covenant Not to Execute (“Agreement”), absolving Mr. Kuhn of any personal liability to the Plaintiff. Further, at request of the Plaintiff, Mr. Kuhn signed an

Affidavit of No Other Insurance, stating that Mr. Kuhn did not have UIM or Excess, Umbrella Coverage. While the Agreement provides that the Plaintiff retains the ability to bring suit for the purpose of collecting against UIM or excess, umbrella coverage, the provided documents clearly show that the Plaintiff is fully aware that no such coverage exists.

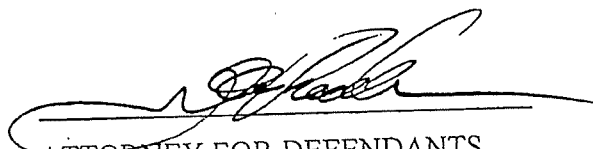
Lastly, the suit is wholly improper, due to the fact that even if, hypothetically, Kuhn & Kuhn LLC were found to be vicariously liable under the theory of *respondeat superior*, Kuhn & Kuhn LLC as the employer has the right of indemnity, as a matter of law, against Mr. Kuhn personally, as the employee, which would further violate the Agreement, which provides that he is never at any time to be liable to the Plaintiff beyond the consideration provided for in the Agreement. *Addy v. Bolton*, 257 S.C. 28, 183 S.E.2d 708 (1971).

#### IV. CONCLUSION

For the foregoing reasons, Kuhn & Kuhn LLC and John Robert Kuhn respectfully requests this Court dismiss Plaintiff's Complaint against Kuhn & Kuhn LLC and John Robert Kuhn, for failure to state a claim upon which relief can be granted, under South Carolina Rule of Civil Procedure 12(b)(6).

WHEREFORE, based on the grounds and reasons set forth herein, Defendants pray that the Court grant its Motion to Dismiss, with prejudice.

Respectively submitted,  
John R. Kuhn, Esquire  
Bar Number: 6901  
Kuhn & Kuhn, LLC  
473 Savannah Highway  
Charleston, SC 29407



ATTORNEY FOR DEFENDANTS

Charleston, South Carolina

Dated: February 19, 2019

# EXHIBIT A

RECEIVED

AGREEMENT AND COVENANT NOT TO EXECUTE

JAN 12 2019

This AGREEMENT AND COVENANT NOT TO EXECUTE [hereinafter "COVENANT"] made this \_\_\_\_ day of \_\_\_\_\_, 2019, entered and agreed between Miguel Oyuela-Martinez, hereinafter sometimes referred to as "Covenantor;" John R. Kuhn, hereinafter sometimes referred to as "Covenantee;" and Progressive Northern Insurance Company, hereinafter sometimes referred to as "Insurer."

WHEREAS, on October 24, 2018 in Charleston County, South Carolina, Covenantor was involved in an automobile-pedestrian accident with Covenantee at or near Ashley Phosphate Road in North Charleston, South Carolina; and

WHEREAS, the automobile being owned and driven by John R. Kuhn, at the time of the aforementioned accident was insured by Insurer under Policy Number 42096969, and had Five Hundred Thousand (\$500,000.00) Dollars in available combined single limit coverage under said policy; and

WHEREAS, the damages sustained by Covenantor in the aforementioned accident may exceed the liability limit of the said insurance policy, and the Covenantor is desirous of protecting his right to proceed to suit against Covenantee for purposes of collecting underinsured/uninsured motorist benefits, or against any other Defendants or insurers who may provide liability, excess or umbrella coverage; and

WHEREAS, claimants other than the Covenantor have also asserted property damage and/or bodily injury claims as a result of the accident of October 24, 2018 and Covenantor has demanded payment of the remaining policy limit after those claims are addressed;

NOW, FOR AND IN CONSIDERATION OF the payment to Covenantor of the total sum of Four Hundred Sixty-Nine Thousand Eight Hundred Eighty-Four and 60/100 (\$469,884.60) Dollars by Insurer on behalf of the Covenantee, the sufficiency and receipt of which is hereby acknowledged, Covenantor, Covenantee and Insurer agree as follows:

1. If and in the event Covenantor is unable to resolve by agreement and settlement of his claim with the underinsured/uninsured motorist insurer or such other Defendants or insurers who may provide liability, excess or umbrella coverage, Covenantor shall have the right to bring suit against Covenantee and/or said underinsured/uninsured motorist or liability insurers or Defendants, in accordance with South Carolina law, and prosecute the same to final judgment, including any declaratory judgment action regarding coverage.

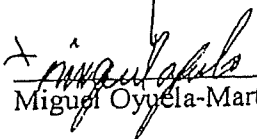
2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that Covenantee, his agents, representatives, heirs and assigns, shall never at any time, be liable to Covenantor, his agents, subrogees, representatives, heirs or assigns, beyond the consideration expressed herein and paid, except to the limits of all available underinsured/uninsured motorist coverage and/or other excess liability or umbrella coverage, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the

payment to Covenantor of the aforementioned sum, Covenantor, his subrogees, agents, representatives, heirs or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against Covenantee, by execution or otherwise, any judgment that may be rendered in any such lawsuit except as herein stated. Covenantor also agrees that he will never seek to collect any such judgment from the personal assets of the Covenantee. Further, immediately upon reduction to judgment of any such lawsuit, Covenantor, his subrogees, agents, representatives, heirs or assigns, will provide Covenantee with an executed satisfaction of said judgment. Moreover, this COVENANT or copy hereof shall be considered and serve as a satisfaction of any such judgment in any claim or lawsuit presented by Covenantor against Covenantee for the aforementioned automobile accident, and can be recorded as such should Covenantor, his subrogees, agents, representatives, heirs or assigns fail to execute a Satisfaction of Judgment.

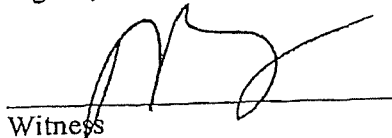
3. Covenantor acknowledges and understands that certain liens may exist on these settlement proceeds, such as liens arising from medical services and/or treatment rendered by various medical providers. In further consideration of the sum paid, Covenantor agrees that any and all outstanding liens will be satisfied out of these proceeds, specifically including but not limited to any lien held by the Government of the United States or by the State of South Carolina, pursuant to any Medicare or Medicaid program or by any workers' compensation carrier. Covenantor hereby agrees to and accepts responsibility to pay all valid liens, subrogation claims and/or assignments relating to this claim. Covenantor also specifically agrees and understands that Covenantee is in no way liable to any one or responsible for any of the aforementioned claims. Covenantee has settled this claim and has no further responsibility whatsoever to any third party by virtue of said third party's rights flowing through Covenantor's claims against Covenantee.

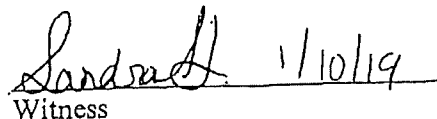
4. Covenantor understands that should CMS (Medicare) find that a Medicare Set-Aside Allocation should have been established and that Medicare's interests were not adequately protected, CMS (Medicare) may require Covenantor to expend up to the entire settlement amount on Medicare covered expenses related to the injury before Medicare will provide coverage for the injury. Covenantor voluntarily accepts this risk and waives any and all claims of any nature and/or damages against Covenantee should Medicare take such action, including, but not limited to a Private Cause of Action against the Insurer (as defined in the preceding paragraphs of this Covenant) under the Medicare Secondary Payer Act (MSP) pursuant to 42 USCA Section 1395y(b)(3)(A).

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10 day of January, 2019.

  
Miguel Oyuela-Martinez

Signed, sealed and delivered in the presence of:

  
Witness

 1/10/19  
Witness

# EXHIBIT B

# AFFIDAVIT OF NO OTHER INSURANCE

I, JOHN R KUHN, hereby certify that on October 24, 2018 the only applicable insurance policy I had was with Progressive Northern Insurance Company under policy number 42096969.

I, JOHN R KUHN, hereby declare that on October 24, 2018, I did not possess, nor was I insured under any other policies of insurance, either automobile or general, which would indemnify or compensate me in case of an automobile accident resulting in property damage, personal injury, or medical expense payments either to myself or another. I declare, under penalty of perjury, that the foregoing is true and accurate.

The undersigned being first duly sworn, hereby affirms that all statements made herein of his or her own knowledge are true and all statements made herein on information and belief are believed to be true.

Signed: \_\_\_\_\_

*John R. Kuhn*  
Signature of individual completing affidavit

Witness Signature:

*Michaela Mayfield*

Witness Address:

*473 Savannah Hwy  
Charleston, SC 29407*

Subscribed, and sworn to, before me, this *9th* day of *January*, year *2019*.

*John R. Kuhn and Michaela Mayfield* whose ~~names~~ *names* personally known to me.

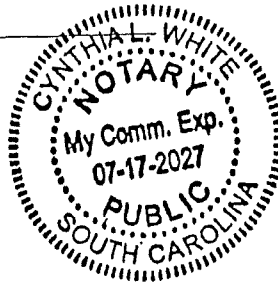
Licensed Notary – State of *South Carolina*

Identification Produced *Drivers Licenses*

Identification (seal) \_\_\_\_\_

*Cynthia L. White*

Form 2576 (11/14)



STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO: 2019-CP-10-0341

Miguel Oyuela-Martinez,  
Plaintiff,  
v.  
Kuhn & Kuhn LLC, and John Robert Kuhn,  
Defendant.

**AFFIDAVIT OF JOHN KUHN**

FILED  
2019 JUN -7 PM 12:35  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY \_\_\_\_\_

Personally appeared before me John Robert Kuhn, who, after being duly sworn, states as follows:

1. My name is John Robert Kuhn and I am a defendant in the above captioned matter.
2. I make this affidavit of my own personal knowledge.
3. On October 24, 2018, at approximately 1:00 p.m., I was operating my personally owned vehicle- a 2017 Audi SUV – and was on a personal errand for the purpose of driving to go and get some lunch. I was by myself. The vehicle I was driving is registered and titled in my name and I am the sole owner. It has always been registered and titled in my name and I have always used it as my personal vehicle. The vehicle is insured under a personal lines auto policy with Progressive Northern Insurance Company. A copy of the declarations page is attached as Exhibit “A”.
4. Unfortunately, while operating my vehicle on October 24, 2018, I was involved in an accident where Miguel Oyuela-Martinez was injured. Mr. Oyuela-Martinez was a pedestrian and was on bench at the time of the accident. A copy of the accident report is attached as Exhibit “B”.
5. In the Answer that has been filed on my individual behalf in this matter, I have admitted fault in my role as a contributing cause of the accident. See attached Exhibit “C”.

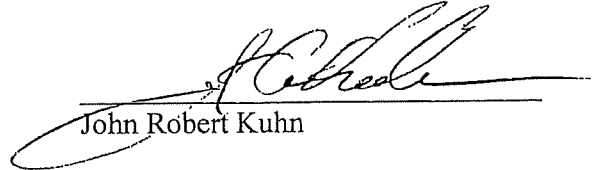
6. Prior to the commencement of this action, Progressive Northern Insurance Company paid Mr. Oyuela-Martinez for his injuries under a Covenant Not to Execute. A copy of that covenant is attached as Exhibit "D".
7. In his complaint, Mr. Oyuela-Martinez now claims that at the time of the accident I was acting as the agent, servant or employee of the law firm of Kuhn & Kuhn, LLC and that consequently Kuhn & Kuhn, LLC is vicariously liable for the accident. Additionally, Mr. Oyuela-Martinez claims that Kuhn & Kuhn, LLC had a duty to supervise my actions as a driver of my personally owned automobile involved in the accident.
8. I am owner and managing partner of the law firm of Kuhn & Kuhn, LLC. Since 2002 Kuhn & Kuhn, LLC has devoted its practice to wills, trusts and probate law.
9. As stated, at the time of this accident, I was driving my personally owned vehicle on a personal trip to purchase lunch for myself. I was not on law firm business of any type, nor was I seeking to accomplish any benefit or purpose for the law firm. I was not buying lunch for any law firm employees or law firm clients. I was not coming from or going to any client of the law firm, nor was I coming from any location or going to any destination to accomplish any law firm business. The law firm was not directing, supervising or controlling my actions in any way at the time of this accident. Additionally, the law firm had no right to control my personal actions (driving or otherwise) on the date of this accident. I was in no way acting as the agent, servant, employee or representative of the law firm. My personal actions in going to get lunch for myself were wholly unrelated in any form or fashion to the legal business of Kuhn & Kuhn, LLC.
10. On the day of the accident I was having phone conversations with a friend (Marina) because I was considering the purchase of a wine shop and was inquiring of Marina if she

would be interested in serving as manager of the shop. I also texted with Marina following the accident. Ultimately, I decided not to purchase the wine shop. This potential business venture and my conversations with Marina were in no way connected to or associated with the legal business of Kuhn & Kuhn, LLC.

11. Following this accident, I spoke with Progressive and gave a recorded interview by telephone in which I was asked about the details of the accident. At one point in that interview I mentioned that I was going to Office Mart for my work. To explain, following the accident my wife came to the scene. After the scene was cleared, we discussed our going together to Office Mart to look at some furniture for our new office location since my vehicle was not drivable and she would be transporting me from the scene. This decision to visit Office Mart was made only after the accident had occurred and was not the reason for my personal trip to get lunch.
12. The mission of Kuhn & Kuhn, LLC is to provide legal services in the areas of wills, trusts and probate matters. As such, the law firm has no duty or responsibility with regard to my actions as an individual driver of my personally owned and personally maintained vehicle. The law firm has no ability to control my actions as an individual driver of my personally owned vehicle because none of these actions are connected or associated in any way with the business of the law firm. Any decisions or actions that I took or failed to take in my individual role as a driver and contributing cause of this accident were completely independent and separate from any actions or services which typically are or would ever be provided by the law firm. Again, as explained herein, the vehicle involved in the accident is my personally owned vehicle titled in my individual name and has no connection to the business of the law firm. Moreover, no vehicle expenses, payments, maintenance or upkeep costs, or taxes of any type or nature have

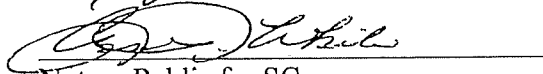
ever been run through the law firm. My individual acts of driving the vehicle do not fall within the scope of services provided by the law firm. Finally, the accident which occurred in this matter did not take place on law firm property.

13. For all of these factual and legal reasons, I am respectfully requesting that this court dismiss the claims filed by Plaintiff against Kuhn & Kuhn, LLC.

  
John Robert Kuhn

Sworn to before me this 23<sup>rd</sup> day of

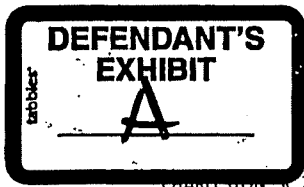
May, 2019



Notary Public for SC

My Commission Expires: 07-17-2027





PANY  
CHARLESTON, SC 29401

JOHN R KUHN  
2 WATER STREET  
CHARLESTON, SC 29401



**Policy Number: 42096969**

Underwritten by:  
Progressive Northern Insurance Co  
August 7, 2018  
Policy Period: Sep 3, 2018 - Mar 3, 2019  
Page 1 of 3

**1-843-577-0585**

**W M MEANS COMPANY**  
Contact your agent for personalized service.

**progressiveagent.com**

**Online Service**  
Make payments, check billing activity, update  
policy information or check status of a claim.

**1-800-274-4499**

To report a claim.

# Auto Insurance Coverage Summary

## This is your Renewal Declarations Page

The coverages, limits and policy period shown apply only if you pay for this policy to renew.

Your coverage begins on September 3, 2018 at 12:01 a.m. This policy expires on March 3, 2019 at 12:01 a.m.

Your insurance policy and any policy endorsements contain a full explanation of your coverage. The policy limits shown for a vehicle may not be combined with the limits for the same coverage on another vehicle. The policy contract is form 9611A SC (10/14). The contract is modified by form A048 SC (07/11).

### Underwriting Company

Progressive Northern Insurance Co  
P.O. Box 6807  
Cleveland, OH 44101  
1-800-876-5581

### Drivers and resident relatives

|               | Additional information |
|---------------|------------------------|
| John R Kuhn   | Named insured          |
| August P Kuhn |                        |
| Madeline Kuhn |                        |
| PHILIP E KUHN |                        |
| LOUISA R KUHN |                        |

**Outline of coverage**

**2008 MERCEDES-BENZ ML350 4 DOOR WAGON**

VIN: **4JGBB86E48A396424**

Garaging ZIP Code: 29401

Primary use of the vehicle: Pleasure

|                                             | Limits                                        | Deductible | Premium |
|---------------------------------------------|-----------------------------------------------|------------|---------|
| Liability To Others                         |                                               |            | \$      |
| Bodily Injury and Property Damage Liability | \$500,000 combined single limit each accident |            |         |
| Uninsured Motorist                          | \$500,000 combined single limit each accident |            |         |
| Deductible Applies to Property Damage       |                                               | \$200      |         |
| Underinsured Motorist                       | \$500,000 combined single limit each accident |            |         |
| Deductible Applies to Property Damage       |                                               | \$0        |         |
| Medical Payments                            | \$5,000 each person                           |            |         |
| Comprehensive                               | Actual Cash Value                             | \$500      |         |
| Comprehensive Window Glass                  |                                               | \$0 glass  |         |
| Total premium for 2008 MERCEDES-BENZ        |                                               |            | \$      |

**2017 AUDI Q5 4 DOOR WAGON**

VIN: **WA1L2AFP2HA027329**

Garaging ZIP Code: 29401

Primary use of the vehicle: Commute

|                                             | Limits                                        | Deductible      | Premium |
|---------------------------------------------|-----------------------------------------------|-----------------|---------|
| Liability To Others                         |                                               |                 | \$      |
| Bodily Injury and Property Damage Liability | \$500,000 combined single limit each accident |                 |         |
| Uninsured Motorist                          | \$500,000 combined single limit each accident |                 |         |
| Deductible Applies to Property Damage       |                                               | \$200           |         |
| Underinsured Motorist                       | \$500,000 combined single limit each accident |                 |         |
| Deductible Applies to Property Damage       |                                               | \$0             |         |
| Medical Payments                            | \$5,000 each person                           |                 |         |
| Comprehensive                               | Actual Cash Value                             | \$500           |         |
| Comprehensive Window Glass                  |                                               | \$0 glass       |         |
| Collision                                   | Actual Cash Value                             | \$500/\$0 glass |         |
| Rental Reimbursement                        | up to \$50 each day/maximum 30 days           |                 |         |
| Roadside Assistance                         |                                               |                 |         |
| Total premium for 2017 AUDI                 |                                               |                 | \$      |

**2017 PORSCHE MACAN 4 DOOR WAGON**

VIN: **WP1AF2A57HLB61320**

Garaging ZIP Code: 29401

Primary use of the vehicle: Business

Number of years owned/leased when policy started or vehicle added: < 1 year

|                                                              | Limits                                        | Deductible      | Premium       |
|--------------------------------------------------------------|-----------------------------------------------|-----------------|---------------|
| Liability To Others                                          |                                               |                 | \$ [REDACTED] |
| Bodily Injury and Property Damage Liability                  | \$500,000 combined single limit each accident |                 |               |
| Uninsured Motorist                                           | \$500,000 combined single limit each accident |                 | [REDACTED]    |
| Deductible Applies to Property Damage                        |                                               | \$200           |               |
| Underinsured Motorist                                        | \$500,000 combined single limit each accident |                 | [REDACTED]    |
| Deductible Applies to Property Damage                        |                                               | \$0             |               |
| Medical Payments                                             | \$5,000 each person                           |                 | [REDACTED]    |
| Comprehensive                                                | Actual Cash Value                             | \$500           | [REDACTED]    |
| Comprehensive Window Glass                                   |                                               | \$0 glass       |               |
| Collision                                                    | Actual Cash Value                             | \$500/\$0 glass | [REDACTED]    |
| Rental Reimbursement                                         | up to \$40 each day/maximum 30 days           |                 | [REDACTED]    |
| Roadside Assistance                                          |                                               |                 | [REDACTED]    |
| Total premium for 2017 PORSCHE ( business use )              |                                               |                 | \$ [REDACTED] |
| <b>Subtotal policy premium</b>                               |                                               |                 | \$ [REDACTED] |
| South Carolina Uninsured Motorist Fund charge                |                                               |                 | [REDACTED]    |
| <b>Total 6 month policy premium and fees</b>                 |                                               |                 | \$ [REDACTED] |
| Discount if paid in full                                     |                                               |                 | [REDACTED]    |
| <b>Total 6 month policy premium if paid in full and fees</b> |                                               |                 | \$ [REDACTED] |

**Premium discounts**

| Policy   |                                                                        |
|----------|------------------------------------------------------------------------|
| 42096969 | Advance Quote, Home Owner, Multi-Car and Continuous Insurance: Diamond |

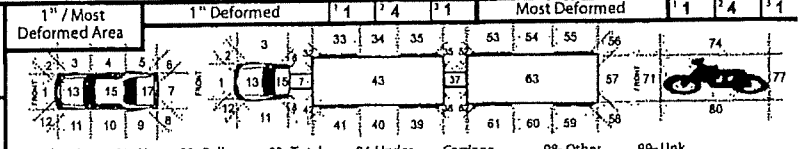


| Unit | Date of Birth | Sex | Race | INJ | Seat | R/S | A.M.D. | Eject | LAI | Tran | Name | Street Address         | Zip Code                              |
|------|---------------|-----|------|-----|------|-----|--------|-------|-----|------|------|------------------------|---------------------------------------|
| 01   | 05-24-1982    | F   | B    | 0   | 01   | 13  | 4      | 9     | 1   | 1    | 2    | WARREN-SI JESSICA CHAR | 6280 ROLLING FORK ROAD NORTH SC 29406 |
| 02   | 07-31-1962    | M   | W    | 0   | 01   | 13  | 4      | 9     | 1   | 1    | 2    | KUHN JOHN ROBER        | 2 WATER STREET CHARLESTO SC 29402     |
| 03   | 09-27-1983    | F   | H    | 0   | 01   | 13  | 4      | 9     | 1   | 1    | 2    | GARCIA-RA SONIA        | 6625 DORCHESTER ROAD NORTH SC 28418   |

|                                        |                            |                        |                              |                                                  |                          |                     |           |
|----------------------------------------|----------------------------|------------------------|------------------------------|--------------------------------------------------|--------------------------|---------------------|-----------|
| <b>Race</b>                            | A - Asian/Pacific Islander | W - Caucasian          | B - African American         | H - Hispanic                                     | O - Other                | U - Unk.            |           |
| <b>Injury Status</b>                   | 0 - Not Injured            | 1 - Possible Injury    | 2 - Non-Incapacitating       | 3 - Incapacitating                               | 4 - Fatal                |                     |           |
| <b>Seating Loc.</b>                    | 01 02 03                   | 04 05 06               | 07 08 09                     | 20 - Pedestrian                                  | 60 - Sleeper of Cab      |                     |           |
| <b>Air Bag Deployment / Switch</b>     | 1 - Deployed Front         | 4 - Not Deployed       | 2 - Deployed Side            | 7 - Not Applicable                               | 3 - Deployed Both        | 9 - Deployment Unk. |           |
| <b>Ejection</b>                        | 1 - Not Ejected            | 2 - Part Ejected       | 3 - Tot. Ejected             | 7 - Not App.                                     | 9 - Unk.                 |                     |           |
| <b>Head Injury</b>                     | 1 - Yes                    | 2 - No                 | <b>Location After Impact</b> | 3 - Freed (non-mech.)                            | 4 - Not Applicable       |                     |           |
| <b>Transported to Medical Facility</b> | 1 - Yes                    | 2 - No                 | 3 - Unknown                  | <b>By:</b> 1 - EMS 2 - Police 8 - Other 9 - Unk. |                          |                     |           |
| <b>Restraint/Safety Device</b>         | 00 - None Used             | 21 - Child Safety Seat | 11 - Shoulder belt           | 12 - Lap Belt Only                               | 13 - Shoulder & Lap Belt | 88 - Other          | 99 - Unk. |

|                                |                                |                         |                                |                           |                                 |                          |                         |                          |                                 |                              |                           |                          |                                |                                      |                              |               |                     |                            |                                        |                                           |           |                   |                                 |
|--------------------------------|--------------------------------|-------------------------|--------------------------------|---------------------------|---------------------------------|--------------------------|-------------------------|--------------------------|---------------------------------|------------------------------|---------------------------|--------------------------|--------------------------------|--------------------------------------|------------------------------|---------------|---------------------|----------------------------|----------------------------------------|-------------------------------------------|-----------|-------------------|---------------------------------|
| <b>Non-Collision</b>           | 04 - Equipment Failure         | 05 - Fire/Explosion     | 06 - Immersion                 | 07 - Jackknife            | 08 - Overturn/Rollover          | 09 - Ran off Road Left   | 10 - Ran off Road Right | 11 - Separation of Units | 12 - Spill (1 Two-Wheeled Veh.) | 18 - Other Noncollision      | 19 - Unk. Non-collision   |                          |                                |                                      |                              |               |                     |                            |                                        |                                           |           |                   |                                 |
| <b>Collision: Not Fixed</b>    | 20 - Animal (Deer Only)        | 21 - Animal (All Other) | 22 - Motor Veh. (In Transport) | 23 - Motor Veh. (Stopped) | 24 - Motor Veh. (Other Runaway) | 25 - Motor Veh. (Paired) | 26 - Pedalcycle         | 27 - Pedestrian          | 28 - Railway Veh.               | 29 - Work Zone Maint. Equip. | 30 - Other Movable Object | 39 - Unk. Movable Object |                                |                                      |                              |               |                     |                            |                                        |                                           |           |                   |                                 |
| <b>Collision: Fixed Object</b> | 40 - Bridge Overhead Structure | 41 - Bridge Parapet End | 42 - Bridge Pier or Abutment   | 43 - Bridge Rail          | 44 - Culvert                    | 45 - Curb                | 46 - Ditch              | 47 - Embankment          | 48 - Equipment                  | 49 - Fence                   | 50 - Guardrail End        | 51 - Guardrail Face      | 52 - Highway Traffic Sign Post | 53 - Impact Attenuator/Crash Cushion | 54 - Light/Luminaire Support | 55 - Mail Box | 56 - Median Barrier | 57 - Overhead Sign Support | 58 - Other (Post, Pole, Support, Etc.) | 59 - Other (Wall, Building, Tunnel, Etc.) | 60 - Tree | 61 - Utility Pole | 62 - Work Zone Maint. Equipment |

|                                          |                              |                       |                          |                     |                    |                           |                         |                         |                      |                          |                              |                      |                   |                    |                    |                              |
|------------------------------------------|------------------------------|-----------------------|--------------------------|---------------------|--------------------|---------------------------|-------------------------|-------------------------|----------------------|--------------------------|------------------------------|----------------------|-------------------|--------------------|--------------------|------------------------------|
| <b>Manner of Collision (Struck Veh.)</b> | 00 - Not Coll. w/ Motor Veh. | 10 - Rear End Collide | 20 - Head On             | 30 - Rear-to-Rear   | 40 - Angle (↘/↗)   | 41 - Angle (↖/↘)          | 42 - Angle (↔)          | 43 - Angle (↗/↘)        | 44 - Angle (↖/↗)     | 50 - Sideswipe Same Dir. | 60 - Sideswipe Opposite Dir. | 70 - Backed Into     | 99 - Unknown      |                    |                    |                              |
| <b>Vehicle Type:</b>                     | 01 - Automobile              | 02 - Pickup Truck     | 03 - Truck Tractor       | 04 - Other Truck    | 15 - Full Size Van | 16 - Mini Van             | 17 - Sport Utility      | 25 - Motorcycle         | 26 - Other Motorbike | 27 - Pedalcycle          | 38 - Animal Drawn Veh        | 39 - Animal (Ridden) | 61 - School Bus   | 62 - Passenger Bus | 98 - Other         | 99 - Unk. (Hit and Run Only) |
| <b>Vehicle Use Code</b>                  | 01 - Personal                | 02 - Driver Training  | 03 - Construction/Maint. | 04 - Ambulance      | 05 - Military      | 06 - Transport Passengers | 07 - Transport Property | 08 - Farm Use           | 09 - Wrecker or Tow  | 10 - Police              | 11 - Government              | 12 - Fire Fighting   | 13 - Logging      | 18 - Other         | 41 - Pedestrian    |                              |
| <b>Vehicle Attachment</b>                | 1 - None                     | 2 - Mobile Home       | 3 - Semi-Trailer         | 4 - Utility Trailer | 5 - Farm Trailer   | 6 - Trailer w/ Boat       | 7 - Camper Trailer      | 8 - Towed Motor Vehicle | 9 - Petroleum Tanker | 10 - Lowboy Trailer      | 11 - Autocarrier Trailer     | 12 - Flat Bed        | 13 - Other Tanker | 14 - Flat Bed      | 15 - Twin Trailers | 16 - Other                   |



|                                  |                           |                                          |                               |                      |                          |                        |           |           |           |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |             |
|----------------------------------|---------------------------|------------------------------------------|-------------------------------|----------------------|--------------------------|------------------------|-----------|-----------|-----------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|------------|-------------|
| <b>Alcohol / Drug Test Given</b> | 1 - Given - Known Results | 2 - Given - Unusable                     | 3 - Given - Pending           | 4 - None             | 5 - Refused              |                        |           |           |           |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |             |
| <b>Test Type</b>                 | 1 - Breath (Alc Only)     | 2 - Blood                                | 3 - Urine                     | 4 - Serum            | 8 - Other                |                        |           |           |           |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |             |
| <b>Drug Results</b>              | 1 - Amphetamines          | 2 - Cocaine                              | 3 - Marijuana                 | 4 - Opiates 7 - None | 5 - PCP 8 - Other        |                        |           |           |           |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |             |
| <b>AIC Test Results</b>          | 1 - Two-way, Not Divided  | 2 - Two-way, Divided, Unprotected Median | 3 - Two-way, Divided, Barrier | 4 - One-Way          | 8 - Other                |                        |           |           |           |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |             |
| <b>Extent of Deformity</b>       | 0 - None/Minor            | 1 - Under-Compartment Intrusion          | 2 - Under-No Intrusion        | 3 - Under-Unknown    | 4 - Over-MV in transport | 5 - Over-Other Vehicle | 6 - None  | 9 - Unk.  |           |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |            |             |
| <b>Functional Damage</b>         | 1 - 1-2                   | 2 - 3-4                                  | 3 - 5-6                       | 4 - 7-8              | 5 - 9-10                 | 6 - 11-12              | 7 - 13-14 | 8 - 15-16 | 9 - 17-18 | 10 - 19-20 | 11 - 21-22 | 12 - 23-24 | 13 - 25-26 | 14 - 27-28 | 15 - 29-30 | 16 - 31-32 | 17 - 33-34 | 18 - 35-36 | 19 - 37-38 | 20 - 39-40 | 21 - 41-42 | 22 - 43-44 | 23 - 45-46 | 24 - 47-48 | 25 - 49-50 | 26 - 51-52 | 27 - 53-54 | 28 - 55-56 | 29 - 57-58 | 30 - 59-60 | 31 - 61-62 | 32 - 63-64 | 33 - 65-66 | 34 - 67-68 | 35 - 69-70 | 36 - 71-72 | 37 - 73-74 | 38 - 75-76 | 39 - 77-78 | 40 - 79-80 | 41 - 81-82 | 42 - 83-84 | 43 - 85-86 | 44 - 87-88 | 45 - 89-90 | 46 - 91-92 | 47 - 93-94 | 48 - 95-96 | 49 - 97-98 | 50 - 99-100 |

|                                         |                                   |                     |                            |                                 |                             |                                           |                                     |                       |                                    |                   |                    |            |                                  |                                 |                                 |                      |               |                                |              |
|-----------------------------------------|-----------------------------------|---------------------|----------------------------|---------------------------------|-----------------------------|-------------------------------------------|-------------------------------------|-----------------------|------------------------------------|-------------------|--------------------|------------|----------------------------------|---------------------------------|---------------------------------|----------------------|---------------|--------------------------------|--------------|
| <b>Action Prior to Impact (Vehicle)</b> | 01 - Backing                      | 02 - Changing lanes | 03 - Entering traffic lane | 04 - Leaving traffic lane       | 05 - Making U-turn          | 06 - Movements Essentially Straight Ahead | 07 - Overtaking/passing             | 08 - Parked           | 09 - Slowing or Stopped in traffic | 10 - Turning left | 11 - Turning right | 18 - Other | 21 - Approaching/Leaving Vehicle | 22 - Entering/Crossing Location | 23 - Playing/Working on Vehicle | 24 - Pushing Vehicle | 25 - Standing | 26 - Walking, Playing, Cycling | 27 - Working |
| <b>Weather Condition</b>                | 1 - Clear (no adverse conditions) | 2 - Rain            | 3 - Cloudy                 | 4 - Sleet, Hail                 | 5 - Snow                    | 6 - Fog, Smog, Smoke                      | 7 - Blowing Sand, Oil, Dirt or Snow | 8 - Severe Crosswinds | 9 - Unk.                           |                   |                    |            |                                  |                                 |                                 |                      |               |                                |              |
| <b>Light Condition</b>                  | 1 - Daylight                      | 2 - Dawn            | 3 - Dusk                   | 4 - Dark (Lighting Unspecified) | 5 - Dark (Street Lamp Lit)  | 6 - Dark (Street Lamp Not Lit)            | 7 - Dark (No Lights)                |                       |                                    |                   |                    |            |                                  |                                 |                                 |                      |               |                                |              |
| <b>Junction Type</b>                    | 01 - Crossover                    | 02 - Driveway       | 03 - Five/More Points      | 04 - Four-way Intersection      | 05 - Railway Grade Crossing | 07 - Shared Use Paths or Trails           | 08 - T-Intersection                 | 09 - Traffic Circle   | 12 - Y - Intersection              | 13 - Nonjunction  |                    |            |                                  |                                 |                                 |                      |               |                                |              |

|                                     |                                       |                                      |                                      |                                         |                                     |                                        |                                             |                                         |                                    |                               |                                      |                                    |                                  |                              |                          |                                    |                                 |                    |                   |                            |           |
|-------------------------------------|---------------------------------------|--------------------------------------|--------------------------------------|-----------------------------------------|-------------------------------------|----------------------------------------|---------------------------------------------|-----------------------------------------|------------------------------------|-------------------------------|--------------------------------------|------------------------------------|----------------------------------|------------------------------|--------------------------|------------------------------------|---------------------------------|--------------------|-------------------|----------------------------|-----------|
| <b>Primary Contributing Factors</b> | 01 - Disregarded Signs, Signals, Etc. | 02 - Distracted/Inattention          | 03 - Driving Too Fast for Conditions | 04 - Exceeded Authorized Speed Limit    | 05 - Failed to Yield Right of Way   | 06 - Ran off Road                      | 07 - Fatigued/Asleep                        | 08 - Followed Too Closely               | 09 - Made an Improper Turn         | 10 - Medical Related          | 11 - Aggressive Operation of Vehicle | 12 - Over-correcting/Over-steering | 13 - Swerving to Avoiding Object | 14 - Wrong Side or Wrong Way | 15 - Under the Influence | 16 - Vision Obscured (Within Unit) | 17 - Improper lane Usage/Change | 18 - On Cell Phone | 19 - 20 - Texting | 28 - Other Improper Action | 29 - Unk. |
| <b>Roadway</b>                      | 30 - Debris                           | 31 - Non-highway Work                | 32 - Obstruction in Roadway          | 33 - Road Surface Condition (i.e., Wet) | 34 - Rut, Holes, Bumps              | 35 - Shoulders (None, Low, Soft, High) | 36 - Traffic Control Device (i.e., Missing) | 37 - Work Zone (Constr./Maint./Utility) | 38 - Worn, Travel-Polished Surface | 48 - Other                    | 49 - Unk.                            |                                    |                                  |                              |                          |                                    |                                 |                    |                   |                            |           |
| <b>Non-Motorist</b>                 | 50 - Inattentive                      | 51 - Lying &/or Illegally in Roadway | 52 - Failure to Yield R. of W.       | 53 - Not Visible (Dark Clothing)        | 54 - Disregard Signs, Signals, Etc. | 55 - Improper Crossing                 | 56 - Darting                                | 57 - Wrong Side of Road                 | 66 - Under the Infl.               | 67 - Other Person Under Infl. |                                      |                                    |                                  |                              |                          |                                    |                                 |                    |                   |                            |           |
| <b>Environmental</b>                | 60 - Animal In Road                   | 61 - Glare                           | 62 - Obstruction                     | 63 - Weather Cond.                      | 68 - Other                          | 69 - Unk.                              |                                             |                                         |                                    |                               |                                      |                                    |                                  |                              |                          |                                    |                                 |                    |                   |                            |           |
| <b>Vehicle Defect</b>               | 70 - Brakes                           | 71 - Steering                        | 72 - Power Plant                     | 73 - Tires/Wheel                        | 74 - Lights                         | 75 - Signals                           | 76 - Windows/Shield                         | 77 - Restraint System                   | 78 - Truck Coupling                | 79 - Cargo                    | 80 - Fuel System                     | 88 - Other                         | 89 - Unk.                        |                              |                          |                                    |                                 |                    |                   |                            |           |

Mail FR-10 to: SC Department of Motor Vehicles  
Office of Financial Responsibility (803) 896-5000  
PO Box 1498, Blythewood, SC 29016-0050

SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES FR-10 (REV. 04/2016)  
NOTICE OF REQUIREMENT

Submit Electronically: Agents or Company  
Representatives can submit your Insurance  
Information at WWW.SC-ALIR.COM

Date: 10-24-2018 Time: 1 2 5 9 County: 10 Interstate: 1-Interstate 2-US Primary 3-SC Primary Secondary: 4-Secondary 5-County 6-PP Collision Location (Rt. # / Name): 575 / ASHLEY PHOSPHATE RD Main line: 0-2-Alternate 5-Spur 6-Connection 7-Business Miles: Dir: N E S W Near City or Town of: NORTH CHARLESTON

To Vehicle Owner/Operator: Failure to return this form to the Department of Motor Vehicles within 15 days from the date of the collision could result in the suspension of your driver license and registration privileges pursuant to South Carolina Code of Laws 56-9-351 and 56-10-530.

|                                      |                    |                           |                               |                                                                   |                    |                     |                   |                                      |                    |                           |                               |                                                   |                    |                     |                   |
|--------------------------------------|--------------------|---------------------------|-------------------------------|-------------------------------------------------------------------|--------------------|---------------------|-------------------|--------------------------------------|--------------------|---------------------------|-------------------------------|---------------------------------------------------|--------------------|---------------------|-------------------|
| W-291951                             |                    |                           |                               | Driver/Pedestrian's Full Name<br>WARREN-SIMMONS JESSICA CHARMAINE |                    |                     |                   | W-291952                             |                    |                           |                               | Driver/Pedestrian's Full Name<br>KUHN JOHN ROBERT |                    |                     |                   |
| Unit #                               | Sex                | Race                      | Street                        | Unit #                                                            | Sex                | Race                | Street            | Unit #                               | Sex                | Race                      | Street                        | Unit #                                            | Sex                | Race                | Street            |
| 01                                   | F                  | B                         | 6280 ROLLING FORK ROAD APT. H | 02                                                                | M                  | W                   | 2 WATER STREET    | 01                                   | F                  | B                         | 6280 ROLLING FORK ROAD APT. H | 02                                                | M                  | W                   | 2 WATER STREET    |
| #Occ                                 | Birth Date         | City, State, & Zip        |                               | #Occ                                                              | Birth Date         | City, State, & Zip  |                   | #Occ                                 | Birth Date         | City, State, & Zip        |                               | #Occ                                              | Birth Date         | City, State, & Zip  |                   |
| 1                                    | 05-24-1982         | NORTH CHARLESTON SC 29406 |                               | 1                                                                 | 07-31-1962         | CHARLESTON SC 29402 |                   | 1                                    | 05-24-1982         | NORTH CHARLESTON SC 29406 |                               | 1                                                 | 07-31-1962         | CHARLESTON SC 29402 |                   |
| State                                | Driver's License # |                           |                               | State                                                             | Driver's License # |                     |                   | State                                | Driver's License # |                           |                               | State                                             | Driver's License # |                     |                   |
| SC                                   | 103001702 D        |                           |                               | SC                                                                | 004234640 D        |                     |                   | SC                                   | 103001702 D        |                           |                               | SC                                                | 004234640 D        |                     |                   |
| Year                                 | Body               | Vehicle Make              | VIN #                         | Year                                                              | Body               | Vehicle Make        | VIN #             | Year                                 | Body               | Vehicle Make              | VIN #                         | Year                                              | Body               | Vehicle Make        | VIN #             |
| 2011                                 | SU                 | JEEP                      | 1J4RS4GG4BC843930             | 2017                                                              | SU                 | AUDI                | WA1L2AFP2HA027329 | 2011                                 | SU                 | JEEP                      | 1J4RS4GG4BC843930             | 2017                                              | SU                 | AUDI                | WA1L2AFP2HA027329 |
| State                                | Year               | License Plate #           | Owner's D.L. #                | State                                                             | Year               | License Plate #     | Owner's D.L. #    | State                                | Year               | License Plate #           | Owner's D.L. #                | State                                             | Year               | License Plate #     | Owner's D.L. #    |
| CA                                   | 2019               | QCQ566                    | 103001702                     | SC                                                                | 2019               | MXA520              | 004234640         | CA                                   | 2019               | QCQ566                    | 103001702                     | SC                                                | 2019               | MXA520              | 004234640         |
| Home Telephone (843) 3406573         |                    |                           |                               | Owner's Full Name<br>WARREN-SIMMONS JESSICA CHARMAINE             |                    |                     |                   | Home Telephone (843) 3406573         |                    |                           |                               | Owner's Full Name<br>KUHN JOHN ROBERT             |                    |                     |                   |
| Bus. Telephone ( )                   |                    |                           |                               | Street<br>6280 ROLLING FORK ROAD APT. H                           |                    |                     |                   | Bus. Telephone ( )                   |                    |                           |                               | Street<br>2 WATER STREET                          |                    |                     |                   |
| Contributed To Collision<br>Yes (No) |                    |                           |                               | City, State, & Zip<br>NORTH CHARLESTON SC 29406                   |                    |                     |                   | Contributed To Collision<br>Yes (No) |                    |                           |                               | City, State, & Zip<br>CHARLESTON SC 29402         |                    |                     |                   |

|          |                    |                           |                             |                                                      |  |  |                                              |                                                 |      |                 |                |
|----------|--------------------|---------------------------|-----------------------------|------------------------------------------------------|--|--|----------------------------------------------|-------------------------------------------------|------|-----------------|----------------|
| W-291953 |                    |                           |                             | Driver/Pedestrian's Full Name<br>GARCIA-RANGEL SONIA |  |  |                                              | State                                           | Year | License Plate # | Owner's D.L. # |
| Unit #   | Sex                | Race                      | Street                      | Home Telephone (843) 7516200                         |  |  |                                              | CA                                              | 2019 | KMW340          | NONE           |
| 03       | F                  | H                         | 6625 DORCHESTER ROAD LOT 55 | Owner's Full Name<br>GARCIA-RANGEL SONIA             |  |  |                                              |                                                 |      |                 |                |
| #Occ     | Birth Date         | City, State, & Zip        |                             | Bus. Telephone ( )                                   |  |  |                                              | Street<br>6625 DORCHESTER ROAD LOT 55           |      |                 |                |
| 1        | 09-27-1983         | NORTH CHARLESTON SC 29418 |                             | Contributed To Collision<br>Yes (No)                 |  |  |                                              | City, State, & Zip<br>NORTH CHARLESTON SC 29418 |      |                 |                |
| State    | Driver's License # |                           |                             | Insurance Company:                                   |  |  | Accident Insurance Information for Unit # 02 |                                                 |      |                 |                |
| OT       | NONE               |                           |                             | GAINSCO                                              |  |  | Company Name<br>PROGRESSIVE                  |                                                 |      |                 |                |
| Year     | Body               | Vehicle Make              | VIN #                       | Accident Insurance Information for Unit # 01         |  |  | Area Code/Phone Number<br>(843) 5770585      |                                                 |      |                 |                |
| 2008     | VN                 | HOND                      | 5FNRL38788B004215           | Company Name<br>STATE FARM                           |  |  | Policy Number<br>42096969                    |                                                 |      |                 |                |

|                                                                               |  |  |  |                                              |  |  |  |                                         |  |  |  |
|-------------------------------------------------------------------------------|--|--|--|----------------------------------------------|--|--|--|-----------------------------------------|--|--|--|
| All Units Insurance Information<br>(to be completed by Investigating Officer) |  |  |  |                                              |  |  |  |                                         |  |  |  |
| Accident Insurance Information for Unit # 01                                  |  |  |  | Accident Insurance Information for Unit # 03 |  |  |  |                                         |  |  |  |
| Company Name<br>STATE FARM                                                    |  |  |  | Company Name<br>GAINSCO                      |  |  |  | Company Name<br>GAINSCO                 |  |  |  |
| Area Code/Phone Number<br>(843) 4949843                                       |  |  |  | Area Code/Phone Number<br>(843) 4949843      |  |  |  | Area Code/Phone Number<br>(866) 4246726 |  |  |  |
| Agency Name<br>SHANNON FREEMAN                                                |  |  |  | Agency Name<br>GAINSCO                       |  |  |  | Agency Name<br>GAINSCO                  |  |  |  |
| Policy Number<br>598 0969-A27-40                                              |  |  |  | Policy Number<br>598 0969-A27-40             |  |  |  | Policy Number<br>45MGEP0178880-00       |  |  |  |

|                                                                                                                                                                                           |  |              |  |                |  |                                                                                                                                                                                                                                        |  |  |                                            |  |  |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--------------|--|----------------|--|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|--|--------------------------------------------|--|--|
| Automobile Liability Insurance Information                                                                                                                                                |  |              |  |                |  |                                                                                                                                                                                                                                        |  |  |                                            |  |  |
| Notice of Requirement Accepted                                                                                                                                                            |  |              |  |                |  | Signature                                                                                                                                                                                                                              |  |  | Y N Refused to Affix Signature?            |  |  |
|                                                                                                                                                                                           |  |              |  |                |  |                                                                                                                                                                                                                                        |  |  | Y N Vehicle Subject to Registration in SC? |  |  |
| To Be Completed Below or Entered at WWW.SC-ALIR.COM By Insurance Company representative. This form should not be mailed to DMV if insurance information has been submitted electronically |  |              |  |                |  | The information as contained herein is based solely upon my knowledge and belief as a representative of the above insurance company and no warranty of liability is imputed into the above mentioned insurance as I have listed herein |  |  |                                            |  |  |
| Reference to Unit #: _____, I hereby affirm that to the best of my knowledge the vehicle described above was insured by the below stated insurance company on the date of the collision.  |  |              |  |                |  |                                                                                                                                                                                                                                        |  |  |                                            |  |  |
| Insurance Company                                                                                                                                                                         |  |              |  | Policy #:      |  | Signature                                                                                                                                                                                                                              |  |  | Title                                      |  |  |
| Beginning Date:                                                                                                                                                                           |  | Ending Date: |  | Policy Holder: |  | NAIC# (Assigned by S.C. Dept. of Ins.)                                                                                                                                                                                                 |  |  | Bus. Telephone ( )                         |  |  |

Notice: If liability insurance was not in effect for your vehicle involved in the collision, the Department of Motor Vehicles could suspend your driver license and registration privileges pursuant to South Carolina Code of Laws 56-9-351 and 56-10-530.

|                                                                                                                                                                       |  |             |  |                      |  |                                                     |  |      |                 |                                            |  |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|-------------|--|----------------------|--|-----------------------------------------------------|--|------|-----------------|--------------------------------------------|--|
| If any of the below are applicable, Disregard the above portion.                                                                                                      |  |             |  |                      |  | Form FR-10 Not Issued: Section 56-10-520            |  |      |                 |                                            |  |
| Check here if a Form SR-23, Fleet policy of 25 or more vehicles is on file with the Department of Motor Vehicles covering the vehicle                                 |  |             |  |                      |  | No FR-10 Issued to Operator/ Owner of Unit #: _____ |  |      |                 |                                            |  |
| Check here if a certificate of self-insurance has been issued by the Department of Motor Vehicles covering the vehicle and indicate the certificate number: SI- _____ |  |             |  |                      |  | Summons Issued to:                                  |  |      |                 |                                            |  |
| Check here if liability insurance was not in effect to comply with South Carolina statutory requirements                                                              |  |             |  |                      |  | Signature                                           |  |      | Summons Number: |                                            |  |
|                                                                                                                                                                       |  |             |  |                      |  | Date                                                |  |      | Signature       |                                            |  |
| Investigating Officer's Name<br>COBB - DARIN A                                                                                                                        |  | Rank<br>SGT |  | SCCIA #<br>2253-1344 |  | Code<br>1 0 0 8                                     |  | Date |                 | Reviewer's Name                            |  |
|                                                                                                                                                                       |  |             |  |                      |  |                                                     |  |      |                 | Rank<br>Internal Agency Code<br>2018032155 |  |

ORIGINAL

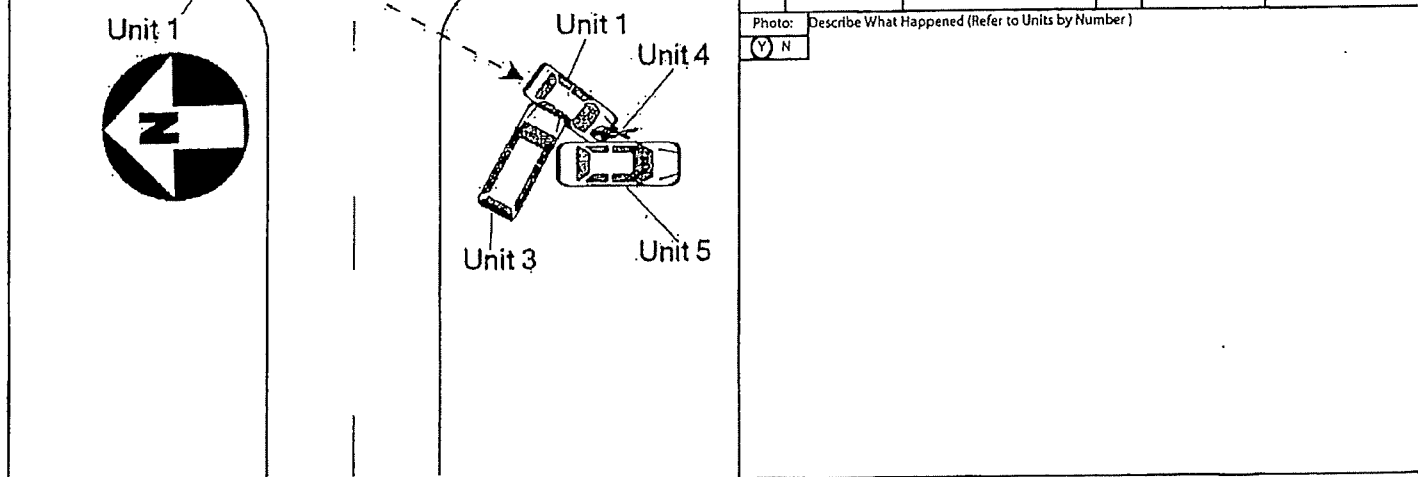
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|---------------------------------------|--|-------------|--------------------------------------------------------------------------|--|------------------|-------------------------------------------------------|------------------|-----------------|
| SOUTH CAROLINA DPS/OHS & DMV USE ONLY |  | Page #<br>2 | SOUTH CAROLINA<br>TRAFFIC COLLISION REPORT FORM<br>TR-310 (Rev. 04/2016) |  | # Of Units<br>05 | Amended - Attach Copy of Original Report<br>Corrected | Notified<br>1301 | Arrived<br>1304 |
|---------------------------------------|--|-------------|--------------------------------------------------------------------------|--|------------------|-------------------------------------------------------|------------------|-----------------|

|                                   |                                                  |                      |                                                 |                                               |                                                                 |                                         |                                          |                                                                                                           |                                               |
|-----------------------------------|--------------------------------------------------|----------------------|-------------------------------------------------|-----------------------------------------------|-----------------------------------------------------------------|-----------------------------------------|------------------------------------------|-----------------------------------------------------------------------------------------------------------|-----------------------------------------------|
| Date<br>10-24-2018                | Time of Collision<br>1259                        | County<br>10         | 1- Interstate<br>2- US Primary<br>3- SC Primary | 4- Secondary<br>5- County<br>6- PP 7- Ramp    | Collision Location (Rt. # / Name)<br>5 75 / ASHLEY PHOSPHATE RD | 0- Main Line<br>2- Alternate<br>5- Spur | 6- Connection<br>7- Business             | Miles:<br>Dir. N E S W                                                                                    | In/ Near City or Town of:<br>NORTH CHARLESTON |
| Lane # / Dir.<br># 3 Of 6 N E S W | Distance Offset<br>.00                           | Direction<br>N E S W | 1- Interstate<br>2- US Primary<br>3- SC Primary | 4- Secondary<br>5- County<br>6- Other 7- Ramp | Base Intersection (Rt. # / Name)<br>From 998 / ROCK ST          | 0- Main Line<br>2- Alternate<br>5- Spur | 6- Connection<br>7- Business<br>9- Other | GPS COORDINATES 00 00' 00.00"<br>DEGREES MINUTES SECONDS<br>Latitude 32 55 57.27<br>Longitude 80 03 17.11 |                                               |
| R.R. Id.                          | From Ramp Only<br>N E 1- Entrance<br>S W 2- Exit | To<br>N E<br>S W     | 1- Interstate<br>2- US Primary<br>3- SC Primary | 4- Secondary<br>5- County<br>6- Other 7- Ramp | Second Intersection (Rt. # / Name)<br>Toward 280 / STALL RD     | 0- Main Line<br>2- Alternate<br>5- Spur | 6- Connection<br>7- Business<br>9- Other |                                                                                                           |                                               |

|                                                           |                          |                    |                    |                                                          |                                     |                           |                             |
|-----------------------------------------------------------|--------------------------|--------------------|--------------------|----------------------------------------------------------|-------------------------------------|---------------------------|-----------------------------|
| W-291954 Driver/Pedestrian's Full Name<br>OYUELA MIGUEL A |                          |                    |                    | W-291955 Driver/Pedestrian's Full Name<br>LEGALLY PARKED |                                     |                           |                             |
| Unit #<br>04                                              | Sex<br>M                 | Race<br>H          | Street<br>UNKNOWN  | Unit #<br>05                                             | Sex                                 | Race                      | Street                      |
| #Occ<br>1                                                 | Birth Date<br>01-22-1949 | City, State, & Zip |                    | #Occ<br>0                                                | Birth Date                          | City, State, & Zip        |                             |
| State<br>OT                                               | Driver's License #       | Class              | Insurance Company. | State                                                    | Driver's License #                  | Class                     | Insurance Company.<br>GEICO |
| Year                                                      | Body                     | Vehicle Make       | VIN #              | Year<br>2013                                             | Body<br>4S                          | Vehicle Make<br>MERZ      | VIN #<br>WDDGF8AB5DR298967  |
| State                                                     | Year                     | License Plate #    | Owner's D.L. #     | State<br>SC                                              | Year<br>2019                        | License Plate #<br>MMZ158 | Owner's D.L. #<br>100434108 |
| Home Telephone<br>( )                                     | Owner's Full Name        |                    |                    | Home Telephone<br>(843) 4126749                          | Owner's Full Name<br>JUSTIN MATTHEW |                           |                             |
| Bus. Telephone<br>( )                                     | Street                   |                    |                    | Bus. Telephone<br>( )                                    | Street<br>9640 STOCKPORT CIRCLE     |                           |                             |
| Contributed To Collision<br>Yes No                        | City, State, & Zip       |                    |                    | Contributed To Collision<br>Yes No                       | City, State, & Zip<br>SC 29485      |                           |                             |

|                               |                    |                                 |                                |                                                    |                       |                                 |                                 |                                 |                                                    |
|-------------------------------|--------------------|---------------------------------|--------------------------------|----------------------------------------------------|-----------------------|---------------------------------|---------------------------------|---------------------------------|----------------------------------------------------|
| Estimated Speed<br>0          | Speed Limit<br>NP  | C.D.L. Req: Yes No<br>Statute # | T/B S Req: Yes No<br>Statute # | Alc/Drg info (see back): Yes No<br>Towed By Yes No | Estimated Speed<br>0  | Speed Limit<br>NP               | C.D.L. Req: Yes No<br>Statute # | T/B S Req: Yes No<br>Statute #  | Alc/Drg info (see back): Yes No<br>Towed By Yes No |
| Driver/Pedestrian's Full Name |                    |                                 |                                | State                                              | Year                  | License Plate #                 | Owner's D.L. #                  |                                 |                                                    |
| Unit #                        | Sex                | Race                            | Street                         | Home Telephone<br>( )                              |                       | Owner's Full Name               |                                 |                                 |                                                    |
| #Occ                          | Birth Date         | City, State, & Zip              |                                |                                                    | Bus. Telephone<br>( ) |                                 | Street                          |                                 |                                                    |
| State                         | Driver's License # | Class                           | Insurance Company.             | Contributed To Collision<br>Yes No                 |                       | City, State, & Zip              |                                 |                                 |                                                    |
| Year                          | Body               | Vehicle Make                    | VIN #                          | Estimated Speed                                    | Speed Limit           | C.D.L. Req: Yes No<br>Statute # | T/B S Req: Yes No<br>Statute #  | Alc/Drg info (see back): Yes No | Towed By Yes No                                    |

|                                   |             |                   |                         |                 |       |
|-----------------------------------|-------------|-------------------|-------------------------|-----------------|-------|
| Dir. of Travel: Unit 1: N (S) E W |             | Unit 2: N S E (W) |                         | Unit 3: N S E W |       |
| Unit 1 Dam.                       | Unit 2 Dam. | Unit 3 Dam.       | Prop. Dam. 1            | Prop. Dam. 2    |       |
| \$0                               | \$1000      | \$                | \$                      | \$              |       |
| Property Owner/Witness:           |             |                   | Property Owner/Witness: |                 |       |
| Address                           |             |                   | Address                 |                 |       |
| State                             | Zip:        | Phone             | State                   | Zip:            | Phone |



NOTICE - THE TR-310 IS FOR STATISTICAL REPORTING PURPOSES ONLY AND IS A REFLECTION OF THE OFFICER'S BEST KNOWLEDGE, OPINION AND BELIEF COVERING THE COLLISION BUT NO WARRANTY IS MADE AS TO THE FACTUAL ACCURACY THEREOF.

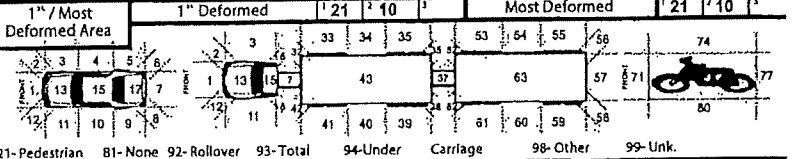
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|------------------------------------------------|-------------|----------------------|------------------------------|---------------------------|---------------------------------|--------------|------------------------------------|
| Investigating Officer's Name<br>COBB - DARIN A | Rank<br>SGT | SCCJA #<br>2253-1344 | Jurisdiction Code<br>1 0 0 8 | Review Date<br>10-29-2018 | Reviewer's Name<br>ANTHONY KING | Rank<br>SGT. | Internal Agency Code<br>2018032155 |
|------------------------------------------------|-------------|----------------------|------------------------------|---------------------------|---------------------------------|--------------|------------------------------------|

| Unit: | Date of Birth | Sex: | Race | INU: | Seat: | R/S | A.B.D. | Eject: | LAI: | Tran: | Name            | Street Address | Zip Code |
|-------|---------------|------|------|------|-------|-----|--------|--------|------|-------|-----------------|----------------|----------|
| 04    | 01-22-1949    | M    | H    | 3    | 20    | 00  | 4      | 3      | 1    | 1     | OYUELA MIGUEL A | UNKNOWN        |          |
| 05    |               |      |      |      | 99    |     |        |        |      |       | LEGALLY         |                |          |

|                                    |                                                                                             |                                                               |                                                                             |                                                                                    |                                                         |                                                                                                                                                                    |                                                                                 |                                                                                                                          |                                                      |
|------------------------------------|---------------------------------------------------------------------------------------------|---------------------------------------------------------------|-----------------------------------------------------------------------------|------------------------------------------------------------------------------------|---------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------|
| <b>Race</b>                        | A - Asian/Pacific Islander<br>B - African American<br>I - Alaskan Native or American Indian | W - Caucasian<br>H - Hispanic<br>O - Other<br>U - Unk.        | <b>a) Injury Status</b><br>0 - Not Injured<br>1 - Possible Injury           | 2 - Non-Incapacitating<br>3 - Incapacitating<br>4 - Fatal                          | <b>Seating Loc.</b><br>01 02 03<br>04 05 06<br>07 08 09 | 20 - Pedestrian<br>30 - Trailing Unit<br>40 - Bus or Van (4th row or Higher)<br>50 - Other Enclosed Area (nontrailing)<br>51 - Other Unenclosed Area (nontrailing) | 60 - Sleeper of Cab<br>70 - Riding on Unit Exterior<br>80 - Lap<br>99 - Unk./NA | <b>Restraint/Safety Device</b><br>00 - None Used<br>11 - Shoulder belt<br>12 - Lap Belt Only<br>13 - Shoulder & Lap Belt | 21 - Child<br>Safety Seat<br>88 - Other<br>99 - Unk. |
| <b>Air Bag Deployment / Switch</b> | 1 - Deployed Front<br>2 - Deployed Side<br>3 - Deployed Both                                | 4 - Not Deployed<br>7 - Not Applicable<br>9 - Deployment Unk. | <b>Ejection</b><br>1 - Not Ejected<br>2 - Part. Ejected<br>3 - Tot. Ejected | b) 2 or 3 Wheel Motorized Vehicle Only<br><b>Head Injury:</b><br>1 - Yes<br>2 - No | 3 - Freed (non-mech.)<br>4 - Not Applicable             | a) <b>Transported to Medical Facility</b><br>1 - Yes<br>2 - No                                                                                                     | b) <b>By:</b><br>1 - EMS<br>2 - Police<br>8 - Other<br>9 - Unk.                 | <b>Pedestrian, Motor/Pedalcycle Only</b><br>31 - Helmet<br>41 - Protective Pads                                          | 51 - Reflective Clothing<br>61 - Lighting            |

|                      |                                                                                     |                                                                                  |                                                                             |                                                                                                                   |                                                                                                                                                                                                                                    |                                                                                                                               |                                                                                                                                                                                            |                                                                                                                                                                                                        |                                                                                                                                                                                                                                |
|----------------------|-------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|-----------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Non-Collision</b> | 01 - Cargo/Equip Loss or Shift<br>02 - Cross Median/Center<br>03 - Downhill Runaway | 04 - Equipment Failure<br>05 - Fire/Explosion<br>06 - Imersion<br>07 - Jackknife | 08 - Overturn/Rollover<br>09 - Ran off Road Left<br>10 - Ran off Road Right | 11 - Separation of Units<br>12 - Spill (Two-Wheeled Veh. 1)<br>18 - Other Noncollision<br>19 - Unk. Non-collision | <b>Collision: Not Fixed</b><br>20 - Animal (Deer Only)<br>21 - Animal (All Other)<br>22 - Motor Veh. (n-Transport)<br>23 - Motor Veh. (5 Lapped)<br>24 - Motor Veh. (Other Roadway)<br>25 - Motor Veh. (Parked)<br>26 - Pedalcycle | 27 - Pedestrian<br>28 - Railway Veh.<br>29 - Work Zone Maint. Equip.<br>30 - Other Movable Object<br>39 - Unk. Movable Object | <b>Collision: Fixed Object</b><br>40 - Bridge Overhead Structure<br>41 - Bridge Parapet End<br>42 - Bridge Pier or Abutment<br>43 - Bridge Rail<br>44 - Culvert<br>45 - Curb<br>46 - Ditch | 47 - Embankment<br>48 - Equipment<br>49 - Fence<br>50 - Guardrail End<br>51 - Guardrail Face<br>52 - Highway Traffic Sign Post<br>53 - Impact Attenuator/Crash Cushion<br>54 - Light/Luminaire Support | 55 - Mail Box<br>56 - Median Barrier<br>57 - Overhead Sign Support<br>58 - Other (Post, Pole, Support, Etc.)<br>59 - Other (Wall, Building, Tunnel, Etc.)<br>60 - Tree<br>61 - Utility Pole<br>62 - Work Zone Maint. Equipment |
|----------------------|-------------------------------------------------------------------------------------|----------------------------------------------------------------------------------|-----------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|

|                                          |                                                                                |                                                                                                      |                                                                                                   |                                                                                     |
|------------------------------------------|--------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------|
| <b>Manner of Collision (Struck Veh.)</b> | 00 - Not Coll. w/ Motor Veh.<br>10 - Rear End<br>20 - Head On                  | 30 - Rear-to-Rear<br>41 - Angle (↘↗)<br>42 - Angle (↔↔)<br>43 - Angle (↗↘)                           | 50 - Sideswipe Same Dir.<br>60 - Sideswipe Opposite Dir.<br>70 - Backed Into<br>99 - Unknown      |                                                                                     |
| <b>Vehicle Type:</b>                     | 01 - Automobile<br>12 - Pickup Truck<br>13 - Truck Tractor<br>14 - Other Truck | 15 - Full Size Van<br>16 - Mini Van<br>17 - Sport Utility<br>25 - Motorcycle<br>26 - Other Motorbike | 27 - Pedalcycle<br>38 - Animal Drawn Veh<br>39 - Animal (Ridden)<br>41 - Pedestrian<br>51 - Train | 61 - School Bus<br>62 - Passenger Bus<br>98 - Other<br>99 - Unk. (Hit and Run Only) |



|                           |                                                                   |                                                                                         |                                                                                                   |                                                                     |
|---------------------------|-------------------------------------------------------------------|-----------------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------|---------------------------------------------------------------------|
| <b>Vehicle Use Code</b>   | 01 - Personal<br>02 - Driver Training<br>03 - Construction/Maint. | 04 - Ambulance<br>05 - Military<br>06 - Transport Passengers<br>07 - Transport Property | 08 - Farm Use<br>09 - Wrecker or Tow<br>10 - Police<br>11 - Government                            | 12 - Fire Fighting<br>13 - Logging<br>18 - Other<br>41 - Pedestrian |
| <b>Vehicle Attachment</b> | 1 - None<br>2 - Mobile Home<br>3 - Semi-Trailer                   | 4 - Utility Trailer<br>5 - Farm Trailer<br>6 - Trailer w/ Boat<br>7 - Camper Trailer    | 8 - Towed Motor Vehicle<br>9 - Petroleum Tanker<br>A - Lowboy Trailer<br>B - Auto Carrier Trailer | C - Other Tanker<br>D - Flat Bed<br>E - Twin Trailers<br>F - Other  |

|                                         |                                                                                                                                                                                              |                                                                                                            |                                                                                                                                                                                                                                  |                                                                                                                                        |
|-----------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------|
| <b>Action Prior to Impact (Vehicle)</b> | 01 - Backing<br>02 - Changing lanes<br>03 - Entering traffic lane<br>04 - Leaving traffic lane<br>05 - Making U-turn<br>06 - Movements Essentially Straight Ahead<br>07 - Overtaking/passing | 08 - Parked<br>09 - Slowing or Stopped in traffic<br>10 - Turning left<br>11 - Turning right<br>18 - Other | (Non-motorist)<br>21 - Approaching/Leaving Vehicle<br>22 - Entering/Crossing Location<br>23 - Playing/Working on Vehicle<br>24 - Pushing Vehicle<br>25 - Standing<br>26 - Walking, Sliding, Cycling<br>99 - Unk.<br>27 - Working |                                                                                                                                        |
| <b>Weather Condition</b>                | 1 - Clear (no adverse conditions)<br>2 - Rain<br>3 - Cloudy<br>4 - Sleet, Hail<br>5 - Snow                                                                                                   | 6 - Fog, Smog, Smoke<br>7 - Blowing Sand, Oil, Dirt or Snow<br>8 - Severe Crosswinds<br>9 - Unk.           | 02 - Flashing Traffic Signal<br>11 - RR (X-bucks, Lights & Gates)<br>12 - RR (X-bucks & Lights)<br>13 - RR (X-bucks Only)                                                                                                        | 21 - Officer or Flagman<br>22 - Oncoming Emergency Vehicle<br>31 - Pavement Markings (only)<br>41 - Stop Sign<br>42 - School zone Sign |

|                        |                                                                                                       |                                                                                    |                                                                                                                                                        |                                                                                                                                                     |                                                                                                          |
|------------------------|-------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------|
| <b>Light Condition</b> | 1 - Daylight<br>2 - Dawn<br>3 - Dusk<br>4 - Dark (Lighting Unspecified)<br>5 - Dark (Street Lamp Lit) | 6 - Dark (Street Lamp Not Lit)<br>7 - Dark (No Lights)                             | <b>Alc Test Results</b><br>A1 - 1 - Two-way, Not Divided<br>A2 - 2 - Two-way, Divided, Unprotected Median<br>A3 - 3 - Island 4 - Roadside 6 - Shoulder | 1 - Straight - Level<br>2 - Straight - On grade<br>3 - Wet<br>4 - Dry<br>5 - Snow<br>6 - Ice<br>7 - Water (Standing, etc.)<br>8 - Other<br>9 - Unk. | 3 - Two-way, Divided, Barrier<br>4 - One-Way<br>8 - Other<br>Trafficway                                  |
| <b>Junction Type</b>   | 01 - Crossover<br>02 - Driveway                                                                       | 03 - Five/More Points<br>04 - Four-way Intersection<br>05 - Railway Grade Crossing | 07 - Shared Use Paths or Trails<br>08 - T-Intersection<br>09 - Traffic Circle                                                                          | 12 - Y - Intersection<br>13 - Nonjunction<br>99 - Unk.                                                                                              | 1 - Before 1st Sign<br>2 - Advanced Warning Area<br>3 - Shoulder/Median Work<br>4 - Lane Shift/Crossover |

|                |             |                                                                                                                                                                                                                                                                     |                                                                                                  |                                                                                                                                                                                                                                                                                        |                                                                                                                                                                                                                                                                                                                                      |                                                                                                                                                                                                                                                                                                                              |                                                                                                                                |                                                                                                                                                                                                                                                                  |
|----------------|-------------|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>Primary</b> | 18 - Driver | 01 - Disregarded Signs, Signals, Etc.<br>02 - Distracted/Inattention<br>03 - Driving Too Fast for Conditions<br>04 - Exceeded Authorized Speed Limit<br>05 - Failed to Yield Right of Way<br>06 - Ran off Road<br>07 - Fatigued/Asleep<br>08 - Followed Too Closely | 09 - Made an improper Turn<br>09 - Medical Related<br>20 - Texting<br>28 - Other Improper Action | 12 - Aggressive Operation of Vehicle<br>13 - Over-correcting/Over-steering<br>14 - Swerving to Avoiding Object<br>15 - Wrong Side or Wrong Way<br>16 - Under the Influence<br>17 - Vision Obscured (Within Unit)<br>18 - Improper lane Usage/Change<br>19 - On Cell Phone<br>29 - Unk. | <b>Roadway</b><br>30 - Debris<br>31 - Non-highway Work<br>32 - Obstruction in Roadway<br>33 - Road Surface Condition (i.e., Wet)<br>34 - Rut, Holes, Bumps<br>35 - Shoulders (None, Low, Soft, High)<br>36 - Traffic Control Device (i.e., Missing)<br>37 - Work Zone (Constr./Maint./Utility)<br>38 - Worn, Travel-Polished Surface | <b>Non-Motorist</b><br>48 - Other<br>49 - Unk.<br>50 - Inattentive<br>51 - Lying &/or Illegally in Roadway<br>52 - Failure to Yield R. of W.<br>53 - Not Visible (Dark Clothing)<br>54 - Disregard Signs, Signals, Etc.<br>55 - Improper Crossing<br>56 - Darting<br>57 - Wrong Side of Road<br>67 - Other Person Under Infl | <b>Environmental</b><br>60 - Animal In Road<br>61 - Glare<br>62 - Obstruction<br>63 - Weather Cond.<br>68 - Other<br>69 - Unk. | <b>Vehicle Defect</b><br>70 - Brakes<br>71 - Steering<br>72 - Power Plant<br>73 - Tires/Wheel<br>74 - Lights<br>75 - Signals<br>76 - Windows/Shield<br>77 - Restraint System<br>78 - Truck Coupling<br>79 - Cargo<br>80 - Fuel System<br>88 - Other<br>89 - Unk. |
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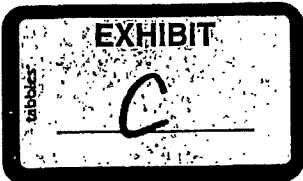
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|-----------------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------------|-------------------------------------------------------------------------------------------|------------------------------------|-----------------------------------|-------------------------------------------------------------------------------------------------------------------------|------------------------------|---------------------|-------------------------------------------------|--|--------------------|--|--|
| Mail FR-10 to: SC Department of Motor Vehicles<br>Office of Financial Responsibility (803) 896-5000<br>PO Box 1498, Blythewood, SC 29016-0050 |                                                                                                                                                                                                                                                                 |                    | SOUTH CAROLINA DEPARTMENT OF MOTOR VEHICLES FR-10 (REV. 04/2016)<br>NOTICE OF REQUIREMENT |                                    |                                   | Submit Electronically: Agents or Company<br>Representatives can submit your Insurance<br>Information at WWW.SC-ALIR.COM |                              |                     |                                                 |  |                    |  |  |
| Date                                                                                                                                          | Time                                                                                                                                                                                                                                                            | County             | 1- Interstate<br>2- US Primary<br>3- SC Primary                                           | 4- Secondary<br>5- County<br>6- PP | Collision Location (Rt. # / Name) | 0- Main line<br>2- Alternate<br>5- Spur                                                                                 | 6- Connection<br>7- Business | Miles: Dir. N E S W | (In) Near City or Town of:                      |  |                    |  |  |
| 10-24-2018                                                                                                                                    | 12 59                                                                                                                                                                                                                                                           | 10                 |                                                                                           |                                    | 575 / ASHLEY PHOSPHATE RD         |                                                                                                                         |                              |                     | NORTH CHARLESTON                                |  |                    |  |  |
| To Vehicle<br>Owner/<br>Operator                                                                                                              | Failure to return this form to the Department of Motor Vehicles within 15 days from the date of the collision could result in the suspension of your driver license and registration privileges pursuant to South Carolina Code of Laws 56-9-351 and 56-10-530. |                    |                                                                                           |                                    |                                   |                                                                                                                         |                              |                     |                                                 |  |                    |  |  |
| W-291954                                                                                                                                      |                                                                                                                                                                                                                                                                 |                    | Driver/Pedestrian's Full Name<br>OYUELA MIGUEL A                                          |                                    |                                   | W-291955                                                                                                                |                              |                     | Driver/Pedestrian's Full Name<br>LEGALLY PARKED |  |                    |  |  |
| Unit #                                                                                                                                        | Sex                                                                                                                                                                                                                                                             | Race               | Street                                                                                    |                                    |                                   | Unit #                                                                                                                  | Sex                          | Race                | Street                                          |  |                    |  |  |
| 04                                                                                                                                            | M                                                                                                                                                                                                                                                               | H                  | UNKNOWN                                                                                   |                                    |                                   | 05                                                                                                                      |                              |                     |                                                 |  |                    |  |  |
| #Occ                                                                                                                                          | Birth Date                                                                                                                                                                                                                                                      |                    | City, State, & Zip                                                                        |                                    |                                   | #Occ                                                                                                                    | Birth Date                   |                     | City, State, & Zip                              |  |                    |  |  |
| 1                                                                                                                                             | 01-22-1949                                                                                                                                                                                                                                                      |                    |                                                                                           |                                    |                                   | 0                                                                                                                       |                              |                     |                                                 |  |                    |  |  |
| State                                                                                                                                         | Driver's License #                                                                                                                                                                                                                                              |                    |                                                                                           | Insurance Company:                 |                                   |                                                                                                                         | State                        | Driver's License #  |                                                 |  | Insurance Company: |  |  |
| OT                                                                                                                                            |                                                                                                                                                                                                                                                                 |                    |                                                                                           |                                    |                                   |                                                                                                                         |                              |                     |                                                 |  | GEICO              |  |  |
| Year                                                                                                                                          | Body                                                                                                                                                                                                                                                            | Vehicle Make       | VIN #                                                                                     |                                    |                                   | Year                                                                                                                    | Body                         | Vehicle Make        | VIN #                                           |  |                    |  |  |
|                                                                                                                                               |                                                                                                                                                                                                                                                                 |                    |                                                                                           |                                    |                                   | 2013                                                                                                                    | 4S                           | MERZ                | WDDGF8AB5DR298967                               |  |                    |  |  |
| State                                                                                                                                         | Year                                                                                                                                                                                                                                                            | License Plate #    | Owner's D.L. #                                                                            |                                    |                                   | State                                                                                                                   | Year                         | License Plate #     | Owner's D.L. #                                  |  |                    |  |  |
|                                                                                                                                               |                                                                                                                                                                                                                                                                 |                    |                                                                                           |                                    |                                   | SC                                                                                                                      | 2019                         | MMZ158              | 100434108                                       |  |                    |  |  |
| Home Telephone                                                                                                                                |                                                                                                                                                                                                                                                                 |                    | Owner's Full Name                                                                         |                                    |                                   | Home Telephone                                                                                                          |                              |                     | Owner's Full Name                               |  |                    |  |  |
| ( )                                                                                                                                           |                                                                                                                                                                                                                                                                 |                    |                                                                                           |                                    |                                   | (843) 4126749                                                                                                           |                              |                     | REYES JUSTIN MATTHEW                            |  |                    |  |  |
| Bus. Telephone                                                                                                                                |                                                                                                                                                                                                                                                                 |                    | Street                                                                                    |                                    |                                   | Bus. Telephone                                                                                                          |                              |                     | Street                                          |  |                    |  |  |
| ( )                                                                                                                                           |                                                                                                                                                                                                                                                                 |                    |                                                                                           |                                    |                                   | ( )                                                                                                                     |                              |                     | 9640 STOCKPORT CIRCLE                           |  |                    |  |  |
| Contributed To Collision                                                                                                                      |                                                                                                                                                                                                                                                                 | City, State, & Zip |                                                                                           |                                    | Contributed To Collision          |                                                                                                                         | City, State, & Zip           |                     |                                                 |  |                    |  |  |
| Yes (No)                                                                                                                                      |                                                                                                                                                                                                                                                                 |                    |                                                                                           |                                    | Yes (No)                          |                                                                                                                         | SUMMERVILLE SC 29485         |                     |                                                 |  |                    |  |  |

|                                                                               |                    |               |                        |                                           |                 |                                              |                          |
|-------------------------------------------------------------------------------|--------------------|---------------|------------------------|-------------------------------------------|-----------------|----------------------------------------------|--------------------------|
| Driver/Pedestrian's Full Name                                                 |                    |               | State                  | Year                                      | License Plate # | Owner's D.L. #                               |                          |
|                                                                               |                    |               |                        |                                           |                 |                                              |                          |
| Unit #                                                                        | Sex                | Race          | Street                 |                                           |                 | Home Telephone                               | Owner's Full Name        |
|                                                                               |                    |               |                        |                                           |                 | ( )                                          |                          |
| #Occ                                                                          | Birth Date         |               | City, State, & Zip     |                                           |                 | Bus. Telephone                               | Street                   |
|                                                                               |                    |               |                        |                                           |                 | ( )                                          |                          |
| State                                                                         | Driver's License # |               |                        | Insurance Company:                        |                 |                                              | Contributed To Collision |
|                                                                               |                    |               |                        |                                           |                 |                                              | Yes No                   |
| Year                                                                          | Body               | Vehicle Make  | VIN #                  |                                           |                 | Accident Insurance Information for Unit # 05 |                          |
|                                                                               |                    |               |                        |                                           |                 | Company Name                                 |                          |
|                                                                               |                    |               |                        |                                           |                 | GEICO                                        |                          |
|                                                                               |                    |               |                        |                                           |                 | Area Code/Phone Number                       |                          |
|                                                                               |                    |               |                        |                                           |                 | (800) 8413000                                |                          |
| All Units Insurance Information<br>(to be completed by Investigating Officer) |                    |               |                        | Agency Name                               |                 | Policy Number                                |                          |
|                                                                               |                    |               |                        |                                           |                 | 4463115545                                   |                          |
| Accident Insurance Information for Unit # 04                                  |                    |               |                        | Accident Insurance Information for Unit # |                 |                                              |                          |
| Company Name                                                                  |                    |               | Area Code/Phone Number |                                           |                 | Company Name                                 |                          |
|                                                                               |                    |               | ( )                    |                                           |                 | ( )                                          |                          |
| Agency Name                                                                   |                    | Policy Number |                        | Agency Name                               |                 | Policy Number                                |                          |
|                                                                               |                    |               |                        |                                           |                 |                                              |                          |

|                                                                                                                                                                                                                                                             |              |                                                                 |
|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|--------------|-----------------------------------------------------------------|
| Automobile Liability Insurance Information                                                                                                                                                                                                                  |              |                                                                 |
| Notice of Requirement Accepted                                                                                                                                                                                                                              |              | Signature                                                       |
|                                                                                                                                                                                                                                                             |              | Y N Refused to Affix Signature?                                 |
|                                                                                                                                                                                                                                                             |              | Y N Vehicle Subject to Registration in SC?                      |
| To Be Completed Below or Entered at WWW.SC-ALIR.COM By Insurance Company representative. This form should not be mailed to DMV if insurance information has been submitted electronically                                                                   |              |                                                                 |
| Reference to Unit #: _____, I here by affirm that to the best of my knowledge the vehicle described above was insured by the below stated insurance company on the date of the collision.                                                                   |              |                                                                 |
| Insurance Company                                                                                                                                                                                                                                           |              | Policy #:                                                       |
|                                                                                                                                                                                                                                                             |              |                                                                 |
| Beginning Date:                                                                                                                                                                                                                                             | Ending Date: | Policy Holder:                                                  |
|                                                                                                                                                                                                                                                             |              |                                                                 |
| Signature                                                                                                                                                                                                                                                   |              | Title                                                           |
|                                                                                                                                                                                                                                                             |              |                                                                 |
| NAIC# (Assigned by S.C. Dept. of Ins.)                                                                                                                                                                                                                      |              | Bus. Telephone                                                  |
|                                                                                                                                                                                                                                                             |              | ( )                                                             |
| Notice: If liability insurance was not in effect for your vehicle involved in the collision, the Department of Motor Vehicles could suspend your driver license and registration privileges pursuant to South Carolina Code of Laws 56-9-351 and 56-10-530. |              |                                                                 |
| If any of the below are applicable, Disregard the above portion.                                                                                                                                                                                            |              | Form FR-10 Not Issued: Section 56-10-520                        |
| Check here if a Form SR-23, Fleet policy of 25 or more vehicles is on file with the Department of Motor Vehicles covering the vehicle                                                                                                                       |              | No FR-10 Issued to Operator/ Owner of Unit #:                   |
| Check here if a certificate of self-insurance has been issued by the Department of Motor Vehicles covering the vehicle and indicate the certificate number: SI- _____                                                                                       |              | Summons Issued to:                                              |
| Check here if liability insurance was not in effect to comply with South Carolina statutory requirements                                                                                                                                                    |              | For operating or allowing the operation of an uninsured vehicle |
| Signature                                                                                                                                                                                                                                                   |              | Summons Number:                                                 |
|                                                                                                                                                                                                                                                             |              | Signature                                                       |
| Date                                                                                                                                                                                                                                                        |              |                                                                 |
|                                                                                                                                                                                                                                                             |              |                                                                 |
| Investigating Officer's Name                                                                                                                                                                                                                                | Rank         | SCCJA #                                                         |
| COBB - DARIN A                                                                                                                                                                                                                                              | SGT          | 2253-1344                                                       |
| Code                                                                                                                                                                                                                                                        | Date         | Reviewer's Name                                                 |
| 1 0 0 8                                                                                                                                                                                                                                                     |              |                                                                 |
| Internal Agency Code                                                                                                                                                                                                                                        | 2018032155   |                                                                 |



STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO: 2019-CP-10-0341

Miguel Oyuela-Martinez,  
v. Plaintiff,

**ANSWER OF DEFENDANT JOHN  
ROBERT KUHN TO PLAINTIFF'S  
COMPLAINT**

Kuhn & Kuhn LLC, and John Robert Kuhn,  
Defendant.

**(Jury Trial Demanded)**

**TO: KEVIN SMITH, ESQUIRE, ATTORNEY FOR PLAINTIFF AND TO THE  
PLAINTIFF ABOVE NAMED:**

The Defendant John Robert Kuhn herein files his Answer to the Plaintiff's Complaint and would respectfully show as follows:

**FOR A FIRST DEFENSE**

1. Each and every allegation of the Plaintiff's Complaint not hereinafter admitted is expressly denied.

**FOR A SECOND DEFENSE**

2. The Defendant John Robert Kuhn would admit that on or about October 24, 2018 an accident occurred when the Defendant Kuhn was operating his personally owned vehicle and collided with a vehicle which was in the lane to Mr. Kuhn's right and that as a result of this collision the Plaintiff, who was a pedestrian sitting on a bus bench at the corner of Ashley Phosphate Road and Rocks Street in Charleston, South Carolina was injured; the Defendant John Robert Kuhn admits simple fault (duty and breach of duty) and would admit that he was a contributing cause of certain injuries sustained by the Plaintiff in the accident; all remaining allegations of the Plaintiff's complaint are again denied.

FILED  
2019 FEB 28 4:11:08  
JULIE J. SMITH, CLERK OF COURT  
BY [Signature]

**FOR A THIRD DEFENSE**

3. The Defendant John Robert Kuhn would herein show that the Plaintiff's Complaint fails to state facts sufficient to constitute a cause of action upon which relief might be granted to the Plaintiff as to one or more of the causes alleged by the Plaintiff and therefore the Plaintiff's Complaint must be dismissed in whole or in part pursuant to *South Carolina Rule of Civil Procedure* 12(b)(6).

**FOR A FOURTH DEFENSE**

4. The Defendant John Robert Kuhn reserves the right to move to amend his answer based upon motion timely made once the process of discovery and depositions has been completed should additional defenses become known or warranted.

**FOR A FIFTH DEFENSE**

5. The Defendant John Robert Kuhn would herein show that the venue of this matter must be situated in a county consistent with South Carolina statutory and case law.

**FOR A SIXTH DEFENSE**

6. The Defendant John Robert Kuhn would herein show that prior to the commencement of this litigation by the Plaintiff the Plaintiff executed a Covenant Not to Execute in favor of the Defendant John Robert Kuhn and accordingly any and all defenses available pursuant to the language of that Covenant Not to Execute and pursuant to the law of South Carolina are raised herein.

**FOR A SEVENTH DEFENSE**

7. Pursuant to S.C. Code Ann. §15-32-520, any proceeding to determine punitive damages should be bifurcated from any trial to determine liability and compensatory damages.

**FOR AN EIGHTH DEFENSE**

8. Any award of punitive damages should not exceed the greater of three (3) times the amount of compensatory damages as provided for in S.C. Code Ann. §15-32-530.

**FOR A NINTH DEFENSE**

9. The Defendant would show, upon information and belief, that the Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that the Defendant could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because this Defendant can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates this Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills this Defendant's exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

Wherefore, having fully answered the Plaintiff's Complaint, the Defendant John Robert Kuhn would pray that the same be dismissed with costs being granted to him. The Defendant

John Robert Kuhn also prays for such other and further relief as the court deems just and proper,  
and also demands a trial by jury.

*Respectfully submitted,*

MURPHY & GRANTLAND, P.A.



---

Ronald B. Diegel, Esquire – Bar No. 65076  
4406-B Forest Drive (29206)  
P.O. Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
**Attorneys for Defendant John Robert Kuhn**

Columbia, South Carolina  
February 26, 2019

STATE OF SOUTH CAROLINA  
COUNTY OF CHARLESTON

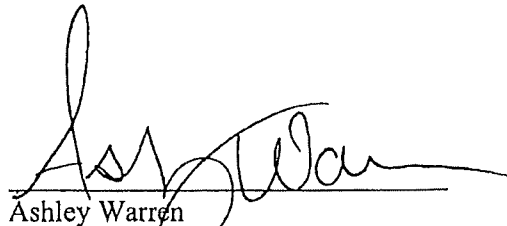
IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO: 2019-CP-10-0341

Miguel Oyuela-Martinez,  
Plaintiff,  
v.  
Kuhn & Kuhn LLC, and John Robert Kuhn  
Defendant.

**CERTIFICATE OF SERVICE**

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorneys for **John Robert Kuhn**, do hereby certify that I have served a copy of the foregoing, **Answer of Defendant John Robert Kuhn to Plaintiff's Complaint**; in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address(es):

Kevin Smith, Esquire  
Amanda Stearns, Esquire  
Hoffman Law Firm  
7087 Rivers Ave  
North Charleston, SC 29406

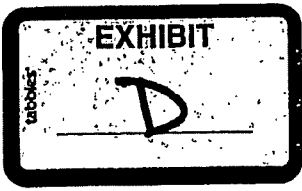


Ashley Warren

*Legal Assistant to Ronald B. Diegel, Esquire*

Columbia, South Carolina  
February 26, 2019

FILED  
2019 FEB 28 AM 11:08  
JULIE J. ARMSTRONG  
CLERK OF COURT  
BY JS



RECEIVED

JAN 12 2019

AGREEMENT AND COVENANT NOT TO EXECUTE

PT 001

This AGREEMENT AND COVENANT NOT TO EXECUTE [hereinafter "COVENANT"] made this \_\_\_\_ day of \_\_\_\_\_, 2019, entered and agreed between Miguel Oyuela-Martinez, hereinafter sometimes referred to as "Covenantor;" John R. Kuhn, hereinafter sometimes referred to as "Covenantee;" and Progressive Northern Insurance Company, hereinafter sometimes referred to as "Insurer."

WHEREAS, on October 24, 2018 in Charleston County, South Carolina, Covenantor was involved in an automobile-pedestrian accident with Covenantee at or near Ashley Phosphate Road in North Charleston, South Carolina; and

WHEREAS, the automobile being owned and driven by John R. Kuhn, at the time of the aforementioned accident was insured by Insurer under Policy Number 42096969, and had Five Hundred Thousand (\$500,000.00) Dollars in available combined single limit coverage under said policy; and

WHEREAS, the damages sustained by Covenantor in the aforementioned accident may exceed the liability limit of the said insurance policy, and the Covenantor is desirous of protecting his right to proceed to suit against Covenantee for purposes of collecting underinsured/uninsured motorist benefits, or against any other Defendants or insurers who may provide liability, excess or umbrella coverage; and

WHEREAS, claimants other than the Covenantor have also asserted property damage and/or bodily injury claims as a result of the accident of October 24, 2018 and Covenantor has demanded payment of the remaining policy limit after those claims are addressed;

NOW, FOR AND IN CONSIDERATION OF the payment to Covenantor of the total sum of Four Hundred Sixty-Nine Thousand Eight Hundred Eighty-Four and 60/100 (\$469,884.60) Dollars by Insurer on behalf of the Covenantee, the sufficiency and receipt of which is hereby acknowledged, Covenantor, Covenantee and Insurer agree as follows:

1. If and in the event Covenantor is unable to resolve by agreement and settlement of his claim with the underinsured/uninsured motorist insurer or such other Defendants or insurers who may provide liability, excess or umbrella coverage, Covenantor shall have the right to bring suit against Covenantee and/or said underinsured/uninsured motorist or liability insurers or Defendants, in accordance with South Carolina law, and prosecute the same to final judgment, including any declaratory judgment action regarding coverage.

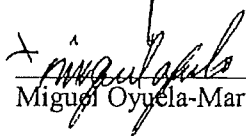
2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that Covenantee, his agents, representatives, heirs and assigns, shall never at any time, be liable to Covenantor, his agents, subrogees, representatives, heirs or assigns, beyond the consideration expressed herein and paid, except to the limits of all available underinsured/uninsured motorist coverage and/or other excess liability or umbrella coverage, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the

payment to Covenantor of the aforementioned sum, Covenantor, his subrogees, agents, representatives, heirs or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against Covenantantee, by execution or otherwise, any judgment that may be rendered in any such lawsuit except as herein stated. Covenantor also agrees that he will never seek to collect any such judgment from the personal assets of the Covenantantee. Further, immediately upon reduction to judgment of any such lawsuit, Covenantor, his subrogees, agents, representatives, heirs or assigns, will provide Covenantantee with an executed satisfaction of said judgment. Moreover, this COVENANT or copy hereof shall be considered and serve as a satisfaction of any such judgment in any claim or lawsuit presented by Covenantor against Covenantantee for the aforementioned automobile accident, and can be recorded as such should Covenantor, his subrogees, agents, representatives, heirs or assigns fail to execute a Satisfaction of Judgment.

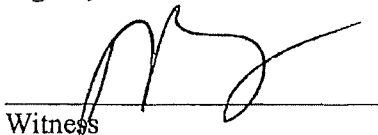
3. Covenantor acknowledges and understands that certain liens may exist on these settlement proceeds, such as liens arising from medical services and/or treatment rendered by various medical providers. In further consideration of the sum paid, Covenantor agrees that any and all outstanding liens will be satisfied out of these proceeds, specifically including but not limited to any lien held by the Government of the United States or by the State of South Carolina, pursuant to any Medicare or Medicaid program or by any workers' compensation carrier. Covenantor hereby agrees to and accepts responsibility to pay all valid liens, subrogation claims and/or assignments relating to this claim. Covenantor also specifically agrees and understands that Covenantantee is in no way liable to any one or responsible for any of the aforementioned claims. Covenantantee has settled this claim and has no further responsibility whatsoever to any third party by virtue of said third party's rights flowing through Covenantor's claims against Covenantantee.

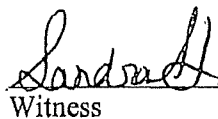
4. Covenantor understands that should CMS (Medicare) find that a Medicare Set-Aside Allocation should have been established and that Medicare's interests were not adequately protected, CMS (Medicare) may require Covenantor to expend up to the entire settlement amount on Medicare covered expenses related to the injury before Medicare will provide coverage for the injury. Covenantor voluntarily accepts this risk and waives any and all claims of any nature and/or damages against Covenantantee should Medicare take such action, including, but not limited to a Private Cause of Action against the Insurer (as defined in the preceding paragraphs of this Covenant) under the Medicare Secondary Payer Act (MSP) pursuant to 42 USCA Section 1395y(b)(3)(A).

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 10 day of January, 2019.

  
Miguel Oyuela-Martinez

Signed, sealed and delivered in the presence of:

  
Witness

 1/10/19  
Witness

## SUPPLEMENTAL AGREEMENT AND COVENANT NOT TO EXECUTE

This AGREEMENT AND COVENANT NOT TO EXECUTE [hereinafter "COVENANT"] made this 27<sup>th</sup> day of November, 2019, entered and agreed between Miguel Oyuela-Martinez, hereinafter sometimes referred to as "Covenantor;" John R. Kuhn, hereinafter sometimes referred to as "Covenantee;" and Progressive Northern Insurance Company, hereinafter sometimes referred to as "Insurer."

WHEREAS, on October 24, 2018 in Charleston County, South Carolina, Covenantor was involved in an automobile-pedestrian accident with Covenantee at or near Ashley Phosphate Road in North Charleston, South Carolina; and

WHEREAS, the automobile being owned and driven by John R. Kuhn, at the time of the aforementioned accident was insured by Insurer under Policy Number 42096969, and had Five Hundred Thousand (\$500,000.00) Dollars in available combined single limit coverage under said policy; and

WHEREAS, the damages sustained by Covenantor in the aforementioned accident may exceed the liability limit of the said insurance policy, and the Covenantor is desirous of protecting his right to proceed to suit against Covenantee for purposes of collecting underinsured/uninsured motorist benefits, or against any other Defendants or insurers who may provide liability, excess or umbrella coverage; and

WHEREAS, claimants other than the Covenantor have also asserted property damage and/or bodily injury claims as a result of the accident of October 24, 2018 and Covenantor has demanded payment of the remaining policy limit after those claims are addressed; and

WHEREAS, Covenantor previously executed an Agreement and Covenant Not to Execute on January 10, 2019 for payment of \$469,884.60 and the remaining balance now available under the policy after settlement of all other claims is \$4,757.59;

NOW, FOR AND IN CONSIDERATION OF the payment to Covenantor of the total additional sum of Four Thousand Seven Hundred Fifty-Seven and 59/100 (\$4,757.59) Dollars by Insurer on behalf of the Covenantee, the sufficiency and receipt of which is hereby acknowledged, Covenantor, Covenantee and Insurer agree as follows:

1. If and in the event Covenantor is unable to resolve by agreement and settlement of his claim with the underinsured/uninsured motorist insurer or such other Defendants or insurers who may provide liability, excess or umbrella coverage, Covenantor shall have the right to bring suit against Covenantee and/or said underinsured/uninsured motorist or liability insurers or Defendants, in accordance with South Carolina law, and prosecute the same to final judgment, including any declaratory judgment action regarding coverage.

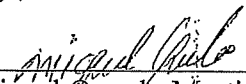
2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that Covenantee, his agents, representatives, heirs and assigns, shall never at any time, be liable to Covenantor, his agents, subrogees, representatives, heirs or assigns, beyond the consideration expressed herein and paid, except to the limits of all available underinsured/uninsured

motorist coverage and/or other excess liability or umbrella coverage, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to Covenantor of the aforementioned sum, Covenantor, his subrogees, agents, representatives, heirs or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against Covenantee, by execution or otherwise, any judgment that may be rendered in any such lawsuit except as herein stated. Covenantor also agrees that he will never seek to collect any such judgment from the personal assets of the Covenantee. Further, immediately upon reduction to judgment of any such lawsuit, Covenantor, his subrogees, agents, representatives, heirs or assigns, will provide Covenantee with an executed satisfaction of said judgment. Moreover, this COVENANT or copy hereof shall be considered and serve as a satisfaction of any such judgment in any claim or lawsuit presented by Covenantor against Covenantee for the aforementioned automobile accident, and can be recorded as such should Covenantor, his subrogees, agents, representatives, heirs or assigns fail to execute a Satisfaction of Judgment.


3. Covenantor acknowledges and understands that certain liens may exist on these settlement proceeds, such as liens arising from medical services and/or treatment rendered by various medical providers. In further consideration of the sum paid, Covenantor agrees that any and all outstanding liens will be satisfied out of these proceeds, specifically including but not limited to any lien held by the Government of the United States or by the State of South Carolina, pursuant to any Medicare or Medicaid program or by any workers' compensation carrier. Covenantor hereby agrees to and accepts responsibility to pay all valid liens, subrogation claims and/or assignments relating to this claim. Covenantor also specifically agrees and understands that Covenantee is in no way liable to any one or responsible for any of the aforementioned claims. Covenantee has settled this claim and has no further responsibility whatsoever to any third party by virtue of said third party's rights flowing through Covenantor's claims against Covenantee.

4. Covenantor understands that should CMS (Medicare) find that a Medicare Set-Aside Allocation should have been established and that Medicare's interests were not adequately protected, CMS (Medicare) may require Covenantor to expend up to the entire settlement amount on Medicare covered expenses related to the injury before Medicare will provide coverage for the injury. Covenantor voluntarily accepts this risk and waives any and all claims of any nature and/or damages against Covenantee should Medicare take such action, including, but not limited to a Private Cause of Action against the Insurer (as defined in the preceding paragraphs of this Covenant) under the Medicare Secondary Payer Act (MSP) pursuant to 42 USCA Section 1395y(b)(3)(A).

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 27<sup>th</sup> day of November, 2019.

  
\_\_\_\_\_  
Miguel Oyuela-Martinez

Signed, sealed and delivered in the presence of:

  
\_\_\_\_\_  
Witness

\_\_\_\_\_  
Witness

**RECEIVED**

**Jan 13 2021**

**SC Court of Appeals**

**THE STATE OF SOUTH CAROLINA**  
In the Court of Appeals

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**APPEAL FROM CHARLESTON COUNTY CIRCUIT COURT**  
Bentley D. Price, Circuit Court Judge

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Appellate Case No.: 2020-000932

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Miguel Oyuela-Martinez,..... Appellant,

v.

Kuhn & Kuhn, LLC and John Robert Kuhn, Defendants  
Of which Kuhn & Kuhn, LLC.....Respondent.

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**CERTIFICATE OF COUNSEL**

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Counsel hereby certifies that this Record on Appeal contains no material which is irrelevant to the appeal.

/s/ Kevin B. Smith

Kevin B. Smith  
SC Bar No: 70587  
Amanda R. Itterly  
SC Bar No.: 103028  
Hoffman Law Firm  
7087 Rivers Avenue  
N. Charleston, SC 29406  
(843) 769-7077  
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ksmith@hoffmanlawfirm.com  
amanda@hoffmanlawfirm.com  
Attorneys for Appellant

North Charleston, SC

January 7, 2021