RECEIVED

Sep 08 2022

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger C. Young, Circuit Court Judge

Appellate Case No. 2020-000915
Case No. 2018-CP-08-01079

Latarsha Docena-Guerrero,	Petitioner,
v.	
Rafael Docena-Guerrero,	Defendant
and	
Government Employees Insurance Company, as underinsured motorist insurance carrier,	Respondent.

PETITION FOR WRIT OF CERTIORARI

F. Elliotte Quinn IV
Steven E. Goldberg
The Steinberg Law Firm, LLP
103 Grandview Drive
Summerville, SC 29483

ATTORNEYS FOR PETITIONER

CERTIFICATION OF COUNSEL

Counsel for Petitioner hereby certifies that a Petition for Rehearing was made and was finally ruled on by the Court of Appeals on August 18, 2022.

QUESTION PRESENTED

I. Did the Court of Appeals err in dismissing the appeal as not immediately appealable?

II. Did the circuit court err in ordering that a UIM carrier may appear and defend more than thirty days after service on the UIM carrier?

STATEMENT OF THE CASE

Petitioner Latarsha Docena-Guerrreo commenced this action on June 15, 2018, to recover for injuries suffered as the result of the negligent operation of a motor vehicle by Defendant Rafael Docena-Guerrero. (R. pp. 10–12) On July 16, 2018, Defendant filed an answer denying Petitioner's claims. (R. p. 13) On August 26, 2019, the South Carolina Department of Insurance accepted service of Petitioner's Summons and Complaint for Respondent Government Employees Insurance Company as Petitioner's underinsured motorist carrier, and Petitioner filed the Department of Insurance's Acceptance of Service with the Court on August 28, 2019. (R. p. 19) On February 19, 2020, Respondent filed a Notice of Motion and Motion for Relief from Default and a Notice of Appearance and Conditional Answer for the Defendant. (R. pp. 20–25) In response, on February 20, 2020, Petitioner filed a Motion to Quash the Answer and Appearance by UIM Carrier and Counsel. (R. p. 26)

On March 10, 2020, the Honorable Circuit Court Judge Roger C. Young held a hearing on Petitioner's Motion to Quash and on Respondent's Motion for Relief from Default. (R. p. 1) On April 30, 2020, Judge Young entered an order denying Petitioner's Motion to Quash and granting Respondent's Motion for Relief from Default. (R. p. 1) On May 11, 2020, Petitioner moved for

reconsideration, and on May 27, 2020, Judge Young denied Petitioner's Motion for Reconsideration. (R. pp. 4–6 & 35–47) On June 12, 2020, Petitioner noticed this appeal.

One June 17, 2020, Respondent moved to dismiss the appeal as interlocutory. On September 10, 2020, the Court of Appeals denied Respondent's motion to dismiss. On June 22, 2022, after the parties submitted their briefs but without an oral argument, the Court of Appeals issued a *per curiam* decision pursuant to Rule 220(b) of the South Carolina Appellate Court Rules dismissing the appeal as interlocutory. On July 7, 2022, Petitioner moved for a rehearing, and on August 18, 2022, the Court of Appeals denied the petition for rehearing.

STATEMENT OF FACTS

On February 4, 2016, Petitioner was a passenger in a motor vehicle driven by Defendant, her husband, and she was injured in a crash resulting from Defendant's negligent operation of the motor vehicle. (R. pp. 10–11) Thereafter she filed suit against Defendant seeking to recover for her injuries caused by Defendant's negligence. (R. p. 10) Defendant appeared through counsel and filed an answer. (R. p. 13) After learning that her damages exceed the limits of Defendant's automobile liability insurance coverage, on August 26, 2019, Petitioner served Respondent, as her underinsured motorist insurance carrier, through the South Carolina Department of Insurance. (R. p. 19) Respondent was both the automobile liability insurance carrier for Defendant and the UIM carrier for Petitioner. (R. pp. 20 & 22)

On December 19, 2019, after more than thirty days elapsed following service on Respondent through the Department of Insurance, Petitioner and Defendant entered into a Covenant Not to Execute whereby in exchange for payment of a sum, Petitioner agreed that she would not execute any judgment obtained against Defendant. (R. pp. 20 & 26–27)

On February 19, 2020, after more than 150 days since Petitioner served Respondent, Respondent filed a "Motion for Relief from Default" and a "Conditional Answer." (R. pp. 20 & 22) Respondent moved "for an Order setting aside the default and default judgment, if any," and moved solely pursuant to Rule 55 of the South Carolina Rules of Civil Procedure. (R. p. 20) Respondent's Conditional Answer was made "on behalf of Government Employees Insurance Company" and not on behalf of Defendant. (R. p. 22) The Conditional Answer states that the attorney filing the pleading "does not represent the Defendant and is not at this time undertaking such representation but is specifically reserving the option to assume control of the defense in the name of the Defendant pursuant to the underinsured motorist statute, should the carrier choose to exercise that option." (R. p. 22) The Conditional Answer further states that Respondent, "as the purported underinsured motorist carrier," is "responding to the Complaint of the Plaintiff in place of the Defendant." (R. p. 23) The attorney making the Conditional Answer for Respondent signed the pleading "Attorney for Government Employees Insurance Company appearing pursuant to S.C. Code § 38-77-160 on behalf of Government Employees Insurance Company." (R. p. 25)

In response, Petitioner moved to quash the Conditional Answer and the appearance by Respondent. (R. p. 26) Petitioner asserted that Section 38-77-160 provides that a UIM carrier has thirty days after service of process to appear, Respondent did not appear within thirty days of service, and therefore Respondent cannot appear in this action.

At the hearing on the motions, the parties agreed that Respondent was not in default. (R. p. 55, lines 1–3; p. 56, lines 4–5; p. 62, line 3) Petitioner argued the plain language of Section 38-77-160 does not permit Respondent to make a late appearance, and Respondent argued that despite the statutory language, the Court could permit Respondent to make a late appearance for "good cause." The Court entered an order granting Respondent's Motion for Relief from Default and

denying Petitioner's Motion to Quash. (R. p. 1) Therein, the Court found "that good cause exists to set aside any default (though none has been entered by the court) and to allow the late appearance by the UIM carrier pursuant to SCRCP Rule 55(c)." (R. p. 1) The order does not mention and contains no discussion of Section 38-77-160.

Petitioner then moved for reconsideration, arguing that Rule 55(c), which the Court used as the basis for permitting Respondent to appear, does not apply because there was no default. (R. p. 35) Petitioner argued that the applicable law is Section 38-77-160 which does not contain any exception, much less a "good cause" exception, to the requirement that UIM carriers appear within thirty days of service. The circuit court denied Petitioner's Motion for Reconsideration, again providing no explanation as to how an exception can be read into Section 38-77-160's plain language requiring that a UIM carrier appear within thirty days of service to participate in the defense of an action. (R. p. 4) The circuit court found "the issue of whether or not the UIM carrier has the right to appear and defend this matter under the circumstances is to be handled under the South Carolina Rules of Civil Procedure to determine the just determination of the action." (R. p. 4) The circuit court then reasoned that the South Carolina Rules of Civil Procedure are intended to promote the just resolution of every action and Section 38-77-160 was enacted "for the very purpose of ensuring that the UIM carrier have the right to contest its liability for underinsured motorist's benefits," and therefore, "to promote the ends of justice and have the cases decided on the merits" Respondent should be permitted to make a late appearance. (R. p. 5)

ARGUMENT

This appeal presents multiple novel questions of law. South Carolina's appellate courts have not previously addressed either (1) whether a UIM carrier can be appear and defend under any circumstances when the UIM carrier failed to appear within thirty days of service as required

by Section 38-77-160 or (2) whether an order allowing a UIM carrier to appear and defend despite failing to comply with Section 38-77-160 is immediately appealable.

I. THE COURT OF APPEALS ERRED IN DISMSSING THE APPEAL AS INTERLOCUTORY AND NOT IMMEDIATELY APPEALABLE.

Because the Court of Appeals issued its decision dismissing the appeal "pursuant to Rule 220(b), SCACR"[1] and without any reasoning, the precise grounds for the Court of Appeals' decision are unclear. The citations provided appear to indicate the Court of Appeals concluded: (1) generally only final judgments are appealable, and the appeal is not from a final judgment; (2) while orders affecting a substantial right are an exception to the final judgment requirement and are immediately appealable, orders affecting a substantial right are limited to those that "determine the action and prevent a judgment from which an appeal might be taken or discontinue the action;" and (3) orders setting aside an entry of default and permitting a party to file an answer are not immediately appealable. The Court of Appeals' second and third grounds are erroneous as applied in this case.

A. The Court of Appeals Overlooks the Mode of Trial Exception to the Final Judgment Requirement for Appealability.

First, the Court of Appeals' reliance on *Brown v. County of Berkeley* and its conclusion that to be an order affecting a substantial right the order "must determine the action and prevent a judgment from which an appeal might be taken or discontinue the action" overlooks applicable

[1] While perhaps not an error which alone necessitates reversal, the Court of Appeals' issuance of the decision "pursuant to Rule 220(b)" and without any reasoning is erroneous and hampers the parties and the Supreme Court in ascertaining the basis for the Court of Appeals' decision. First, Rule 220(b)(1) of the South Carolina Appellate Court Rules provides only that the "Supreme Court may file" a memorandum opinion. Rule 220(b)(1) does not permit the Court of Appeals to file a memorandum opinion, and instead, the Court of Appeals must file an opinion which "in writing" states "every point distinctly stated in the case which is necessary to the decision of the appeal" and "the reason for the court's decision." Rule 220(b), SCACR. Second, Rule 220(b)(1) only permits a memorandum opinion in four discrete circumstances, none of which are a dismissal of an appeal as interlocutory.

decisions of this Court and misstates the applicable legal standard. Specifically, the Court of Appeals overlooked the exception whereby an interlocutory order is immediately appealable when it affects the mode of trial.

As recognized by the Supreme Court in *Hagood v. Sommerville* and numerous decisions prior to *Hagood*, South Carolina law provides that "the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right." 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005). The *Hagood* decision first states the same general rule on when an order affects a substantial right as stated in *Brown*—"when [the order] (a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action"—and then provides that "[i]n a well-established exception to the general rule, we repeatedly have held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)." *Id.* at 196, 607 S.E.2d at 709.

The *Brown* decision issued eleven months after *Hagood* did not overrule *Hagood* or otherwise change the "well-established exception" that an order affecting a mode of trial is an order affecting a substantial right and thereby immediately appealable. Since the *Brown* decision, the Court of Appeals issued numerous decisions applying the affecting the mode of trial exception. *See, e.g., S.C. Cmty. Bank v. Salon Proz, LLC*, 420 S.C. 89, 93, 800 S.E.2d 488, 490 (Ct. App. 2017) ("Orders affecting the mode of trial affect substantial rights under [§ 14-3-330(2)] and must, therefore, be appealed immediately." (quoting *First Union Nat. Bank of S.C. v. Soden*, 333 S.C. 554, 565, 511 S.E.2d 372, 377 (Ct. App. 1998)); *Frampton v. S.C. Dep't of Transp.*, 406 S.C. 377, 385, 752 S.E.2d 269, 274 (Ct. App. 2013) ("Orders affecting the mode of trial affect a substantial right as defined in section 14-3-330(2) of the South Carolina Code (1976), and must, therefore, be appealed immediately." (internal quotation omitted)); *Bowers v. Thomas*, 373 S.C. 240, 247, 644

S.E.2d 751, 754 (Ct. App. 2007) ("If an order deprives a party of a mode of trial to which that party is entitled as a matter of right, the order is immediately appealable and failure to do so forever bars appellate review.") Therefore, the Court overlooked the applicable exception whereby an interlocutory order is immediately appealable if it affects the mode of trial, and the order at issue here is immediately appealable if it affects the mode of trial.

The order here affects the mode of trial because had Respondent complied with the thirty-day requirement of Section 38-77-160, Respondent would be permitted to take over the defense of this action as the UIM carrier. But Respondent's ability to take over the defense of this action exists solely by virtue of Section 38-77-160, and absent such statute, a plaintiff would proceed solely against the tortfeasor with the UIM carrier not participating in the suit. UIM insurance coverage is a "creature of the legislature," and the right to recover from a first-party insurer for a loss caused by an uninsured or underinsured driver does not exist "except for the statute." *Criterion Ins. Co. v. Hoffman*, 258 S.C. 282, 290, 188 S.E.2d 459, 462 (1972). UIM coverage is a form of first-party insurance, and a first-party insurer normally has no right to participate in a suit against a third-party. *See Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007); *Criterion*, 258 S.C. at 290, 188 S.E.2d at 462; *Squires v. Nat'l Grange Mut. Ins. Co.*, 247 S.C. 58, 66, 145 S.E.2d 673, 677 (1965); *Uptegraft v. Home Ins. Co.*, 662 P.2d 681, 684 (Okla. 1983); 9 Couch on Ins. § 122:1.

Accordingly, South Carolina common law provides that a plaintiff proceeds solely against the tortfeasor and not against her own insurer, and the common law has been narrowly modified in the instance of UIM insurance where a UIM insurer can take over the defense in the limited circumstances provided in and subject to the requirements of Section 38-77-160. A trial court permitting a UIM insurer to take over the defense where the requirements of Section 38-77-160

have not been met affects the mode of trial for the plaintiff because the plaintiff then no longer has the common law mode of trial in which she proceeds solely against the tortfeasor and does not have to litigate against her own insurer. By permitting a UIM insurer to take over the defense, the trial court creates a right for the UIM insurer where one did not previously exist and eliminates the plaintiff's right to not have to litigate against one's own first-party insurer in an action against a third-party. Moreover, in the situation here where the UIM carrier did not attempt to take over the defense or to make any appearance until after the plaintiff entered into a covenant not to execute with the at-fault driver for a portion of her damages, the plaintiff would otherwise have the option to resolve the case through an abbreviated bench trial. With the UIM carrier permitted to appear after the period provided for in Section 38-77-160, the plaintiff no longer has the option to select an abbreviated bench trial mode of trial.

Recognizing that a decision to permit a UIM insurer to take over the defense pursuant to Section 38-77-160 affects the mode of trial and is immediately appealable comports with existing South Carolina caselaw on which trial court decisions affect the mode of trial. In *Hagood*, the Court held an order disqualifying a party's attorney affected a substantial right and was immediately appealable. The Court reasoned that such an order may be immediately appealed because of the importance of the right and because "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification." *Hagood*, 362 S.C. at 198, 607 S.E.2d at 710. The same reasoning applies here. A plaintiff has an important, common law right to proceed solely against the tortfeasor and to resolve the matter against that tortfeasor without interference

by and opposition from the plaintiff's own first-party insurer, except in the narrow instance where a UIM insurer satisfies the requirements of Section 38-77-160.

Also, like *Hagood*, were a trial court's order permitting a UIM insurer to take over the defense not immediately appealable, the plaintiff's interests would not be adequately protected because it may be very difficult to ascertain whether prejudice to the plaintiff resulted from that decision. Generally, South Carolina's appellate courts require an appellant to show prejudice from an error below for that error to warrant reversal. *See, e.g.*, *Owners Ins. Co. v. Clayton*, 364 S.C. 555, 563, 614 S.E.2d 611, 615 (2005) ("Error without prejudice does not warrant reversal."); *JKT Co., Inc. v. Hardwick*, 247 S.C. 413, 419, 265 S.E.2d 510, 513 (1980) ("An error not shown to be prejudicial does not constitute grounds for reversal."). As an example of the difficulty in showing prejudice that may result were this matter not immediately appealable, were Respondent permitted to take over the defense in this case at this point and the jury then returned a verdict for Petitioner in an amount below Petitioner's damages, Petitioner would then have to appeal following that final judgment. At that point, if the appellate courts required Petitioner to show prejudice resulted from the trial court's erroneous decision to permit Respondent to take over the defense, how could Petitioner show that the inadequate verdict was the result of the erroneous decision? Permitting Respondent to take over the defense significantly changes the remainder of the case thereafter for Petitioner, but there may be no adequate appellate avenue available at the end of the case to assess and rectify an erroneous decision to permit Respondent to take over the defense.

Because the appealed order allows Petitioner's first-party insurance carrier to litigate against Petitioner rather than Petitioner litigating against just the tortfeasor as provided for by the common law, because the appealed order eliminates the option for Petitioner to resolve the remainder of this action through an abbreviated bench trial, and because not permitting an

immediate appeal would not adequately protect Petitioner's mode of trial rights given the difficulty Petitioner would encounter in showing prejudice from the appealed order after a final judgment, the appealed order affects the mode of trial. The order thus affects a substantial right and is immediately appealable under Section 14-3-330.

B. The Court of Appeals Erroneously Treated the Appealability of the Order Below as the Setting Aside of an Entry of Default.

Second, the Court of Appeals erroneously treated the appealability issue as whether an order setting aside an entry of default is immediately appealable and misapprehended the nature of the order below. Of the five authorities cited by the Court as establishing that this issue is not immediately appealable, two state the standard for when an interlocutory order is immediately appealable and the remaining three authorities—*Jefferson by Johnson v. Gene's Used Cars, Inc.*, 295 S.C. 317, 368 S.E.2d 456 (1988); *Wetzel v. Woodside Dev. Ltd. P'ship*, 364 S.C. 589, 615 S.E.2d 437 (2005); *Ateyeh v. United of Omaha Life Ins. Co.*, 293 S.C. 436, 361 S.E.2d 340 (Ct. App. 1987)—provide that orders setting aside an entry of default are not immediately appealable.

While the Court of Appeals cited *Ateyeh* for the proposition that "an order that 'has the effect of allowing a party to answer a complaint after the time to answer has expired' is not immediately appealable," does not support the broad holding the Court of Appeals reads into it. Like the other decisions relied on by the Court of Appeals, the issue in *Ateyeh* was "an appeal from an order of the Circuit Court setting aside an entry of default prior to final judgment." *Ateyeh*, 293 S.C. at 436, 361 S.E.2d at 340. The language cited by the Court of Appeals here is not a holding that any order allowing a party to answer a complaint after the time for doing so has expired is not immediately appealable. Rather, the language the Court of Appeals quotes from *Ateyeh* follows discussion of an earlier decision in which the Supreme Court held that an order allowing a party to answer requests for admission after the time to answer had expired was not immediately

appealable. *Id.* at 438, 361 S.E.2d at 341. Referring to the order at issue in that earlier case, the *Ateyeh* decision states: "Such an order is obviously comparable to the order in the instant case which has the effect of allowing a party to answer a complaint after the time to answer has expired." *Id.* Therefore, *Ateyeh* does not contain a broad holding that any order allowing a party to answer a complaint after the time for doing so has expired, and rather, *Ateyeh* is a narrower decision on a different issue—that an order setting aside an entry of default is not immediately appealable.

Here, the circuit court found, *and the parties agree*, that there was no entry of default or default judgment. (R. pp. 1 & 4) The issue here is a statutory issue as to whether a UIM carrier can take over and defend an action where the UIM carrier fails to appear within the thirty-day requirement provided in Section 38-77-160. The effect of Section 38-77-160 is to provide a UIM carrier a limited period in which to elect to participate in the defense of a claim and otherwise bar a UIM carrier from participating in the defense. Section 38-77-160 does not operate to impose a default judgment, Rule 55(c) of the South Carolina Rules of Civil Procedure is immaterial to Section 38-77-160, and the Court of Appeals' reliance on Rule 55(c) and decisions applying that rule is erroneous.

C. The Court of Appeals Overlooked that Failing to Provide an Immediate Appeal of the Issue Would Not Adequately Protect Petitioner's Interests and Will Cause this Issue to Continue to Evade Appellate Review.

In *Hagood*, the Supreme Court found the grant of a motion to disqualify a party's attorney was immediately appealable in part because "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification." *Hagood*, 362 S.C. at 198, 607 S.E.2d at 710. Here, the Court of Appeals overlooked that the denial of an immediate appeal would similarly fail to adequately protect Petitioner's interests because it would be difficult to ascertain after a trial whether the order

permitting Respondent to defend prejudiced Petitioner. As discussed *infra*, the denial of her right to an immediate appeal would prejudice Petitioner, but it may be difficult or impossible for Petitioner to establish that prejudice in a subsequent appeal.

Moreover, the issue here is one that needs resolution not only to provide clarity to the parties in this case but also to provide clarity to the bar and insurers generally. Were the issue not decided now, the parties likely would resolve this case without any subsequent appeal. The same is likely true for other cases in which the issue arises. Were the Court not to address the issue here, the bar and insurers will continue to struggle with this issue due to the lack of any appellate ruling and the issue will continue to evade appellate review.

II. SECTION 38-77-160 OF THE SOUTH CAROLINA CODE DOES NOT PERMIT A UIM CARRIER TO APPEAR WHEN THE UIM CARRIER FAILED TO APPEAR WITHIN THIRTY DAYS OF SERVICE.

The issue in this case is a matter of statutory interpretation, and the statute at issue here, Section 38-77-160, plainly and unambiguously provides that a UIM carrier may only appear and participate in an action if it does so within thirty days of being served. Therefore, the circuit court erred in permitting Respondent to appear and participate in this action.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys and clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)).

After the first paragraph of Section 38-77-160 which establishes and defines UIM coverage, the second paragraph of that section provides in full:

> No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit. No underinsured motorist policy may contain a clause requiring the insurer's consent to settlement with the at-fault party.

The language of Section 38-77-160 is plain, unambiguous, and conveys a clear and definite meaning: a UIM carrier may appear and defend in the name of the defendant if the UIM carrier does so within thirty days of service on it. The statute contains no exception to that thirty-day requirement, and more specifically, neither contains any "good cause" exception nor any language that could be read as suggesting such a "good cause" exception. Accordingly, South Carolina's courts are to give effect to the plain language of the statute and bar any appearance by a UIM carrier more than thirty days after service on that carrier.

The circuit court erred in not applying the plain language of Section 38-77-160 and further erred in instead applying Rule 55(c) of the South Carolina Rules of Civil Procedure. Rule 55(c) does not apply here because that rule applies only where there has been "an entry of default" or "a judgment by default," and here, the circuit court found and the parties agree that there was no entry of default or default judgment. (R. pp. 1 & 4) Furthermore, Rule 55(c) has no application to and cannot supersede or alter the application of a statute like Section 38-77-160. The South Carolina Constitution provides that the "Supreme court shall make rules governing the practice and procedure in all such courts," but specifically provides that such rules are made "[s]ubject to the

statutory law." S.C. Const. art. V, § 4. Addressing the relationship between statutes and rules of civil procedure, South Carolina courts hold the effect of Article V, Section 4 of the South Carolina Constitution is that statutes control and may not be altered by a rule of civil procedure. *See Hendricks v. State*, 387 S.C. 221, 223, 692 S.E.2d 892, 893 (2010) ("Where, as here, the General Assembly has provided a specific procedure to be followed in PCR cases, and that method is inconsistent with the more general procedure of the SCRCP, the statutory procedure must be followed."); *State v. Cottingham*, 224 S.C. 181, 187, 77 S.E.2d 897, 900 (1953) ("Statutes override rules of court, if in conflict."); *Marichris, LLC v. Derrick*, 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009) ("A rule of civil procedure may not limit the provisions of a statute." (citing S.C. Const. art. V, § 4)).

While there is no ambiguity in Section 38-77-160 and Rule 55(c) has no impact on the application of the plain language of Section 38-77-160, even were the Court to consider anything beyond the plain language to determine the General Assembly's intent in enacting the statute, which the Court should not do given the unambiguous plain language of the statute, the Court would reach the same result. Moreover, consideration of material beyond the language of the statute reinforces the conclusion that Section 38-77-160's language is plain and unambiguous in providing that a UIM carrier can only appear and defend if it does so within thirty days of service.

First, South Carolina courts previously considered analogous language in statutes of limitations and statutes of repose and held the statutes applied as written without any good cause exceptions. In *Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association*, the South Carolina Supreme Court considered whether the medical malpractice statute of repose in Section 15-3-545 of the South Carolina Code barred a hospital's equitable indemnification claim against a doctor. 411 S.C. 557,

769 S.E.2d 847 (2015). The Court found the statute of repose's language covered the claim and applied the statute to bar the claim. *Id.* In doing so, the Court rejected an argument that an exception should be read into the statute of repose and instead applied the plain language of the statute. *See id.* at 561–63, 769 S.E.2d at 849–50. The Court explained its rejection of the argument for reading in an exception as arising from the fact that "[i]f the General Assembly desires to expand [the] exceptions [to the statute of repose] to include the situation presented here, that decision lies exclusively in the Legislative Branch." *Id.* at 562, 769 S.E.2d at 849.

Similarly, in *Sims v. Amisub of South Carolina, Inc.*, the Supreme Court considered whether an insanity tolling exception exists for the three-year statute of limitations for medical malpractice claims. 414 S.C. 109, 777 S.E.2d 379 (2015). Finding the "clear language" and "unambiguous language" of the statute did not provide for such an exception, the Court held that insanity did not toll the statute of limitations. *Id.* at 116, 777 S.E.2d at 383. The Court noted the appellant's "equitable argument that fairness dictates" such an exception to the statute of limitations but rejected that argument because the plain language of the statute set forth the General Assembly's intent and "the fairness of such decisions remains within the prerogative of the legislature." *Id.* at 117, 777 S.E.2d at 383.

The principles of statutory application and interpretation applied in *Columbia/CSA-HS* and *Sims* apply with equal force here. While one rational policy choice may be to allow a UIM carrier to participate in an at-fault driver's defense even when the carrier does not appear within thirty days of service, another rational policy choice is to permit a UIM carrier to participate in an at-fault driver's defense only when the carrier appears within thirty days of service. The weighing of the policy options and the decision as to which policy option to enact is for the General Assembly. Here, the General Assembly set out in the plain language of Section 38-77-160 that

UIM carriers have a limited right to participate in the defense of at-fault drivers, and one limitation on that statutory right is that the UIM carrier must appear within thirty days of service. Like a statute of limitation or statute of repose, courts cannot create exceptions to the statute to permit a UIM carrier to participate in the defense where the UIM carrier failed to appear within the statutory time period.

Second, "[t]he General Assembly is presumed to know the law." *Williams v. Gov't Employees Ins. Co. (GEICO)*, 409 S.C. 586, 602, 762 S.E.2d 705, 714 (2014). The General Assembly is aware of Rule 55(c) and the good cause standard in the rule because the General Assembly reviews proposed rules of civil procedure in deciding whether to disapprove them or permit them to take effect. S.C. Const. art. V, § 4A. The General Assembly also knows how to provide for a good cause exception when it intends to do so as evidenced by the General Assembly employing a "good cause" standard in numerous statutes.[2] Therefore, had the General Assembly intended to provide a good cause exception to the thirty-day requirement in Section 38-77-160, the General Assembly would have included such an exception in the statute, and the absence of

[2] *See, e.g.*, S.C. Code Ann. § 23-50-45 (South Carolina Crimestoppers Act: "Except as otherwise provided by this section, evidence of privileged communications, protected information, and protected identities is not admissible in a civil proceeding unless good cause is shown to the court."); § 49-19-1840 (Drainage Districts under 1920 Act: "All suits instituted under the preceding sections shall stand for trial as other equitable actions unless a continuance be granted for good cause shown within the discretion of the court."); § 56-16-40 (Regulation of Motorcycle Manufacturers, Distributors, Dealers, and Wholesalers: "Thereafter, the manufacturer shall not establish or relocate the proposed new motorcycle dealership unless the court has determined that there is good cause for permitting the establishment or relocation of the motorcycle dealership."); § 58-33-140 (statute governing certification of major utility facilities: "The commission may, in extraordinary circumstances for good cause shown, and giving consideration to the need for timely start of construction of the facility, grant a petition for leave to intervene as a party to participate in subsequent phases of the proceeding . . . ."); § 63-9-780 (South Carolina Adoption Act: "No person may have access to the records except for good cause shown by order of the judge of the court in which the decree of adoption was entered."); § 63-9-1110 (South Carolina Adoption Act: providing that the court may waive certain requirements "upon good cause shown").

such an exception in the statutory language indicates the General Assembly did not intend to provide for such an exception. *See Columbia/CSA-HS*, 411 S.C. at 562–63, 769 S.E.2d at 849–50 (finding that where the General Assembly provided a specific exception in one statute but did not provide that exception in the language of a second statute, the General Assembly did not intend for such an exception to apply to the second statute).

Third, in essentially the opposite situation as present here, South Carolina courts applied Section 38-77-160 to bar an insured from pursing a UIM carrier where the insured did not precisely comply with the requirements of Section 38-77-160, and the courts did so without applying any good cause exception. In *Williams v. Selective Ins. Co.*, the Supreme Court considered the grant of summary judgment for a UIM carrier where the plaintiff insured settled with the at-fault driver's liability carrier for the policy limits in exchange for a covenant not to execute, then filed a claim with the plaintiff's UIM carrier. 315 S.C. 532, 533, 446 S.E.2d 402, 403 (1994). The UIM carrier refused to pay the UIM benefits, and the plaintiff insured filed suit against the UIM carrier. *Id.* On appeal from the grant of summary judgment for the UIM carrier, the Court held Section 38-77-160's requirement that the insured serve the UIM carrier in the liability action is an absolute prerequisite to recovering from a UIM carrier. *Id.* at 534, 446 S.E.2d at 404. The Court did not consider whether the insured had good cause for failing to serve the UIM carrier and did not give any indication that any exception may exist for the requirement that the insured file suit against the at-fault driver and serve the UIM carrier in that suit.

Similarly, in *Ex parte Allstate Ins. Co.*, the plaintiff insured did not serve the UIM carrier with the lawsuit against the at-fault driver until after a trial of the claims against the at-fault driver. 339 S.C. 202, 203–04, 528 S.E.2d 679, 679–80 (Ct. App. 2000). The trial court granted summary judgment for the UIM carrier as required by Section 38-77-160. *Id.* at 204, 528 S.E.2d at 680. On

appeal, the Court of Appeals rejected the plaintiff insured's explanations as to why it was permissible to serve the UIM carrier after the trial against the at-fault driver on the basis that the language of "the statute is absolute." *Id.* at 205, 528 S.E.2d at 680. The Court of Appeals held that because the plaintiff insured had not complied with the requirements stated in Section 38-77-160, the plaintiff insured had no right to UIM benefits. *Id.* at 205, 528 S.E.2d at 681. The Court of Appeals did so without any consideration of whether the plaintiff insured had good cause for failing to serve the UIM carrier until after the trial against the at-fault driver. If the language of "the statute is absolute" for insureds, then it also must be "absolute" for insurers.

Fourth and finally, permitting a UIM carrier only thirty days in which to appear and participate in the defense without any good cause exception to that thirty-day requirement comports with the larger statutory scheme for UIM enacted by the General Assembly. UIM insurance coverage is a "creature of the legislature" and the right to recover from a first-party insurer for a loss caused by an uninsured or underinsured driver does not exist "except for the statute." *Criterion Ins. Co. v. Hoffman*, 258 S.C. 282, 290, 188 S.E.2d 459, 462 (1972). UIM coverage is a form of first-party insurance, and a first-party insurer normally has no right to participate in a suit against a third-party. *See Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42, (2007); *Criterion*, 258 S.C. at 290, 188 S.E.2d at 462, *Squires v. Nat'l Grange Mut. Ins. Co.*, 247 S.C. 58, 66, 145 S.E.2d 673, 677 (1965); *Uptegraft v. Homes Ins. Co.*, 662 P.2d 681, 684 (Okla. 1983); Steven Plitt et al., 9 *Couch on Ins.* § 122.1 (3rd ed. 2020).

Having created the UIM form of first-party insurance and given the unusual nature of that coverage where an insured's carrier pays for the liability of a third-party, the General Assembly decided to provide a UIM carrier with a limited right to participate in the defense of the at-fault driver. *See Ex parte Allstate Ins. Co.*, 339 S.C. at 207, 528 S.E.2d at 681. That limited right is an

exception to the normal rule that a first-party insurer has no right to defend litigation between an insured and a third-party tortfeasor. The General Assembly could have not provided any right for the UIM carrier to defend the litigation, and then the UIM carrier would be limited to contesting coverage through a later action between the insured and the insurer. *Squires*, 247 S.C. at 66, 145 S.E.2d at 677. Instead, weighing the policy options, the General Assembly decided to provide a limited right for UIM carriers to participate in the defense, and one of the limitations on that right to participate is that the UIM carrier must appear within thirty days of service.

Even with a right to participate in litigation between an insured and an at-fault driver, there are reasons that a UIM carrier may elect not to participate in certain cases. The UIM carrier may believe an insurance policy provision bars coverage regardless of the outcome in the liability litigation. The UIM carrier may believe the claim against the at-fault driver is so strong that the UIM carrier will be obligated to pay its policy limits and any defense in the liability litigation would be an unwise expenditure on attorney's fees. The UIM carrier may believe the claim against the at-fault driver is so weak or the damages so small that the UIM coverage will never be obligated to pay and therefore any defense mounted would be an unwise expenditure on attorney's fees. Given that there are reasons a UIM carrier may choose not to participate in the defense of an at-fault driver, the General Assembly presumably intended to provide a limited period of time in which a UIM carrier can choose to participate in the defense and after which the injured party can know the UIM carrier will not participate and carry on with the litigation accordingly.

Here, Petitioner followed the statute and relied upon the procedure mandated by the General Assembly. Having served Respondent as the UIM carrier in this action, Petitioner waited more than thirty days for Respondent to appear and defend. When Respondent did not appear, Petitioner reasonably relied on that as an indication that Respondent did not intend to appear and

contest the liability and damages components of Petitioner's claim for UIM benefits. Petitioner entered into a covenant not to execute with the at-fault driver in exchange for the at-fault driver agreeing to pay less than the limits of the at-fault driver's liability policy. Petitioner did so because Respondent did not appear, and in doing so, Petitioner relinquished her options to make a *Tyger River*[3] policy limits demand for Defendant's automobile liability insurance and to proceed to trial against defendant to recover the full amount of Defendant's liability policy. Petitioner substantially relied on and altered her position due to Respondent's failure to appear, and permitting Respondent to make a late appearance would result in substantial prejudice to Petitioner.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests the Court grant the petition for a writ of certiorari, reverse the Court of Appeals' opinion, reverse the Circuit Court, and order that Respondent's answer and appearance be quashed.

Respectfully submitted,

F. Elliotte Quinn IV
Steven E. Goldberg
The Steinberg Law Firm, LLP
103 Grandview Drive
Summerville, SC 29483
(843) 871-6522

Attorneys for Petitioner

September 8, 2022

[3] *Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933).