THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

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

Appellate Case Number: 2022-001247
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.

RESPONDENT'S RESPONSE TO PETITIONER'S WRIT OF CERTIORARI

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ATTORNEYS FOR RESPONDENT

ARGUMENTS:

RESPONSE TO QUESTION I:

This is an interlocutory appeal. The Court of Appeals properly dismissed this appeal under the Final Judgment Rule. In this case, none of the considerations governing review are present. There is no novel question of law, there was no dissent among the Court of Appeals, the decision of the Court of Appeals does not conflict with any prior decision of the Supreme Court, no substantial constitutional issues are involved, and no federal questions are included. This is a small car wreck case, and the Plaintiff still has every right to a fair trial. The Plaintiff's right to a fair trial has not been impinged upon at all. The argument that this order is immediately appealable because it affects the mode of trial is completely off-target. This decision preserves the traditional right to trial for all parties involved.

RESPONSE TO QUESTION II:

The decision of the Circuit Court on the Plaintiff's Motion to Quash and the Underinsured Carrier's Motion for Relief from Default is a discretionary decision. The Circuit Court properly exercised its discretion when it denied the Plaintiff's Motion to Quash and granted the Underinsured Carrier's Motion For Relief From Default. The UIM Carrier is entitled to constitutional rights of due process and application of the South Carolina Rules of Civil Procedure, which were properly applied by the Circuit Court. The Plaintiff still has every right to a full and fair trial on her claim.

STATEMENT OF THE CASE

This matter arose from Respondent Government Employees Insurance Company's (hereinafter "GEICO") Motion for Relief from Default (Motion for Relief from Default, Record on Appeal, p. 20) and the Plaintiff's Motion to Quash the appearance by GEICO as the Underinsured Motorist Carrier (hereinafter "UIM Carrier")(Motion to Quash, Record on Appeal, p. 26). The Court agreed that the UIM carrier should have the right to defend this claim, denied the Plaintiff's Motion to Quash, and accepted GEICO's Notice of Appearance as if timely filed. (Order Denying Motion to Quash, Record on Appeal, p. 1).

Counsel for the Plaintiff filed a Motion for Reconsideration, asserting that the only law that applied to this situation is S.C. Code of Laws §38-77-160; that this statute is a statute of limitations; and that GEICO cannot seek any relief under the South Carolina Rules of Civil Procedure. (Motion for Reconsideration, Record on Appeal, p. 35). The Plaintiff claims that §38-77-160 sets forth a thirty (30) day statute of limitations for the UIM Carrier to appear, after which there is no recourse for the UIM carrier under any circumstances. The Court exercised its discretion, disagreed with the Plaintiff, and denied the Plaintiff's Motion to Quash. The Court granted GEICO's Motion for Relief from Default and accepted the Notice of Appearance.

This case has not been tried. There is no final judgment or order ending this case. This is an interlocutory appeal of an Order Denying a Motion to Quash and granting a Motion for Relief from Default. These are not final orders, and they do not affect any substantial right of the parties.

The Respondent filed a Motion to Dismiss this appeal with the Court of Appeals on June 17, 2020. (Motion to Dismiss, Record on Appeal, p. 78). This Motion was originally denied by Order of the Honorable James Lockemy on September 10, 2020, but the Order reserved the parties right to argue the issue of appealability in their appellate briefs. (Order, Record on Appeal, p. 85).

The Court of Appeals then granted the Motion to Dismiss on June 22, 2022 stating that "Because this issue is not immediately appealable, we dismiss this appeal without prejudice."

STATEMENT OF FACTS

This case arises from a very minor two vehicle accident that occurred on I-26 on February 4, 2016. The Plaintiff, Latarsha Docena-Guerrero, was a passenger in the vehicle being driven by her husband, Rafael Docena-Guerrero, when the accident giving rise to this lawsuit occurred. The Docena-Guerreros were insured with GEICO Insurance Company at the time of the accident. GEICO provided liability coverage and underinsured motorist coverage on the vehicle. This is a lawsuit in which one spouse is suing the other to obtain the insurance proceeds.

Mr. Docena-Guerrero was driving to work early in the morning on February 4, 2016. It was raining at the time of the accident. Jarrett Wright was in the vehicle traveling in front of Mr. Docena-Guerrero. Traffic slowed down on I-26, forcing Mr. Wright to slow down. Mr. Docena-Guerrero slowed down but failed to completely stop in time, bumping into the rear of Mr. Wright's vehicle. The investigating officer estimated the property damage to Mr. Wright's vehicle to be only fifty dollars ($50) and only five hundred dollars ($500) to the Docena-Guerreros' truck. The actual damage to the Docena-Guerreros' truck was $872.29. This was a minor accident that does not appear to justify any claim for any injuries at all, much less a claim for any significant injuries.

Although it is admitted that Mr. Guerrero was negligent in causing the contact between the vehicles, proximate cause and damages are strongly contested. Thus, there is a meritorious defense to the Plaintiff's claim.

On June 15, 2018, the Plaintiff, Latarsha Docena-Guerrero, filed suit against her husband, Rafael Docena-Guerrero. GEICO assigned the defense of Mr. Docena-Guerrero to Attorney Meg

Horn under the liability portion of the lawsuit. Ms. Horn timely answered the Complaint and defended the case.

On or about August 26, 2019, counsel for the Plaintiff served GEICO as the underinsured motorist carrier through the South Carolina Department of Insurance. When the notification from the Department of Insurance was received in the mail room at GEICO, it was mistakenly classified as a redundant copy of the lawsuit, instead of a new claim for UIM coverage. It was sent to the adjuster handling the liability defense, instead of having a separate adjuster assigned. (Affidavit of Stacie Dumas, Record on Appeal, p. 70). Because of this mistake, the UIM portion of the case was not immediately assigned to defense counsel.

Counsel for the Plaintiff never filed for an Entry of Default nor placed GEICO into default. There was no Entry of Default in this case. No Default Judgment was ever obtained or filed. The Plaintiff could not have possibly changed her position in reliance on any Entry of Default or Default Judgment in this case, as there was none.

The Plaintiff asserts that she relied on the late response by GEICO in determining to settle with GEICO as the primary carrier for less than the primary limits. However, the Plaintiff actually offered to settle with GEICO for less than the limits on a full release prior to the lawsuit being filed. On April 28, 2017, the Plaintiff made a demand to settle within the primary liability limits for $24,000 on a full release. (Letter from Steven Goldberg dated 4/28/17, Record on Appeal, p. 69). Thus, the current position that the Plaintiff was prejudiced by settling for less than the policy limits is inconsistent with the prior written demand from Plaintiff's counsel.

The Plaintiff, Latarsha Docena-Guerrero, settled the claim against her husband through GEICO as the liability carrier for less than the liability limits, accepting $22,000 out of the limits of $25,000. (Covenant Not to Execute, Record on Appeal, p. 72). On or about December 23, 2019,

counsel for the Plaintiff returned the signed Covenant Not to Execute to defense counsel, Meg Horn. Attorney Meg Horn remained as the defense counsel for approximately two months until an order substituting counsel was filed on February 21, 2020. (Consent Order Substituting Counsel, Record on Appeal, p. 7)

The undersigned counsel was retained by GEICO as the UIM carrier on or about February 18, 2020. On February 19, 2020, the undersigned filed a Notice of Appearance and Conditional Answer with the Court. (Notice of Appearance, Record on Appeal, p. 22). Although there had never been any entry of default filed, and even though the case was still being actively defended by Attorney Meg Horn, as a precaution, the undersigned filed a Motion for Relief from Default because the Notice of Appearance had not been filed within thirty (30) days of the date of service upon the Insurance Commissioner. (Motion for Relief from Default, Record on Appeal, p. 20; Memorandum in Support of Motion for Relief from Default, Record on Appeal, p. 29; Affidavit of Adjuster Stacie Dumas, Record on Appeal, p. 70)

Counsel for the Plaintiff takes the position that a UIM carrier has no recourse at all if the Notice of Appearance is not filed within thirty (30) days of service. Such a position is unreasonable and ignores Constitutional rights to Due Process, the South Carolina Rules of Civil Procedure, and South Carolina common law on relief from default.

Counsel for the Plaintiff claims that the thirty (30) day time limit in S.C. Code of Laws §38-77-160 is a statute of limitations, beyond which there is no means for a UIM carrier to file an appearance and defend a case. (Transcript of March 10, 2020 Hearing, p. 5, Record on Appeal, p. 53, p. 57, l. 5-p. 58, l. 16) The Plaintiff is attempting to prohibit her own insurance carrier from defending this claim on the merits. Such a position is improper. Statutes of limitation are contained in South Carolina Code Title 15, Chapter 3. They are entitled as "Limitations on Civil Actions".

Statutes of limitation are not contained in South Carolina Code Title 38. Chapter 77 covering automobile insurance. There is no known statute of limitations under South Carolina law that is so short as thirty (30) days and eliminates the rights of any party or entity.

The acceptance of the late filing should be handled under the South Carolina Rules of Civil Procedure, just as any filing of an Answer, Motion For Relief From Default, or Motion to Extend the Time to Answer.

To further undermine the UIM carrier's ability to defend the claim, counsel for the Plaintiff then sent a message to the Defendant, Rafael Docena-Guerrero, through his client, Latarsha Docena-Guerrero, to retain Mr. Goldberg's friend Jonathan Altman as personal counsel. (Emails from Steven Goldberg to Tom Milligan dated 2/21/20, Record on Appeal, p. 76). This action occurred when the Defendant was already personally protected by a Covenant Not To Execute and there was no known legitimate need for him to retain personal counsel. The Defendant and Plaintiff's spouse, Rafael Docena-Guerrero, then hired Mr. Goldberg's friend, Jonathan Altman, to represent him. (Letter of Representation from Jon Altman, Record on Appeal, p. 34). This means that the associated attorneys are now representing both the Plaintiff and the Defendant in the case. Attorneys should not represent both sides to a lawsuit whose interests are in conflict. See, S.C Rules of Professional Conduct, Rules 407.1.3 and 407.1.7.

Counsel for the Plaintiff took the position that (1) a UIM carrier has no recourse at all if the Notice of Appearance is not filed within thirty (30) days of service and (2) that it is proper for the Plaintiff's team to represent both the Plaintiff and the Defendant at trial. The apparent purpose of these actions is to prevent the UIM carrier from having any ability to defend the claim against it by its insured. Indeed, if counsel for the Plaintiff has his way, the Plaintiff's team would be conducting both the offense and defense at the trial of this matter with no input from the real party

in interest, the target UIM carrier. Unless there is some rational, legitimate explanation for these actions, this is not proper and should not be allowed.

In this case, there is a meritorious defense to this lawsuit between husband and wife, that the impact was too minor to justify the Plaintiff's claim for injuries and need for treatment. Good cause exists to set aside failure to file the Notice of Appearance within thirty (30) days, as it occurred due to a mistaken classification by the mailroom of the Complaint as a redundant copy. The Plaintiff, who is suing her husband, has incurred no prejudice as no change in position occurred in reliance on the delay in filing the Notice of Appearance. The Plaintiff can still have her day in court to prove the merits of this claim. The Honorable Roger Young correctly ruled on the issue so that this matter would proceed to trial on its merits. This is a discretionary decision that should not be overturned.

This case has not been tried yet and no final judgment has been entered. This decision should not have been appealed at all until after a final decision was rendered on the case.

STANDARD OF REVIEW

ABUSE OF DISCRETION:

The standard for setting aside an Entry of Default is whether "good cause" exists under Rule 55(c), whereas the standard to set aside a judgment of default is "excusable neglect" under Rule 60(b).

The decision whether to set aside an Entry of Default is left to the sound discretion of the trial judge. Wham v. Shearson Lehman Brothers., Inc., 298 S.C. 462, 381 S.E.2d 499 (S.C. App.1989). The factors the judge should consider in deciding whether to set aside an Entry of Default are (1) the timing of the Motion for Relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Id.

The trial judge's decision will not be reversed absent an abuse of discretion. An abuse of discretion in setting aside a default judgment occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support. Ricks v. Weinrauch, 293 S.C. 372, 360 S.E.2d 535 (S.C. .App.1987). The discretionary element makes it clear that the party requesting a judgment by default is not entitled to one as of right, even when the defendant is technically in default. Id. Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits. Dixon v. Besco Engineering, 320 S.C. 174, 463 S.E.2d 636 (S.C..App.1995). In re: Estate of Weeks, 495 S.E.2d 454, 329 S.C. 251 (S.C. App. 1997)

ARGUMENT

A. MOTION TO DISMISS – FINAL JUDGMENT RULE:

The Respondent Government Employees Insurance Company moved to dismiss this appeal on the basis that the Appellant is attempting to appeal an interlocutory order. Only final decisions may be appealed pursuant to the South Carolina Rules of Civil Procedure Rule 72 and the South Carolina Appellate Court Rules, Rule 201 *Right to Appeal.* Final orders are those that terminate the case or that fix the rights of the parties so that the court has nothing further to do in the case. Flanigan, *South Carolina Rules of Civil Procedure,* 3rd Edition, p. 564.

The appellant is attempting to appeal the Circuit Court's Order Denying Motion to Quash the Answer and Appearance by the UIM Carrier and Granting Motion for Relief from Default, and the denial of the follow up Motion for Reconsideration. Such orders are not final judgments. South Carolina adheres to the Final Judgment Rule, which provides that, with limited exceptions, an appeal lies only from a final judgment. Brunson vs. American Koyo Bearings, 367 S.C. 161, 623 S.E. 2d 870 (S.C. App. 2005). An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review is considered an interlocutory order from which no immediate appeal is allowed. Hagood vs. Sommerville, 363 S.C. 191, 607 S.E. 2d 707 (2005). An order setting aside an entry of default is not appealable until after final judgment. Ateyah vs. United of Omaha Life Insurance Company, 293 S.C. 436, 361 S.E. 2d 340 (S.C. App. 1987).

In this case, the Respondent GEICO as the UIM carrier filed a Motion for Relief from Default for failure to timely file a Notice of Appearance. The Plaintiff filed Motion to Quash the appearance of GEICO. The Honorable Roger Young granted GEICO's Motion for Relief and denied the Plaintiff's Motion to Quash and Motion for Reconsideration. These are not final

judgments, and these decisions do not end the case. These decisions do not involve the merits of the action and do not affect a substantial right of the parties. These decisions merely set the case on course for trial on the merits.

In the cases cited by the Petitioner as being immediately appealable, the party was denied a right to a fair trial. In South Carolina Community Bank vs. Salon Proz, *LLC,* 420 S.C. 89, 800 S.E. 2d 488 (2017), the petitioner was denied their right to a jury trial. In Hagood vs. Sommerville, 362 S.C. 191, 607 S.E. 2d 707 (2005), the petitioner appealed an order disqualifying their attorney from trying the case. In the case at bar, the petitioner has not lost any rights to a fair jury trial. This appeal is not made for the purposes of ensuring that the Plaintiff Petitioner receives a fair trial. The actual purpose of this appeal is to prohibit the defense from receiving a fair trial where the Plaintiff has to prove her claim on the merits. This should not be allowed.

The Plaintiff's attempt to appeal the court's decision to grant a Motion For Relief From Default and denying the Plaintiff's attempt to quash the appearance of the UIM carrier is clearly not immediately appealable. The Court of Appeals agreed and dismissed the appeal. The Respondent GEICO moves that the Writ of Certiorari be denied.

B. S.C. CODE OF LAWS §38-77-160 IS NOT A STATUTE OF LIMITATION

Plaintiff counsel's argument that S.C. Code of Laws §38-77-160 is a statute of limitation is clearly incorrect. The Supreme Court has already specifically ruled that this statute is not a statute of limitation. Ex parte South Carolina Farm Bureau Mutual Insurance Company, 314 S.C. 487, 431 S.E. 2d 252 (1993). The Supreme Court clearly set forth that this statue is a notice statute, and not a statute of limitation. A statute of limitation must contain within itself a specific statement limiting the time within which an action is to be brought. Hardee vs. Lynch, 212 S.C. 6,

46 S.E. 2d 179 (1948). The language does not establish a statute of limitation because a statute of limitations must contain within itself a specific statement limiting the time within which the action is to be brought. Franklin vs. Devore, 327 S.C. 418, 489 S.E. 2d 651 (S.C. App. 1998).

Counsel for the Plaintiff claims that the thirty (30) day time limit in S.C. Code of Laws §38-77-160 is a statute of limitations, beyond which there is no means for a UIM carrier to file an appearance and defend a case. (Transcript of Record, p. 5, Record on Appeal, p. 53, p. 57, l.5-p. 58, l. 16) The Plaintiff is attempting to prohibit her own insurance carrier from defending this claim on the merits. Such a position is improper.

Statutes of Limitation are contained in South Carolina Code Title 15, Chapter 3. They are entitled as "Limitations on Civil Actions". Statutes of Limitation are not contained in South Carolina Code Title 38. Chapter 77 covering automobile insurance. There is no known statute of limitations under South Carolina law that is so short as thirty (30) days and eliminates the rights of any party or entity. Nothing in §38-77-160 creates a statute of limitation. Ex parte Allstate Insurance Company, 339 S.C. 202, 528 S.E. 2d 679 (2000).

Counsel for the Plaintiff takes the position that a UIM carrier has no recourse at all if the Notice of Appearance is not filed within thirty (30) days of service. Such a position is completely unreasonable. This position ignores the South Carolina Rules of Civil Procedure and South Carolina common law on relief from default. It is illogical to claim that South Carolina statutory law does not work in conjunction at all with the South Carolina Rules of Civil Procedure. GEICO was put on notice of the suit and has appeared in time to assume the defense and handle the remainder of the case.

The thirty (30) day time period set forth in S.C. Code §38-77-160 is similar to the thirty (30) day time period to answer a complaint set forth in SCRCP Rule 12, except that the language

is actually less stringent. In S.C. Code §38-77-160, the UIM Carrier is granted time – the insurer "has thirty days after service of process on it in which to appear." Rule 12 uses mandatory language for answering – "A Defendant shall serve his answer within thirty (30) days after service of the Complaint upon him." However, a Defendant is allowed to move for relief from default in spite of the more stringent language in the rule. The acceptance of the late filing by GEICO in this case should be handled under the South Carolina Rules of Civil Procedure, just as any filing of an Answer, Motion For Relief From Default, or Motion to Extend the Time to Answer. The Honorable Roger Young agreed with the UIM Carrier's position that this statute is not a statute of limitation and granted GEICO's motion.

C. RELIEF FROM DEFAULT/RIGHT TO DEFEND CASE:

SCRCP Rule 55 governs Motions for Relief from Default and SCRCP Rule 60(b) governs motions for relief from judgment or orders. Rule 60(b) provides:

> **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment order, or proceeding, for the following reasons:
>
> 1) Mistake, inadvertence, surprise, or excusable neglect;
> 2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> 3) Fraud, misrepresentation, or other misconduct of an adverse party;
> 4) The judgment is void;
> 5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that the judgment should have prospective application.

The decision to grant relief from default is solely within the sound discretion of the trial court. Wham v. Shearson Lehman Brothers, Inc., 289 S.C. 462, 381 S.E. 2d 499 (S.C. App. 1989).

In determining if relief should be granted from a simple entry of default, the Court should examine the following factors:

1. The timing of the Motion for Relief;
2. Whether the Defendant has a meritorious defense; and
3. The degree of prejudice to the Plaintiff if relief is granted.

Maxwell v. Genez and Doe, 350 S.C. 563, 567 S.E. 2d 496 (S.C. App., 2002); Wham, supra. Courts should strive so as to promote the ends of justice and dispose of cases on their merits. In re Estate of Weeks, 329 S.C. 251, 495 S.E. 2d 454 (S.C. App. 1997).

The standard for relief from failure to timely file a Notice of Appearance in this case is not governed by the strict requirements of Rule 60, as no judgment has been entered. The Plaintiff had not even filed for an Entry of Default against the UIM Carrier. The standard in this case is the much lower standard of only having to show good cause for relief under SCRCP Rule 55.

In this case, there is a meritorious defense to this lawsuit between husband and wife, that the impact was too minor to justify the Plaintiff's claim for injuries and need for treatment. Good cause exists to set aside failure to file the Notice of Appearance within thirty (30) days, as it occurred due to a mistaken classification by the mailroom of the Complaint as a redundant copy. The Plaintiff, who is suing her husband, has incurred no prejudice as no change in position occurred in reliance on the delay in filing the Notice of Appearance. The only "prejudice" is that the Plaintiff will have to prove her case on the merits in a jury trial.

The UIM carrier showed that good reason exists for relief from the default judgment in this case. The Honorable Roger Young agreed and granted the Motion for Relief. This is a discretionary decision that should not be overturned on appeal.

D. UIM CARRIER'S RIGHT TO APPEAR AND DEFEND:

UIM coverage is voluntary coverage; it is not mandatory coverage. The insurance policy provides that the insurance carrier has the right to appear and defend in the name of the underinsured motorist in any action which may affect our liability. This language in the insurance contract mirrors the language from S.C. Code §38-77-160 providing that the UIM carrier has a right to appear and defend. The policy also requires that the insured cooperate with the insurer in the investigation of the claim. In this case, the insureds are violating this duty and attempting to thwart their carrier's right to defend the case.

S.C. Code §38-77-160 was enacted in 1989 for the ***purpose*** of protecting an insurance carrier's right to contest its liability for underinsurance benefits. S.C. Code §38-77-160 provides in pertinent part that:

1) the insurer has the right to appear ***and defend*** in the name of the underinsured motorist in any action which may affect its liability.
2) In the event that 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 the insured, the underinsured motorist insurer may assume control of the defense of the action for its own benefit.

The first sentence unambiguously states that the insurer has a right to appear ***and defend.*** This should not be limited to the right to make an appearance and passively observe the proceedings as a bystander while the Plaintiff obtains a verdict that the UIM carrier is responsible for paying.

The case of Williams vs. Selective Insurance Company, 315 S.C. 532, 446 S.E. 2d 402 (1994) states that the intent of S.C. Code §38-77-160 is to protect an insurance carrier's right to contest its liability for underinsurance benefits. Broome vs. Watts, 319 S.C. 337, 461 S.E. 2d 46

(1995) held that the UIM carrier had ***rights separate and distinct*** from the rights of the defendant. The court in Broome also confirmed the finding in the Williams case that the intent of §38-77-160 is to protect an insurance carrier's right to contest liability for underinsured benefits. (Emphasis added). Williams and Broome further held that the purpose of §38-77-160 is to avoid the result of a total waiver of the UIM carrier's right to defend. The right to defend includes the right to a jury trial.

The Court in Broome further held that the UIM carrier was the **actual defendant,** which must pay damages on behalf of the named defendant in the event of liability when the named defendant had settled and was protected by a covenant. Although the UIM carrier "steps into the shoes of the underinsured motorist", it has rights separate and distinct from the underinsured motorist. *See also,* Rowzie vs. Allstate, 556 F. 2d 165 (4th Cir. 2009). When the UIM Carrier has the only exposure to a verdict in an action, the UIM Carrier is the real party in interest. The fact that they are not named as a "party", i.e., the named Plaintiff or named Defendant, does not change the fact that they are the real party in interest. The real party in interest should be afforded the same protections as every other party under the laws and rules of the State of South Carolina.

The Plaintiff in the Broome case was attempting to unfairly thwart the UIM carrier's rights by getting a settling Defendant to waive the UIM carrier's right to defend itself properly. The Court in Broome refused to stand for such tactics. The Broome decision cited with approval that the South Carolina Department of Insurance had addressed this issue by stating that §38-77-160 does not "sanction collusive settlements or to otherwise circumvent the underinsured motorist's insurer's right or opportunity to defend." *Citing* S.C. Dept. Ins. Bulletin No. 4-89 (1989)(Bulletin 4-89 withdrawn by Bulletin 2002-10). The Broome decision prevented the

Plaintiff from unfairly eliminating the UIM carrier's rights, as the Plaintiff convinced the Defendant, who no longer had any stake in the matter, to agree to waive the right to a jury trial and to waive venue in Lexington County. The Court ruled that this attempted action by the Plaintiff to thwart the UIM carrier's right to defend was improper.

In the present case, the Plaintiff wife and Defendant husband are trying to prevent the UIM carrier from being able to defend the case. This should not be allowed.

To further undermine the UIM carrier's ability to defend the claim, counsel for the Plaintiff sent a message to the Defendant Rafael Docena-Guerrero through his client Latarsha Docena-Guerrero to retain Mr. Goldberg's friend Jonathan Altman as personal counsel. (Emails from Steven Goldberg to Tom Milligan dated 2/21/20, Record on Appeal, p. 76). This action occurred when the Defendant was already personally protected by a Covenant and there was no known legitimate need for him to retain personal counsel. The Defendant and Plaintiff's spouse, Rafael Docena-Guerrero, then hired Mr. Goldberg's friend Jonathan Altman to represent him. (Letter of Representation from Jon Altman, Transcript of Record, p. 34). This means that the associated attorneys are now representing both the Plaintiff and the Defendant in the case. Attorneys should not represent both sides to a lawsuit whose interests are in conflict. S.C Rules of Professional Conduct, Rules 407.1.3 and 407.1.7.

It should also be pointed out that the obligation of good faith in a first party setting is a two-way street. The Court in the seminal case of Nichols vs. State Farm Mutual Insurance Company, 279 S.C. 336, 306 S.E. 2d 616 (1983) stated that the obligation of good faith is an obligation that ***NEITHER PARTY*** will do anything to impair the other's rights to receive benefits under the contract. The attempt by the insured to prohibit the UIM carrier from defending a claim and substituting a member of the Plaintiff's team as counsel for the Defendant is a clear violation

of the Plaintiff's duty of good faith to the insurance carrier. It takes twisted logic to think that this scenario is in any way "just".

In Cobb vs. Benjamin, 325 S.C.573, 482 S.E. 2d 589 (1997) the Court stated that the purpose of the 1989 amendment to §38-77-160 is "to protect an insurance carrier's right to contest its liability for underinsured benefits." The 1989 amendment to §38-77-160 states that the UIM carrier has the "right to appear and defend in the name of the underinsured motorist in any action which may affect its liability…"

In the case of Ex parte Allstate Insurance Company, 339 S.C. 202, 528 S.E. 2d 679 (2000), the Plaintiff obtained an excess verdict, then put the UIM carrier on notice after the trial. The Court ruled that the UIM carrier did not have to pay because they were not put on notice before trial and had no opportunity to defend their interests. The Court specifically ***rejected*** the argument that the UIM carrier had to pay (after judgment) because the liability and damages had been fully litigated before a jury, with the Defendant being represented by counsel for his liability carrier pursuant to the liability carrier's right and duty to defend its insured. It is an even worse situation in this case when the Defendant is being represented by the attorney selected by the Plaintiff's counsel to represent the Defendant.

In Crawford vs. Henderson, 356 S.C. 389, 589 S.E. 2d 204 (2003), the Court held that the rights of the UIM carrier and the Defendant are not synonymous. Although the UIM carrier steps into the shoes of the named Defendant, it has rights separate and distinct from the underinsured motorist. The Court in Broome and Williams established that the interests of a UIM carrier and a named Defendant are separate and distinct. Clearly, once the named Defendant has settled for his liability limits, he no longer has a stake in the outcome of the litigation, as in this case. The UIM carrier, on the other hand, still has a viable financial interest in the case. This is especially true in

a case involving one spouse suing the other, where both stand to benefit from a successful Plaintiff's case.

F. GRANTING PLAINTIFF'S APPEAL WOULD BE A VIOLATION OF RESPONDENT'S CONSTITUTIONAL RIGHTS:

This course of action, trying to sue the UIM carrier without allowing the UIM carrier to defend the case, rises to the level of a Constitutional violation. The United States Constitution prohibits the State from depriving any person of life, liberty, or property ***without due process of law.*** The Takings Clause from the United States Constitution provides: "No person shall be ... deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." United States Constitution, Amendment V. The Takings Clause of the South Carolina Constitution provides that "The privileges and immunities of citizens of this state shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied equal protection of the laws." South Carolina Constitution Art. I, § 3.

Counsel for the Plaintiff is attempting to prohibit the UIM carrier from defending this case. This is improper. It violates the very intent of §38-77-160. The position taken by the Plaintiff deprives the UIM carrier of Due Process. The course of action being pursued by the Plaintiff's counsel is an attempt to obtain a verdict without the UIM carrier being able to defend or have any say in the matter. This position should not be allowed or permitted in a South Carolina court of law.

G. PUBLIC POLICY:

Courts should strive for the disposition of cases on their merits in a manner that is fair to all participants in the case. The Rules of Civil Procedure should be liberally construed so as to promote the ends of justice and dispose of cases on their merits. South Carolina Rules of Civil

Procedure, Rule 1. In re Estate of Weeks, 329 S.C. 251, 495 S.E. 2d 454 (S.C. App. 1997). No rule or statute should be interpreted in such a way that deprives any entity from due process in defending a claim against it. Indeed, this obligation to promote the ends of justice and to handle cases on their merits should fall on the shoulders of the attorneys, as officers of the court, and not just upon the Court itself. There is no honor, justice, or good faith in an attempt to gain a victory over the UIM carrier without allowing the UIM carrier to investigate and defend the action on its merits.

CONCLUSION

Courts should strive for the disposition of cases on their merits in a manner that is fair to all participants in the case. The Rules of Civil Procedure should be liberally construed so as to promote the ends of justice and dispose of cases on their merits. No rule or statute should be interpreted in such a way that deprives any entity from due process in defending a claim against it. Indeed, this obligation to promote the ends of justice and to handle cases on their merits should fall on the shoulders of the attorneys, as officers of the court, and not just upon the Court itself. There is no honor, justice, or good faith in an attempt to gain a victory over the UIM carrier without allowing the UIM carrier to investigate and defend the action on its merits.

This matter should not even be on appeal, as it is not a final judgment. Even if the appellant's position is considered, it should be denied. S.C. Code of Laws §38-77-160 is not a statute of limitations. The decision of the Honorable Roger Young in denying the Motion to Quash was absolutely correct. It is a discretionary decision that should not be overturned. The Court of Appeals decision to dismiss this appeal was clearly correct, as this is not a final judgment and the Plaintiff's right to a fair trial is not affected at all.

RESPECTFULLY SUBMITTED:

s/ *Tom Milligan*

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