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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Jennifer B. McCoy, Circuit Court Judge

Appellate Case No. 2022-001455

Crystal Webb,

Appellant,

v.

Dana Thomas Slaughter,

Respondent.

**AMENDED REPLY BRIEF OF
APPELLANT**

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TABLE OF CONTENTS

Table of Authorities..... 3

Clarification of Facts..... 4

Reply Arguments:

- 1. Respondent is not entitled to a satisfaction of judgment until the case has ended pursuant to the plain terms of the Covenant not to Execute; thus, satisfaction of the judgment is only appropriate if the Court finds that Progressive is bound by the judgment (Respondent’s Argument 1)..... 4
- 2. Appellant did not thwart Progressive’s right to a jury trial; rather, Progressive waived that right by failing to object or otherwise request a jury trial at any time prior to or during the bench trial (Respondent’s Issue 2; Progressive’s Argument Aii) 5
- 3. The Circuit Court erred in holding that the non-jury judgment was not binding on Progressive (Progressive’s Arguments A and Ai)..... 7

Conclusion..... 9

TABLE OF AUTHORITIES

CASES

Ex parte Allstate Ins. Co., 339 S.C. 202, 528 S.E.2d 679 (Ct. App. 2000)..... 6-7

Broome v. Watts, 319 S.C. 337, 461 S.E.2d 46 (1995)..... 8

In the Care and Treatment of Corley, 365 S.C. 252, 616 S.E.2d 441 (2005)..... 6

Progressive Max Ins. Co. v. Floating Caps, Inc., 405 S.C. 35, 747 S.E.2d 178 (2013)..... 4-5

Williams v. Selective Ins. Co., 315 S.C. 532, 446 S.E.2d 402 (1994)..... 8

STATUTES

S.C. Code Ann. § 38-77-160 (1976, as amended)..... 8

CLARIFICATION OF FACTS

In Respondent's Statement of the Case, Respondent indicates on page 7 that "Counsel for the Defendant was not noticed of or included in the hearing and did not attend the hearing."

However, at the time of the damages hearing, Counsel for Progressive had been substituted as Counsel (Orders to Substitute Counsel), and it is clear from the record that Counsel for Progressive was on notice of the hearing because Counsel appeared at that hearing.

REPLY ARGUMENTS

- 1. Respondent is not entitled to a satisfaction of judgment until the case has ended pursuant to the plain terms of the Covenant not to Execute; thus, satisfaction of the judgment is only appropriate if the Court finds that Progressive is bound by the Judgment. (Respondent's Argument 1).**

The Covenant not to Execute, paragraph 4, specifically provides:

4. That furthermore, Crystal Webb and Ronald Webb covenants and promises that if they should attain a judgment against Dana Thomas Slaughter, they will not execute said judgment against Dana Thomas Slaughter or Government Employees Insurance Company and that, **upon a final determination of whether any excess liability insurance coverage or underinsured motorist benefits will be paid, Crystal Webb, Ronald Webb, and their attorney, Julio Rossington, will cause the judgment to be marked and entered as satisfied.**

(Emphasis added) (Covenant not to Execute).

Whether underinsured motorist benefits will be paid and to what extent is clearly still an at issue in this case because Progressive has previously taken the position that it is not bound by the judgment, and Appellant takes the position that either Progressive is bound by the judgment or the case should be remanded for a trial. Under either scenario, there has been no final determination of whether any underinsured motorist benefits will be paid in accordance with the plain terms of the Covenant not to Execute. *See Progressive Max Ins. Co. v. Floating Caps, Inc.*, 405 S.C. 35, 747 S.E.2d 178, 183-84 (2013) (Covenants not to Execute are contracts, and their

plain and unambiguous language should be given full force and effect). Accordingly, based on the plain language of the Covenant not to Execute, Respondent is not entitled to have the judgment marked satisfied at this time. Thus, the trial judge erred in marking the judgment satisfied unless this Court finds that Progressive is bound by and required to pay the judgment.

2. Appellant did not thwart Progressive’s right to a jury trial; rather, Progressive waived that right by failing to object or otherwise request a jury trial at any time prior to or during the hearing. (Respondent’s Argument 2; Progressive’s Argument Aii).

Respondent contends Appellant “thwarted” Progressive’s right to a jury trial. Progressive argues it was not afforded its right to defend the case. Progressive asserts that even though it attended the hearing, it had no “obligation to attempt to participate, let alone object to the mode of ‘trial’ being implemented against [Respondent].”

Initially, it is Appellant’s position that Respondent is not the proper party to assert arguments on behalf of Progressive. As Progressive maintains throughout its brief, it is a separate and distinct entity from Respondent. Regardless, as is clear from the record, Appellant took no steps to thwart Progressive’s rights. Progressive was on notice of the proceedings for almost nine months before the bench trial was held. By its own admission, it participated in the litigation during this time by sending discovery requests. At no time did Appellant attempt to sequester the proceedings from Progressive. Rather, as is abundantly clear from the record, Progressive waived its rights in this case by failing to take any steps to object to the bench trial which was requested in on April 6, 2021 until after the hearing was held. Progressive has further failed to provide any evidence of what testimony or evidence it would have presented had the hearing been held as a jury trial.

Additionally, Progressive has couched its arguments as being bound by a default judgment. However, as the transcript shows, a bench trial was held. Progressive appeared and

had the opportunity to present witnesses as to liability and damages, cross examine Appellant regarding liability and damages, present evidence, and request a jury trial. Thus, to the extent Progressive contends it is being “bound” by a default judgment, that representation is not accurate.

As has been previously stated, Appellant requested a damages hearing on April 6, 2021, before Progressive responded to the Complaint and requested a jury trial. (Motion for Damages Hearing). Progressive was served with the Complaint on March 25, 2021, and answered on April 23, 2021. (Progressive’s Answer). At the time Progressive answered the Complaint, the request for a hearing had already been filed. At no time between March 25, 2021 and December 28, 2021, at which Progressive filed its Motion to Reconsider, did Progressive ever object to the hearing being held as a bench trial. In fact, Appellant filed a memorandum on November 19, 2021, through counsel, in support of the request for damages, and Progressive did not file a Memorandum in Reply. (Memorandum). Rather, the only evidence in the entire record that Progressive ever desired a jury trial in this matter is as follows: (1) On the face of its Answer, Progressive typed “Jury Trial Demanded,” and (2) in its Motion to Reconsider filed on December 28, 2021, after the hearing, Progressive argued its right to a jury trial had not been protected. Progressive had a duty to object and/or request the jury trial at some point prior to or during the damages hearing to preserve that issue for appeal; however, no objection or request was made thereby waiving the right to contest that issue on appeal. *See, i.e., In the Care and Treatment of Corley*, 365 S.C. 252, 616 S.E.2d 441 (2005) (stating constitutional issues must be raised to and ruled on by the trial judge in order to be preserved for appellate review).

Progressive cites *Ex parte Allstate Ins. Co.*, 339 S.C. 202, 528 S.E.2d 679 (Ct. App. 2000) in support of its argument. In *Ex parte Allstate Ins. Co.*, a jury trial was held, and the jury

awarded the Plaintiff \$36,447.00. After trial, while post-trial motions were pending, Plaintiff's counsel served the UIM carrier with a copy of the Summons and Complaint. When the UIM carrier answered, it demanded a jury trial and stated it was not notified of the suit before trial. On appeal, the Court of Appeals rejected the argument that the UIM carrier was bound by the jury verdict because it did not have the right to participate in the defense.

The case at hand is entirely dissimilar from the facts presented in *Ex parte Allstate, supra*. In this case, Progressive was on notice of this case for eight months prior to the hearing (which was held as a bench trial). Progressive was substituted as counsel in the underlying case by two orders dated June 30, 2021 and August 4, 2021. (Substitution Orders). Progressive was on notice of the bench trial, appeared, was represented by counsel, and was given an opportunity to call and question witnesses and present evidence. Progressive did not object to the mode of trial or request a jury trial. Progressive did not proffer any evidence of what it would have presented had the hearing been held as a jury trial. Accordingly, Progressive implicitly consented to moving forward in the case with a bench trial.

Progressive has not stated to the Court what should have procedurally happened in this case to protect its rights. It certainly was not Appellant's duty to protect Progressive's rights. Progressive was represented by Counsel, was noticed for the hearing, appeared, was given the opportunity to participate, call witnesses, and/or cross-examine witnesses. Progressive did not request a jury trial at any time during the proceedings. Thus, it is unclear what Progressive is suggesting should have occurred. If the Court finds Progressive did not waive its right to a jury trial, Appellant requests the Court remand to the circuit court for a jury trial as to damages.

3. The Circuit Court Judge erred in finding that the non-jury default was not binding on the UIM carrier. (Progressive's Argument A and Ai).

Progressive contends that the Circuit Court correctly found that it was not bound by the

non-jury judgment. Progressive admits it was served with the Complaint, timely answered, and that there was ample time before the damages hearing for Progressive to assume Respondent's defense. However, Progressive contends it is a separate entity from Respondent and therefore not bound by the judgment.

Progressive has cited the case of *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995) in support of its argument. However, *Broome* is not applicable to the facts at hand. Specifically, in *Broome*, the issue presented to the Court was whether an UIM carrier was bound by a settlement agreement between the parties wherein the parties waived a jury trial. The Court found the UIM carrier was not bound, but rather, pursuant to S.C. Code Ann. § 38-77-160, had the right to appear, defend, and assume the defense of the action for its own benefit. The Court of Appeals cited the case of *Williams v. Selective Ins. Co.*, 315 S.C. 532, 446 S.E.2d 402 (1994) for the proposition that the purpose of § 38-77-160 "is to avoid the result of a total waiver of the UIM carrier's right to defend."

In this case, Progressive was given ample notice, appeared, and was given the right to defend at the bench trial. If Progressive wished to cross-examine the Appellant regarding liability, it had every right to do so. If Progressive wished to call witnesses to contest liability, it had every right to do so. If Progressive wanted to have a jury trial, all it had to do was ask. However, Progressive did not do any of those things. Rather, Progressive allowed the bench trial to proceed, and it waived its right at those proceedings to participate by failing to call witnesses and/or cross-examine the witnesses called.

Appellant is not arguing that Progressive was in default, was bound by the settlement agreement, or that it did not have a right to a jury trial. Appellant concedes that those rights are set forth in case law. Rather, Appellant is arguing that despite being given every opportunity to

state and/or argue that it wanted to proceed with a jury trial, call witnesses, and cross-examine witnesses, Progressive failed to do all of those things even though it appeared at the bench trial and was allowed to participate. Accordingly, it waived its rights to contest the judgment entered.

CONCLUSION

For the reasons stated herein, the Court should reverse the trial judge's ruling and find that Progressive is bound by the judgment issued. In the alternative, the Court should remand for a jury trial.

Respectfully Submitted:

July 24, 2023

s/ Brett L. Stevens

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CERTIFICATE OF SERVICE

I, Brett L. Stevens, Attorney for the Appellant, certify to the Court that on this 24th day of July, 2023, I served a copy of Appellant's Amended Reply Brief in the above-referenced case, by serving the same by electronic delivery:

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Webb v. Slaughter, 2022-001455

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Dear all,

Please see the attached Amended Reply Brief on behalf of Appellant, along with the Certificate of Service, in the above-referenced case. I will be filing both today with the Court of Appeals via OneDrive.

Sincerely,
Brett Stevens

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