THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
AUG 25 2023
SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer McCoy, Circuit Court Judge

Appellate Case No. 2022-001455

Crystal Webb, Appellant,

v.

Dana Thomas Slaughter, Respondent.

RESPONDENT'S FINAL BRIEF

RESPECTFULLY SUBMITTED:

s/ *Tom Milligan*

Thomas H. Milligan (SC Bar # 12272)
MILLIGAN & HERNS, PC
721 Long Point Road, Suite 401
Mount Pleasant, SC 29464
Telephone: (843) 971-6750
Facsimile: (843) 971-6509
Email: tom@milliganlawfirm.com

ATTORNEYS FOR RESPONDENT

August 23, 2023
Mt. Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Jennifer McCoy, Circuit Court Judge

Appellate Case No. 2022-001455

Crystal Webb, Appellant,

v.

Dana Thomas Slaughter, Respondent.

RESPONDENT'S FINAL BRIEF

RESPECTFULLY SUBMITTED:

s/ *Tom Milligan*

Thomas H. Milligan (SC Bar # 12272)
MILLIGAN & HERNS, PC
721 Long Point Road, Suite 401
Mount Pleasant, SC 29464
Telephone: (843) 971-6750
Facsimile: (843) 971-6509
Email: tom@milliganlawfirm.com

ATTORNEYS FOR RESPONDENT

August 23, 2023
Mt. Pleasant, South Carolina

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND RULES

OTHER

STATEMENT OF ISSUES ON APPEAL

1. When the Defendant has a covenant not to execute protecting them from personal liability and the case has been legally ended, is the Defendant entitled to a satisfaction of judgment to remove any judgment from his record?

2. When the individual Defendant settles with the Plaintiff on a covenant not to execute and is personally protected from any judgment and the underinsured motorist carrier timely appears and demands a jury trial, is it wrong for the Plaintiff to obtain a default judgment against the individual Defendant personally to try to thwart the underinsured carrier's right to a jury trial?

STATEMENT OF THE CASE

This case is based on a motor vehicle incident which occurred on August 20, 2020. Plaintiff filed her Complaint against the Defendant on December 31, 2020. (Complaint, R., p. 30) Thereafter, Plaintiff filed an Affidavit of Service on January 15th indicating service of the Complaint was perfected on January 8, 2021. (Affidavit of Service, R., p. 115). Plaintiff then filed an Affidavit of Default against the individual defendant, Dana Thomas Slaughter ("Defendant") on March 9, 2021. (Affidavit of Default, R., p. 117). An Entry of Default was issued on March 11, 2021. (Entry of Default, R., p. 5). The Entry of Default did not apply to any underinsured motorist carrier.

Thereafter, the Defendant filed an Answer on March 19, 2021 (Answer, R., p. 34) and moved to be relieved from Default prior to any damages hearing being held or any judgment entered. (Motion of Defendant to Set Aside Entry of Default, R., p. 90). Plaintiff filed a "Notice of Motion and Motion for Damages" on April 6, 2021. (Motion for Damages Hearing, R., p. 92). While the Defendant's Motion for Relief from Default was pending, the liability carrier agreed to settle with the Plaintiff on a Covenant Not To Execute. The Plaintiff executed the Covenant Not To Execute in favor of Defendant on April 16, 2021. (Signed Covenant Not to Execute, R., p. 119). Once the Defendant was protected by the covenant, there was no need for defense counsel to take further action to prosecute the Motion for Relief from Default or otherwise defend the case.

There was and is no proper reason for Counsel for the Plaintiff to pursue a default judgment against a party who had settled out of the case. The appropriate manner to handle the situation is to withdraw the entry of default in order to pursue the underinsured motorist carrier. Counsel for the Plaintiff should have withdrawn the Entry to Default. However, this was not done. Counsel for the Plaintiff moved forward with the damages hearing against the settled out individual defendant

in an effort to deprive the underinsured motorist carrier of its constitutional and statutory rights to defend the case.

The Plaintiff served the Complaint on Progressive Northern (hereinafter Progressive or the UIM Carrier) as the underinsured motorist carrier through the Department of Insurance on March 25, 2021. Progressive timely answered the Complaint on its behalf on April 23, 2021 and asserted its constitutional and statutory right to a jury trial. (Progressive Answer R., p. 37). After answering the Complaint, Progressive propounded written discovery upon Plaintiff on June 7, 2021 – 5 months before a damages hearing. Upon information and belief, the Plaintiff never responded to these discovery requests.

On June 30, 2021, counsel for Progressive was substituted in for the undersigned to defend the case. (Order to Substitute Counsel, R., p. 13). At all times from the inception of the case against the UIM Carrier, Progressive has maintained its right to a jury trial. Progressive is entitled to Due Process under the Constitution and to a jury trial under South Carolina Law. Plaintiff's actions are clearly an attempt to circumvent the UIM Carrier's rights to defend the case before a jury.

On December 3, 2021, with counsel for the individual Defendant no longer involved in the case, the Plaintiff moved forward with her damages hearing. Counsel for the Defendant was not noticed of or included in the hearing and did not attend the hearing. Counsel for Progressive attended the hearing but did not participate in this meaningless hearing. (Transcript of Damages Hearing, R., p. 42). The judge appeared to be perplexed by the pursuit of the default judgment by counsel for the Plaintiff, but she allowed the Plaintiff to obtain the requested default judgment against the individual Defendant and end the entire case. The Default Judgment was entered on December 16, 2021. (Default Judgment, R., p. 16). The case was formally ended at that time by court order. No judgment was ever properly obtained against the UIM Carrier.

Upon learning that the case was ended and there was a filed judgment against the Defendant, the undersigned counsel for the Defendant filed to have the judgment marked as satisfied pursuant to the agreed upon terms of the Covenant not to Execute. (Motion for Reconsideration and/or to Mark Judgment Satisfied, R., p. 96). Progressive filed a separate Motion to Mark the Judgment Satisfied. (Progressive Motion to Mark Judgment Satisfied, R., p. 99). The hearing was held before the Honorable Jennifer McCoy. (Transcript of Motion Hearing, R., p. 66). The Motion to Mark the Judgment as Satisfied was properly granted by the Honorable Jennifer McCoy on August 9, 2022. (Order to Satisfy Judgment, R., p. 23). This order ended the case. The Satisfaction was filed on August 9, 2022.

Counsel for the Plaintiff filed a Motion for Reconsideration. (Motion for Reconsideration, R., p. 106). This motion was opposed by both the Defendant's counsel and Progressive's counsel. (Slaughter Memorandum in Opposition to Motion for Reconsideration, R., p. 111; Progressive Northern Response to Motion to Reconsider, R., p. 112). The Motion for Reconsideration was denied. (Order Denying Motion for Reconsideration, R., p. 27).

STATEMENT OF FACTS

The Statement of the Case also sets forth most of the Statement of Facts. Defendant Dana Slaughter settled with the Plaintiff on a Covenant not to Execute prior to entry of any judgment. Once the Covenant was signed, no default judgment should have ever been entered against this individual Defendant. Copies of the executed Covenant not to Execute are attached hereto and incorporated by reference. (R., p. 119) The Defendant was not given any notice or opportunity to contest liability and damages at the damages hearing, and indeed had no reason to do so as the case against him personally was already settled. When the Defendant was protected by a Covenant Not to Execute, no default judgment should ever have been entered against him.

In the alternative, the Covenant not to Execute provides that the Plaintiffs will cause the judgment to be marked and entered as satisfied or that the Clerk of Court will do so if the Plaintiff refuses to do so. The language reads as follows:

> 4. That, furthermore, Crystal Webb and Ronald Webb further covenants and promises that if they should attain a judgment against Dana Thomas Slaughter, they will not execute on said judgment against Dana Thomas Slaughter or Government Employees Insurance Company and that, upon a final determination of whether any excess liability 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.**
>
> 5. That should Crystal Webb, Ronald Webb, or their attorney, Julio Rossington, refuse to mark and enter any judgment attained against Dana Thomas Slaughter or Government Employees Insurance Company as satisfied as provided above, Crystal Webb, Ronald Webb, and their attorney, Julio Rossington, **authorize the Clerk of Court for the County of Charleston, State of South Carolina, to mark and enter the judgment as satisfied** upon receiving a copy of this Agreement from counsel for Dana Thomas Slaughter and Government Employees Insurance Company.

The Court agreed and marked the judgment as satisfied in accordance with the duly executed Covenant not to Execute.

STANDARD OF REVIEW

Rule 60, SCRCP applies as to potential relief from a final order or judgment. To be granted relief from a final judgment, a party must demonstrate a clerical error, mistake, inadvertence, excusable neglect, newly discovered evidence or fraud. See Rule 60, SCRCP.

ARGUMENT # 1

A defendant who has settled with the Plaintiff on a Covenant Not to Execute is entitled to have a judgment marked as satisfied when the case is ended to remove it from his record and credit.

COVENANT NOT TO EXECUTE:

Covenants not to execute were approved by the Supreme Court in Poston by Poston vs. Barnes, 294 S.C. 261, 363 S.E. 2d 888 (1987). A Covenant Not to Execute is a promise not to enforce a right of action or execute a judgment when one had such a right at the time of entering the agreement. Id. While a Covenant Not to Execute is not a release, it is nonetheless a settlement between the parties to the agreement. Wade vs. Berkeley County, 348 S.C. 224, 559 S.E. 2d 586 (2002). The Covenant Not to Execute is designed to protect the Defendant from personal liability while allowing the Plaintiff and remaining parties to the action to continue to *fully litigate* the claim to conclusion. It is not designed to and has no power to strip another party of their rights to fully litigate the claim.

A Covenant Not to Execute is a contract and contract principles of law should be used to determine what the parties intended. See, Ecclesiastes Production Ministries vs. Outparcel Associates, 649 S.E. 2d 494 (2007); Bowers vs. Department of Transportation, 360 S.C. 149, 600 S.E. 2d 543 (S.C. App. 2004). In construing a contract, the primary objective is to ascertain and give effect to the intention of the parties. Southern Atlantic Financial Services, Inc. vs. Middleton, 349 S.C. 77, 562 S.E. 2d 482 (S.C. App. 2002). The parties' intention must, in the first instance, be derived from the language of the contract. Schulmeyer vs. State Farm Fire & Casualty Company, 353 S.C. 491, 579 S.E. 2d 132 (2003). The court must first look to the contract's language – if the language is perfectly plain and capable of legal construction, it alone determines

the document's force and effect. Superior Automobile Insurance Co. vs. Maners, 261 S.C. 263, 199 S.E. 2d 719 (1973).

In this case, the Plaintiff entered into a binding contract with the Defendant authorizing the judgment at the end of the case to be marked as satisfied. This case was ended by the Default Judgment. The Court then properly enforced the binding contract. The Plaintiff was and is obligated contractually and as a matter of principle to mark the judgment as satisfied against the party with whom they agreed to settle.

ARGUMENT # 2

A Plaintiff cannot thwart the underinsured motorist carrier's right to a jury trial by obtaining a default judgment against an individual defendant who has settled out of the case. When the underinsured motorist carrier asserts its right to a jury trial, it is not bound by any default judgment against the individual defendant.

UIM CARRIER'S RIGHT TO APPEAR AND DEFEND IN A JURY TRIAL:

The real purpose of the Plaintiff's strategy was to prevent the UIM Carrier from asserting its constitutional rights to Due Process. Counsel for the Plaintiff attempted to use a default judgment against the settled out Defendant to eliminate the UIM carrier's rights to defend the case in a jury trial. Such as strategy is dishonorable, unconstitutional, and should never be allowed.

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 case. 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 and the Constitution.

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 is trying to prevent the UIM carrier from being able to defend the case. This should not be allowed.

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 its right defending the claim in a jury trial is a clear violation of the Plaintiff's duty of good faith to the insurance carrier. It is 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. This is similar to the present situation, in which the Plaintiff is attempting to hold the UIM carrier accountable for a default judgment without allowing them to defend.

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 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 force the UIM Carrier to pay a judgment while prohibiting the UIM carrier from defending this case. This is highly improper. It violates the very intent of SC. Code of Laws §38-77-160. The position taken by the Plaintiff would deprive the UIM carrier of Due Process if successful. 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 attempted at all and certainly should not be allowed or permitted in a South Carolina court of law.

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

Counsel for the Plaintiff chose to pursue a tactic to try to deprive the UIM Carrier of its right to defend the case. This tactic ended the case with a Default Judgment against the individual Defendant who was protected by a covenant, but which was not effective against the UIM carrier. The UIM Carrier is in no way responsible for the Default Judgment, as they were not allowed their constitutional and statutory right to defend the case and have a jury trial. The Defendant personally has a contract with the Plaintiff that grants him the right to have this judgment satisfied. The decision of the Honorable Jennifer McCoy to mark the judgment as satisfied was absolutely correct and should be affirmed.

RESPECTFULLY SUBMITTED:

s/ *Tom Milligan*

Thomas H. Milligan (SC Bar # 12272)
MILLIGAN & HERNS, PC
721 Long Point Road, Suite 401
Mount Pleasant, SC 29464
Telephone: (843) 971-6750
Email: tom@milliganlawfirm.com

August 23, 2023
Mt. Pleasant, South Carolina

ATTORNEYS FOR RESPONDENT
DANA SLAUGHTER