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SC Court of Appeals

35THE 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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court make an error at law in Ordering the Judgment be marked Satisfied?

2. Did Progressive waive its argument that it was entitled to a jury trial and, thus, should be bound by the judgment?

STATEMENT OF THE CASE

On December 31, 2020, Plaintiff initiated this automobile accident case the filing of a Summons and Complaint in the Charleston County Court of Common Pleas. (R.pp.30-33). On January 8, 2021, Defendant was served with the Summons and Complaint by Certified Mail, Return Receipt Requested, Restricted Delivery. (R.pp.115-16). Defendant did not file an Answer. An Affidavit of Default was filed on March 9, 2021, and an Order for the Entry of Default was entered that same day. (R.pp.5-6; pp.117-18). On March 19, 2021, Defendant, through counsel Thomas H. Milligan and William J. Blount, moved to set aside the entry of default and simultaneously filed an Answer to the Complaint. (R.pp.34-36; pp.90-91).

On March 15 2021, Plaintiff served Progressive Northern Insurance Company (hereinafter Progressive) as the uninsured motorist carrier.

On April 6, 2021, Plaintiff moved for a damages hearing. (R.p.92).

On April 16, Plaintiff and Defendant entered into a Covenant not to Execute in exchange for $10,000.00 (the limits of the liability policy). (R.pp.119-121). The Covenant not to Execute specifically acknowledged that Plaintiff alleged her "damages would exceed the amount of liability insurance coverage available to its insured." The Covenant not to Execute further stated as follows:

> 4. That, furthermore, [Plaintiff] further covenants and promises that if they should attain a judgment against [Defendant], they will not execute on said judgment against [Defendant] or Government Employees Insurance Company and that, upon a final determination of whether any excess liability coverage or

> underinsured motorist benefits will be paid, [Plaintiff] and their attorney, Julio Rossington, will cause the judgment to be marked and entered as satisfied.
>
> . . .
>
> 12. That [Plaintiff] and [Defendant] and Julio Rossington further agree that this instrument is not intended as a release or discharge, nor as an accord and satisfaction with any person, but only as a Covenant Not to Execute against [Defendant] and/or Government Employees Insurance Company, their heirs, executors, administrators, legal representatives, successors, and assigns, on any judgment that may be attained against [Defendant] or Government Employees Insurance Company in any potential lawsuit.

(R.pp.119-121).

On April 23, 2021, Progressive, through counsel Jeffrey M. Crudup, filed an Answer to the Complaint requesting a jury trial. (R.pp.37-41).

On June 30, 2021 and August 4, 2021, Mr. Thomas Milligan and Mr. William Blount were relieved as counsel for Defendant, and Jeffrey Crudup as counsel for Progressive, was "substituted as counsel of record appearing and defending this action on behalf of the Underinsured Motorist Carrier." (R.pp.7-9; pp.13-15).

A damages hearing was originally scheduled for August 2, 2021 but was continued by Order dated that same day. (R.pp.10-12).

On November 19, 2021, Plaintiff, through counsel, filed a Memorandum in Support of her Motion for Damages with Exhibits. (R.pp.93-95). Progressive did not file anything in response to the Memorandum. The damages hearing was held on December 16, 2021. At that hearing, the following exchange occurred:

THE COURT: Mr. Crudup, do you want an opportunity to cross-examine these witnesses? And if you do, that's fine. I just . . .

MR. CRUDUP: Your Honor, I guess I have to put this on the record at this point. So I'm

the UIM carrier in this and I've answered this complaint. I answered it timely.

THE COURT: Right.

MR. CRUDUP: There is no – my client is not in default. So I do not believe that I – I mean, I don't believe I should be deposing these folks. It is our position that we do not – we were not provided an opportunity to defend ourselves. We've never – we've sent discovery, but we have not refuted. So, at this point, as far as I know, there's a covenant not to execute for this person. And my client has never done anything but answer this complaint. So Mr. Rossington is free to move forward as he sees fit, but our position is that this damages hearing, any judgment against us would not affect my client, who is Progressive Insurance.

MR. ROSSINGTON: That's a ludicrous argument, Your Honor.

THE COURT: Who's in default?

MR. CRUDUP: The defendants, Your Honor. The actual defendants.

THE COURT: Right. Not Progressive.

MR. CRUDUP: No.

MR. ROSSINGTON: Well, Your Honor, Progressive has been on notice of this matter from the beginning. And initially when the claims started, the defendant was represented by another entity. And since that time –

THE COURT: Uh-huh.

MR. ROSSINGTON: -- Mr. Crudup has taken over as counsel. So this is not a case where we've got a default prior to the UIM carrier being aware, Your Honor. Both parties were simultaneously aware. And this is the first time that Mr. Crudup has even attempted to oppose default. So I think any argument in respect to that has long been waived. And it is a default, Your Honor. We can go against defendant and, you know, it will surely be my job to

enforce it.

THE COURT: Okay.

MR. CRUDUP: Your Honor, for the record, I don't think I have to oppose this default because I'm not in default. My client is not this defendant. It is Progressive Insurance.

THE COURT: Right. So for that reason I think we can really streamline today's hearing. So, Mr. Rossington, this makes your job a lot easier today. Your know, I'm happy to – do you want to briefly ask your client and the doctor, since you've gone to the trouble of having them with you today, we can , we can do it real quick. I don't think Mr. Crudup is even gonna talk to them today, it doesn't sound like, so –

(R.p.46, line 25-p.49, line 4).

Following this interaction, Mr. Crudup did not present any evidence, did not cross-examine witnesses, and did not present any mitigating evidence even though he was asked, again, if he had any questions for the witnesses. (R.p.53, lines 1-3; p.62, line 21-p.63, line 2). After Plaintiff testified, Mr. Crudup indicated he re-raised his "earlier objection," but did not indicate what his exact objection was. (R.p.63, lines 1-2).

On December 16, 2021, the Court entered judgment in Plaintiff's favor in the amount of $60,000.00. (R.pp.16-22).

On December 22, 2021, Mr. Thomas Milligan and Mr. William Blount filed a Notice of Appearance along with a timely Notice of Motion and Motion to Reconsider Default Judgment or to Mark the Judgment as Satisfied. (R.pp.96-98). In this motion, counsel contended that due to the Covenant not to Execute, no judgment should had been entered against the Defendant. In the alternative, the Judge should be marked satisfied because that's what the Covenant not to Execute required.

On December 28, 2021, Progressive filed a Motion to Mark Judgment Satisfied, arguing the default judgment was not enforceable against Progressive and that the default judgment ended the case and foreclosed Plaintiff from seeking additional money from Progressive. (R.pp.99-104). Progressive further argued that it was not afforded its statutory rights and, therefore, was not subject to any judgment.

On June 14, 2022, a hearing was held on both motions. After arguments from all counsel, the Court issued an Order marking the Judgment Satisfied, finding:

1. Plaintiff pursued a non-jury default judgment against Defendant personally after the parties entered into a Covenant not to Execute and the UIM carrier demanded a jury trial;
2. The non-jury default judgment was not binding on the UIM carrier because it had demanded a jury trial;
3. The Covenant not to Execute required the Plaintiff to cause the judgment to be mark satisfied;
4. The default judgment causes harm to Defendant personally and that the judgment must be marked satisfied to prevent further harm to Defendant;
5. The Court was not provided with an adequate explanation of why Plaintiff sought to circumvent the UIM carrier's right to a jury trial or enter into a default judgment against an individual who was protected by a covenant;
6. The Judgment shall be marked satisfied and the Order ends the case.

(R.pp.23-26).

On August 18, 2022, Plaintiff filed a Motion to Reconsider which was summarily denied. (R.pp.27-29; pp.106-110). This appeal followed.

STANDARD OF REVIEW

"In an action at law, when a case is tried without a jury, the trial court's findings of fact will be upheld on appeal when they are reasonably supported by the evidence." *Wilder v. Blue Ribbon Taxicab Corp.*, 396 S.C. 139, 144, 719 S.E.2d 703, 706 (Ct. App. 2011) (citing *Townes Assocs., Ltd. v. City of Greenville*, 266 S.C. 81, 86, 221 S.E.2d 773, 775 (1976)). The trial court's findings of fact will not be disturbed on appeal unless wholly unsupported by the evidence or unless it clearly appears the findings were influenced or controlled by an error of law. *Wilder*, *supra* (quoting *Bulter Contracting, Inc. v. Court Street, LLC*, 369 S.C. 121, 127-28, 631 S.E.2d 252, 255-56 (2006)). The trial court's findings in such a case are equivalent to a jury's findings in an law action. *Id.*

ARGUMENT

1. The Trial Court made an error of law in Ordering the Judgment be marked Satisfied because the Covenant not to Execute against the Defendant did not prelude Plaintiff from seeking additional damages from Progressive.

"[A] covenant not to execute is one type of settlement agreement." *Wade v. Berkeley County*, 348 S.C. 224, 228, 559 S.E.2d 586 (2002). "It 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 into the agreement,'" and "[i]t is 'normally executed when a settlement occurs after the filing of a lawsuit.'" *Id.*, quoting *Poston by Poston v. Barnes*, 294 S.C. 261, 264, 363 S.E.2d 888, 890 (1987).

A covenant not to execute is not a release. *Wade*, 348 S.C. at 228. "A release is an agreement providing that a duty owed to the maker of the release is discharged immediately." *Ecclesiastes Prod. Ministries v. Outparcel*, 374 S.C. 483, 492, 649 S.E.2d 494, 498 (Ct. App. 2007). "A Covenant Not To Execute is a promise not to enforce a right of action or execute a

judgment when one had such right at the time of entering into the agreement." *Poston*, 294 S.C. at 264.

A Covenant Not To Execute does not preclude recovery of underinsured motorist benefits. *See Ackerman v. Travelers Indem. Co.*, 318 S.C. 137, 456 S.E.2d 408 (Ct. App. 1995). Rather, where the language in a Covenant Not To Execute clearly contemplates the recovery of underinsured benefits, a Covenant Not To Execute does not preclude such recovery. *Ackerman, 318 S.C. at 147; See also O'Neill v. Smith,* 388 S.C. 246, 695 S.E.2d 531, 532 (2010) (noting in the facts that the liability insurer for Defendant Adams tendered the limits of its policy to Plaintiffs in exchange for an "Agreement and Covenant Not to Execute" which provided that in consideration for the sum of $100,000, Plaintiffs agreed not to execute any judgment they might obtain against the personal assets of the Defendants and would instead pursue recovery only through UIM coverage).

Initially, Defendant waived any right to contest the default judgment; thus, to the extent the Defendant argued in the Motion to Reconsider that the trial judge should set aside the default judgment, that issue was not properly before the Court. Following the entry of default, Defendant, through counsel, moved to set aside the entry of default. However, following the Covenant not to Execute, Counsel was relieved by Consent Order and did not pursue the motion to be relieved from the entry of default. Defendant did not appear at the damages hearing or otherwise contest the entry of default. Accordingly, the only issue that could have been properly before the trial judge at the time the motion to reconsider was filed was whether, pursuant to Rule 60(b)(5), SCRCP, the judgment should be marked as satisfied.

The trial judge erred in finding the Judgment should be marked satisfied because the Covenant not to Execute clearly contemplated that Plaintiff would seek additional damages in

the litigation. It appears from her findings that the trial judge believed the Covenant not to Execute was a release of liability; however, a Covenant not to Execute is not a release. *See Wade*, *supra*. The terms of the Covenant are specifically set forth in the Statement of the Case. Specifically, the Covenant not to Execute stated that Plaintiff believed her damages would exceed the limits of the liability insurance; that it was not a release; that if Plaintiff obtained a judgment against Defendant, Plaintiff would not execute the judgment against Defendant; and that upon a final determination of whether any underinsured motorist benefits would be paid, Plaintiff would have the judgment marked as satisfied. (R.pp.119-121). Defendant was well aware that Plaintiff was seeking underinsured motorist benefits because Counsel for Defendant and Counsel for Progressive entered into two Consent Orders in which Counsel for Progressive was substituted in the litigation. (R.pp.7-9; pp.13-15). If the Covenant not to Execute was a final determination of the litigation, the parties would have entered into a Stipulation of Dismissal. It is unfathomable, based on the record before the Court, that Defendant believed that the Covenant not to Execute was a final determination of damages in this case. Rather, the only promise Plaintiff made in exchange for the $10,000.00 was not to execute any judgment against Defendant. Plaintiff never promised not to pursue a judgment.

Further, a Covenant not to Execute does not preclude the recovery of underinsured motorist benefits. In *Ackerman*, *supra*, Counsel for the underinsured motorist policy specifically argued that the Covenant not to execute given to the Defendant precluded recovery of uninsured motorist benefits. This Court disagreed, finding the intentions of the parties governs in determining whether an instrument is a convent not to execute or a release. The Court found the language of the Covenant not to Execute in that case clearly contemplated (as it does in this case) that the Plaintiffs could recover any underinsured motorist coverage available. Thus, this Court

found recovery of underinsured benefits, following the execution of a Covenant not to Execute was not precluded. The exact facts are present in this case. The Covenant not to Execute by its exact language contemplates that Plaintiffs will continue to pursue a judgment to obtain underinsured motorist coverage and that the intention of the parties was merely to promise that Plaintiff would not execute any such judgment against the Defendant.

For all of these reasons, the findings of the trial judge – that Plaintiff incorrectly pursued a judgment after entering a Covenant not to Execute; that the Covenant not to Execute required the Judgment be marked satisfied; that the default judgment caused continuing harm to the Defendant; that Plaintiff did not provide an adequate explanation of why the default judgment was sought; and that the Judgment should be marked satisfied – should all be reversed. The trial judge erred as a matter of law in these findings because the Covenant not to Execute, by its plain language, did not support these findings.

2. **Progressive is bound by the damages ruling because it failed object to the mode of trial.**

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

> 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 . . . . 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.

The right to defend includes the right to a jury trial. *Broome v. Watts*, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995).

However, the failure to object to the mode of trial constitutes waiver. *See generally Ex*

Parte Cannon, 385 S.C. 643, 658, 685 S.E.2d 814, 822 (Ct. App. 2009) (finding one may waive to any objection regarding personal jurisdiction if one appears and fails to object); *Bunch v. Charleston & W.C. Ry. Co.*, 91 S.C. 139, 144, 74 S.E.2d 363, 365 (1912) ("Failure to object at the time is a waiver."); *State v. McCrary*, 242 S.C. 506, 508, 131 S.E.2d 687 (1963) (finding the appellant consented to be tried upon two indictments at the same time where he raised no objection to the mode of trial in the lower court).

Further, any objection made must be specific to preserve an argument for appeal. *See Busillo v. City of N. Charleston*, 404 S.C. 604, 608, 745 S.E.2d 142, 145 (Ct. App. 2013) (citations omitted); *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731 (1997) (stating "an objection must be sufficiently specific to inform the trial court of the point being urged by the objector.").

Finally, an objection cannot be made for the first time in a Motion to Reconsider. *See Kosciusko v. Parham*, 428 S.C. 481, 506, 836 S.E.2d 362, 375 (Ct. App. 2019) (finding an issue may not be raised for the first time in a motion to reconsider).

Relevant portions of the transcript are set forth in the Statement of the Case. As is noted there, at the damages hearing, Progressive argued only that because it was not in default, it should not be bound by the judgment. (R.p.46, line 25-p.49, line 4). Progressive's counsel never argued that it was entitled to a jury trial or that it had not had ample opportunity (even though it had been served almost nine months prior to the hearing) to participate in its own defense. The term "jury trial" does not appear in the transcript from that hearing. Accordingly, Progressive waived this argument because it failed to object to the mode of trial at the time of the hearing. *See generally Ex Parte Cannon*, *supra*; *Bunch v. Charleston & W.C. Ry. Co.*, *supra*; *State v. McCrary*, *supra*.

Further, to the extent an objection was made, it was not specific enough to preserve an argument regarding the mode of trial for appellate review. *See Busillo*, *supra*. The trial judge made no ruling on whether Progressive was entitled to a jury trial because that issue was never specifically raised to the trial judge. *See generally Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006) (stating issues must be raised to and ruled on by the trial court to be preserved for appellate review).

Of note, Progressive was on notice for almost eight months that Plaintiff had requested a damages hearing. Counsel for Progressive was substituted in June of 2021 in the case to defend the action. In November of 2021, prior to the December 2021 damages hearing, Plaintiff filed a Memorandum in Support of Damages. At no time did Progressive lodge an objection to the mode of trial. Further, Progressive never requested a continuance at the time of the damages hearing to prepare a defense. Rather, the first time the objection to the mode of trial appears in the record is in Progressive's Motion to Mark the Judgment Satisfied. At this time, the objection had been waived. *See Kosciusko*, *supra* (an objection cannot be made for the first time in a Motion to Reconsider).

Moreover, Progressive, despite being served almost nine months prior to the hearing, chose not to participate in the hearing. Progressive did not call witnesses, cross-examine witnesses, present evidence, or enter mitigating evidence. Progressive had nine months to prepare for the hearing, but presented nothing in defense. Accordingly, for all of these reasons, Progressive should be bound by the judgment.

In the alternative, to the extent the issue was properly before the trial judge, the trial judge should have vacated the judgment and scheduled the case for a jury trial. By marking the judgment satisfied, the trial judge precluded Plaintiff's right to recover any further damages as

contemplated by the Covenant not to Execute.

CONCLUSION

For the reasons stated herein, the Court should reverse the trial judge's ruling, find the judgment has not been satisfied, and find that Progressive Insurance Company is bound by the judgment. In the alternative, the Court should reverse the trial judge's ruling, find the judgment has not been satisfied, and remand for a jury trial as to damages.

Respectfully Submitted:

September 8, 2023

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RULE 211, SCACR, CERTIFICATION

In accordance with Rule 211, SCACR, I certify that this Final Brief is identical to the Appellant's Initial Brief except that this Brief contains references to the Record on Appeal and may contain corrections of typographical errors or misspellings.

s/ Brett L. Stevens

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