RECEIVED
May 16 2025
SC Court of Appeals

ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

EXHIBIT A

Order Denying Texas Insurance Company's Motion to Reconsider

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) FOR THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY)
) CASE NO.: 2021-CP- 26-04596
VIKTAR KLEUCHENIA,)
)
Plaintiff,) **ORDER DENYING TEXAS INSURANCE**
) **COMPANY'S MOTION TO RECONSIDER**
v.)
)
BRIAN MCLEOD,)
)
Defendant.)

RECEIVED
May 16 2025
SC Court of Appeals

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

This matter comes before the Court on Defendant Texas Insurance Company's Motion to Reconsider ("Motion") the Court's February 28, 2025, Order Denying Texas Insurance Company's Motion to Vacate Judgment ("Order"). Plaintiff Viktar Kleuchenia ("Plaintiff") filed a Response opposing the Motion on March 17, 2025. A hearing on the Motion was held on March 19, 2025.

For the reasons that follow, Texas Insurance Company's Motion to Reconsider is **DENIED**.

STANDARD OF REVIEW

Relief from final judgment or order is analyzed under Rule 60(b), *SCRCP*, where the moving party has the burden to present evidence proving the facts essential to relief. BB&T v. Taylor, 369 S.C. 548, 552, 633 S.E.2d 501, 503 (2006). "A party is usually allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." Elam v. S.C. Dep't of Transp., 361 S.C. 9, 21, 602 S.E.2d 722, 778-9 (2004). Thus, a motion for reconsideration is "one final chance not only to call the court's attention to a possible misapprehension of an *earlier* argument, but also to revisit a *previously raised* argument." Id. (emphasis added).

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

In its Motion, Texas Insurance Company ("Texas Insurance") sets forth twenty-two (22) separate grounds for reconsideration. Several of the grounds were not raised in its initial Motion

to Vacate, but the Court addresses each of Texas Insurance's grounds for reconsideration enumerated herein to correspond with each of the enumerated grounds as set forth in its Motion.

1. The Court's interpretation of S.C. Code Ann. § 38-77-160.

S.C. Code Ann. § 38-77-160, states, in relevant part, "[t]he 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." Id.

The evidence, and Texas Insurance's own admission, establishes that it was properly served with a copy of the summons and complaint and failed to appear within thirty (30) days. Texas Insurance has provided no explanation, much less a reasonable explanation, for its failure to appear in accordance with § 38-77-160.[1] Texas Insurance only appeared after entry of judgment and has not set forth sufficient grounds for relief under Rule 60(b), *SCRCP*.

2. Texas Insurance's classification under Rule 5, *SCRCP*.

Rule 5(a), *SCRCP*, states, in relevant part:

> "[u]nless ordered by the court because of numerous defendants or other reasons, all (1) written orders... (3) written motions... (4) written notices... (8) offers of judgment... shall be served upon ***each of the parties of record***. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for serving of summons in Rule 4, and notice of any trial or hearing on unliquidated damages shall also be given to parties in default " Id. (emphasis added).

The plain, clear, and unambiguous language of Rule 5, *SCRCP*, requires service of documents enumerated therein on "parties of record." Id. Texas Insurance did not become a party of record until filing its Notice of Appearance on September 17, 2024, despite being served with

[1] Previous orders issued by the Court also note Texas Insurance was served with pleadings and failed to appear in accordance with the UIM Statute. See Ord. Granting Plf.'s Mot. for Summ. Judg., Aug. 15, 2023 (establishing Findings of Facts that include service upon Texas Insurance and its failure to appear in the case); see also Ord. Granting Plf.'s Mot. for Ord. of Ref., p. 2, ¶ 13, Aug. 15, 2023 ("Onyx Insurance Company and/or Texas Insurance Company has not filed a notice of appearance in the case or assumed control of the defense at this time and has waived its right to appear pursuant to § 38-77-160.").

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

pleadings almost two years prior. Under the clear and plain language of Rule 5, *SCRCP*, service of documents enumerated therein was not required upon Texas Insurance prior to its appearance.[2]

3. Service of documents under Rule 5, *SCRCP*.

South Carolina Courts have addressed the proper reading and interpretation of court rules and statutes:

> "When interpreting a court rule, 'we apply the same rules of construction used in interpreting statutes. Therefore, the words of [the rule] must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the rule.' When the language of a court rule is clear and unambiguous, the court is obligated to follow its plain and ordinary meaning."

Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 509, 602 S.E.2d 99, 102 (2004) (citing Green v. Lewis TruckLines, Inc., 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994)).

Texas Insurance's argument that Rule 5, *SCRCP*, only requires non-service of documents on parties in default is in direct contradiction of the plain language of the rule which clearly states service is required "upon each of the parties of record." Id. If an entity is not a party of record, service is not required. Texas Insurance was served with pleadings and failed to appear or respond, and therefore, was not a party of record within the plain language of the rule.

Moreover, Texas Insurance's argument fails to recognize the actual entry of default is a ministerial act and not dispositive of default.[3] See Stark Truss Co., 360 S.C. at 509, 602 S.E.2d at 102; Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E. 2d 122, 123 ("[W]hether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by the affidavit."). To the extent a UIM carrier can default under the rules, the actual entry of default is not dispositive.

---

[2] The record contains no evidence of any pleading asserting new or additional claims for relief after the initial summons and complaint that would require service under Rule 5, *SCRCP*. The record contains evidence that notice of the damages hearing was provided to Texas Insurance.

[3] To the extent Texas Insurance asserts the Court previously held it was not in default, the Court points out that it simply noted in ruling on its *Order of Judgment for Damages* that "neither Mr. McLeod nor the UIM carrier has been held in default *by order of the court*." See Ord. of Judg. for Dmgs., June 4, 2025. (emphasis added).

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

4. The Court's interpretation of Rule 5 and 6, *SCRCP*, regarding service.

Rule 5, *SCRCP*, requires service of documents enumerated therein on "each of the parties of record." Id. Rule 6, *SCRCP*, addresses timing of motions and hearings but does not alter, supplement, modify, or change when service is required under Rule 5, *SCRCP*. The Court's ruling follows the clear and plain language of the procedural rules regarding service of documents.

5. The Court's application of Rule 6, *SCRCP*.

Rule 6, *SCRCP*, addresses time computations of motions in the event service of a written motion is required under Rule 5, *SCRCP*. Pursuant to Rule 5, *SCRCP*, which specifically enumerates "written motions" as a document that is only required to be served on "parties of record," Plaintiff's Motion for Costs and Interest and supporting affidavit was not required to be served on Texas Insurance because it had not appeared at the time of filing. Id.

6. Service of an offer of judgment under Rule 5, *SCRCP*.

When reading a statute, one "should not concentrate on isolated phrases within the statute." CRFE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011). "Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose." Id.

S.C. Code Ann. § 15-35-400 addresses service an offer of judgment within the language of the statute and clearly states notice shall be made "in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure." Id. Likewise, Rule 68, *SCRCP*, addresses service of an offer of judgment within the language of the rule and clearly states "[s]ervice of the offer of judgment shall be made as provided in these rules." Id.

Both § 15-35-400 and Rule 68, *SCRCP*, clearly instruct that an offer of judgment is to be served in accordance with the service requirements set forth within the South Carolina Rules of Civil Procedure. See Rule 68, *SCRCP*, Note to 2006 Amend. ("This amendment makes this provision consistent with S.C. Code Ann. § 15-35-400, which became effective July 1, 2005).

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

Rule 5, *SCRCP*, clearly and unambiguously controls service requirements of an offer of judgment, as it is a specifically enumerated document listed within the rule. Texas Insurance had failed to appear at the time the offer of judgment was filed and was not a party of record under Rule 5, *SCRCP*. Service of the offer of judgment on Texas Insurance was not required.[4]

7. Due Process afforded to Texas Insurance.

Due process does not mandate any particular form or procedure but is a flexible concept to the circumstances and interests of each case. See S.C. Dep't of Soc. Servs. v. Holden, 459 S.E.2d 846 (1995); see, e.g., West American Insurance Company v. Popa, 352 Md. 455, 723 A.2d (1998) ("[I]f the uninsured/underinsured motorist carrier has notice of the underlying tort suit and an opportunity to intervene, due process requirements are satisfied, and the carrier is ordinarily bound by the determinations made in the tort case.").

Texas Insurance cites no authority supporting a violation of due process for failing to serve documents on an entity who has failed to appear after service of pleadings. Any denial of due process to Texas Insurance is its own fault for failing to appear and protect its interest. See Patel v. S. Brokers, Ltd., 277 S.C. 490, 289 S.E.2d 642 (1982) (Any alleged violation of due process for failing to appear after service "is the result of a self-inflicted wound.").

8. The Court's application of Williams v. Selective Insurance.

"The intent of § 38-77-160 requiring service of pleadings on a UIM carrier is to provide notice of the claim and give the carrier an opportunity to contest its liability for benefits." Williams v. Selective Ins. Co. of the Southeast, 315 S.C. 532, 446 S.E.2d 402 (1994).

Texas Insurance was properly served with pleadings, provided notice and the opportunity to appear. To the extent Texas Insurance alleges it was not required to appear in the matter because

[4] To the extent Texas Insurance alleges Defendant Brian McLeod was not served with the offer of judgment, the offer of judgment was filed with the Court and served on him as a party of record through his attorney via electronic service.

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

it did not contest the admission of liability by the named Defendant, the amount of the underlying damages, or its liability for UIM benefits, ignores the fact that its failure to appear resulted in judgment which it has not provided sufficient grounds to vacate under Rule 60(b), *SCRCP*.

9. The effect of the award of damages.

The Court's ruling does not conflate an award of damages and does not enter an award directly against Texas Insurance. The judgment is entered against Brian McLeod, as an underinsured motorist. Texas Insurance's election not to appear in the case does not obligate Plaintiff to serve it with subsequent documents and does not bar Plaintiff's right to pursue claims against an underinsured motorist.

10. Abrogation of Texas Insurance's due process rights.

The Court's interpretation of the laws and procedural rules do not abrogate the constitutional rights of Texas Insurance. All laws and rules relevant herein, including but not limited to, § 38-77-160; § 15-35-400; Rule 68, *SCRCP*; Rule 5, *SCRCP*; and Rule 6, *SCRCP*; are all clear and unambiguous. These rules provide proper notice to a UIM carrier and a fair opportunity to appear and protect its interest in any case affecting its liability. Should a UIM carrier fail to appear and become a party of record in the case, the Court's rules do not require Plaintiff to continue to serve it with documents listed within Rule 5, *SCRCP*. The UIM carrier is treated the same under the laws and rules as any other entity who fails to appear after service of pleadings.

11. Texas Insurance's request for relief under Rule 60(b) that the judgment is void.

The Order addresses Texas Insurance's request for relief under Rule 60(b) that the judgment is void and concluded proper notice and an opportunity to appear was provided pursuant to § 38-77-160, and all documents were served in accordance with the requirements set forth under Rule 5, *SCRCP*. Texas Insurance's opportunity to be heard on any issues in the case was provided

upon service of the summons and complaint. To the extent Texas Insurance was not heard on any issue was due to its own inaction in failing to appear and protect its interest in the case.

12. Texas Insurance's request for relief under Rule 60(b) for failure to serve the offer of judgment.

The Order addresses Texas Insurance's request for relief under Rule 60(b) that the offer of judgment was not served on Texas Insurance, amounting to extrinsic fraud. As previously noted, an offer of judgment is a specifically enumerated document under Rule 5, *SCRCP*, that requires service on "each of the parties of record." There can be no fraud when a document is served in accordance with the clear and plain language of the applicable court rule.

13. The Court's interpretation of § 15-35-400 and Rule 68, *SCRCP*.

The Order addresses service of the offer of judgment under § 15-35-400 and Rule 68, *SCRCP*, outlining the clear and plain language in each that an offer of judgment is to be served in accordance with the South Carolina Rules of Civil Procedure (i.e., Rule 5, *SCRCP*). Had Texas Insurance appeared upon service of the summons and complaint it could have accepted any offer of judgment filed with the Court. See Goodson v. Amer. Bankers Ins. Co. of Fla., 395 S.C. 400, 403, 368 S.E.2d 687, 690 (1988) ("[A] party has a duty to monitor the progress of his case.").

14. Texas Insurance's assertion of a "meritorious defense."

The Order addresses a "meritorious defense" presented by Texas Insurance and concluded it has not set forth any reasonable explanation for its failure to appear or respond upon service of the summons and complaint. Texas Insurance alleges it elected not to appear and that it would have timely paid UIM benefits under the policy upon notice of the damages award. Texas Insurance's argument fails to consider that its election not to appear resulted in judgment and it has provided no reasonable basis to vacate judgment under Rule 60(b), *SCRCP*.

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

15. Violation of due process for failure to serve offer of judgment.

The offer of judgment was filed and served in accordance with § 15-35-400; Rule 68, *SCRCP*; and corresponding Rule 5, *SCRCP*. There is no violation of due process where pleadings were served on Texas Insurance – who either elected not to appear or simply failed to act – and all subsequent documents were served in accordance with the applicable laws and procedural rules.

16. Sufficiency of notice of trial on damages.[5]

Rule 6, *SCRCP*, applies to a motion that is required to be served under Rule 5, *SCRCP*, and the scheduling of a hearing on that motion. The damages trial was not set by written motion of Plaintiff, and thus, Rule 6, *SCRCP*, does not apply. Even if the damages trial were set by written motion, service of the written motion would not be required under Rule 5, *SCRCP*.

Moreover, Rule 5(a) provides "notice of any trial or hearing on unliquidated damages shall also be given to parties in default." Id. To the extent Texas Insurance is a defaulting party, Rule 55(b)(2) states "[p]ursuant to Rule 5(a), notice of any trial or hearing on unliquidated damages shall also be given to parties in default by first class mail to the last known address of such party whether or not such party has appeared in the action." Id.

On April 1, 2024, Plaintiff filed with the Court a letter addressed to Texas Insurance providing notice of the damages trial scheduled for April 9, 2024.[6] The mailing of the letter provides eight (8) days of notice to Texas Insurance. Thus, the evidence in the record shows that

[5] Texas Insurance's initial Motion to Vacate does not seek any relief from the Court's initial *Order of Judgment for Damages*. See Texas Insurance Co.'s Memo. in Supp. of Mot. to Vacate, p. 12 ("Texas does not seek to relitigate through this motion [to vacate] either the liability of the Defendant in this case, nor the damages awarded under the initial damages order entered on June 4, 2024).

[6] The contents of the letter set forth the name of the case along with the case caption, the date and time for the damages trial, the name of the presiding special referee, along with the contact information for Plaintiff's counsel. The letter provides sufficient information to inform Texas Insurance of the scheduled proceeding.

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

Texas Insurance, despite its failure to appear, was provided as much notice as a defaulting party who has actually appeared.[7]

17. Application of S.C. Department of Insurance Bulletin 4-89.

To the extent Texas Insurance cites to S.C. Department of Insurance Bulletin 4-89, the Court makes no determination of its precedential value. Nevertheless, even considering Texas Insurance's argument that a UIM carrier has the right, but not the ordinary duty, to appear or defend in a lawsuit against a putative at-fault driver does not mean it can wait and appear after judgment to seek relief without satisfying Rule 60(b), *SCRCP*. If Texas Insurance wanted to appear and protect its interest in this case – as it now seems to try and do – then it should have appeared and protected its interest prior to any judgment.

18. Service of an offer of judgment pursuant to § 15-35-400.

To the extent Texas Insurance alleges § 15-35-400 requires service on the "offeree himself," it is only focusing on an isolated phrase and failing to read the statute in its entirety. See CRFE, LLC v. Greenville Cnty. Assessor, 395 S.C. at 74, 716 S.E.2d at 881 (statutes must be read as a whole). The statute clearly and unambiguously states "[t]he offeror shall give notice of the offer of judgment ... to the offeree himself, *in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure*." Id. Texas Insurance fails to consider the remainder of the sentence within the statute. Moreover, the "service rules" contemplated and referenced within § 15-35-400 refers to Rule 5, *SCRCP*, requiring service of "offers of judgment . . . upon each of the parties of record." Id.

19. Plaintiff's recovery of the damages award.

---

[7] Under Rule 55(b)(2), *SCRCP*, when a party in default has appeared in the case, the moving party must provide notice of the motion or application for judgment at least 3 days prior to the hearing on such application. Under Rule 55(b)(2), *SCRCP*, when a party in default has not appeared, notice of the hearing or trial on damages must be provided via first-class mail. The first-class mailing of Plaintiff's letter on April 1, 2024, providing notice of the damages trial on April 8, 2024, provides three (3) days of notice plus an additional five (5) days for mailing under Rule 6(e), *SCRCP*.

The Order addresses an award of damages against Brian McLeod, as an underinsured motorist. In this action, Texas Insurance was provided notice and an opportunity to protect its interest. The Court makes no determination of what effect the judgment has between Plaintiff and Texas Insurance.

20. Abrogation of contractual rights pursuant to § 15-35-400.

The Order and award of damages assesses damages suffered by Plaintiff at the hands of Brian McLeod, an underinsured motorist. In assessing Plaintiff's damages, the Court makes no determination of what effect the judgment has between Plaintiff and Texas Insurance.

21. Inconsistency of ruling under Rule 5, *SCRCP*.

The Court's ruling does not make any inconsistency in the status of Texas Insurance. To the extent a UIM carrier can be in default under Rule 5(a), no service is required on Texas Insurance. Even if a UIM carrier cannot be considered a defaulting party under Rule 5(a), *SCRCP*, service is still not required upon Texas Insurance because it was not a party of record.

22. Personal and subject matter jurisdiction for awarding damages.

"The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give notice of the action and an opportunity to appear and defend." White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 8-9, 753 S.E. 2d 537, 541 (2014).

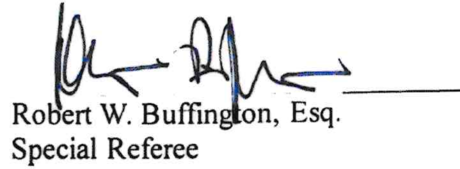
The record establishes Plaintiff properly served Texas Insurance, as an underinsured motorist carrier, evidenced by the filed acceptance of service from the S.C. Department of Insurance. Texas Insurance admits it was properly served. The judgment was entered against Brian McLeod, as an underinsured motorist. Brian McLeod and Texas Insurance were properly served and the Court has personal jurisdiction over all parties and subject matter jurisdiction over all issues. See Broome v. Watts, 319 S.C. 337, 341, 461 S.E.2d 46, 48 (1995) (UIM carrier "steps into the shoes of the underinsured motorist" to pay damages in the event of liability.)

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596

CONCLUSION

For the reasons set forth above, exercising its sound discretion in reconsidering the issues set forth in Texas Insurance's Motion to Reconsider, the Court stands by its prior determination and Texas Insurance's Motion to Reconsider is **DENIED**.

AND IT IS SO ORDERED.



Robert W. Buffington, Esq.
Special Referee

~~April~~ May 2, 2025

ELECTRONICALLY FILED - 2025 May 05 3:29 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596
ELECTRONICALLY FILED - 2025 May 05 3:52 PM - HORRY - COMMON PLEAS - CASE#2021CP2604596