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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Robert W. Buffington, Special Referee

Appellate Case No. 2025-000968

Ex Parte: Texas Insurance Company, Appellant,

Viktar Kleuchenia, Respondent

v.

Brian McLeod, Defendant.

FINAL BRIEF OF RESPONDENT

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November 12, 2025

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II. Whether the trial court abused its discretion in finding there were not sufficient grounds for relief under Rule 60(b), *SCRCP*, because all documents were served in accordance with the applicable procedural rules.

III. Whether the trial court abused its discretion in finding there were not sufficient grounds for relief under Rule 60(b), *SCRCP*, because entry of the July 2nd Judgment did not violate any rights of Texas Insurance.

STATEMENT OF THE CASE

This is a case where Appellant Texas Insurance Company, an underinsured motorist carrier, was properly served with a summons and complaint but failed to acknowledge, process, investigate, respond, intervene, or otherwise defend in any way, thereby resulting in judgment of $2,398,788.11 being entered against the underinsured motorist. After entry and notice of judgment, Texas Insurance filed a notice of appearance and motion to vacate on the grounds that Respondent did not continue to serve it with legal documents after service or process, despite its failure to appear. The trial court held that Texas Insurance had not set forth sufficient grounds for relief under Rule 60(b), *SCRCP*, because Texas Insurance did not provide a reasonable basis for its failure to appear pursuant to § 38-77-160, that all documents were served in accordance with the applicable procedural rules, and that entry of judgment did not violate its due process rights since it was afforded proper notice and an opportunity to protect its interests. The lower court upheld its decision on Texas Insurance's motion to reconsider. Texas Insurance appeals the lower courts order denying its motion to reconsider.

STATEMENT OF FACTS

This appeal arises from a motor vehicle accident between Viktar Kleuchenia and Brian McCleod ("Defendant") occurring on July 17, 2018, in Horry County, South Carolina. (R. p. 70, ¶ 7). At the time of the accident, Plaintiff was insured by Onyx Insurance Company through Policy No. OIC-SC-0001119-02, which provided underinsured motorist coverage in the amount of $50,000.00 for policy period March 19, 2018, through March 29, 2019. (R. pp. 116-140).

On July 12, 2021, Plaintiff filed suit against Defendant Brian McLeod. (R. pp. 68-72). On July 21, 2021, Plaintiff served Defendant with a copy of the Summons and Complaint via process server. (R. p. 618). Defendant's liability carrier retained counsel and filed an Answer on his behalf. (R. pp. 73-76).

On August 17, 2021, Plaintiff also served his purported UIM carrier, Onyx Insurance Company, through the South Carolina Department of Insurance in accordance with S.C. Code Ann. § 38-77-160. (R. p. 619). On August 25, 2021, Onyx Insurance Company – through its third-party administrator, North American Risk Services – acknowledged receipt of the Summons and Complaint via e-mail to Plaintiff's counsel. (R. p. 620). Onyx Insurance Company/North American Risk Services did not retain defense counsel, did not file an appearance in the case, or otherwise take any action. No follow up was made by Onyx Insurance/North American Risk Services.

Plaintiff, in further attempting to have the UIM carrier appear and participate in the case, discovered the plaintiff's applicable policy was assumed by Texas Insurance. (R. p. 142). On September 22, 2022, Plaintiff served Texas Insurance Company with a copy of the Summons and Complaint through the South Carolina Department of Insurance. (R. p. 623). Plaintiff also served an additional copy of the Summons and Complaint directly to Texas Insurance's business address via certified mail, which was signed received by Texas Insurance on September 27, 2022. (R. pp. 621-622). Despite service of the pleadings, Texas Insurance did not respond to Plaintiff or the SCDOI in any way, did not file an appearance in the case, did not forward the pleadings to defense counsel, and did not conduct any investigation into the pending lawsuit or Plaintiff's claim.

On February 23, 2023, Plaintiff reached a settlement with Defendant's liability carrier in the amount of $800,000.00 on a covenant not to execute. (R. pp. 624-627). On April 10, 2023, Plaintiff filed a motion for summary judgment on the issue of liability and a motion for reference to a special referee. (R. pp. 179-194). Plaintiff's motion for summary judgment and request for special referee made clear that Texas Insurance had been served with pleadings but failed to appear and had not assumed control of the defense. (R. p. 196, ¶¶ 5-13). Plaintiff's motions were heard on August 8, 2023, by the Honorable Kristi F. Curtis, resulting in summary judgment being granted

on the issue of liability and the case was referred to Bobby Buffington to serve as special referee on the issue of damage. (R. pp. 1-16).

On August 17, 2023, Plaintiff filed an Offer of Judgment with the court for $50,000.00, which represented the UIM policy limits under Plaintiff's applicable policy. (R. pp. 84-87). No acceptance was filed.

The special referee set a damages trial for April 9, 2024. On April 1, 2024, Plaintiff mailed to Texas Insurance, and filed with the court, a correspondence providing notice of the trial on damages scheduled for April 9, 2024. (R. p. 208). No response or appearance was made by Texas Insurance. The damages trial proceeded on April 9, 2024, without appearance by Texas Insurance,[1] resulting in a damages award of $2,250,000.00 which was entered by the court on June 4, 2024.[2] (R. pp. 18-41). On June 5, 2025, Plaintiff filed a Motion for Costs and Interest that was ruled on by the special referee without a hearing and judgment was amended to $2,398,788.11, which was entered by the court on July 2, 2024. (R. pp. 42-46).

On August 20, 2024, Plaintiff served Texas Insurance with a copy of the final judgment and requesting payment thereof within twenty (20) days. (R. pp. 628-633). On September 4, 2024, Texas Insurance responded to Plaintiff that it had no knowledge of the pending lawsuit or being served a summons. (R. pp. 634-660).

On September 9, 2024, despite initially alleging it had no knowledge of the lawsuit, Texas Insurance sent Plaintiff a check in the amount of $25,000.00 representing that amount to be Plaintiff's UIM policy limits. (R. p. 661). On September 17, 2024, Texas Insurance filed, for the very first time, a Notice of Appearance along with a Motion to Vacate Judgment. (R. pp. 88-89;

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[1] The special referee made note on the record of service and Texas Insurance's failure to appear. (R. pp. 214-215).
[2] The lower court's *Order of Judgment for Damages* provided a set off in the amount of $1,000,000.00, representing Mr. McLeod's full liability policy limits. (R. p 41).

430-431). On September 30, 2024, Plaintiff subsequently filed suit against Texas Insurance alleging bad faith and breach of contract, providing a copy to its local counsel.[3] (R. pp. 105-175). On October 4, 2024, Texas Insurance then tendered an additional $25,000.00, for a total of $50,000.00, representing Plaintiff's UIM policy limits. (R. p. 664). Plaintiff declined Texas Insurance's offer at that time.

On December 5, 2025, Texas Insurance's motion to vacate judgment was heard by the special referee. (R. pp. 480-543). On February 28, 2025, the lower court entered its order denying Texas Insurance's motion to vacate on the grounds that Texas Insurance had not satisfied grounds for relief under Rule 60(b), *SCRCP*. (R. pp. 48-56). Specifically, the court found that Texas Insurance had failed to appear and protect its interest in accordance with § 38-77-160, that Texas Insurance had provided no reasonable explanation for its failure to appear, that Plaintiff had served all documents in accordance with the applicable procedural rules, and that Texas Insurance's due process rights had not been violated because it was provided notice and an opportunity to appear and protect its interest but failed to do so. (R. pp. 48-56).

On March 4, 2025, Texas Insurance filed a motion to reconsider the court's order denying its motion to vacate judgment.[4] (R. pp. 544-553). On March 19, 2025, a hearing was held on Texas Insurance' motion to reconsider before the special referee. (R. pp. 557-617). On May 5, 2025, the court entered its order denying Texas Insurance's motion to reconsider. (R. pp. 57-67). On May 5, 2025, Texas Insurance filed a notice of appeal to appeal the court's *Order Denying Texas Insurance Company's Motion to Reconsider*. (R. pp. 90-104).

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[3] This case is currently pending before the Honorable Joseph Dawson, III, in the United States District Court of South Carolina, Florence Division. *See Viktar Kleuchenia vs. Texas Insurance Company, as successor of Onyx Insurance Company, Inc., a Risk Retention Group*, Case No.: 4-24-cv-05628-JD.

[4] Neither Texas Insurance's motion to vacate judgment nor its motion to reconsider attack, in any way, the initial June 4th Judgment entered against the underinsured motorist. Its motions, and therefore this pending appeal, only attack the July 2nd Judgment adding costs and interests. (R. pp. 430; 487; 544-553)

STANDARD OF REVIEW

Rule 60(b), *SCRCP*, states, in relevant part, "[o]n 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; . . . (3) fraud, misrepresentation, or other misconduct of an adverse party . . . ."

It is well established that the standard for relief under Rule 60(b) is more rigorous than the standard to set aside default under Rule 55(c). *Sundown Operating Co., Inc. v. Intedge Industries, Inc.,* 383 S.C. 601, 607 (2009). The intent of the rules is to make it more difficult for a party to obtain relief once the court has entered a judgment, which carries greater finality. *Id.*; *Chewning v. Ford Motor Co.*, 354 S.C.72, 89 (2003). South Carolina has consistently recognized the "longstanding policy towards final judgment and that important benefits are achieved by the preservation of final judgments." *Id.* at 86.

"Whether to grant or deny a motion under Rule 60(b) lies within the sound discretion of the judge. Our standard of review, therefore, is limited to determining whether there was an abuse of discretion." *Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004) (citation omitted). "An abuse of discretion arises where the trial judge was controlled by an error of law or where his order is based on factual conclusions that are without evidentiary support." *Tri-County Ice & Fuel Co. v. Palmetto Ice Co.,* 303 S.C. 237, 242, 399 S.E.2d 779, 782 (1990).

ARGUMENT

This appeal is fundamentally about Texas Insurance's failure to take accountability for its own negligence. To be clear, Texas Insurance brings this appeal as an attempt to avoid or otherwise limit its potential exposure in a separate pending bad faith and breach of contract case. *See Nichols v. State Farm Mut. Auto Ins.*, 279 S.C. 336, 306 S.E.2d 616 (1983) ("[I]f an insured can

demonstrate bad faith or unreasonable action by the insurer in processing a claim under their mutually binding insurance contract, he can recover consequential damages in a tort action.").

Texas Insurance attempts to argue that a UIM carrier has no obligation to appear or otherwise respond to service of a Summons and Complaint – much less respond within thirty (30) days – and that Respondent had a duty to continue to serve it with legal documents throughout the ongoing lawsuit as if it had appeared and become a party of record to the case. Texas Insurance argues that Plaintiff's failure to continue to serve it with legal documents after its own failure to appear is somehow grounds to vacate the July 2nd Judgment under Rule 60(b).

As correctly held by the lower court, Texas Insurance failed to appear and protect its interests in accordance with § 38-77-160, all documents were served in accordance with the applicable procedural rules, and Texas Insurance's due process rights were not violated because it was given notice and an opportunity to appear and protect its interests. (R. pp. 56; 57-67).

I. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN FINDING THERE WERE NOT SUFFICIENT GROUNDS FOR RELIEF UNDER RULE 60(b), *SCRCP*, BECAUSE TEXAS INSURANCE PROVIDED NO REASONABLE BASIS FOR ITS FAILURE TO APPEAR IN ACCORDANCE WITH § 38-77-160.

S.C. Code Ann. § 38-77-160 ("UIM Statute"), specifically states, in relevant part:

> 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.***

S.C. Code Ann. § 38-77-160 (emphasis added).

Once served, the UIM carrier has thirty (30) days to appear in the same manner as any other party. *See id.* The South Carolina Supreme Court has specifically interpreted the UIM statute's service requirements and held that "[t]he intent of Section 38–77–160 is to protect an

insurance carrier's right to contest its liability for underinsured benefits." *Williams v. Selective Ins. Co. of Se.*, 315 S.C. 532, 534, 446 S.E.2d 402, 404 (1994).

It is not disputed that proper service was affected upon Defendant Brian McLeod and Texas Insurance. (R. pp. 618-623). It is not disputed that Texas Insurance did not make an appearance within thirty (30) of service of process. (R. pp. 88-89). Texas Insurance's appearance in the case was made on September 17, 2024, by the filing of its Notice of Appearance approximately 721 days after service of process and 105 days after entry of initial judgment. (R. pp. 88-89). Because Texas Insurance was properly served and failed to appear within thirty (30) days in accordance with § 38-77-160, it waived its right to later appear and protect its interests.

Texas Insurance does not argue any reasonable basis for failing to appear, but rather, argues § 38-77-160 does not require any appearance by a UIM carrier in response to proper service and/or the clear language setting forth a thirty (30) appearance requirement has no meaning. (R. pp. 561-562).

In asserting its argument, Texas Insurance cites a 1989 Insurance bulletin that states:

> The words "may assume control of the defense" clearly indicate that the underinsured motorist has the election of: (1) relying on the continued defense by the liability carrier of the putative underinsured motorist; (2) joining with the liability carrier for the putative underinsured motorist to monitor or jointly provide a defense; or (3) requesting that the primary control of the defense be relinquished by the liability insurer when the insurer's limits have been exhausted by tender and payment to the injured party.[5]

First, the insurance bulletin has no precedential authority, as noted by the lower court. (R. p. 65).

[5] *Contra Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1996) ("We hold § 38-77-160 does not require payment of the applicable liability policy limits as a precondition to collecting UIM benefits, but the UIM carrier is entitled to a credit for any amount of liability insurance coverage not exhausted in a settlement with its insured."); *see* (R. at 41) (The lower court's *Order of Judgment for Damages* provided setoff for the full liability policy limits of $1,000,000).

Second, in citing the referenced bulletin, Texas Insurance boldly emphasizes the language permitting a UIM carrier "the election of: (1) relying on the continued defense by the liability carrier…", suggesting this is what Texas Insurance did in this case. (Initial Brief of App., p. 14-15). However, Texas Insurance's initial correspondence to Plaintiff on September 4, 2024, after entry of the judgment, outright states "TIC has no record of being served any documents including, but not limited to a summons." (R. p. 634). Texas Insurance did not decline to appear because it was relying on the continued defense of the liability carrier, it simply failed to process the pleadings and had no knowledge of the lawsuit until after judgment was entered. (R. pp. 602; 63) ("[Plaintiff's counsel] may be right. Texas may have a mailing issue, you know.").

Third, even assuming the bulletin's application has authority, it does not permit a UIM carrier to ignore service of process by relying on the liability carrier's defense then later vacate judgment against the underinsured motorist because of its own election not to appear and defend. *See Ex Parte Allstate Ins. Co.*, 399 S.C. 202, 205, 528 S.E.2d 679 (Ct. App. 2000). ("[T]he UIM carrier always has the right to 'appear and defend in the name of the underinsured in any action which may affect its liability' notwithstanding the fact that it may not have the right to 'control' the defense.") (*citing* § 38-77-160). Moreover, in direct contradiction of the cited insurance bulletin, South Carolina has clearly held that a UIM carrier has no right to rely on the defense of the liability carrier once it settles with the plaintiff. *See Cobb v. Benjamin*, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1996) ("[W]hen a liability carrier obtains a settlement agreement relieving its insured of personal liability, its duty to defend is discharged and its counsel may withdraw. In that situation, the UIM carrier has no standing to enforce the duty to defend on the liability carrier." (*citing Nationwide Mut. Ins. Co. v. Tate*, 313 S.C. 444, 447-48, 438 S.E.2d 266, 268 (Ct. App. 1993). To

the extent Texas Insurance made an election not to appear and rely on the liability carrier's defense, it cannot thereafter vacate judgment under Rule 60(b) because it made a poor decision.

Fourth, and most importantly, Texas Insurance's argument completely ignores the clear and plain language of § 38-77-160 that specifically states the underinsured motorist carrier "has thirty days after service of process on it in which to appear." *Id.* The Legislature included this specific language in the statute for a reason. The right of a UIM carrier to defend in the name of a party to an action is a right that is created by the UIM statute. *See* Rule 24, *SCRCP* (a non-party cannot participate in an action unless the Court permits it to intervene). Section 38-77-160 creates an avenue for an injured party to enforce her entitlement to UIM benefits by meeting the statutory condition of serving the pleadings on her UIM carrier. *See id.* Should the UIM carrier wish to protect its interests, the plain and clear language requires an appearance be made within thirty (30) days of service of process, just like any other entity that is served with process under the law. *See also* Rule 12(a), *SCRCP* ("A defendant shall serve his answer within 30 days after the service of the complaint upon him…."); *see also*, *e.g.*, *Pilgrim v. Miller*, 350, S.C. 637, 67 S.E.2d 527 (Ct. App. 2022) (Carrier has an obligation to defend, to act diligently, to take up the matter upon receipt of pleading); *Richardson v. P.V. Inc.*, 383 S.C. 610, 682 S.E.2d 263 (2009) (Nothing in the record from carrier explaining failure to answer and negligent oversight is not grounds for relief).

The legislature clearly intended § 38–77–160 to (1) require a plaintiff to put his UIM carrier on notice (if he wishes to enforce his right to UIM coverage) by serving the pleadings on the carrier through the Department of Insurance; and (2) require the UIM carrier to act (if it wishes to exercise its right to defend) by appearing within thirty days of service. *See Donze v. General Motors*, 420 S.C. 8, 22, 800 S.E.2d 479 (2017), *quoting Barnwell v. Barber-Colman Co.*, 301 S.C. 534, 538, 393 S.E.2d 162, 163- 64 (1989) ("[Courts] cannot read into a statute something that is not within

the manifest intention of the Legislature as gathered from the statute itself. To depart from the meaning expressed by the words is to alter the statute, to legislate and not to interpret. The responsibility for the justice or wisdom of legislation rests with the Legislature, and it is the province of the Courts to construe, not to make, the laws.") (citations omitted).

These conditions on both the injured plaintiff and the UIM carrier are strictly applied. *See Hucks v. Dolan*, 288 S.C. 468, 470 343 S.E.2d 613, 615 (1986) ("Since the right of adoption in South Carolina is not a natural right but wholly statutory, it must be strictly construed."). On the one hand, as it relates to a plaintiff, our courts have specifically stated that a plaintiff must provide proper service in accordance with the requirements of § 38–77–160 and do so on the UIM carrier at the "early stages" of litigation to allow it the opportunity to intervene and participate. *See Ex Parte Allstate Ins. Co.*, 339 S.C. 202, 205, 528 S.E.2d 679 (Ct. App. 2000); *see also Williams v. Selective Ins. Co. of Se.*, 315 S.C. 532, 534, 446 S.E.2d 402, 404 (1994) ("[F]ailure to pursue an action against the at-fault driver [in accordance with § 38–77–160] resulted in a total waiver of Insurer's right to defend."). On the other hand, as it relates to an insurer, our courts have specifically stated that "[t]he insurer may not benefit from the protections of the statue when [it] does not comply with the statute." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 626 S.E.2d 6 (2005) (limiting the construction of a UM/UIM statute to its "plain and unambiguous terms").

South Carolina's lower courts have also strictly applied § 38–77–160 as requiring an appearance by a UIM carrier within thirty (30) days of service or it waives its right to later appear and protect its interests. *See*, *e.g.*, *Order Granting Plaintiff's Motion to Strike the Appearance of UIM Carrier*, *Darleen Townsend vs. Ashley Davinroy Cook*, 2023-CP-10-02712, (Court of Common Pleas, County of Charleston) (January 13, 2025) (striking UIM carrier's notice of appearance and conditional answer made one-hundred-sixty-seven [167] days after service on the

SCDOI); *Order Granting Plaintiff's Motion to Strike the Appearance of a Non-party*, *Allison Lee vs. Alexandria Yatese Adams-White, et. al.*, 2024-CP-10-04436, (Court of Common Pleas, County of Charleston) (April 1, 2025) (striking UM carrier's notice of appearance and conditional answer made fifty-six [56] days after SCDOI accepted service).

In fact, in an earlier order issued in this very case, Judge Kristi F. Curtis, in ruling on Plaintiff's motion for order of reference, made specific findings of fact holding Texas Insurance had been properly served and "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." (R. p. 7, ¶¶ 5, 8, 13). Texas Insurance does not appeal that order and only appeals the Order to Reconsider. (R. p. 90).

The only case Texas Insurance cites as an attempt to argue it has no obligation to appear within thirty (30) days is *Ex Parte S.C. Farm Bureau Mut. Ins. Co.*, 314 S.C. 489, 431 S.E.2d 253 (1993). However, Texas Insurance's reliance on *Ex Parte S.C. Farm Bureau* is misplaced because that case only held that § 38-77-160 does not create a statute of limitations for bringing a claim against a UIM carrier and that service on the UIM carrier outside the three-year statute of limitations was not grounds for dismissal. *See id.* The issue here is not one involving a statute of limitations in bringing the lawsuit, it is simply whether Texas Insurance appeared within the thirty (30) day requirement under § 38-77-160.

It is undisputed that Texas Insurance failed to appear and protect its interests in compliance with § 38-77-160, or at any time prior to entry of judgment. Texas Insurance provides no explanation for its failure to appear other than attempting to argue it is not required to appear. Because Texas Insurance provides no explanation, much less a reasonable explanation, it has not set forth sufficient grounds to vacate the July 2nd Judgment under Rule 60(b).

The court need not go any further in addressing Texas Insurance's remaining arguments because this issue is dispositive to the appeal. Should the court address any remaining issues and find in favor of Texas Insurance, it would be equivalent to allowing it to appear and protect its interests despite its failure to comply with § 38-77-160.

II. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN FINDING THERE WERE NOT SUFFICIENT GROUNDS FOR RELIEF UNDER RULE 60(b), *SCRCP*, BECAUSE ALL DOCUMENTS WERE SERVED IN ACCORDANCE WITH THE APPLICABLE PROCEDURAL RULES.

The lower court did not abuse its discretion in holding that the offer of judgment filed on August 17, 2023, was issued and served in accordance with the applicable law and procedural rules. (R. pp. 57-67). Likewise, the lower court did not abuse its discretion in holding that all other documents were properly issued and served in accordance with the procedural rules. (*Id.*).

A. The offer of judgment was served in accordance with the clear and plain language of § 15-35-400; Rule 68, *SCRP*; and Rule 5(a), *SCRCP*.

S.C. Code Ann. § 15-35-400 and Rule 68, *SCRCP*, both govern offer of judgments and each addresses service using similar language. Specifically, § 15-35-400(A) states, in relevant part:

> [A]ny party may, at any time more than twenty days before the actual trial date, file with the clerk of the court a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein, for property, or to effect specified in the offer. The offeror shall give notice of the offer of judgment to the offeree's attorney, or if the offeree is not represented by an attorney, 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.**

Similarly, Rule 68(a), *SCRCP*, states, in relevant part:

> Any party in a civil action, except a domestic relations action, may file, no later than twenty days before trial date, a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or to allow judgment to be taken against the offeror for the sum stated therein, or to the effect specified in the offer. **Service of the offer of judgment shall be made as proved in these rules.**

Both § 15-35-400(B) and Rule 68, *SCRCP*, both plainly and clearly state that offers of judgment shall be served as provided by the South Carolina Rules of Civil Procedure. *See id.*; *Carolina Power & Light Co. v. City of Bennettsville*, 314 S.C. 137, (1994) ("When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning.").

Rule 5(a), *SCRCP*, ("Service and Filing of Pleadings and Other Papers") governs service of documents, including offers of judgments:

> **(a) Service: When Required.** Unless otherwise ordered by the court because of numerous defendants or other reason, all (1) written orders; (2) pleadings subsequent to the original summons and complaint, which includes answers, counterclaims, cross claims, replies and amended complaints; **(**3) written motions, other than ones which may be heard ex parte; (4) written notices; (5) discovery requests and responses; (6) appearances; (7) demands; **(8) offers of judgments**; (9) designations of record or case; (10) grounds or exceptions on appeal; and (11) other similar papers **shall be served upon each of the parties of record. No service need be made on parties in default for failure to appear…."**

As Rule 5(a), *SCRCP*, plainly states offers of judgments are only required to be served on "parties of record." *Id.* Rule 5(a) further states "no service need be made on parties in default for failure to appear." *Id.* Thus, if an entity is not a party of record, no service of an offer of judgment is required. *See id.* Likewise, even if an entity is a party of record but is in default for failing to appear, no service of an offer of judgment is required. *See id*.

An insured has no right to name a UIM carrier in a direct action to establish liability and damages but only in a subsequent action relating to coverage. *See*, *e.g.*, *Vernon v. Harleysville Mut. Cas. Co.*, 244 S.C. 152, 135 S.E.2d 841 (1964). The purpose of serving the insurer under § 38–77–160 is to provide the insurer with an opportunity to intervene and appear in the action to defendant and protect its interests. *Ex Parte Allstate Ins. Co.*, 399 S.C. 202, 205, 528 S.E.2d 679 (Ct. App. 2000). Indeed, the right of a UIM to intervene and defend in the name of a party to an

action is a right that has been created by statute. *See id.*; *see also Broome v. Watts*, 319, S.C. 337, 461 S.E.2d 46 (1995) (UIM carrier "steps into the shoes of the underinsured motorist.").

Upon service of process, it is upon the UIM carrier (if it wishes to protect its interests) to appear and intervene as a party of record to ensure further service of any documents during litigation. Texas Insurance never filed a notice of appearance in the case to assert itself as a party of record until September 17, 2024, almost two years after service of process on the SCDOI and well after entry of judgment against the underinsured motorist. (R. pp. 88-89).

Texas Insurance Company	Motion/Vacate Judgment	Motion		09/17/2024-16:54	09/17/2024-16:54	
Texas Insurance Company	NEF(09-17-2024 11:54:28 AM) Add Party to Case	Filing		09/17/2024-16:31		
Texas Insurance Company	Add Party to Case	Filing		09/17/2024-11:54		
Texas Insurance Company	Notice/Notice of Appearance	Filing		09/17/2024-11:54		

The offer of judgment was filed on August 17, 2023, which means Texas Insurance was not a party of record at the time of its filing and no service was required under Rule 5(a). (R. pp. 84-87). Even if Texas Insurance was a party of record at the time the offer of judgment, service would still not be required under Rule 5(a) because it does not require service of an offer of judgment on a party who is in default for failing to appear. *See id.*; *see*, *e.g.*, *Stark Truss Co., v. Superior Constr. Corp.,* 360 S.C. 503, 509, 602 S.E.2d 99, 102 (2004) (noting the actual entry of default is a ministerial act and not dispositive of default).[6]

In arguing service of the offer of judgment was improper, Texas Insurance attempts to rely on limited cherry-picked language within § 15-35-400 stating "[t]he offeror shall give notice of the offer of judgment… to the offeree…." Texas Insurance parses this limited language to argue

[6] Texas Insurance attempts to incorrectly argue that: (1) Texas Insurance was not in default because no order of default was actually entered; or (2) if Texas Insurance was in default, it was somehow still entitled to service of ongoing legal documents under Rule 5(a) beyond notice of the damages trial.

that notice of the offer of judgment must be provided no matter what the service rules say. However, Texas Insurance fails to read the remainder of the very same sentence it relies on which states, "[t]he offeror shall give notice of the offer of judgment… to the offeree… **in accordance with the service rules for motions and other pleadings set forth in the South Carolina Rules of Civil Procedure**." *Id.* (emphasis added); *see also CRFE, LLC v. Greenville Cnty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011) (When reading a statute, we "should not concentrate on isolated phrases within the statute. Instead, we read the statute as a whole and in a manner consonant and in harmony with its purpose.") (citations omitted). The very same sentence Texas Insurance relies on to argue notice must be provided regardless of any service requirement clearly states that notice is only required to the extent the South Carolina Rules of Civil Procedure require service. *See* § 15-35-400. Thus, under the plain language of § 15-35-400, "notice" is equivalent to service, as "notice" is only required to be provided in accordance with service. *Id.* Even to the extent it may be determined that notice is not equivalent to service (which would contradict the plain language of § 15-35-400), Texas Insurance was provided constructive notice of all filings in the case because it was served with pleadings and could have taken proper action to intervene and ensure service of any subsequent filings. *See Norris v. Greenville S. & A. Ry. Co.*, 111 S.C. 322, 97 S.E. 848 (1919) (Constructive notice is satisfied "[w]hen a person has notice of such facts as are sufficient to put him on inquiry, which, if pursued with due diligence, would lead to knowledge of other facts, he must be presumed to have knowledge of the undisclosed facts.") Only "[a]fter a person has actually made due inquiry and such inquiry has proved futile, he is to be regarded as having acted bona fide and without notice of the fact."). *See* 66 C.J.S. *Notice* § 11 (1950).

Notably, in trying to argue the offer of judgment was improper, Texas Insurance does not rely on any language in Rule 68 because it does not use the word "notice" but only "service."

Compare § 15-35-400 *with* Rule 68, SCRCP; *but see* Rule 68, *SCRCP*, Note to 2006 Amendment ("This amendment makes this provision consistent with S.C. Code Ann. § 15-35-400, which became effective July 1, 2005."). Texas Insurance's argument would result in inconsistent applications of § 15-35-400 and Rule 68 and would also improperly result in a finding that "notice" is somehow required beyond the service requirements within the service rules.

It is indisputable § 15-35-400 requires notice be provided "in accordance with the service rules." *Id.* It is indisputable Rule 5(a) only requires service of an offer of judgment on "parties of record." *Id.* It is indisputable Texas Insurance was not a party of record when the offer of judgment was filed on August 17, 2023. (R. pp. 84-89). Because service is not required under Rule 5(a), and notice is required in accordance with the service rules, no notice is required to Texas Insurance.

It should be further noted that Rule 5(a) outright states that service (and therefore notice) of an offer of judgment is not required to be made on a party in default for failing to appear. *Id.* Under the clear language of Rule 5(a), a plaintiff is not required to serve an offer of judgment on a party who is in default for failing to appear. The Generally Assembly could have easily omitted offers of judgments within the list of documents enumerated within Rule 5(a), but it clearly intended to include them as documents that are only required to be served on a party of record who is not in default for failing to appear. There is nothing in Rule 5(a), or § 15-35-400, or Rule 68, that states a plaintiff is not permitted to file an offer of judgment when an entity has failed to appear or when a party has defaulted for failing to appear. The plain language still permits the filing of an offer of judgment under those circumstances.

Texas Insurance had not appeared in the case and made themselves a party of record at the time the offer of judgment was filed on August 17, 2023. As such, service (and therefore notice) of the offer of judgment was not required on Texas Insurance. Because the offer of judgment was

served in accordance with the clear and plain language of the applicable procedural rules, there are no grounds to vacate the July 2nd Judgment under Rule 60(b).

B. All motions and notices were served in accordance with Rules 5(a), *SCRCP*, and the July 2nd Judgment is not void for lack of service or notice.

The lower court correctly concluded that all documents were served in accordance with the clear and plain language of Rule 5(a) and that proper notice of the trial on damages was provided. (R. pp. 57-67). Moreover, the lower court correctly concluded that Rule 6(d), *SCRCP*, does not change or override the service requirements of Rule 5(a), *SCRCP*. (R. pp. 57-67).

i. All documents were served in accordance with Rule 5(a), *SCRCP*.

As previously mentioned, Rule 5(a) governs when service of various documents is required. Enumerated within Rule 5(a) are several itemized documents including but not limited to "(1) written orders… (3) written motions… (4) written notices… (8) offers of judgment …." *Id.* Rule 5(a) plainly and clearly states that service of these enumerated documents is only required to "be served upon each of the parties of record." *Id.* Rule 5(a) further provides that "no service need be made on parties in default for failing to appear." *Id.*

The lower court correctly held that Texas Insurance did not intervene as a party of record until the filing of its notice of appearance on September 17, 2024, and that no service of subsequent documents was required upon Texas Insurance under the plain language of Rule 5(a). (R. pp. 47-56; 57-67). The lower court even addressed Texas Insurance's argument that it somehow should be considered a party of record just because it was served, and correctly pointed out that Texas Insurance would be a defaulting party and service would still not be required based on the clear language or Rule 5(a) stating "no service need be made on parties in default for failing to appear." (R. p. 59).

Respondent's service of documents is in direct alignment with the court's own service actions and instructions. For example, in issuing its *Order Granting Plaintiff's Motion for Summary Judgment* and *Order Granting Plaintiff's Motion for Reference*, the clerk of court did not serve or list Texas Insurance on its Certificate of Electronic Notification accompanied with service of each order. (R. pp. 1-5; 11; 17). The Certificate of Electronic Notification clearly does not list Texas Insurance as a party of record. (R. pp. 1-5; 11; 17). The Certificate even provides a section for the clerk of court to complete that states: "The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:" (R. pp. 1-5; 11; 17). This section of the Certificate is blank and does not list Texas Insurance as a party of record to the case. (R. pp. 1-5; 11; 17).

Because Texas Insurance failed to appear and was not a party of record to the case until the filing of its notice of appearance, Respondent was not required to provide service under Rule 5(a). Moreover, assuming Texas Insurance is considered a party of record for purposes of Rule 5(a), it would be a party in default for failing to appear and no service would be required. As such, all documents were served in accordance with the applicable procedural rules.

ii. Rule 6(d), *SCRCP* does not override or change the service requirements of Rule 5(a), *SCRCP*.

Rule 6(d) ("Time") addresses time computations for when a hearing is to be scheduled after service of a written motion. *Id.* Texas Insurance attempts to use the language contained in Rule 6(d) to argue that Respondent had a duty to serve it with written motions after its failure to appear. (R. p. 470-471). However, as the lower court correctly held, Texas Insurance misapplies Rule 6(d). (R. p. 54-55; 60). Under the South Carolina Rules of Civil Procedure, Rule 5(a) clearly addresses when service of various documents is required, including notices and written motions. Rule 6(d) simply addresses the scheduling of a hearing on a written motion, if one is to be held. It does not

override, change, or assert some new or additional service requirement beyond Rule 5(a). Moreover, as the lower court noted, *Plaintiff's Motion for Costs and Interest* was ruled on without a hearing at the discretion of the special referee. (R. pp. 55; 64).

iii. Texas Insurance was provided proper notice of the damages trial.

Rule 5(a) clearly states that service of written motions and written notices are only required to be served on "each of the parties of record." *Id.* Moreover, Rule 5(a) also states that "[n]o service need be made on parties in default for failing to appear." *Id.* However, if a party is in default for failing to appear, Rule 5(a) requires the plaintiff to provide notice of the trial on damages. *Id.*

Rule 55(b)(2) addresses the manner of notice of the damages trial and 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.* Under Rule 55(b)(2), 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. *Id.* Under Rule 55(b)(2), when a party in default has not appeared, notice of the hearing or trial on damages must be provided via first-class mail. *Id.*

The damages trial was not set by any written motion of Respondence, but upon scheduling of the lower court. (R. p. 64). Because Texas Insurance had not appeared as a party of record, notice of the damages trial was not required (R. p. 64). Nevertheless, on April 1, 2024, Plaintiff filed with the lower court a letter addressed and mailed to Texas Insurance at its business mailing address of 10805 Old Mill Road, Omaha, NE 68154, providing notice of the damages trial scheduled for April 9, 2024. (R. p. 208). The mailing of this notice provides eight (8) days notice to Texas Insurance. (R. p. 64). Thus, as the lower court correctly held, Texas Insurance, despite its failure to appear, was provided as much notice as is required to a defaulting party who has actually

appeared under Rule 5(a) and Rule 55(b)(2). (R. pp. 64-65). Notably, Texas Insurance did not respond or make any appearance in response to Respondent's notice. (R. pp. 214-215).

Texas Insurance failed to appear and was not a party of record and therefore written notice was not required to be served. Even if Texas Insurance is a party of record, it would be in default and notice of the damages trial would be required under Rule 55(b)(2). Plaintiff's correspondence dated April 2, 2024, satisfied the notice requirement under Rule 55(b)(2).

III. THE LOWER COURT DID NOT ABUSE ITS DISCRETION IN FINDING THERE WERE NOT SUFFICIENT GROUNDS FOR RELIEF UNDER RULE 60(b), *SCRCP*, BECAUSE THE JULY 2ND JUDGMENT DOES NOT VIOLATE ANY RIGHTS OF TEXAS INSURANCE.

Entry of the July 2nd Judgment against the underinsured motorist does not violate Texas Insurance's due process right or abrogate any of its contractual rights under the UIM policy.

A. Texas Insurance was afforded proper due process.

Procedural due process requirements are not technical; no particular form of procedure is necessary. *In re Vora*, 354 S.C. 582 S.E.2d 416 (2003) "[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481, 92 S. Ct. 2593 (1972). The requirements in a particular case depend on the importance of the interest involved and the circumstances under which the deprivation may occur. *S.C. Dept. of Soc. Servs. v. Beeks*, 325 S.C. 243, 246, 481 S.E.2d 703, 705 (1997).

The only requirement of a plaintiff in bringing a claim for UIM benefits is to serve the at-fault driver and her underinsured motorist carrier, giving it the opportunity to intervene and protect its interest. *See* § 38-77-160; *see also Williams v. Selective Ins. Co. of the Southeast*, 315 S.C. 532, 446 S.E.2d 402 (1994)., "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." As outlined above, the procedural rules do not require ongoing service of documents

enumerated in Rule 5(a) on an entity who is not a party of record or who is in default for failing to appear. The only further requirement is providing notice of the trial on damages to a party in default for failing to appear pursuant to Rule 5(a) and Rule 55(b)(2). There can be no violation of due process when proper notice and opportunity to appear and defend under § 38-77-160 is provided and all subsequent documents are served in accordance with the applicable procedural rules.

Other states have specifically addressed the issue of a UIM carrier's due process rights after its failure to appear and held that the UIM carrier is afforded proper due process if it is provided notice and an opportunity to intervene and protect its interests. *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."); *Lenzi v. Redland Ins. Co.*, 996 P.2d 603, 140 Wash. 2d 267 (2000) ("Notions of fair play and substantial justice dictate that [Insured] had any duty to [UIM carrier] other than timely notifying it of the filing of the summons and complaint.").

Texas Insurance cites various cases to argue Respondent's failure to serve it with documents after service of process and its own failure to appear violates its due process rights. The cases cited by Texas Insurance are the same exact cases it cited to in making this argument in its Motion to Vacate Judgment to the lower court. *See*, *e.g.*, *Tryon Fed. Sav. & Loan Ass'n. v. Phelps*, 307 S.C. 361, 415 S.E.2d 397 (1992) (hearing granted to determine whether *pro se* "**party litigant**" had been served with notice of hearing and order).[7] (emphasis added) (R. pp. 469-470; 51).

[7] Additional cases cited by Texas Insurance to do not support a finding of a violation of due process when a party failed to appear as a party of record after service of process. See, *e.g.*, *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002) (analyzing whether service of an order was made on a party to the case); *S.C. Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 459 S.E.2d 849 (1995) (denying alleged due process violation for admission of affidavit at divorce proceeding); *Keowee Inv. Group, LLC v. Pickens County,* 2004 S.C. App. Unpub. LEXIS 423 (Unpublished opinion) (violation of Rule 5 for failing to serve a co-defendant party of record but no

In specifically analyzing these cases, the lower court correctly pointed out that each case cited by Texas Insurance all involves a party of record who has appeared and participated in the case at some point. (R. p. 51). There is no authority cited by Texas Insurance where the court found a violation of due process based on lack of notice of subsequent proceedings when the entity seeking relief has been properly served with process but failed to appear and become a party of record to the case. (R. p. 51).

Moreover, going back to the initial point of Texas Insurance failing to take accountability for its own actions, South Carolina law is clear that lack of due process cannot be violated when the alleged violation is due to one's own negligence. *Patel v. S. Brokers, Ltd.*, 277 S.C. 490, 289 S.E.2d 642 (1982) ("If there has been any denial of due process, which this court doubts, it is the result of a self-inflicted wound."). Any alleged denial of due process to Texas Insurance is its own fault for failing to appear and protect its interests after proper service. (R. p. 61). Had Texas Insurance simply filed a notice of appearance in response to service it would have received service and notice of all court filings including, but not limited to, any offer of judgment. In fact, had it simply monitored the public index filings and been aware of the filed offer of judgment, nothing would have prevented Texas Insurance from filing an acceptance despite its failure to appear. *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.").

B. Entry of the July 2nd Judgment against the underinsured motorist does not abrogate any contractual rights of Texas Insurance.

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prejudice); *Conner v. City of Forest Acres*, 348 S.C. 454, 560 S.E.2d 606 (2002) (analyzing service requirement of notice of appeal on a party of record).

Texas Insurance argues that entry of the July 2nd Judgment entered against the underinsured motorist which included costs and interest based, in part,[8] on the offer of judgment, abrogates its contractual rights with Plaintiff. (R. pp. 478; 550). However, in ruling on both its Order Denying Motion to Vacate and Order Denying Motion to Reconsider, the lower court made clear the award of judgment has been entered against Mr. McLeod, as the underinsured motorist, and has not been entered directly against Texas Insurance, as the underinsured motorist carrier. (R. p. 66).

The court does not have the authority to enter judgment directly against the UIM carrier. Rather, plaintiff must pursue his claim on liability and damages against the underinsured motorist, then seek recovery from the underinsured motorist carrier in a direct action. *See Hatchett v. nationwide Mut. Ins. Co.,* 244, S.C. 425, 432, 137 S.E.2d 608, 612 (1964). In pursuing his claim against the underinsured motorist (Mr. McLeod), plaintiff is permitted to fully prosecute his claim to its fullest extent under the law; particularly considering the substantial delay and costs Mr. Kleuchenia incurred in trying his case to judgment. (R. pp. 421-429). To the extent Texas Insurance argues the July 2nd Judgment awards damages that have not been plead, this contention is false based on the clear language of the Complaint that seeks relief for all actual damages including, but not limited to, pre-judgment interest and costs. (R. p. 72).

What effect the July 2nd Judgment that has been entered against Mr. McLeod, as the underinsured motorist, has on Texas Insurance, as the underinsured motorist carrier, are issues to be addressed in the pending bad faith and breach of contract case. As mentioned, Texas Insurance brings this appeal in hopes this Court will find some issue that may be used against Plaintiff in the pending bad faith and breach of contract case. Because there is a collateral pending bad faith

[8] The July 2nd Judgment also included an award of taxable costs under Rule 54(e), which a prevailing party is entitled to as a matter of right. *See* Rule 54(e), *SCRCP*; (R. p. 43).

lawsuit premised on the very judgment Texas Insurance is attempting to attack on this appeal, the court should decline to disturb the judgment and let those issues be addressed in the collateral case.

CONCLUSION

Nothing in either Texas Insurance's motion to vacate judgment nor its motion to reconsider (and therefore, this appeal) attacks the validity in any way of the initial June 4th Judgment entered against the underinsured motorist. (R. pp. 430; 487; 544-553). Texas Insurance only attacks the July 2nd Judgment that was amended to add costs and interest. (R. at *Id.*). As such, nothing on this appeal can, in any way, disturb the June 4th Judgment against the underinsured motorist.

The trial court did not abuse its discretion in finding that there were not sufficient grounds for relief from the July 2nd Judgment pursuant to Rule 60(b), *SCRCP*, because Texas Insurance provided no reasonable basis for its failure to appear in accordance with § 38-77-160. Moreover, the trial court did not abuse its discretion in finding that there were not sufficient grounds for relief from the July 2nd Judgment pursuant to Rule 60(b), *SCRCP*, because all documents were served in accordance with the applicable procedural rules. Lastly, the lower court did not abuse its discretion in finding that there were not sufficient grounds for relief from the July 2nd Judgment pursuant to Rule 60(b), *SCRCP*, because the July 2nd Judgment does not violate any rights of Texas Insurance.

Based on the foregoing, the July 2nd Judgment entered against the underinsured motorist should be affirmed.

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