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 McCleod, Defendant.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from a motor vehicle accident that occurred on or about July 17, 2018, in Horry County, South Carolina. (R. p. 69). The original Summons and Complaint for this motor vehicle accident were filed on July 12, 2021. (R. pp. 68-72). The Plaintiff, Viktar Kleuchenia, served Onyx Insurance Company, Inc., the purported Underinsured Motorist Carrier, through the Director of the S.C. Department of Insurance on August 17, 2021. (R. p. 619). On March 28, 2022, the Defendant, Brian McLeod, served responses to the Plaintiff's Requests for Admissions admitting negligence and fault for the accident, as well as proximate cause for injuries suffered by the Plaintiff. (R. pp. 190-194). The Plaintiff served Texas Insurance Company through the Director of the S.C. Department of Insurance on September 27, 2022. (R. p. 623). The Plaintiff filed an Offer of Judgment against the Defendant, pursuant to Rule 68, SCRCP and S.C. Code § 15-35-400(B) on January 17, 2023. (R. pp. 77-79). The Defendant filed an acceptance of the Offer of Judgment on January 25, 2023. (R. p. 80). A Satisfaction of Judgment in the amount of $800,000 was filed by the Plaintiff on March 27, 2023. (R. pp. 81-83). On April 10, 2023, the Plaintiff filed a Motion for Summary Judgment on Liability, enclosing as an exhibit the Defendant's responses to Plaintiff's Requests for Admissions. (R. pp. 179-194). Also on April 10, 2023, the Plaintiff filed a Motion to Strike Demand for Jury Trial and Request for Order of Reference, asking that the case be referred to Robert Buffington as the special referee. (R. pp. 195-207). On August 11, 2023, the court entered a Form 4 Order granting summary judgment, striking the Plaintiff's demand for a jury trial, and referring the case to a special referee, with additional reference to a forthcoming formal order to be prepared by Plaintiff's counsel. (R. pp. 1-5). On August 15, 2023, the Plaintiff filed an additional Motion to Strike Demand for Jury Trial and Request for Order of Reference. (R. pp. 6-

11). That same day, the court entered a formal Order Granting Plaintiff's Motion for Summary Judgment on Liability with the instruction that the case proceed forward on the sole issue of damages. (R. pp. 12-17). On August 17, 2023, the Plaintiff filed (but did not serve) Plaintiff's Offer of Judgment for UIM Benefits. (R. pp. 84-87). The "Offer of Judgment for UIM Benefits" specifically states that the Plaintiff "hereby makes the following Offer of Judgment to Texas Insurance Company as assignee of Onyx Insurance Company, as UIM carrier," in accordance with S.C. Code § 15-35-400 and Rule 68, SCRCP. (R. p. 84).

On April 1, 2024, the Plaintiff filed a copy of a letter he purports to have sent to Texas Insurance Company giving notice of an April 9, 2024, hearing in the matter. (R. p. 208). A bench trial was held before the special referee on April 9, 2024, and an Order of Judgment for Damages was entered on June 4, 2024. (R. pp. 18-41). On June 5, 2024, the Plaintiff filed a Motion for Costs and Interest, moving the court for an order "to tax costs and to award Plaintiff the interests and costs owed for failing to accept Plaintiff's Offer of Judgment to resolve this case." (R. pp. 421-429). On July 2, 2024, the special referee entered an Order on Plaintiff's Motion for Costs and Interest. This order granted the Plaintiff's motion, awarded an additional $5,281.26 in costs, and $143,506.85 in interest as of June 4, 2024, with a final judgment in the amount of $2,398,788.11 with interest to begin accruing on entry. (R. pp. 42-46). On August 20, 2024, Plaintiff's counsel sent correspondence to Texas Insurance Company notifying them of the entry of the Order on Plaintiff's Motion for Costs and Interest, demanding payment of the full amount of the judgment. (R. p. 628). On September 17, 2024, the undersigned counsel for Texas Insurance Company filed a Notice of Appearance and a Motion to Vacate Judgment pursuant to Rule 60, SCRCP on the grounds that the Plaintiff's Offer of Judgment for UIM Benefits was never served nor was any notice of hearing ever given to Texas Insurance Company. (R. pp. 430-

431).

Texas Insurance Company's Motion to Vacate was heard by the special referee on December 5, 2024. On February 28, 2025, the court entered an order denying the Motion to Vacate. (R. pp. 47-56). Texas Insurance Company then filed a Motion for Reconsideration on March 4, 2025, asserting several errors of law and fact in the ruling. (R. pp. 544-553). A hearing on the Motion for Reconsideration was held on March 19, 2025, and ultimately an order denying that motion was entered by the court on May 5, 2025. (R. pp. 57-67). A Notice of Appeal was filed the same day by counsel for Texas Insurance Company.

STATEMENT OF FACTS

On July 17, 2018, the Plaintiff, Viktar Kleuchenia, was operating a motor vehicle heading North-bound on Highway 17 in Horry County, South Carolina. (R. p. 70). The Defendant, Brian McCleod, was traveling west on 52nd Avenue North in Horry County, South Carolina. (R. p. 70). McCleod attempted to turn south on Highway 17, pulling into the path of Kleuchenia causing the collision. (R. p. 70). As a result of the accident, Kleuchenia suffered physical injuries, medical expenses, and various future damages. Kleuchenia operated a taxi service and purchased a commercial automobile policy with Onyx Insurance Company, Inc. (hereinafter "Onyx Insurance"), Policy No. OIC-SC-0001119-02 (hereinafter the "Policy"), applicable to this loss with a policy period from March 29, 2018, to March 29, 2019. The Policy provided underinsured motorist coverage with limits of $25,000/$50,000. Onyx Insurance was subsequently purchased by Texas Insurance Company on June 30, 2021, by virtue of an Assumption and Indemnity Agreement. (R. p. 668).

As discussed above, on August 20, 2024, Plaintiff's counsel sent correspondence to Texas Insurance Company notifying them of the entry of the Order on Plaintiff's Motion for

Costs and Interest, demanding payment of the full amount of the judgment. (R. p. 628). This was the first demand, far in excess of the limits of the Policy, that was received by Texas Insurance Company on this claim. In response, Texas Insurance Company, via its Secretary and General Counsel Jeffrey Silver, sent correspondence to Plaintiff's counsel on September 4, 2024, requesting additional information regarding the claim and noting that Texas Insurance Company lacked information regarding the background on service and other proceedings that had occurred in the case. (R. pp. 634-635). On September 9, 2024, Texas Insurance Company tendered to the Plaintiff $25,000, which it believed at the time was the UIM limit under the Policy. (R. p. 661). Upon reevaluation of the number of insured vehicles on the Policy at the time of the accident, which had changed since the inception of the Policy, on October 4, 2024, Texas Insurance Company tendered an additional $25,000 (for a total of $50,000), the applicable UIM limits under the Policy, to the Plaintiff. (R. p. 664).

Meanwhile, on September 30, 2024, the Plaintiff filed an action against Texas Insurance Company in the South Carolina Court of Common Pleas, Horry County. This action alleged causes of action against Texas Insurance Company for bad faith, breach of the covenant of good faith and fair dealing, breach of contract, breach of contract accompanied by fraud and/or misrepresentations, quantum meruit/unjust enrichment, and seeks "actual, consequential, and extra-contractual damages," as well as punitive damages, pre and post judgment interest including but not limited to interest on the judgment awarded by the Special Referee, costs and attorney's fees. (R. pp. 105-175). Texas Insurance Company filed a Notice of Removal to the U.S. District Court on October 7, 2024. (R. pp. 176-178). That action is currently pending.

STANDARD OF REVIEW

In reviewing an order on a Motion to Vacate Judgment under Rule 60(b), SCRCP, the

Court of Appeals applies the abuse of discretion standard. *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 502 (2006); *see also Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 18, 594 S.E.2d 478, 482 (2004). "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). However, in this case, which turns solely upon the issue of due process, the parties agree on the underlying applicable facts regarding service of documents and notice provided. Therefore, the issues before this court are limited to review of the Special Referee's findings of law in the interpretation and application of the South Carolina Code and the Rules of Civil Procedure to the service and notice requirements set forth therein. As this appeal therefore solely presents questions of law, these findings are properly reviewed *de novo*. *S.C. Dep't of Soc. Servs. v. Boulware*, 422 S.C. 1, 6, 809 S.E.2d 223, 226 (2018) ("Questions of statutory interpretation are questions of law, which are subject to *de novo* review and which we are free to decide without any deference to the court below." (internal quotation marks omitted); *see also Deutsche Bank Nat'l Tr. Co. v. Estate of Houck*, 434 S.C. 500, 505, 863 S.E.2d 829, 832 (Ct. App. 2021) (citing *Ziegler v. Dorchester Cnty.*, 426 S.C. 615, 619, 828 S.E.2d 218, 220 (2019)) ("We review questions of law de novo.").

ARGUMENT

This case is fundamentally about due process. "Under Both Article I, Section 3 of the South Carolina Constitution and the fourteenth amendment to the United States Constitution, a person cannot be deprived "of life, liberty, or property without due process of law." *S.C. Nat'l Bank v. Cent. Carolina Livestock Mkt., Inc.*, 289 S.C. 309, 312, 345 S.E.2d 485, 487 (1986). "The fundamental requirements of due process include notice, an opportunity to be heard in a

meaningful way, and judicial review." *Kurschner v. City of Camden Plan. Comm'n*, 376 S.C. 165, 171, 656 S.E.2d 346, 350 (2008). "A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court." *Griffin v. Cap. Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992). Here, the Special Referee erred in his conclusion that conventional notions of due process, the laws of the State of South Carolina, and the procedural rules applicable to our courts, did not require service of an "Offer of Judgment for UIM Benefits," service of a resulting "Motion for Costs and Interest," or proper notice of hearings awarding damages in this case.

I. THE SPECIAL REFEREE ERRED IN HIS INTERPRETATION OF SERVICE REQUIREMENTS OF THE "OFFER OF JUDGMENT FOR UIM BENEFITS."

In this case, as well as in the companion bad-faith claim currently pending in the S.C. District Court, the Respondent argues that Texas Insurance Company is exposed to extra-contractual damages, in excess of its UIM limits under the Respondent's commercial automobile policy. The basis for these claimed damages is the lack of an appearance by Texas Insurance Company after service of the summons and complaint, the constructive rejection of the "Offer of Judgment for UIM Benefits," and the resulting award made to the Respondent of costs and interest, with a final award by the Special Referee in the amount of $2.389,788.11 (interest accruing).

A. The service requirements are plain within the language of the statute and the South Carolina Rules of Civil Procedure governing offers of judgment.

In South Carolina, offers of judgment within the civil litigation framework are governed both by state statute and by the civil rules of procedure. S.C. Code § 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 the 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.

S.C. Code Ann. § 15-35-400(A). The current language of S.C. § 15-35-400 was enacted in 2005 as part of the "Tort Reform Act of 2005 Relating to Medical Malpractice." In response to those revisions, the S.C. Supreme Court amended Rule 68, SCRCP in 2006, to make it consistent with the revisions to the Code. Rule 68, SCRCP (Note to 2006 Amendment). This rule states:

> Any party in a civil action, except a domestic relations action, may file, no later than twenty days before the 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 a sum stated therein, or to the effect specified in the offer. Service of the offer of judgment shall be made as provided in these rules. Within twenty days after service of the offer of judgment or at least ten days prior to the trial date, whichever date is earlier, the offeree or his attorney may file a written acceptance of the offer of judgment.

Rule 68(a), SCRCP.

Both the rule and the statute mandate service of an Offer of Judgment. Rule 68(a), SCRCP, states that "[s]ervice of the offer of judgment shall be made as provided in these rules" and indeed establishes a deadline for response of the offeree based upon that date of service. (emphasis added). However, S.C. Code § 15-35-400(A) goes a step further and provides that "[t]he 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." (emphasis

added). The rule also clearly contemplates that the offeree is entitled to notice of the offer given the stated method of acceptance: “Within twenty days after service of the offer of judgment or at least ten days prior to the trial date, whichever is earlier the offeree or his attorney may file a written acceptance of the offer of judgment.” Rule 68(a), SCRCP. (emphasis added). Furthermore, the rule contemplates notice to the offeree in the event of a withdrawal of the offer: “Any offeror may withdraw and offer of judgment prior to its acceptance or prior to the date on which it would be considered rejected by giving notice to the offeree or his attorney as provided in these rules.” *Id.* (Emphasis added).

If a statute or rule is "plain, unambiguous, and conveys a clear meaning, interpretation is unnecessary and the stated meaning should be enforced." *Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003) (citing *Knotts v. S.C. Dep't of Nat. Res.*, 348 S.C. 1, 558 S.E.2d 511 (2002)). Furthermore, "[a] statute should be so construed that no word, clause, sentence, provision or part shall be rendered surplusage, or superfluous." *State v. Sweat*, 386 S.C. 339, 351, 688 S.E.2d 569, 575 (2010); *see also Lightner v. Hampton Hall Club*, 419 S.C. 357, 364, 798 S.E.2d 555, 558-559 (2017) (statutes should be interpreted so as to "[g]iv[e] effect to each word in the statute …"). "[T]he cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will." *Id.* (citing Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)). If a statute's language is plain, unambiguous, and conveys a clear meaning "the Rules of Statutory Interpretation are not needed and the Court has no right to impose another meaning." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581; *see also State v. Scott*, 351 S.C. 584, 587, 571 S.E.2d 700, 702 (2002). “If a statute's language is plain and unambiguous and conveys a clear and

definite meaning, there is no occasion for employing rules of statutory interpretation and the court has no right to look for or impose another meaning." *Miller v. Doe*, 312 S.C. 444, 447, 441 S.E.2d 319, 321 (1994). The terms must be construed in context and their meaning determined by looking at the other terms used in the statute. *State v. Morgan*, 352 S.C. 359, 366, 574 S.E.2d 203, 206 (Ct. App. 2002). Under the plain meaning rule, it is not the courts place to change the meaning of a clear and unambiguous statute. *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 231, 612 S.E.2d 719, 724 (Ct. App. 2005). When the terms of a statute are clear, the court must apply those terms according to their literal meaning. *Holley v. Mount Vernon Mills, Inc.*, 312 S.C. 320, 323, 440 S.E.2d 373, 374 (1994). Both the statute and the rule are clear that notice and service is required. There is no dispute that notice and service of the "Offer of Judgment for UIM Benefits" was not given to Texas Insurance Company as the UIM carrier, nor was the resulting Motion for Costs and Interest served. As such, the subsequent July 2, 2024, order awarding of costs and interest should have properly been vacated. However, the Special Referee rejected the mandatory language requiring notice and service of the offer of judgment under both the statute and the rule, focusing instead upon the language following the mandate, which deals with the *method* of service for the offer of judgment.

B. The Special Referee was incorrect in his interpretation of the service requirements under South Carolina Rules of Civil Procedure 5 and 6.

Instead of accepting the clear service obligation contained in the rule and the statute, the Special Referee chose to focus solely on the language contained in S.C. Code § 15-35-400(A) and Rule 68, SCRCP, following the notice and service mandate that deals with the method of achieving service of the offer. The Special Referee, citing *CRFE, LLC v. Greenville Cnty. Assessor*¸ 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011), recognized that:

> '[w]hen reading a statute, one 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.' S.C. Code Ann. § 15-35-400 addresses service [of] 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.'

(R. p. 60). The Special Referee noted the equivalent language of Rule 68, SCRCP, that "[s]ervice of the offer of judgment shall be made as provided in these rules." Rule 68(a), SCRCP. However, the Special Referee then chose to eschew the words "shall give notice of the offer of judgment […] to the offeree himself" as an "isolated phrase" and instead chose to focus solely on the language instructing the offeror on how such notice was to be given.

The reasonable and plain interpretation of this language, giving harmony to its purpose, is that an offer of judgment shall be served according to the methods of effective service described within the South Carolina Rules of Civil Procedure. *See Williams v. Williams*, 436 S.C. 550, 588, 873 S.E.2d 785, 806 (Ct. App. 2022) ("Rules of civil procedure must be considered in relation to one another and construed together."). "In interpreting the language of a court rule, we apply the same rules of construction used in interpreting statutes." *Green ex rel. Green v. Lewis Truck Lines, Inc.*, 314 S.C. 303, 304, 443 S.E.2d 906, 907 (1994) (per curiam). "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." *Stark Truss Co. v. Superior Constr. Corp.*, 360 S.C. 503, 508, 602 S.E.2d 99, 102 (Ct. App. 2004) (alteration in original) (quoting *Green*, 314 S.C. at 304, 443 S.E.2d at 907). Here, instead of giving effect to the entirety of the rule, the Special Referee erroneously concluded that the language in the rules instead allow for non-service of the "Offer of Judgment for UIM Benefits" upon the UIM Carrier in this case. In support of this, the Special Referee engaged in a myopic application of Rule 5(a), SCRCP, which deals specifically

with "Service and Filing of Pleadings and Other Papers. Rule 5(a), SCRCP states, in relevant part:

> **(a) Service: When Required**. Unless otherwise ordered by the court because of numerous defendants or other reasons, 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 judgment; (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, 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.

Rule 5(a), SCRCP. (Emphasis added).

In construing Rule 5(a), SCRCP, the Special Referee incorrectly concluded that Texas Insurance Company was not entitled to service alternatively because (1) Texas Insurance Company was not a "party of record" and/or (2) Texas Insurance Company was a party, but it was "in default for failure to appear." (R. p. 58). In so doing, the Special Referee completely abandoned the clear language of S.C. Code § 15-35-400(A) and Rule 68, SCRCP regarding the service and notice upon the "offeree" and substituted the irrelevant designation of "party". This is especially troubling as neither the rule nor the statute require the designation of "party" in assessing the penalties of non-acceptance. Both rule and statute are substantially verbatim in the consequences of non-acceptance:

> If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of

the offer;…"

S.C. Code Ann. § 15-35-400(B).

It should be noted however, that both rule and statute are also substantially identical regarding the impact (or lack thereof) that an offer of judgment, and the consequences of non-acceptance shall have, on the rights of parties concerning the recovery of money in accordance with the provisions of a written contract. Again, both rule and statute state that the provisions regarding an offer of judgment in South Carolina "shall not be interpreted to abrogate the contractual rights of any party concerning the recover of attorney's fees or other monies in accordance with the provisions of any written contract between the parties to the action." S.C. Code Ann. § 15-35-400(C); Rule 68(c), SCRCP. As such, Texas Insurance asserts the language of both S.C. Code § 15-35-400(C) and Rule 68(c), SCRCP as additionally supporting the reversal of the award of costs and interest on the "Offer of Judgment for UIM Benefits" as contrary to the terms of the written contract for insurance, which establishes policy limits for UIM coverage in this action at $50,000.

C. The Special Referee incorrectly concluded that the language of S.C. Code § 38-77-160 requires an appearance by the UIM Carrier.

In improperly concluding that Texas Insurance was not an "offeree" entitled to service and notice but instead a non "party of record" and/or a party "in default for failure to appear", the Special Referee's analysis referenced back to South Carolina's UIM Statute, which 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.

The Respondent argued, and the Special Referee agreed, that the UIM Carrier had failed to appear within thirty days of service of the summons and complaint, and had therefore waived not only its right to appear in this case, but also its right to service of any subsequent documents in the case, as well as notice of any offers and other proceedings in the matter. As a result, the Special Referee concluded that the only service requirement that exists for a UIM Carrier is the requirement of service of the Summons and Complaint. The Special Referee erroneously concluded that the consequence of not making an appearance within the thirty-day period is constructively a default and waiver of any other rights that the UIM carrier may have with respect to service and notice. Thus, the Special Referee incorrectly concluded that the entirety of the Respondent's due process obligations were satisfied upon service of the summons and complaint. Despite arguments advanced by Texas Insurance Company in the proceedings below, the Special Referee held that such due process obligations are not a continuing duty, even where a non-party to the litigation is purportedly being subject to an award of special damages.

The Special Referee was incorrect in his conclusion that the lack of an appearance by Texas Insurance Company as the UIM carrier in this case operates as a technical default or should otherwise be construed as a waiver of Texas' rights of due process or service under the South Carolina Rules of Civil Procedure. The Special Referee incorrectly reads the UIM Statute to contain mandatory duties of appearance and participation in an action to which it is not a named party. Furthermore, the Special Referee interpreted the statute, not as a protection of the UIM Carrier's rights to participate, but as a waiver of the UIM Carrier's due process rights, for failure to exercise an optional administrative act. As such, the Special Referee found that Texas

Insurance Company failed to provide a reasonable explanation for its “failure to appear” in accordance with S.C Code § 38-77-160. (R. p. 52).

“The intent of S.C Code § 38-77-160 is to protect an insurance carrier's right to contest its liability for underinsured benefits. An insured must therefore preserve the right of action against an at-fault driver so long as the underinsured carrier has not agreed to the amount and payment of underinsured motorist benefits. In the event the insured chooses to settle with the at-fault party's liability carrier, the underinsured carrier has the option to assume control of the defense of the action as provided in S.C. Code § 38-77-160.” *Broome v. Watts*, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995) (citing *Williams v. Selective Ins. Co.*, 315 S.C. 352, 446 S.E.2d 402 (1994)). The language of the statute is permissive in nature, not mandatory, and while the insurer has the right to appear and defend in the name of the underinsured motorist, there is no requirement that the insurer does so. The exercise of this right is optional. *Id.* The statute explicitly states that “the underinsured motorist insurer may assume control of the defense of action,” but nowhere in the language of the statute regarding the rights of the underinsured did the legislature include the words “shall” or “must.”

Instead, the courts of this state have recognized that "although the UIM carrier 'steps into the shoes' of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist." *Broome*, 319 S.C. at 340, 461 S.E.2d at 48. Those rights exist in favor of the underinsured motorist carrier and are exercised solely at its option. Furthermore, the courts have recognized in application of S.C. Code § 38-77-160 that the UIM carrier is neither a party to the litigation, nor in privity with the underinsured defendant, nor the defendant’s liability carrier. *Allstate Ins. Co. v. Donaldson*, 339 S.C. 202, 207, 528 S.E.2d 679, 681-682 (Ct. App. 2000). The S.C. Department of Insurance has construed the UIM statute as follows:

> Ordinarily, ***the underinsured motorist carrier is under no obligation or duty to appear*** or defend the putative at-fault driver who has been sued by an injured party claiming entitlement to underinsured motorist benefits. This SECTION, however, affords the underinsured motorist carrier the right to appear and participate in the defense of the at-fault party. The words "may assume control of the defense" clearly indicate that ***the underinsured motorist carrier 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. ***Nothing in this section*** requires the liability insurer to withdraw from the defense of the action nor ***requires the underinsured motorist carrier to assume control of the defense***. It is the intent of this SECTION that the control of the defense of the putative underinsured motorist pass to the underinsured motorist carrier only when the liability limits for the at-fault driver have been tendered and paid and the underinsured motorist carrier ***elects*** to assume control of the defense.

S.C. Dep't of Ins. Bull. 4-89 (1989) (emphasis added).

UIM coverage is voluntary coverage; it is not mandatory coverage. South Carolina case law has made it clear that the intent of the state's underinsured motorist statute is not to protect the insured, but to protect the insurance company and its right to assume the defense of the case. The legislature notably did not include ramifications for when an insurer fails to appear within thirty (30) days and the statute is in fact void of any language that details such consequences. By ruling that Texas Insurance Company was not entitled to service of the "Offer of Judgment for UIM Benefits," as well as notice and service of other related motions and hearings, the Special Referee improperly imposed a consequence not enumerated within the underinsured motorist statute. This punitive consequence resulting in the denial of due process was a drastic remedy, causing substantial prejudice, completely unsupported by statutory or case law. The effect encouraged by the Respondent and imposed by the Special Referee would be to treat the thirty-

day appearance deadline as a statute of limitations, after which the UIM carrier has waived rights of service and notice not described within the statute. As the courts of South Carolina have recognized, nothing in S.C. Code § 38-77-160 creates a statute of limitations. *Ex Parte S.C. Farm Bureau Mut. Ins. Co.*, 314 S.C. 487, 489, 431 S.E.2d 252, 253 (1993).

In the proceedings below, Texas Insurance Company conceded that it had no intent of asserting an argument against the admission of liability of the at-fault defendant and further did not intend to defend in the name of the at-fault defendant on the issue of damages awarded against the underinsured motorist. (R. p. 562, lines 17-22). Indeed, Texas Insurance Company conceded that the damages awarded against the underinsured motorist would trigger the applicable UIM coverage. (R. p. 572, lines 3-20). It was upon this basis that Texas Insurance Company ultimately attempted to tender its UIM limits. (R. p. 507, lines 15-25). It was never Texas Insurance Company's intent to exercise its rights to assume control of the defense or argue against the resulting damages alleged by its insured. However, nothing in Texas Insurance Company's election not to appear or defend in this action constitutes a waiver of its rights under due process, its service rights under the South Carolina Rules of Civil Procedure, or its rights pursuant to the Policy.

D. Service of the "Offer of Judgment for UIM Benefits" upon the named at-fault defendant was insufficient to satisfy the requirements under SCRCP 5(a).

In the proceedings below, the Respondent took the position that the "Offer of Judgment for UIM Benefits" was served upon the named Defendant to the action through e-filing notice to his counsel, and that such service was sufficient under the requirements of S.C. Code 15-35-400, Rule 68, SCRCP and Rule 5, SCRCP. (R. pp. 84-87). The Special Referee erroneously agreed that this "service" was sufficient under Rule 5, SCRCP because "Texas Insurance had failed to

appear at the time the [Offer of Judgment for UIM Benefits] was filed and was not a party of record under Rule 5, SCRCP. Service of the [Offer of Judgment for UIM Benefits] was not required." (R. p. 61). The Special Referee then added a footnote to his order stating, "[t]o the extent Texas Insurance alleges Defendant Brian McLeod was not served with the [Offer of Judgment for UIM Benefits], the [Offer of Judgment for UIM Benefits] was filed with the Court and served on him as a party of record through his attorney via electronic service." (R. p. 61).

The Special Referee incorrectly concluded that any service requirement established in Rule 68, SCRCP and S.C. Code § 15-35-400 was met through service upon the named defendant/underinsured motorist. However, this conclusion by the Special Referee rejects the clear notice requirements in both the rule and the statute and fails to acknowledge that the Offer of Judgment for UIM Benefits wasn't filed in the underlying case until August 17, 2023. (R. pp. 84-87). That is almost seven months after counsel for the named defendant/underinsured motorist filed an acceptance of the Plaintiff's Offer of Judgment for $800,000 against the named defendant, five months after the Satisfaction of Judgment was filed by the Plaintiff and two days after the unopposed Motion for Summary Judgment was granted by the court. (R. pp. 80-82, pp. 12-17).

Again, the courts of this state have recognized the separate and distinct rights that exist in favor of the UIM carrier from those of the underinsured motorist. *Broome*, 319 S.C. at 340, 461 S.E.2d at 48. There is no privity between the underinsured defendant or his counsel and the underinsured motorist carrier. *Allstate Ins. Co. v. Donaldson*, 339 S.C. at 207, 528 S.E.2d at 681. Once the named Defendant has settled for his own release and/or covenant not to execute, he no longer has a stake in the outcome of the litigation. The South Carolina Court of Appeals determined that when a liability carrier obtains a settlement agreement relieving its insured of

personal liability, its duty to defend is discharged and its counsel may withdraw. *See Cobb v. Benjamin*, 325 S.C. 573, 585, 482 S.E.2d 589, 595 (1997) (citing *Nationwide Mut. Ins. Co. v. Tate*, 313 S.C. 444, 438 S.E.2d 266 (Ct. App. 1993)). The UIM carrier, on the other hand, still has a viable financial interest in the case. In this case, the offer wasn't made until all liability of the at-fault driver, and his resulting exposure had been discharged by the satisfaction of judgment. There was no duty incumbent upon the named defendant or his counsel to forward the "Offer of Judgment for UIM Benefits" to the plaintiff's insurance carrier for evaluation. Indeed, there is no evidence, nor would common sense support the notion that the defendant/underinsured motorist had the power to accept or reject an "Offer of Judgment for UIM Benefits" when the coverage was not on his policy or exist to his benefit. As such, the conclusion that service of the "Offer of Judgment for UIM Benefits" through the court's e-filing system was sufficient for due process and notice purposes solely upon the at-fault driver or counsel is incorrect and should be reversed.

i. If Texas Insurance Company is a party in default, it is entitled to notice and service protections under the South Carolina Rules of Civil Procedure.

In the initial order denying Texas Insurance Company's motion to vacate, the Special Referee held that "Rule 5, SCRCP, would not require service […] upon Texas Insurance […] ***who is not a party of record to the case and not in default.***" (R. p. 55) (emphasis added). It should be noted that the South Carolina Rules of Civil Procedure and existing body of case law in South Carolina are silent as to when one becomes a "party of record" and therefore there is no guidance on whether service of a summons and complaint is sufficient to create a "party of record" or if appearance after service is required to grant the designation. However, despite holding that Texas Insurance Company was not a party of record and recognizing that Texas

Insurance Company was also not a party in default, the Special Referee appears to have determined that the failure of Texas Insurance Company to appear was nonetheless a default. (R. p. 54).

In the May 5, 2025, order denying the motion for reconsideration, the Special Referee ruled that the failure of Texas Insurance Company to appear within thirty days of service of the summons and complaint was a constructive default. Therein, the Special Referee held that Texas Insurance Company "fails to recognize the actual entry of default is a ministerial act and not dispositive of default. To the extent a UIM carrier can default under the rules, the actual entry of default is not dispositive." (R. p. 59) (internal footnote and citations omitted). As such, the Special Referee asserts that the constructive default of Texas Insurance is an additional ground to support his erroneous conclusion that they were not entitled to service and notice in this case.

Even if the entry of default is a ministerial act, and assuming *arguendo* that a default can even be entered against a UIM Carrier under these circumstances, the Special Referee failed to recognize that even parties in default are entitled to certain due process protections that were not afforded to Texas Insurance Company in this case. For example, Rule 55(b)(2), SCRCP requires that notice be given to any party in default of any trial or hearing on unliquidated damages. Rule 55(b)(2), SCRCP. Similarly, Rule 5(a), SCRCP requires that pleadings asserting new or additional claims for relief must be served on parties who have failed to make an appearance, as well as notice of any trial or hearing on unliquidated damages. Rule 5(a), SCRCP. The Motion for Costs and Interest following the "Offer of Judgment for UIM Benefits" would constitute a pleading asserting a new or additional claim for relief as the entitlement to such relief was not previously plead, and could not have existed, but for the constructive rejection of the un-served "Offer of Judgment for UIM Benefits". Similarly, the Motion for Costs and Interest, which was

accompanied by the affidavit of Plaintiff's counsel regarding damages, would normally also require service under Rule 6(d), SCRCP no later than ten days before the hearing. Rule 6(d), SCRCP regarding time for service of motions and supporting affidavits states, in relevant part:

> **A written motion other than one which may be heard *ex parte*, and notice of the hearing thereof, shall be served not later than ten days before the time specified for the hearing**, unless a different period is fixed by these rules or by an order of the court. Such an order may for cause shown be made on *ex parte* application. **When a motion is to be supported by affidavit, the affidavit shall be served with the motion**; and, except as otherwise provided in Rule 59(c), additional or opposing affidavits may be served not later than two days before the hearing, unless the court permits them to be served at some other time. The moving party may serve reply affidavits at any time before the hearing commences.

Rule 6(d), SCRCP. (emphasis added).

As stated above, none of the written motions filed by the Respondent in this case were served on Texas Insurance Company. Texas Insurance Company received service solely of the summons and complaint. No service or notice of "Offer of Judgment for UIM Benefits," or the subsequent Motion for Costs and Interest, or hearing thereon was sent to Texas Insurance Company as required. It is perhaps instructive that the Special Referee himself anticipated that the Motion for Costs and Interest would be served upon the UIM Carrier and contemplated that such would be required prior to its hearing. (R. p. 371, lines 6-25) (Transcript of Damages Hearing, April 9, 2024; 161:6-25). However, the subsequent lack of service did not prevent the Special Referee from awarding damages on the motion of the Plaintiff during the lower proceedings on this issue.

The protections denied to Texas Insurance Company in this case, but otherwise afforded to defaulted parties, are replete throughout our Rules. Rule 54(c), SCRCP dealing with judgments states, "[a] judgment by default shall not be different in kind from or exceed in

amount that prayed for in the demand for judgment." Rule 54(c), SCRCP. A non-appearing defendant would be prejudiced by his lack of notice if the plaintiff were to be awarded relief other than that sought in the complaint. *See Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 561 S.E.2d 659 (Ct. App. 2002); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950) (But when notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected, […] or, where conditions do not reasonably permit such notice, that the form chosen is not substantially less likely to bring home notice than other of the feasible and customary substitutes.); *Pinckney v. Atkins*, 317 S.C. 340, 343, 454 S.E.2d 339, 341 (Ct. App. 1995) ("In cases where judgment is rendered against parties by default, a trial judge may not grant relief beyond that which is demanded in the pleadings"); *see also River Rd. Co. v. Energy Master Products, Inc.*, 300 S.C. 316, 316-17, 387 S.E.2d 694 (Ct. App. 1989) (Holding that a default judgment in excess of the amount sought in the complaint is "clearly unlawful[.]"). Here, Texas Insurance Company was exposed to special damages not previously plead, without the due process that even defaulted parties are owed and are contemplated in the rules.

The ruling of the Special Referee requires a tortured interpretation of the service rules under the South Carolina Rules of Civil Procedure. This interpretation leads to the inequitable and constitutionally improper result that Texas Insurance Company is not entitled to any protections under constitutional due process. Instead, the Special Referee has created a category of litigant that is neither (1) a "non-party," against whom damages cannot be awarded; (2) a "party of record" who would otherwise be entitled to service under Rule 5, SCRCP; nor (3) a

"party in default" who would be entitled to service of new claims for damages such as a Motion for Costs and Interest, and notice of a hearing on special damages. The effect of this categorization is that Texas Insurance Company, a non-party and non-tortfeasor, has become subject to the court's jurisdiction for an award of damages against it, on an "Offer of Judgment for UIM Benefits" and a Motion for Costs and Interest with which it was never served, and an award of special damages at a hearing by this court of which it never received notice. This is contrary to the notion of due process and is an error of law by the Special Referee. On that basis, the award of damages by the Special Referee on the Motion for Costs and Interest should be reversed.

II. THE AWARD OF COSTS AND INTEREST PREMISED UPON THE OFFER OF JUDGMENT IS VOID FOR LACK OF NOTICE AND SERVICE.

Failure to serve the various motions, notices of hearings, and offers of judgment is a violation of Texas Insurance Company's due process rights. "[I]t is fundamental that no judgment or order affecting the rights of a party to the cause shall be made or rendered without notice to the party whose rights are affected." *Tryon Fed. Sav. & Loan Ass'n v. Phelps*, 307 S.C. 361, 362, 415 S.E.2d 397, 398 (1992) (citing *Ins. Co. of North America v. Hyatt*, 290 S.C. 159, 348 S.E.2d 532 (1986)). "Generally, a person against whom a judgment or order is taken without notice may rightly ignore it and may assume that no court will enforce it against his person or property." *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002). "The requirements of due process not only include notice, but also an opportunity to be heard in a meaningful way, and judicial review." *S.C. Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995). "Clearly, failure to serve a particular party with a motion or order adverse to that party's rights would render it ineffective against that party." *Keowee Inv.*

Grp., LLC v. Pickens Cnty., 2004 S.C. App. Unpub. LEXIS 423, at *9 (Ct. App. 2004) (citing *Conner v. City of Forest Acres*, 348 S.C. 454, 461-62, 560 S.E.2d 606, 609-10 (2002)).

The award of costs and interest against Texas Insurance Company, without the fundamental due process considerations of notice and hearing, was therefore void pursuant to Rule 60(b), SCRCP, and the ruling by the Special Referee otherwise is a gross error of law resulting in substantial prejudice to the Respondent. The definition of void under Rule 60, SCRCP "only encompasses judgments from courts which failed to provide proper due process…." *Linda Mc Co., Inc. v. Shore*, 375 S.C. 432, 438, 653 S.E.2d 279, 282 (Ct. App. 2007); *see also Sanders v. Smith*, 431 S.C. 605, 848 S.E.2d 604 (Ct. App. 2020). A void judgment is one that, from its inception, is a complete nullity and is without legal effect. *Belle Hall Plantation Homeowner's Ass'n, Inc. v. Murray*, 419 S.C. 605, 617, 799 S.E.2d 310, 316 (Ct. App. 2017); *see also Ware v. Ware*, 404 S.C. 1, 743 S.E.2d 817 (2013). An exception to the usual requirement of showing of a meritorious defense exists where relief is sought under Rule 60(b)(4), SCRCP; if the judgment is void, relief must be granted, and there is no need for further analysis. *BB&T v. Taylor*, 369 S.C. 548, 552 n. 1, 633 S.E.2d 501, 503 n. 1 (2006). Judgments rendered without due process are void, and Rule 60(b)(4), SCRCP, provides for relief from such a judgment. *Universal Benefits, Inc. v. McKinney*, 349 S.C. 179, 183, 561 S.E.2d 659, 661 (Ct. App. 2002). As the Supreme Court has noted, "[T]he promptness with which relief is sought, the reasons for the failure to act promptly, the existence of a meritorious defense, and the prejudice to the other parties ... do not apply to a motion made pursuant to Rule 60(b)(4), SCRCP." *BB&T v. Taylor, supra.* "A void judgment is one that, from its inception, is a complete nullity and is without legal effect." *Thomas & Howard Co. v. T.W. Graham and Co.*, 318 S.C. 286, 291, 457 S.E.2d 340, 343 (1995). "The definition of void under the rule only encompasses judgments from

courts which failed to provide proper due process, or judgments from courts which lacked subject matter jurisdiction or personal jurisdiction." *McDaniel v. U.S. Fid. & Guar. Co*., 324 S.C. 639, 644, 478 S.E.2d 868, 871 (Ct. App. 1996). "The requirements of due process not only include notice but also include an opportunity to be heard in a meaningful way, and judicial review." *Grannis v. Ordean*, 234 U.S. 385, 394, 58 L. Ed. 1363, 34 S. Ct. 779 (1914). "The fundamental requisite of due process of law is the opportunity to be heard." *S.C. Dep't of Soc. Servs. v. Holden*, 319 S.C. 72, 78, 459 S.E.2d 846, 849 (1995).

In this case, Texas Insurance Company was entitled to service and notice of the various motions and hearings outlined above and giving rise to the Special Referee's award of costs and interest. Most notably for the purposes of this appeal, because Texas Insurance Company did not receive service of the Offer of Judgment, service of the Plaintiff's Motion for Costs and Interest, or notice of the hearing awarding such, the Order on Plaintiff's Motion for Costs and Interest is void.

In addition, the Respondent's failures regarding service and notice operated as an extrinsic fraud upon the Special Referee. "The court grants relief for extrinsic fraud but not intrinsic fraud on the theory that intrinsic deceptions should be discovered during the litigation itself, and to permit such relief would undermine the stability of all judgments. The essential distinction between intrinsic and extrinsic fraud for purposes of relief from judgment is the ability to discover the fraud." *Gainey v. Gainey*, 382 S.C. 414, 426, 675 S.E.2d 792, 798 (Ct. App. 2009). Relief from judgment is granted for extrinsic fraud on the theory that, because the fraud prevented a party from fully exhibiting and trying his case, there has never been a real contest before the court on the subject matter of the action. *Id.* at 425. Extrinsic fraud is fraud that induces a person not to present a case or deprives a person of the opportunity to be heard.

Id.; *See also Ray v. Ray*, 374 S.C. 79, 647 S.E.2d 237 (2007); *Jamison v. Ford Motor Co.*, 373 S.C. 248, 644 S.E.2d 755 (Ct. App. 2007); *Raby Const., LLP v. Orr*, 358 S.C. 10, 594 S.E.2d 478 (2004). Misrepresentation and misconduct is extrinsic when it is collateral to the issues tried in a case and effectively deprives the litigant of a fair hearing or the opportunity to present its case. *Hilton Head Ctr. of S.C. Inc. v. Pub. Serv. Comm'n of S.C.*, 294 S.C. 9, 11, 362 S.E.2d 176, 177 (1987); *Mr. G. v. Mrs. G.*, 320 S.C. 305, 465 S.E.2d 101 (Ct. App. 1995).

Respondents' failures to comply with the service and notice rules prevented Texas Insurance Company from knowing about or otherwise responding to the Offer of Judgment, the Motion for Costs and Interest, and any hearing it would have been entitled to on the motion. As a result, Texas Insurance Company did not have the opportunity to try the case relevant to its potential liability as the UIM carrier and the lack of service and notice fundamentally deprived Texas Insurance Company of its opportunity to (1) accept or deny the offer and (2) to be heard on the issue of the Plaintiff's prayer for costs and interest. The foregoing amounts to an extrinsic fraud on the court and, therefore, the Special Referee should have vacated the award for costs and interest as void.

CONCLUSION

Based on the foregoing, the Plaintiff's "Offer of Judgment for UIM Benefits" should be considered null and void as lacking in service and notice on the UIM Carrier Texas Insurance Company, and the Special Referee's resulting award of costs and interest should be vacated for lack of due process.

Respectfully submitted,

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