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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 McCleod, Defendant.

FINAL REPLY BRIEF OF APPELLANT

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I. THE RESPONDENT MISCONSTRUES THE BASIC PREMISE OF THIS APPEAL AND THE FUNDAMENTAL ISSUE BEFORE THIS COURT.

The Respondent believes this appeal has to do with the right of an underinsured motorist ("UIM") carrier to make an appearance within the statutory framework of the UIM statute. He equates the non-appearance of a UIM carrier with "negligence" and would like the court to impose consequences for non-appearance including the waiver of rights that is not delineated within the UIM statute. (R. at pp. 440). The preponderance of the Respondent's Initial Brief engages in a lengthy and complex explanation of how basic service and notice obligations did not exist under particularized circumstances largely of the Respondent's own creation. However, contrary to the hue with which the Respondent would paint this case, this appeal fundamentally deals with the basic legal premise of the concepts of offer and acceptance.

As this court has recognized, "interpreting offers made under Rule 68 involves construing a contract and a court rule[.]" *Wells v. Vetech, LLC*, 437 S.C. 428, 431, 879 S.E.2d 6, 7 (Ct. App. 2022). The concepts of offer and acceptance are at the core of every offer of judgment pursuant to Rule 68, SCRCP and S.C. Code § 15-35-400. The caselaw within the state dealing with both concepts is prodigious, and nothing is more settled within the foundation of an agreement, whether a contract or an offer of judgment, than the fundamental requirement of communication of the offer. "[T]here can be no contract unless there is [an] offer…[.]" *Masonic Temple, Inc. v. Ebert*, 199 S.C. 5, 13, 18 S.E.2d 584, 587 (1942). The requirement that the offer actually be communicated to the offeree is axiomatic. In examining the power of the offer in contract creation, the court has held: "An offer is the manifestation

of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it. The offer identifies the bargained for exchange and creates a power of acceptance in the offeree. *Carolina Amusement Co. v. Conn. Nat'l Life Ins. Co.*, 313 S.C. 215, 220, 437 S.E.2d 122, 125 (Ct. App. 1993) (citing *Restatement (Second) of Contracts* §§ 24 and 29 (1981) (internal quotations omitted).

The Respondent offers no dispute that the "Offer of Judgment for UIM Benefits" was never communicated to the UIM carrier. (R. at pp. 555-556).[1] The Respondent merely disputes that he was required to communicate the offer under the South Carolina Rules of Civil Procedure. However, as the court has recognized, offers of judgment are not merely a creation of the rules, but are also at their core a contract. If there was no offer made, there could be no rejection. If there was never a rejection, then the consequence contemplated by Rule 68, SCRCP and S.C. Code § 15-35-400(B) for a rejected offer cannot be imposed by the court. The application of this consequence to Texas Insurance Company was a violation of due process and an error by the special referee.

II. RESPONDENT'S RELIANCE ON ORDERS FROM THE LOWER COURTS IS MISPLACED.

The Respondent appears to argue that South Carolina's lower courts uniformly interpret S.C. Code § 38-77-160 as intended to contain an implicit waiver of all rights by a UIM carrier for failure to appear within thirty days of service. (R. at pp. 555). In so arguing, the Respondent provides reference to Court of Common Pleas orders striking the notices of ap-

[1] The Respondent fails in fact to point to any demand ever made by or on behalf of the insured for any benefits under his underinsured motorist coverage.

pearance by UIM carriers in two cases, where it appears those carriers intended to dispute liability. Those cases, while not controlling, are also not analogous to the situation at hand.

It bears repeating that Texas Insurance Company does not and has not disputed, here or in the proceedings below, either the finding of liability against the putative at-fault defendant, nor the initial award of compensatory damages against that defendant by the Special Referee. Texas Insurance Company does not, by virtue of this appeal, attempt to circumvent those orders or at some late date attempt to contest its liability for underinsured benefits. Indeed, as the Respondent has correctly pointed out, the intent of the UIM statute's service requirements are to protect the insurance carrier's right to contest its liability for underinsured benefits. *See Williams v. Selective Ins. Co. of Se.*, 315 S.C 532, 534, 446 S.E.2d 402, 404 (1994)(emphasis). If the analysis were to stop there, there would be no justiciable conflict for the court in this appeal.

However, the Respondent appears to advocate for an expansion of that legislative intent, beyond merely the protection of the right to contest liability for the underinsured benefits. The interpretation urged by the Respondent asks this Court to infer the intent of the service requirements to protect not just the right to contest liability for benefits, but to encompass all rights that an insurance carrier might have, including such rights as service, notice, and any contractual rights that might exist within the policies of insurance upon which the benefits are premised. The Respondent asks the Court to depart from the holding in *Williams,* and instead infer that, as a consequence of not appearing within the statutory timeframe, an insurance carrier waives all rights that exist under the law, not merely their right to contest liability for the UIM benefits.

This is not an interpretation of S.C. Code § 38-77-160 that is uniformly recognized by South Carolina's lower courts. Indeed, lower courts have held for example that:

> The case law clearly reflects that the intent of § 38-77-160 is 1) to provide underinsured motorist coverage to injured parties if the liability limits do not make them whole and 2) to put the carrier on notice and allow it to appear and defend, if it so desires. However, statutory and case law fail to establish, or even contemplate, a UIM default if the carrier does not appear in 30 days. To be clear, the legislative intent behind § 38-77-160 is to protect the UIM carrier from losing its ability to appear and defend. *See, Williams, Cobb, supra*. Taking that right away by holding a UIM carrier, like USAA, in default does not effectuate legislative intent. *Id*. The statute also states that "the evidence of service upon the insurer may not be made a part of the record." There was never legislative intent to hold a UIM carrier in default since there can be no record of service to justify and support an entry of default.

(*Order Granting UIM Carrier's Motion to Set Aside Entry of Default and Denying Plaintiff's Motion to Strike All Filings by UIM Carrier, Leslie Senevey vs. Lucas Perez Elser Fancisco*, 2024-CP-08-00415, (Court of Common Pleas, County of Berkeley)).

Again, while not controlling, this merely illustrates that the lower courts are not uniform in their interpretation of the scope of the waiver implied by the Respondent under S.C. Code § 38-77-160. Furthermore, this illustrates that the courts of South Carolina, in following the reasoning in *Williams*, have not interpreted the statute to carry an implied penalty to be assessed against a UIM carrier for optioning not to exercise its rights to appear or defend in an action.

III. RESPONDENTS' ARGUMENTS REGARDING SERVICE REQUIREMENTS ARE CONTRADICTORY.

The Respondent's entire argument in this case was summed up in two sentences of his Initial Brief, where he argued:

> 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). 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.

(Respondent's Initial Brief at 19).

This is the fundamental position upon which the Respondent has relied in this case to explain his failure to communicate the Offer of Judgment for UIM Benefits to Texas Insurance Company, and the proverbial drum that has been beaten at all stages in this matter. Respondent's entire position relies upon the reading of a portion of a single sentence in Rule 5(a), SCRCP that says "No service need be made on parties in default for failure to appear…" In relying on this excerpt of thirteen words from the rule, Respondent conversely argues (1) that Texas Insurance Company wasn't a party entitled to any service under Rule 5(a), SCRCP and/or (2) Texas Insurance Company was a party but it was constructively in default, and therefore not entitled to service of an offer of judgment, again under Rule 5(a), SCRCP. This underscores the complete misunderstanding of the role of the UIM carrier in the litigation, specifically the responsibilities and rights afforded the insurance carrier who is a non-defendant, and against whom damages cannot be assessed.

The Respondent accuses Texas Insurance Company of parsing and cherry-picking language to reach the common-sense based conclusion that a party against whom damages are assessed is fundamentally entitled to service of the pleading upon which the damages are premised. Again, there is no dispute that the "Offer of Judgment for UIM Benefits," the pleading which asserted entitlement to the award of costs and interest and upon which their

ultimate award by the Special Referee was premised, was not served on Texas Insurance Company. In eschewing this common-sense approach, the Respondent invites the court to enter into a contorted interpretation of the Rules in an effort to thread a needle in order to characterize Texas Insurance Company as not a party, but having duties and obligations under the rules, nonetheless. Of being in default but not being entitled to the protections afforded to defaulted parties. Of not being a defendant but still being liable for damages. Of having an obligation to appear and defend, but in all respects, not being entitled to service or notice under any rule or statute of anything beyond the initial Summons and Complaint. Of acting in bad faith, but not being entitled to a reciprocal expectation of fair dealing.

The interpretation urged by the Respondent asks that this court invalidate basic tenets of contract and Constitutional due process law, as well as other South Carolina Civil Rules of Procedure and sections of the South Carolina Code of Laws, in favor of the selective application of a portion of a single sentence in Rule 5(a) of South Carolina Rules of Civil Procedure. Such an interpretation cannot be borne upon a comprehensive reading of the rules and statutes at issue in this case.

Respectfully submitted,

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PROOF OF SERVICE

I certify that I have served the Final Reply Brief of Appellant on Respondent, Viktar Kleuchenia and other counsel of record on this day by emailing a copy of it as follows:

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