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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

SC Court of Appeals

COUNTY OF LEXINGTON

CIVIL ACTION NO: 2013-CP-32-1368

2014 MAR -7 A 11:50

Ronald Lee Cooper,

BETH A. CARRIGG
CLERK OF COURT
LEXINGTON, SC Plaintiff

vs.

ORDER OF DISMISSAL

Rebecca Sue Fischer,

Defendant.

This matter comes before the Court upon motion by Progressive Northern Insurance Company ("Progressive") for dismissal of any claim by Plaintiff for proceeds from underinsured motorist coverage. After hearing able arguments of counsel and reviewing the pleadings, this Court grants Progressive's motion to dismiss.

This case arises out of a motor vehicle accident that occurred on or about April 24, 2010 in Lexington County, South Carolina. As a result of the accident, Plaintiff brought a negligence action against Defendant Fischer. The Complaint was filed on April 18, 2013. Defendant Fischer was apparently served prior to an Affidavit of Service being filed June 4, 2013. However, Fischer failed to appear or otherwise defend and the case went into default. Plaintiff filed a motion for entry of default on July 26, 2013. On August 29, 2013, this Court issued its Order of Default. In doing so, Fischer's liability was established. Fischer was covered under a liability policy issued by The Travelers Home and Marine Insurance Company (hereinafter "Travelers"). Travelers retained counsel who moved to set aside the default judgment on October 10, 2013, but that motion was denied by Order filed October 28, 2013. Based on that ruling, Plaintiff settled with Defendant Fischer and her liability carrier, Travelers, upon an

Agreement and Covenant Not To Execute with payment of \$25,000. The settlement documents were executed on January 3, 2014.

After obtaining an Entry of Default, after successfully arguing against that default being set aside, and after fully settling with Defendant Fischer, Plaintiff then served Progressive with the pleadings in this case. Progressive is Plaintiff's UIM carrier. The pleadings were first served on Progressive on January 17, 2014. Progressive filed this Motion to Dismiss on the basis that Plaintiff failed to timely serve Progressive with the pleadings in the action establishing liability as required by Section 38-77-160 of the South Carolina Code. Plaintiff waived his claim for UIM coverage by failing to serve Progressive in a timely manner to protect its right to appear and defend in the action establishing liability.

The procedure for obtaining UIM benefits is set forth in section 38-77-160, which provides:

No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. . . . In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist carrier may assume control of the defense of action for its own benefit. . . .

The requirement of timely service on the UIM carrier is absolute. Ex Parte Allstate Insurance Co., 339 S.C. 202, 205, 528 S.E.2d 679, 680 (Ct. App. 2000). "The intent of the statute is that UIM carriers receive notice of actions in which they may be liable for UIM benefits so that they can protect their interests." Id. at 205, 528 S.E.2d at 681. "To allow service on a UIM carrier after that action has been tried would defeat the purpose of granting the UIM carrier the right to 'appear and defend.'" Id. In Ex Parte Allstate, the court held that even though the UIM carrier



was served with the pleadings while post-trial motions were pending, the plaintiff was not entitled to UIM benefits because the plaintiff failed to preserve the UIM carrier's right to appear and defend. Id. at 205-06, 528 S.E.2d at 681.

Ex Parte Allstate is controlling in this matter. Plaintiff failed to serve Progressive until after it had obtained an Order of default and settled with the liability carrier based on that Order. The Order of default was the matter in which Defendant Fischer's liability was established. Accordingly, Plaintiff is denied UIM benefits because he failed to serve Progressive and preserve its right to appear and defend Fischer fully. Plaintiff held Fischer in default and then successfully argued to keep Fischer in default. Had Progressive been served before the Statute of Limitation tolled, it could have appeared on Fischer's behalf and contested both liability and damages. By the time Progressive was served, it was too late for it to appear and defend. Following the settlement, the Defendant has no incentive to cooperate because she has already suffered an adverse result by enforcement of the default and denial of her motion to set it aside.

Plaintiff has failed to comply with section 38-77-160 and is not entitled to UIM benefits. Although an UIM carrier "steps into the shoes" of the underinsured motorist after the liability claim is settled, an UIM carrier has rights that are separate and distinct from the underinsured defendant. Broome v. Watts, 319 S.C. 337, 340, 61 S.E.2d 46, 48 (1995). After settlement, the defendant no longer has a genuine stake in the outcome. Id. at 341, 61 S.E.2d at 48. Since Plaintiff settled with Fischer without consenting to set aside the default, the liability claim became fixed. Essentially, the settlement was a compromise based on the default which Plaintiff had obtained against Fischer. Plaintiff has received payment in satisfaction of the liability claim through the settlement. Plaintiff cannot now set aside the very Order upon which the settlement

was based and re-try the case for UIM purposes. Progressive, a third party to the liability action, is entitled to rely on the judgment.

Section 38-77-160 expressly bars UIM claims unless the UIM carrier is served and allowed to appear and defend *in the action establishing liability*. Liability was established by the Order of default. By settling with Fischer, Plaintiff held Fischer liable under the default. Any further claim is not a claim for liability, but for coverage under Plaintiff's own UIM policy. Plaintiff chose intentionally to foreclose liability against Fischer without first serving Progressive, as required by statute, in order to obtain a more favorable result and settlement as to the liability carrier. Since Progressive was neither served nor allowed to appear and defend prior to the entry of default, Plaintiff's UIM claim is prohibited under section 38-77-160. Plaintiff cannot profit from his knowledgeable and deliberate actions in holding Defendant strictly to the default, knowing full well that Progressive was the UIM carrier but choosing not to advise Progressive of his actions, and then ask for leniency under the UIM statute in order to seek additional monies against Progressive.

This case is now in the procedural posture governed by Williams v. Selective Insurance Company of the Southeast, 315 S.C. 532, 446 S.E.2d 402 (1994). In Williams, the plaintiff settled with the at-fault driver under a covenant not to execute and payment of \$25,000, just as in this case. Id. at 533, 446 S.E.2d at 533. The plaintiff then filed a claim for UIM benefits under her policy. The court held that the plaintiff waived her UIM claim by failing to serve the UIM carrier. Id. at 534, 446 S.E.2d at 404. Williams is controlling. Just as in Williams, Plaintiff settled with the at-fault driver under a covenant not to execute. Plaintiff did not serve the UIM carrier until after the judgment was obtained. Furthermore, as in Williams, another suit can no

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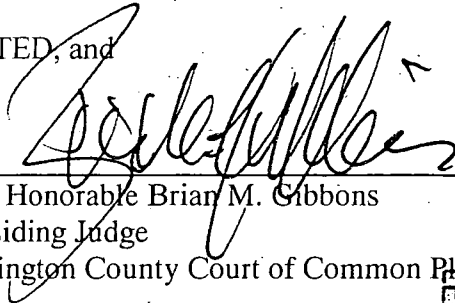
longer be brought because liability has already been established by means of the Order of default and ensuing settlement. Under Williams, this claim for UIM benefits is barred.

Plaintiff failed to serve Progressive until after liability had already been established.

Moreover, Plaintiff cannot now consent to set aside the default since he has already settled with Fischer by enforcing the default against her. Accordingly, Plaintiff has no claim for UIM coverage, and Progressive is entitled to a dismissal of this action. It is therefore

ORDERED, ADJUDGED and DECREED that Progressive Northern Insurance Company's Motion to Dismiss is GRANTED, and

IT IS SO ORDERED.



The Honorable Brian M. Gibbons
Presiding Judge
Lexington County Court of Common Ple

2/28, 2014

BETH A. CARRIG
CLERK OF COURT
LEXINGTON, SC

2014 MAR -1 A 11: 50

FILED