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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

Brian M. Gibbons, Circuit Court Judge

Case No. 2014-001026

Ex parte:

Progressive Northern Insurance Company..... Respondent,

In re:

Ronald Lee Cooper ..... Appellant,

v.

Rebecca Sue Fischer ..... Defendant.

INITIAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. **THE CIRCUIT COURT CORRECTLY HELD THAT A CLAIMANT WHO FAILS TO SERVE A COPY OF THE SUMMONS AND COMPLAINT ON THE UNDERINSURED MOTORIST CARRIER UNTIL AFTER LITIGATING HIS CASE AGAINST THE AT-FAULT DRIVER HAS LOST HIS RIGHTS TO PURSUE UNDERINSURED MOTORIST COVERAGE UNDER § 38-77-160.**

STATEMENT OF THE CASE

On April 18, 2013, Appellant Ronald Lee Cooper filed a Complaint in the Lexington County Court of Common Pleas against Rebecca Sue Fischer for injuries he sustained as a result of an April 24, 2010 accident. Despite the statutory requirement that a person seeking underinsured motorist coverage (UIM) must separately serve his UIM carrier, Appellant served Fischer only on May 31, 2013, and allowed her to fall into default without ever notifying Respondent Progressive Northern Insurance Company, his UIM carrier, of the lawsuit.

Appellant filed an Affidavit of Service on June 4, 2013, and he filed a Motion for Entry of Default on July 26, 2013. (ROA __) (Aff. of Service) (Motion for Entry of Default). On August 28, 2013, the Clerk of Court for Lexington County filed an entry of default against Fischer. (ROA __) (Entry of Default). Because Appellant failed to serve a copy of the Summons and Complaint on Respondent or otherwise notify Respondent of the lawsuit, Respondent was unable to appear and defend on Fischer's behalf prior to entry of the default.

On October 10, 2013, Defendant Fischer, through her counsel, filed a Motion to Set Aside the Entry of Default along with a supporting affidavit and memorandum. (ROA __). (Motion to Set Aside the Entry of Default). Appellant successfully opposed the motion, and The Honorable Eugene C. Griffith, Jr. entered an Order Denying

Defendant's Motion to Set Aside Entry of Default on October 28, 2013. (ROA __) (Order Denying Defendant's Motion to Set Aside Entry of Default). At that point, the merits of the case were concluded without Respondent ever having received notice of the suit.

As a result of the default, Fischer's automobile liability carrier agreed to tender its twenty-five thousand dollar liability limits in exchange for a Covenant Not to Execute against Fischer. (ROA __) (Agreement and Covenant Not to Execute). Appellant signed the Agreement and Covenant on January 3, 2014. (ROA __) (Agreement and Covenant Not to Execute, p. 4). Respondent still had not been notified of or served with the lawsuit. Two months had passed since the Order Denying Defendant's Motion to Set Aside Entry of Default, over four months had passed since the original Entry of Default, and over seven months had passed since Appellant served the Defendant.

After gaining an entry of default against Fischer, getting the Circuit Court to enforce the default despite Fischer's motion for relief, and then obtaining a policy-limits settlement as a result of the default, Appellant then served a copy of the Summons and Complaint on Respondent on January 17, 2014. (ROA __) (Progressive Northern Insurance Company's Motion to Dismiss or in the Alternative for Summary Judgment, p. 2). The January 17, 2014 service – nine months after the action was commenced – was Respondent's first notice of the lawsuit. By that time, the accident had occurred nearly four years prior.

Counsel for Respondent filed a Notice of Appearance and Motion to Dismiss or in the Alternative for Summary Judgment on January 31, 2014. (ROA __) (Progressive Northern Insurance Company's Motion to Dismiss or in the Alternative for Summary

Judgment). The Honorable Brian M. Gibbons held a hearing on the motion on February 21, 2014 and granted Respondent's Motion to Dismiss on March 7, 2014. (ROA __) (Order of Dismissal). Appellant filed a Motion to Reconsider or Alter and Amend Pursuant to Rule 59(e) on March 21, 2014. (ROA __) (Motion to Reconsider or Alter and Amend Pursuant to Rule 59(e)). Respondent opposed the motion, and Judge Gibbons entered an Order Denying Plaintiff's Motion to Reconsider on May 6, 2014. (Order Denying Plaintiff's Motion to Reconsider). No appeal of that Order was made by either Plaintiff or Defendant, and no new evidence has come forward to provide Defendant Fischer any basis to file the same motion again. The Order was entered before Respondent ever received notice of the suit stands as a valid order in this case. No issue is before this Court concerning the existence of that Order.

Relying upon this Court's holding in *Ex Parte Allstate Insurance Co.*, 339 S.C. 202, 528 S.E.2d 679 (Ct. App. 2000), Judge Gibbons held that South Carolina Code § 38-77-160 requires service on the UIM carrier in order to provide notice of the action and an opportunity for the UIM carrier to protect its interest. (ROA __) (Order, p. 2). If Appellant had served Respondent in a timely manner, "Progressive Northern could have appeared and defended on behalf of the Defendant, as is mandated by S.C. Code Ann. § 38-77-160." (ROA __). (Order, p.1). The entry of default – and the Court's refusal to set aside the entry – established liability. Because Respondent did not receive service of the Summons and Complaint "in the action establishing liability" as required by the statute, Appellant failed to satisfy the statutory condition precedent to pursuing UIM benefits and the Court granted Respondent's Motion to Dismiss. (ROA __) (Order, p. 3).

STATEMENT OF THE FACTS

The procedural history set out above constitutes the facts of this case. However, Rule 208, SCRAP provides that a respondent "shall be bound by the matters stated or alleged in appellant's statement of the case" when the respondent does not provide its own statement. Therefore, Appellant's Statement of the Facts necessitates one important point of clarification. Appellant repeatedly refers to Fischer as "Respondent" in his brief. Significantly, he alleges that he was in an accident with respondent, that he served respondent with the Summons and Complaint, that respondent failed to answer or otherwise respond in a timely manner, that respondent's counsel filed a Motion to Set Aside Entry of Default, etc. (Initial Brief of Appellant, pp. 1-4). Progressive is the Respondent in this case, not Fischer.

As set forth above in the Statement of the Case, it is undisputed that Appellant failed to serve Progressive – the Respondent herein – with a copy of the Summons and Complaint until January 17, 2014, nearly nine months after filing the initial lawsuit and almost four years after the date of the accident. Respondent, as UIM carrier, steps into the shoes of Fischer, the named defendant, but the two are still separate entities with separate and distinct rights. *See e.g., Crawford v. Henderson*, 356 S.C. 389, 397, 589 S.E.2d 204, 208 (Ct. App. 2003) (noting that the UIM carrier "steps into the shoes" of the underinsured motorist, but has rights separate and distinct from those of the underinsured motorist). Because Appellant held Fischer in default, her liability insurer tendered its limits and protected her. She chose not to appeal the Order Denying the Motion to Set Aside Entry of Default and now has no more interest in this case. Fischer is not a party to the appeal despite being referenced as such by Appellant. Respondent Progressive

Northern is not the individual mistakenly referred to as "respondent" by Appellant in his brief, but is in fact the true and sole Respondent for this appeal.

ARGUMENT

The Circuit Court correctly relied upon this Court's holding in *Ex parte Allstate* to find that a claimant who waits until after the liability issues have been conclusively established to serve the UIM carrier fails to satisfy the requirement of § 38-77-160. Section 38-77-160 requires service on the UIM carrier "in the action establishing liability." The reason for the statute is two-fold. First, by receiving timely service, the UIM carrier can choose to step in and Answer or otherwise respond when the underinsured motorist fails to protect her own interests. Second, the legislature sought to promote judicial economy by providing a mechanism to litigate the liability question once for recovery of both liability and UIM. In this case, Appellant's failure to serve Respondent prior to obtaining the entry of default defeats both of these statutory goals.

Appellant deprived Respondent of the opportunity to step in and Answer on behalf of Fischer by failing to comply with the statute and waiting until after obtaining a default against the underinsured motorist before notifying Respondent of the claim. Fischer failed to protect her own interests, and Respondent was unable to step in because Appellant failed to comply with the statute. Because timely notice to Respondent is a statutory prerequisite to pursuing the UIM claim, the Circuit Court correctly held that Appellant's violation of the statue required dismissal of his UIM claim.

Appellant also deprived the Court and litigants the benefit of judicial economy created by § 38-77-160. The statute requires service upon Respondent "in the action establishing liability" so that all liability issues can be dealt with in the same case at the

same time. Appellant litigated the liability question against Fischer in full by obtaining the default and successfully opposing Fischer's motion to set it aside. Now, he wants to re-litigate the liability question as to Respondent. The legislature created § 38-77-160 to prevent this kind of duplicative proceeding.

I. The Circuit Court correctly held that *Ex Parte Allstate* controls this case.

When Appellant refused to set aside the entry of default against Fischer, the merits of the case were decided. Fischer moved to set aside the default and the trial court refused. The time for any motion to reconsider or appeal of the denial lapsed long before Appellant served Respondent. Relying upon that victory, Appellant was able to obtain a full policy-limits settlement from Fischer's liability carrier, receiving more than double the amount of his claimed medical bills for soft-tissue injuries. Nonetheless, he now argues that the circuit court should be reversed because no default judgment was entered prior to service on Respondent. The circuit court correctly relied upon this Court's holding in *Ex parte Allstate* when it rejected Appellant's argument and dismissed the UIM claim for failing to comply with the statute.

A. This Court in *Ex parte Allstate* held that § 38-77-160 requires a timely notice that gives the UIM carrier an opportunity to appear and participate in the defense at a point in time when the participation is still meaningful.

The claimant in *Ex parte Allstate* filed suit against the alleged underinsured motorist and pursued the case through a jury trial before serving the UIM carrier. 339 S.C. at 203-04, 528 S.E.2d at 680. Like Respondent here, Allstate filed a Notice of Appearance, demanded a jury trial, and raised an affirmative defense that Allstate was not notified of the suit before trial and was therefore denied statutory procedural protections. *Id.* Unsurprisingly, the claimant in *Ex parte Allstate* raised some of the

same arguments raised by Appellant in this case. In particular, the claimant argued, (1) because he served Allstate while post-trial motions were still pending, service was timely; and (2) because Allstate would not have had the right to step in to defend until the liability carrier tendered policy limits, there was no prejudice to Allstate.[1] *Id.* at 204-05, 528 S.E.2d at 680. The Court of Appeals rejected these arguments.

The Court of Appeals recognized that the purpose of the service requirement is to protect the UIM carrier's ability to step in and protect the interests of the underinsured motorist – and in doing so protect its own interests – before those interests are prejudiced. In other words, the UIM carrier must receive service with enough time for its appearance in the action to be meaningful. "The requirement of service in [§ 38-77-160] is absolute." *Id.* at 205, 528 S.E.2d at 680. Although the statute does not expressly state when service must be accomplished, "[t]he 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.* (emphasis added). Therefore, permitting "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.* (emphasis added)

Relying upon the purpose of the service requirement, the Court of Appeals held that service after trial was insufficient. The Court of Appeals rejected the argument that participation in post-trial motions or appeals permitted Allstate to protect its interests, holding that such limited participation "would have been a far cry from the right to protect itself during the early stages of the lawsuit." *Id.* at 205, 528 S.E.2d at 681.

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[1] The claimant also argued that the issues of liability and damages had both been fully litigated by a jury with the underinsured motorist being represented by counsel. *Id.* Unlike the defendant in *Ex parte Allstate*, Fischer was unable to fully litigate the merits of the case because of the default. This distinction actually strengthens Respondent's position in this case because it steps into the shoes of a defendant who was unable to litigate on the merits because of a position taken by Appellant before the trial court.

The Court of Appeals also rejected the argument that Allstate did not suffer any prejudice because it was unable to step in and control the defense until after the liability carrier tendered its limits.[2] Although Allstate had no right to ***control*** the defense, "the UIM carrier always has the right to 'appear and defend in the name of the underinsured in any action which may affect its liability.'" *Id.* The facts of this case illustrate the point poignantly. Although in *Ex parte Allstate*, Allstate may not have needed to take any additional steps to protect its interests because the underinsured motorist in that case participated in the defense of the claim, here, Respondent could have answered on Fischer's behalf and avoided the default in its entirety, even if Fischer's liability carrier did not step in and defend the case. However, because Appellant failed to serve Respondent or even provide notice of the suit for nine months, Respondent lost these important statutory protections. Therefore, the Circuit Court properly found this Court's holding in *Ex parte Allstate* applicable.

B. By enacting § 38-77-160, the legislature intended to create judicial economy by having one proceeding resolve both liability and underinsured motorist liability.

"***No action may be brought*** under the underinsured motorist provision ***unless*** copies of the pleadings in the action establishing liability are served . . . upon the insurer . . . ." S.C. Code Ann. § 38-77-160 (emphasis added). Section 38-77-160 is a statutory condition precedent to pursuing UIM benefits. By enacting the statute, the General

[2] Appellant argues that this case is controlled by *Broome v. Watts*, 319 S.C. 337, 61 S.E.2d 46 (1995). However, that case merely held that, once a UIM carrier is served with a copy of the Summons and Complaint and files its notice of appearance, the underinsured motorist cannot waive the UIM carrier's right to a jury trial or waive venue in a collusive out-of-court settlement to which the UIM carrier is not a party. Unlike the out-of-court settlement in *Broome*, this case deals with an un-appealed Order of the Circuit Court denying Fischer's Motion to Set Aside Entry of Default. *Broome* involves a Plaintiff who correctly served the UIM carrier prior to a collusive agreement and then tried to bind the UIM carrier. The present case involves Appellant's failure to timely serve his UIM carrier. Therefore, *Broome* does not provide guidance in this case, but *Ex parte Allstate* is applicable and controlling.

Assembly created a streamlined approach to pursuing UIM coverage by providing a mechanism for the UIM carrier to participate in the same litigation that would determine liability against the at-fault driver. The General Assembly recognized the waste of judicial resources that would result from permitting separate actions against an at-fault driver and the UIM carrier.

In order to avoid undesirable duplicative litigation, the General Assembly enacted § 38-77-160 and made service upon the UIM carrier in the action against the at-fault driver a statutory prerequisite to pursuing UIM coverage. Section 38-77-160 requires service upon the liability carrier "***in the action establishing liability***" for this very reason. If the UIM carrier has no notice of the liability action and no opportunity to appear, it could not be bound by the decision in that case. By requiring service, the insurer not only gains the opportunity to appear and participate, but is also bound by the outcome, thus removing the need for repetitive litigation of the same issues.

The facts of this case exemplify the importance of strict adherence to § 38-77-160. If Appellant is allowed to set aside the default, the Circuit Court will be forced to oversee re-litigation of the same case. The action against Fischer has already been litigated to a conclusion on the merits. Fischer defaulted, and Appellant successfully argued against setting aside the default. As a result, the trial court deemed the factual allegations as admitted. The default conclusively establishes the merits of the case. Moreover, that ruling went un-appealed before Respondent was ever notified of the suit and is now the law of the case. *See Atlantic Coast Builders and Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("While his calculation of damages may have been incorrect, an unappealed ruling, right or wrong, is the law of the case.")

(citation omitted). As a result of the unfavorable merits ruling, Fischer and her liability carrier agreed to a full policy-limits settlement. For Fischer, the issues were fully litigated.

Even though Fischer's case has already been litigated to a decision on the merits via the default and denial of the motion to set aside, Appellant asks the Court to simply set aside that default and subject Fischer to the entire litigation process once again. Appellant and Respondent would be dragging Fischer, five years after her accident, back into the fray for discovery and trial even though she herself was denied the ability to try the merits of her case and even though she no longer has any financial interest in the case. This duplicative proceeding is exactly the kind of judicial waste that the General Assembly tried to avoid in § 38-77-160.

This Court's holding in *Ex parte Allstate* and the Supreme Court's holding in *Williams v. Selective Insurance Company of the Southeast*, 315 S.C. 532, 446 S.E.2d 402 (1994), both demonstrate this principle. In *Ex parte Allstate*, the claimant could not obtain a verdict against the at-fault motorist and then serve the UIM carrier because it would require the UIM carrier to be bound by an action to which it was not a party or require re-litigating the case against the at-fault driver. Likewise, the Supreme Court in *Williams* held that a claimant who fails to preserve his rights against the at-fault driver by timely filing a lawsuit also fails to preserve his rights to UIM coverage because the two actions must be litigated together. 315 S.C. at 533, 446 S.E.2d at 404 ("Williams failed to comply with the requirement that she serve on Insurer copies of pleadings in an action against the at-fault driver.").

In this case, the action against Fischer reached a conclusion on the merits. Fischer actually appeared – albeit untimely – to defend the default. The un-appealed order denying the motion to set aside entry of default became the law of the case. Had Appellant allowed Fischer to set aside the default, she presumably would have actively participated in the defense with her liability carrier. Assuming proper service, Respondent would have been involved from the outset in settlement negotiations, discovery and – to the extent permitted by Fischer and her counsel – trial strategy. Because of the liability carrier's contractual relationship with Fischer, Fischer would have been obliged to participate and assist in the defense of the case and appear at hearings and at trial. Fischer's active participation in the case would have benefited Respondent greatly.

Instead of enjoying the benefits that go along with having an actively-involved and interested defendant, Respondent steps into the case without Fischer's continued participation. Before default and the resulting settlement, Fischer had a personal financial interest in the case to the extent that there was a possibility of a verdict in excess of her liability limits.[3] Now, she has obtained protection via a Covenant Not to Execute after being told by the trial court that she would not be permitted to contest the merits of Appellant's allegations. She has no financial interest to participate in the defense of the case. As this Court has previously held, Respondent does not enjoy the benefits of a direct relationship with Fischer and its counsel does not enjoy the protections of an attorney-client privilege. *See Crawford, supra* (holding that attorney for UIM insurer did not have an attorney-client relationship with the underinsured motorist who was a named

[3] By asserting a claim for UIM benefits, Appellant has taken the position that his damages exceed Fischer's liability limits.

defendant). She has no contractual obligation to Respondent to appear at hearings or at trial.

Moreover, because Fischer has no financial interest in the case, there is a very real risk that Respondent would be forced to try the case with an absent defendant, thus opening the door for arguments by Appellant's counsel that Fischer didn't even care enough about the case to attend trial. All of these negative consequences flow from Appellant's failure to abide by the statutory service requirements. More importantly, they reveal the underlying importance of the service requirement and show why it is not sufficient to merely agree to set aside the default as to Respondent at this late stage in the case.[4]

The legislature designed a statutory method for litigating the UIM matter in the same action as the claim against the at-fault driver. In order to ensure the protection of judicial resources and the avoidance of duplicative litigation, as well as to prevent manipulation of the legal process, the legislature made timely service under § 38-77-160 a prerequisite to pursuing UIM benefits. Appellant failed to provide timely service in accordance with the statute and, therefore, is barred by the statute from seeking UIM coverage and re-litigating the case.

[4] The timing of Appellant's offer to set aside the default also reveals the duplicity of his positions in this case. Appellant refused to set aside default ***as to Fischer*** and obtained a full policy-limits settlement as a result of succeeding on the position. Now, he claims that he is willing to set aside the default ***as to Fischer*** in order to pursue additional funds from Respondent. However, certainly he isn't suggesting that he would agree to undo the effects of the default. Would Appellant be willing to set aside the settlement and refund the $25,000 that he recovered from Fischer's liability carrier to permit Fischer to fully litigate her case?

C. Appellant cannot rectify his failure to comply with § 38-77-160 by agreeing to set aside the default after holding the defendant in default and obtaining a full policy-limits settlement.

Before both the Circuit Court and this Court, Appellant argues that he could always agree to set aside the default as to Respondent and permit the case to move forward. If a claimant could merely voluntarily set aside a judgment or default – after binding the defendant driver to the same – in order to pursue his UIM benefits, then the claimant in *Ex parte Allstate* could have done the same. He could have agreed to set aside the jury verdict and allowed the UIM carrier to step in and re-litigate the entire case. However, this would defeat the legislature's goal of having one proceeding to resolve both issues. If setting aside the verdict were a suitable means of satisfying § 38-77-160, then the Court of Appeals in *Ex parte Allstate* would have struck the jury verdict as to Allstate and remanded the case for a new, full trial. Instead, the Court of Appeals in *Ex parte Allstate* recognized that the purpose of § 38-77-160 is to permit the UIM insurer to participate in the same litigation as the underinsured motorist from the beginning. Agreeing to set aside the default does not remedy the failure to satisfy the statutory prerequisite to pursing Appellant's UIM claim. He failed to serve Respondent "in the action establishing [Fischer's] liability." Therefore, "no action may be brought under the underinsured motorist provision." S.C. Code Ann. § 38-77-160.

D. The distinction between the standards in Rule 55(c) and 60(b) actually show that the Circuit Court correctly held that the entry of default should be treated no differently than a jury verdict.

Before Respondent received any notice of the lawsuit, Appellant successfully argued that the Circuit Court should deny Fischer's Motion to Set Aside Entry of Default. Now, Appellant argues that *Ex parte Allstate* does not apply because he only obtained an entry of default, not a default judgment. This distinction is irrelevant to the subject

appeal because no appeal was ever made of the Order Denying Motion to Set Aside Entry of Default. The issue of whether the entry of default can or should be set aside is not before this Court.

Even on this issue, as Appellant acknowledges, the standards for Rule 55(c) and Rule 60(b) are quite different. The burden to set aside entry of default under Rule 55(c) is ***lower*** than the burden to set aside a default judgment under Rule 60(b). *See Wham v. Shearson Lehman Brothers, Inc.*, 298 S.C. 462, 465, 381 S.E.2d 499, 501 (Ct. App. 1989) (holding that the Rule 60(b) standard of "excusable neglect" is more rigorous than the Rule 55(c) "good cause" standard). Because Respondent did not receive timely notice and appear on Fischer's behalf, Fischer was unable to meet the ***lower*** "good cause" standard to obtain relief from the default. Therefore, Appellant's arguments regarding the difference between the Rule 55(c) and Rule 60(b) standards are unavailing.

The Order Denying the Motion to Set Aside Entry of Default went unappealed. Therefore, Fischer's default is the law of the case. It has the same effect as a jury determination that Fischer caused the accident. The only remaining procedural aspect of the case is a damages hearing based upon admitted liability and with no ability to conduct discovery, present opposing witnesses, or contest causation. Although Respondent could attend the damages hearing solely to cross-examine Appellant's witnesses, this is a "far cry" from the procedural protections afforded by § 38-77-160.

E. Appellant cannot claim that he had no way of knowing whether he had a potential UIM claim when he takes the position that his claim is worth more than $25,000 and he could have requested a copy of Fischer's policy prior to filing suit.

South Carolina Code § 38-77-250 requires "[e]very liability insurer providing automobile insurance coverage in this State . . . shall provide, within thirty days of

receiving a written request from the claimant's attorney, a statement, under oath . . . stating with regard to each known policy . . . the limits of coverage." Therefore, Appellant had a statutory right to discover the amount of liability coverage before he ever filed suit. Moreover, the minimum mandatory limits for liability coverage in South Carolina are $25,000. *See* § 38-77-140. Appellant obviously takes the position that his damages exceed that amount. Therefore, he had a reasonable basis to serve Respondent with a copy of the Summons and Complaint when he filed suit. Appellant cannot blame his failure to serve Respondent on an alleged inability to determine whether his claim may have been one for UIM coverage.

Additionally, Appellant had notice via moving forward with an entry of default that only minimum limits would likely be available from any liability carrier for Defendant. At the latest, Appellant had notice that liability coverage would be limited if he sought the entry of default and should have advised any UIM carrier at that time to appear and defend on behalf of the Defendant, as is mandated by S.C. Code Ann. section 38-77-160. The proper procedure was simply not followed by Appellant, thereby waiving his rights to UIM coverage.

CONCLUSION

Compliance with § 38-77-160 is not optional. By requiring timely service upon Respondent, the legislature created a statutory condition precedent to pursuing a claim for UIM coverage. Appellant failed to timely serve Respondent and proceeded to obtain a binding default against the at-fault motorist, Fischer. Permitting him to set aside the default and re-litigate the case only as to Respondent would defeat the legislative design of § 38-77-160. Appellant deprived Respondent of its statutory right to "appear and

defend" in "the action establishing liability." Therefore, he is unable to re-litigate his case to pursue UIM benefits. The Circuit Court correctly relied upon § 38-77-160 and this Court's holding in *Ex parte Allstate*. Therefore, this Court should affirm.

Respectfully submitted,

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Rebecca Sue Fischer ..... Defendant.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Designation of Matter on Ronald Lee Cooper by depositing a copy of it in the United States Mail, postage prepaid, on January 2, 2015, addressed to his attorney of record:

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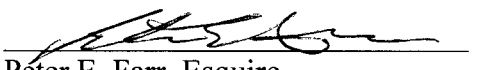
February 3, 2015

[*SIGNATURE ON FOLLOWING PAGE*]



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February 3, 2015

HAND DELIVERED
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1205 Pendleton St.
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Re: Ronald Lee Cooper vs. Rebecca Sue Fischer
Appellate Case No.: 2014-001026
Claim No.: 105015707
Date of Loss: April 24, 2010
Our File No.: 1115-2393

Dear Ms. Kitchings:

Enclosed please find herewith for filing with the Court the original and three (3) copies of Initial Brief of Respondent and Designation of Matter in the above-referenced matter. I would appreciate your filing the original and returning the clocked copies to me by individual delivering same.

By copy of this letter I am serving same on opposing counsel. If you have any questions, please feel free to contact me.

With warm personal regards, I am

Very truly yours,

Peter E. Farr

PEF/smr
Enclosures
cc: John W. Carrigg, Jr., Esquire