



MURPHY & GRANTLAND, P.A.

Peter E. Farr  
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February 3, 2015

**VIA HAND DELIVERY**

Clerk of Court  
South Carolina Court of Appeals  
1205 Pendleton St.  
P.O. Box 11629  
Columbia, SC 29211

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

**RECEIVED**

FEB 05 2015

SC Court of Appeals

Dear Clerk:

The above-referenced matter, Appellate Case Number 2014-001026, is currently pending in the South Carolina Court of Appeals. Initial briefs have been filed by the Appellant and the Respondent, but the record on appeal and final briefs have not yet been prepared. I am writing concerning the caption of this matter before the Court.

The circuit court case from which this appeal was taken involved a tort matter between Ronald Lee Cooper as Plaintiff and Rebecca Sue Fischer as Defendant. Plaintiff Cooper obtained an Entry of Default against Defendant Fischer, and Defendant's liability carrier paid liability coverage on a Covenant Not to Execute. Plaintiff Cooper then served the purported underinsured motorist carrier, Progressive Northern Insurance Company. Progressive obtained an Order of Dismissal, which is attached for your review. Plaintiff Cooper moved for reconsideration of that Order, and the circuit court entered an Order Denying the Motion for Reconsideration, which is also attached for your review. Plaintiff Cooper appealed this Order dismissing Progressive.

As you can see from the Order that is being appealed, the appeal is as to the dismissal of Progressive Northern Insurance Company, not the dismissal of Defendant Fischer. Consequently, the Respondent in the appeal should more properly be Progressive Northern Insurance Company. Defendant Fischer has never obtained any Order or ruling that is being appealed by Plaintiff Cooper. Ronald Cooper is properly the Appellant, and Progressive Northern Insurance Company is properly the Respondent. I believe the caption in the Notice of Appeal and in the Appellant's Initial Brief confuses who is properly the Respondent in this matter.

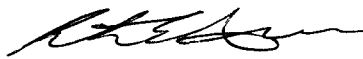
Telephone 803-782-4100 • Facsimile 803-782-4140  
4406-B Forest Drive, Columbia, South Carolina 29206 • Post Office Box 6648, Columbia, South Carolina 29260

I would propose a change in the caption to reflect that this appeal is as to Progressive Northern Insurance Company rather than as to Rebecca Sue Fischer. The proposed caption therefore would be *Ex parte* Progressive Northern Insurance Company, as Respondent, *in re* Ronald Lee Cooper, as Appellant v. Rebecca Sue Fisher, as Defendant. I have used this caption on the Respondent's Initial Brief for your reference, and I am attaching the cover page from my Initial Brief for your review.

I am happy to answer any questions you may have or respond to any comments about the proper caption and would like to make sure an agreed upon caption is used for the record on appeal and final brief. Thank you for your consideration of this request.

With warm personal regards, I am

Very truly yours,

A handwritten signature in black ink, appearing to read "Peter E. Farr", written in a cursive style.

Peter E. Farr

PEF/anh

Enclosures

cc: John W. Carrigg, Jr., Esquire

**ORIGINAL**

3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON  
2014 MAR -7 A 11:50

CIVIL ACTION NO: 2013-CP-32-1368

Ronald Lee Cooper,  
BETH A. CARRIGG  
CLERK OF COURT Plaintiff  
LEXINGTON, SC

vs.

Rebecca Sue Fischer,  
Defendant.

**RECEIVED**  
ORDER OF DISMISSAL  
FEB 05 2015  
SC Court of Appeals

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.

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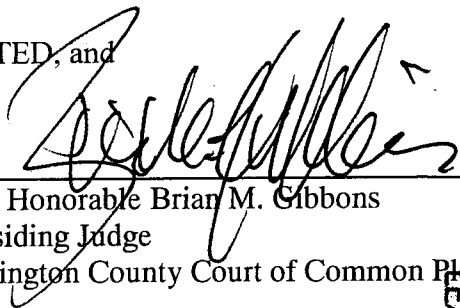
longer be brought because liability has already been established by means of the Order of default and ensuing settlement. Under Williams, this claim for UIM benefits is barred.

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 Pleas

2/28, 2014

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

2014 MAR - 7 A 11: 50

FILED

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

Ronald Lee Cooper,

vs.

Rebecca Sue Fischer,

Defendant.

FILED

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-32-1368

2014 MAY -6 A 10:54

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

**ORDER DENYING PLAINTIFF'S MOTION  
TO RECONSIDER**

**RECEIVED**  
FEB 05 2015  
**SC Court of Appeals**

This matter comes before the Court upon motion by Plaintiff for the Court to reconsider its Order dismissing Plaintiff's underinsured motorist claim against Progressive Northern Insurance Company ("Progressive"). After considering the briefs of the parties and reviewing the Order of Dismissal, this Court denies Plaintiff's motion and reaffirms its decision in the Order of Dismissal.

Plaintiff first argues that he had no reason to know UIM coverage would be needed at the time default was first entered. That argument is flawed because the South Carolina Financial Responsibility Act requires minimum limits of \$25,000.00 to apply in cases of non-cooperation of an insured. Once the Plaintiff files an Affidavit to obtain an Entry of Default, he knows there will likely be only \$25,000.00 in liability coverage available. Plaintiff then should have known at the time the Complaint was not timely answered after valid service that his liability coverage could be limited and advised UIM that it would need to appear and Answer on behalf of the Defendant. Had that course been followed, Progressive Northern could have appeared and defended on behalf of the Defendant, as is mandated by S.C. Code Ann. § 38-77-160. 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. . . .

That procedure was not followed by the Plaintiff.

The Plaintiff next argues that it is inaccurate that the Plaintiff refused to consent to setting aside default before settling with the Defendant. The procedural history is clear. A motion to set aside default was filed, and that motion was denied. No appeal of that order was made, and that order has not been set aside. It stands as a valid order in this case. Such a motion is not before the Court, and the existence of an order denying the Defendant's motion to set aside default is uncontroverted. The Broome case discussed in the Court's prior Order indicates that the parties cannot enter into a binding agreement to prejudice the UIM carrier. The case does not give the Plaintiff the right to pursue legal avenues to collect a settlement and then unilaterally reverse those same legal avenues to try to then pursue the UIM carrier without consequence. The case is by the Plaintiff against the Defendant. Either the Plaintiff correctly serves the UIM to involve it prior to a liability decision or he does not. When he does not, he is bound by his actions in getting an entry of default. Interestingly, Broome involves a Plaintiff who correctly served the UIM prior to this collusive agreement and then tried to bind the UIM carrier through a settlement agreement while the UIM carrier was already in the case.

The case still turns on the requirement of timely service on the UIM carrier. 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.

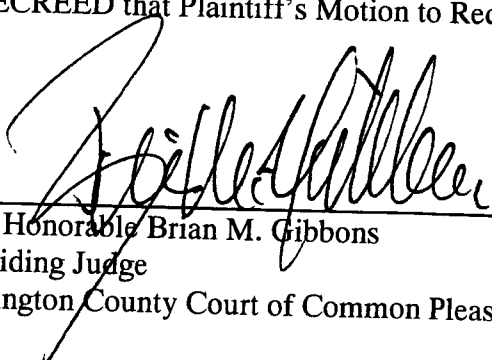
Ex Parte Allstate is controlling in this matter. Plaintiff failed to serve Progressive until after it had obtained an Order of default and settled with the liability carrier based on that Order. The Order of default was the matter in which Defendant Fischer's liability was established. Accordingly, Plaintiff waived his right to UIM benefits by failing to serve Progressive and to preserve its right to appear and defend Fischer fully. Plaintiff held Fischer in default and the successfully argued to keep Fischer in default. Had Progressive been served, 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. Therefore, Plaintiff has failed to comply with section 38-77-160, and Plaintiff is not entitled to UIM benefits.

The Order by the Court is correct in addressing the actual issues in the case. The Plaintiff's motion raises no issues with the Court's Order that have support in any legal authority. Accordingly, the Court does not wish to alter or amend its prior Order of Dismissal. It is therefore

ORDERED, ADJUDGED and DECREED that Plaintiff's Motion to Reconsider is DENIED, and

IT IS SO ORDERED.

4/30, 2014

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

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Ronald Lee Cooper,

vs.

Rebecca Sue Fischer,

Plaintiff

Defendant.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-32-1368

**CERTIFICATE OF SERVICE**

**RECEIVED**


FEB 05 2015

**SC Court of Appeals**

I, the undersigned employee of the law offices of Murphy & Grantland, P.A., Attorney for **Progressive Northern Insurance Company**, do hereby certify that I have served a copy of the foregoing, **Order Denying Plaintiff's Motion to Reconsider**, in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

John W. Carrigg, Jr., Esquire  
137 East Butler Street, Suite 6  
Lexington, SC 29072

Bradley L. Lanford, Esquire  
Baker Ravenel & Bender  
Post Office Box 8057  
3710 Landmark Drive, Suite 400 (29204)  
Columbia, SC 29202

  
Stephanie M. Roberts  
Paralegal to Peter E. Farr, Esquire

May 5, 2014

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON  
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE  
CASE NUMBER 2013CP3201368

Ronald Lee Cooper

RECEIVED  
FEB 05 2015  
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FEB 05 2015  
SC Court of Appeals

Rebecca S. Fischer  
Progressive Northern  
Insurance Company

PLAINTIFF(S)

DEFENDANT(S)

|               |   |
|---------------|---|
| Submitted by: | Attorney for: <input type="checkbox"/> Plaintiff <input type="checkbox"/> Defendant |
|               | <input type="checkbox"/> Self-Represented Litigant                                  |

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.  See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON):**  Rule 12(b), SCRPC;  Rule 41(a), SCRPC (Vol. Nonsuit);  
 Rule 43(k), SCRPC (Settled);  Other: \_\_\_\_\_
- ACTION STRICKEN (CHECK REASON):**  Rule 40(j) SCRPC;  Bankruptcy;  
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;  Other: \_\_\_\_\_
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**  
 Affirmed;  Reversed;  Remanded;  Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED:  See attached order; (formal order to follow)  Statement of Judgment by the Court:

ORDER INFORMATION

This order  ends  does not end the case.

Additional Information for the Clerk: \_\_\_\_\_

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

| Judgment in Favor of<br>(List name(s) below) | Judgment Against<br>(List name(s) below) | Judgment Amount To be Enrolled<br>(List amount(s) below) |
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If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. **Note: Title abstractors and researchers should refer to the official court order for judgment details.**

Circuit Court Judge

Judge Code

5/28/2014

Date

**For Clerk of Court Office Use Only**

This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on **29th of May 2014**, to attorneys of record or to parties (when appearing pro se) as follows:

**John W. Carrigg Jr.**  
137 E. Butler St., Ste. 6 Lexington, SC 29072

**Bradley Lewis Lanford** PO Box 8057 Columbia, SC 29202  
**Peter E. Farr** PO Box 6648 Columbia, SC 29260

**ATTORNEY(S) FOR THE PLAINTIFF(S)**

**ATTORNEY(S) FOR THE DEFENDANT(S)**

Beth A. Carrigg/mh

**Court Reporter**

Beth A. Carrigg - Clerk of Court

**ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.**

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

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FEB 05 2015  
**SC Court of Appeals**

Murphy & Grantland, P.A.  
4406-B Forest Drive (29206)  
P.O. Box 6648  
Columbia, SC 29260

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FEB 05 2015

**SC Court of Appeals**

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