

21812

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**

MAR 30 2015

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

**SC Court of Appeals**

The Honorable Brian M. Gibbons Circuit Court Judge

Case No. 2013-CP-32-1368  
Appellate Case No: 2014-001026

Ex parte:

Progressive Northern Insurance Company.....Respondent,

In re:

Ronald Lee Cooper,.....Appellant,

v.

Rebecca Sue Fischer.....Defendant.

---

**RECORD ON APPEAL**

---

JOHN W. CARRIGG, JR.  
137 E. Butler Street, Ste. 6  
Lexington, S.C. 29072  
Telephone: (803) 785-5511  
*Attorney for Appellant*

Peter E. Farr  
Murphy & Grantland, P.A.  
Post Office Box 6648  
Columbia, S.C. 29260  
Telephone: (803) 782-4100  
*Attorney for Respondent*

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STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

Ronald Lee Cooper,

Plaintiff(s)

vs.

Rebecca Sue Fischer,

Defendant(s)

IN THE COURT OF COMMON PLEAS

COPY

CIVIL ACTION COVERSHEET

13-CP - 32- 2013 APR 18 P 4: 15

2013 CP 320 1368

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON SC

Submitted By: John W. Carrigg, Esquire  
Address: 137 E. Butler Street, Ste. 6, Lexington, S.C. 29072

SC Bar #: 0015239  
Telephone #: (803) 785-5511  
Fax #: (803) 785-5513  
Other:  
E-mail: jcarrigg@carrigglaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

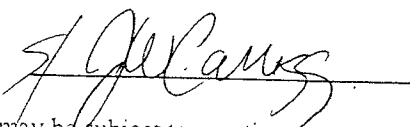
DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.  NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- |   |  |   |  |
|---|--|---|--|
| <p><b>Contracts</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Constructions (100)</li> <li><input type="checkbox"/> Debt Collection (110)</li> <li><input type="checkbox"/> Employment (120)</li> <li><input type="checkbox"/> General (130)</li> <li><input type="checkbox"/> Breach of Contract (140)</li> <li><input type="checkbox"/> Other (199)</li> </ul>  | <p><b>Torts - Professional Malpractice</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Dental Malpractice (200)</li> <li><input type="checkbox"/> Legal Malpractice (210)</li> <li><input type="checkbox"/> Medical Malpractice (220)</li> <li>Previous Notice of Intent Case #<br/>20__-CP-____</li> <li><input type="checkbox"/> Notice/ File Med Mal (230)</li> <li><input type="checkbox"/> Other (299)</li> </ul>   | <p><b>Torts - Personal Injury</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Assault/Slander/Libel (300)</li> <li><input type="checkbox"/> Conversion (310)</li> <li><input checked="" type="checkbox"/> Motor Vehicle Accident (320)</li> <li><input type="checkbox"/> Premises Liability (330)</li> <li><input type="checkbox"/> Products Liability (340)</li> <li><input type="checkbox"/> Personal Injury (350)</li> <li><input type="checkbox"/> Wrongful Death (360)</li> <li><input type="checkbox"/> Other (399)</li> </ul>  | <p><b>Real Property</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Claim &amp; Delivery (400)</li> <li><input type="checkbox"/> Condemnation (410)</li> <li><input type="checkbox"/> Foreclosure (420)</li> <li><input type="checkbox"/> Mechanic's Lien (430)</li> <li><input type="checkbox"/> Partition (440)</li> <li><input type="checkbox"/> Possession (450)</li> <li><input type="checkbox"/> Building Code Violation (460)</li> <li><input type="checkbox"/> Other (499)</li> </ul>  |
| <p><b>Inmate Petitions</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> PCR (500)</li> <li><input type="checkbox"/> Mandamus (520)</li> <li><input type="checkbox"/> Habeas Corpus (530)</li> <li><input type="checkbox"/> Other (599)</li> </ul>  | <p><b>Administrative Law/Relief</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Reinstate Drv. License (800)</li> <li><input type="checkbox"/> Judicial Review (810)</li> <li><input type="checkbox"/> Relief (820)</li> <li><input type="checkbox"/> Permanent Injunction (830)</li> <li><input type="checkbox"/> Forfeiture-Petition (840)</li> <li><input type="checkbox"/> Forfeiture-Consent Order (850)</li> <li><input type="checkbox"/> Other (899)</li> </ul> | <p><b>Judgments/Settlements</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Death Settlement (700)</li> <li><input type="checkbox"/> Foreign Judgment (710)</li> <li><input type="checkbox"/> Magistrate's Judgment (720)</li> <li><input type="checkbox"/> Minor Settlement (730)</li> <li><input type="checkbox"/> Transcript Judgment (740)</li> <li><input type="checkbox"/> Lis Pendens (750)</li> <li><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)</li> <li><input type="checkbox"/> Confession of Judgment (770)</li> <li><input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)</li> <li><input type="checkbox"/> Other (799)</li> </ul> | <p><b>Appeals</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Arbitration (900)</li> <li><input type="checkbox"/> Magistrate-Civil (910)</li> <li><input type="checkbox"/> Magistrate-Criminal (920)</li> <li><input type="checkbox"/> Municipal (930)</li> <li><input type="checkbox"/> Probate Court (940)</li> <li><input type="checkbox"/> SCDOT (950)</li> <li><input type="checkbox"/> Worker's Comp (960)</li> <li><input type="checkbox"/> Zoning Board (970)</li> <li><input type="checkbox"/> Public Service Comm. (990)</li> <li><input type="checkbox"/> Employment Security Comm (991)</li> <li><input type="checkbox"/> Other (999)</li> </ul> |
| <p><b>Special/Complex /Other</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Environmental (600)</li> <li><input type="checkbox"/> Automobile Arb. (610)</li> <li><input type="checkbox"/> Medical (620)</li> <li><input type="checkbox"/> Other (699)</li> <li><input type="checkbox"/> Pharmaceuticals (630)</li> <li><input type="checkbox"/> Unfair Trade Practices (640)</li> <li><input type="checkbox"/> Out-of State Depositions (650)</li> <li><input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)</li> <li><input type="checkbox"/> Sexual Predator (510)</li> </ul> |  |   |  |

Submitting Party Signature: 

Date: 4-18-13

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et. seq.

**FOR MANDATED ADR COUNTIES ONLY**

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR. Failure to do so may affect your case or may result in sanctions.**



STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )  
  
Ronald Lee Cooper, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Rebecca Sue Fischer, )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

FILED

2013 APR 18 P 4: 15

Case Number: 13-CP-32-\_\_\_\_\_

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON SC

COMPLAINT

(Jury Trial Requested)

**2013 CP 320-1368**

Plaintiff complaining of Defendant alleges:

1. That the Plaintiff is a citizen and resident of Lexington County, State of South Carolina.
2. That the Defendant, upon information and belief, is also a citizen and resident of Lexington County, State of South Carolina.
3. That this court has jurisdiction over the matters contained herein and venue is proper.
4. That on or about April 24, 2010 at or about approximately 6:45 p.m. Plaintiff was operating his vehicle, a 2003 Suzuki motorcycle, traveling south on Secondary Road 100 (Blackville Road). in the County of Lexington, State of South Carolina at a safe distance behind Defendant's vehicle.
5. That at the same time and place, Defendant was operating her vehicle, a 1995 Suba, also traveling south on Secondary Road 100 (Blackville Road) in the County of Lexington, State of South Carolina, at some distance ahead of Plaintiff.

6. That as the Defendant approached the intersection of Secondary Road 100 (Blackville Road) and Secondary Road 101 (Fallaw Road), she initially turned toward the right; however, as Plaintiff came up behind her at the intersection and was preparing to turn left on to Secondary Road 100, the Plaintiff instead, suddenly and without warning, turned sharply to the left, forcefully striking the right side of Plaintiff's motorcycle, knocking over Plaintiff's motorcycle and causing Plaintiff fall off of his motorcycle and land up against the Defendant's vehicle, whereupon he bounced off Defendant's vehicle and fell to the roadway.

7. That on or about the aforementioned date at the said time and place, as the vehicles were proceeding as aforesaid, Defendant negligently, carelessly, recklessly, and with flagrant disregard for other traffic on the roadway, caused his vehicle to run into the right side of the vehicle which Plaintiff was operating.

8. That the aforementioned collision was directly, solely and proximately caused by the negligence, carelessness, recklessness and/or willfulness of Defendant.

9. That by reason of the negligence, carelessness, recklessness, and/or willfulness of Defendant, and as a direct and proximate result thereof, Plaintiff has been injured and has suffered and will continue to suffer damages in the following respects:

He has sustained injuries in and about various parts of his body including but not limited to his head, neck, arms and back on account of which he has been caused to suffer and endure considerable pain, discomfort and mental anguish; he has incurred various expenses for medical treatment and upon information and belief will incur additional expenses; he has been and will continue to be prevented from attending to his ordinary affairs and duties; he has been and will continue to be deprived of the normal enjoyments of life he otherwise would have;

and he will continue to endure discomforting physical and mental pain and suffering which he otherwise would not have; and he has been otherwise damaged all to his damage.

WHEREFORE, Plaintiff prays for judgment against the Defendant for actual and punitive damages in such an amount as shall fairly, justly, and adequately compensate him for his losses, and for such punitive damages as the Court may deem just and proper.

By: 

\_\_\_\_\_  
JOHN W. CARRIGG, JR.  
137 E. Butler Street, Suite 6  
Lexington, South Carolina 29072  
Phone (803) 785-5511

Lexington, South Carolina

Dated: 4/8/13

ATTORNEY FOR PLAINTIFF

ORIGINAL

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

FILED

RONALD LEE COOPER

Plaintiff

CASE NO.

2013-CP-32-01368

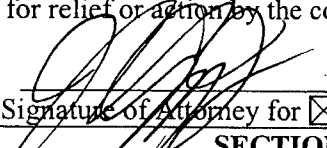

2013 JUL 26 3:00

v.

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Rebecca Sue Fischer

Defendant.

Plaintiff's Attorney: John Carrigg, Bar No. 0015239 Address: 137 E. Butler Street, Ste. 6, Lexington, S.C. 29072 phone: 785-5511 fax: 785-5513 e-mail: jcarrigg@carriglaw.com other:	Defendant's Attorney: , Bar No. Address: phone: fax: e-mail: other:
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b> Nature of Motion: Application for Judgment of Default and Damage Hearing Estimated Time Needed: 30 minutes Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b> <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order. <div style="display: flex; justify-content: space-between;"> <div>           Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant   </div> <div>           Date submitted: 7/26/13         </div> </div>	
<b>SECTION III: Motion Fee</b> <input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: <ul style="list-style-type: none"> <li><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support</li> <li>(check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect</li> <li><input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party</li> <li><input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief</li> <li><input type="checkbox"/> Motion for Stay in Bankruptcy</li> <li><input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCR)</li> <li><input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions</li> </ul> Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	JUDGE: _____ CODE: _____ Date: _____
<b>CLERK'S VERIFICATION</b> Collected by:  <input checked="" type="checkbox"/> MOTION FEE COLLECTED: <u>25</u> <input type="checkbox"/> CONTESTED - AMOUNT DUE: _____ Date Filed: 7/26/13	



**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 (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

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.**

		8/30/2013
<b>Circuit Court Judge</b>	<b>Judge Code</b>	<b>Date</b>

**For Clerk of Court Office Use Only**

This judgment was entered on **3rd of September 2013**, and a copy mailed first class or placed in the appropriate attorney's box on **3rd of September 2013**, 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

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

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

**Beth A. Carrigg/mh**

\_\_\_\_\_  
**Beth A. Carrigg - Clerk of Court**

**Court Reporter**

**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.

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

)  
FILED  
)

IN THE COURT OF COMMON PLEAS

Ronald Lee Cooper,

2013 JUL 25

Case Number: 13-CP-32-01368

Plaintiff,

vs.

Rebecca Sue Fischer,

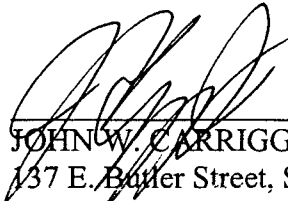
Defendant.

**APPLICATION FOR JUDGMENT  
OF DEFAULT AND DETERMINATION  
OF DAMAGES**

The Plaintiff above named hereby applies to the Court for Judgment by Default against the above-named Defendant and for Determination of Damages on such date and at such time as the Court may fix.

This application was made on the basis that the above-named Defendant failed to plead or otherwise defend in the above action within the time limited by law as appears from the Affidavit of Default filed herein; and that the Clerk of Court has entered Defendant's default upon the calendar (file book).

By:

  
\_\_\_\_\_  
JOHN W. CARRIGG, JR.  
137 E. Butler Street, Suite 6  
Lexington, South Carolina 29072  
Phone (803) 785-5511  
ATTORNEY FOR THE PLAINTIFF

Lexington, South Carolina

Dated: 7/3/13

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

)  
FILED  
)

IN THE COURT OF COMMON PLEAS

Ronald Lee Cooper,  
Plaintiff,

2013 JUL 26

Case No.: 13-CP-32-01368

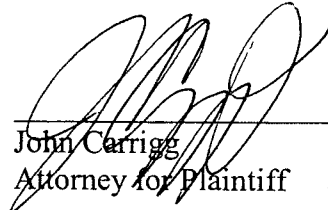
vs.

AFFIDAVIT OF DEFAULT

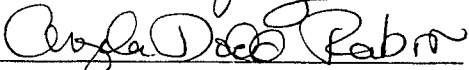
Rebecca Sue Fischer,  
Defendant.

PERSONALLY, appeared before me John Carrigg, who, being duly sworn, deposes and says:

1. That I am the attorney for the Plaintiff in the above-captioned action.
2. That the above-named Defendant was duly and legally served with a Summons and Complaint in said action on the 31st day of May, 2013, as appears by due proof of such service, returned and filed herein.
3. That more than thirty (30) days have elapsed since the making and completion of said service upon the said Defendant, and the said Defendant has not answered, moved against, or otherwise responded to the said Complaint, and the said Defendant is now in default in this action for failure to plead or otherwise defend.

  
 \_\_\_\_\_  
 John Carrigg  
 Attorney for Plaintiff

Sworn to and subscribed before me this 30 day of July, 2013.

  
 \_\_\_\_\_  
 Notary Public for South Carolina

My Commission Expires: 10-5-22

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )

Ronald Lee Cooper,  
Plaintiff,

Case Number: 13-CP-32-01368

vs.

**ORDER**

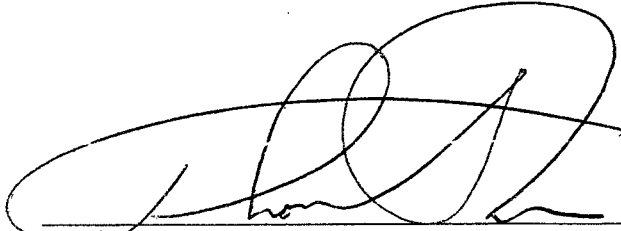
Rebecca Sue Fischer,  
Defendant.

2013 AUG 23 11 22 AM  
CLERK OF COURT  
LEXINGTON, SC

The Defendant having failed to plead or otherwise defend in the above-captioned action within the time limited by law as appears from the Affidavit of Default filed herein, and the Clerk of Court having entered Defendant's default upon the calendar (file book); and the Plaintiff having applied to the Court to set the case down for a date certain for entry of default judgment and determination of the amount of damages.

It is hereby ORDERED that the Defendant, Rebecca Sue Fischer, is in Default and that the above case is hereby set down for hearing on Plaintiff's application for determination of the amount of damages at a Non-Jury term of Court.

And it is so ORDERED.

  
Circuit Court Judge *THOMAS A. RUSSO*  
Eleventh Judicial Circuit

Lexington, South Carolina  
Dated: 8/5/13

COPY

FILED

IN THE STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS  
COUNTY OF LEXINGTON ) FOR THE 11TH JUDICIAL CIRCUIT  
2013 OCT -8 P 12:33

Ronald Lee Cooper,  
Plaintiff,

BETH A. CARRIGG

CLERK OF COURT

Civil Action No.: 11-CP-32-01368

v.

Rebecca Sue Fischer,  
Defendant.

CERTIFICATE OF SERVICE  
BY CERTIFIED AND REGULAR MAIL

The undersigned employee of the Carrigg Law Firm, Angela D. Rabon, Legal Assistant, hereby certifies that a true copy of the foregoing **Order for Damages Hearing and Hearing date of October 17, 2013 at 11:00 a.m.** has been served on the following person via U. S. Mail, postage prepaid and by certified mail, return receipt requested on this 1st day of October 2013 at her last known address. The Order and Hearing Notice were accepted as evidenced by the Defendant on October 4, 2013 with the green return receipt numbered 7008 0150 0002 8102 0280

Rebecca Sue Fischer  
1365 Fallaw Road  
Gaston, S.C. 29053



Angela D. Rabon, Legal Assistant  
Carrigg Law Firm  
137 E. Butler Street, Suite 6  
Lexington, South Carolina 29072  
Phone: (803) 785-5511  
Fax: (803) 785-5513

Lexington, South Carolina

**SENDER: COMPLETE THIS SECTION**

- Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1. Article Addressed to:

Rebecca Fischer  
 1365 Fallaw Rd  
 Gaston, SC 29053

**COMPLETE THIS SECTION ON DELIVERY**

A. Signature

*Rebecca Fischer*

- Agent
- Addressee

B. Received by (Printed Name)

Rebecca S Fischer

C. Date of Delivery

10/4/13

D. Is delivery address different from item 1?  Yes

If YES, enter delivery address below:  No

3. Service Type

- Certified Mail
- Registered
- Insured Mail
- Express Mail
- Return Receipt for Merchandise
- C.O.D.

4. Restricted Delivery? (Extra Fee)

Yes

2. Article Number  
 (Transfer from serv)

7008 0150 0002 8102 0280

11 11 11  
 103 001 - 9 10 13  
 BETHA CARR  
 CLERK OF COURT  
 LEXINGTON

14

# JOHN CARRIGG

ATTORNEY AT LAW

PHONE: (803) 785-5511

137 E. BUTLER STREET  
SUITE 6  
LEXINGTON, SOUTH CAROLINA 29072

FAX (803) 785-5513

JCARRIGG@CARRIGGLAW.COM

October 1, 2013

## NOTICE OF DEFAULT AND DAMAGES HEARING

Rebecca Sue Fischar  
1365 Fallaw Road  
Gaston, S.C. 29053

RE: RONALD COOPER VS. REBECCA FISCHER  
CASE NO: 13-CP-32-01368

Dear Ms. Fischer:

Please be advised that since we received no response/answer from you or your insurance carrier to the Summons and Complaint which was served upon you on May 31, 2013 at 521 Gibson Road, Lexington, S.C., a Default and Damages hearing has been scheduled for the above-referenced matter for October 17, 2013 at 11:00 a.m. before the Honorable Eugene Griffith at the Lexington County Judicial Center.

Sincerely,



Angela D. Rabon, Legal Assistant  
John Carrigg

JC/adr

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON )

Ronald Lee Cooper, )

CASE NO.

Plaintiff )

2013-CP-32-01368

v. )

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Rebecca Sue Fischer )

Defendant. )

Plaintiff's Attorney: John W. Carrigg, Bar No. Address: 137 East Butler Street, Suite 6 Lexington, SC 29072 phone: 803-785-5511 fax: 803-785-5513 e-mail:            other:	Defendant's Attorney: Bradley L. Lanford, Bar No. Address: 3710 Landmark Drive, Suite 400 Columbia, SC 29204 phone: 803.799.9091 fax: 803.779.3423 e-mail: blanford@brblegal.com other:
---	---

- MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)  
 FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)  
 PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)

**SECTION I: Hearing Information**

Nature of Motion: Motion for Continuance  
Estimated Time Needed: 30 minutes Court Reporter Needed:  YES /  NO

**SECTION II: Motion/Order Type**

- Written motion attached  
 Form Motion/Order

I hereby move for relief or action by the court as set forth in the attached proposed order.

  
 Signature of Attorney for  Plaintiff /  Defendant

October 8, 2013  
 Date submitted

**SECTION III: Motion Fee**

- PAID - AMOUNT: \$25.00  
 EXEMPT:  Rule to Show Cause in Child or Spousal Support  
 (check reason)  Domestic Abuse or Abuse and Neglect  
 Indigent Status     State Agency v. Indigent Party  
 Sexually Violent Predator Act     Post-Conviction Relief  
 Motion for Stay in Bankruptcy  
 Motion for Publication     Motion for Execution (Rule 69, SCRPC)  
 Proposed order submitted at request of the court; or,  
 reduced to writing from motion made in open court per judge's instructions  
 Name of Court Reporter:  
 Other:

**JUDGE'S SECTION**

- Motion Fee to be paid upon filing of the attached order.  
 Other:

JUDGE

CODE: \_\_\_\_\_ Date: \_\_\_\_\_

**CLERK'S VERIFICATION**

Collected by: \_\_\_\_\_ Date Filed: \_\_\_\_\_

MOTION FEE COLLECTED: \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \_\_\_\_\_

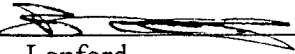
STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )  
  
Ronald Lee Cooper, )  
 )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Rebecca Sue Fischer, )  
 )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
C/A NO.: 2013-CP-32-001368

**MOTION FOR CONTINUANCE  
OF DAMAGES HEARING**

TO: JOHN W. CARRIGG, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF:

The defendant, by and through her undersigned counsel, hereby moves this honorable Court for a continuance of the damages hearing that has been scheduled for October 17, 2013 at 11:00 at the Lexington County Courthouse. This matter was scheduled for a damages hearing after an Order of Default was entered by The Honorable Thomas A. Russo on August 5, 2013. A letter was sent to the defendant on October 1, 2013, notifying the defendant of the hearing which she received on October 4. The defendant immediately contacted her insurance carrier regarding the letter. Counsel for the defendant is still attempting to ascertain whether service was proper and whether notice of the original lawsuit was ever received for purposes of filing a motion to set aside the Order of Default. For that reason, it is requested that the damages hearing be continued beyond October 17, 2013. Counsel was not able to reach opposing counsel prior to filing this motion.

  
Bradley L. Lanford  
BAKER, RAVENEL & BENDER, LLP  
Post Office Box 8057  
Columbia, SC 29202  
Telephone: (803) 799-9091  
Facsimile: (803) 779-3423  
[blanford@brblegal.com](mailto:blanford@brblegal.com)  
*Attorneys for Defendant*  
Our File: 7746.1997

October 8, 2013

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF LEXINGTON )  
 )  
 Ronald Lee Cooper, )  
 )  
 Plaintiff )  
 )  
 v. )  
 )  
 Rebecca Sue Fischer )  
 )  
 Defendant. )

IN THE COURT OF COMMON PLEAS

CASE NO.

2013-CP-32-01368

MOTION AND ORDER INFORMATION  
 FORM AND COVER SHEET

Plaintiff's Attorney: John W. Carrigg, Bar No. Address: 137 East Butler Street, Suite 6 Lexington, SC 29072 phone: 803-785-5511 fax: 803-785-5513 e-mail: other:	Defendant's Attorney: Bradley L. Lanford, Bar No. Address: 3710 Landmark Drive, Suite 400 Columbia, SC 29204 phone: 803.799.9091 fax: 803.779.3423 e-mail: blanford@brblegal.com other:
<input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)</b> <input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)</b> <input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)</b>	
<b>SECTION I: Hearing Information</b> Nature of Motion: Motion to Set Aside Default Judgment Estimated Time Needed: 30 minutes Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b> <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
<div style="display: flex; justify-content: space-between;"> <div style="width: 60%;"> <p style="text-align: center;"> _____            Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant</p> </div> <div style="width: 35%; text-align: right;"> <p>October 10, 2013            Date submitted</p> </div> </div>	
<b>SECTION III: Motion Fee</b> <input checked="" type="checkbox"/> PAID - AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: (check reason) <ul style="list-style-type: none"> <li><input type="checkbox"/> Rule to Show Cause in Child or Spousal Support</li> <li><input type="checkbox"/> Domestic Abuse or Abuse and Neglect</li> <li><input type="checkbox"/> Indigent Status    <input type="checkbox"/> State Agency v. Indigent Party</li> <li><input type="checkbox"/> Sexually Violent Predator Act    <input type="checkbox"/> Post-Conviction Relief</li> <li><input type="checkbox"/> Motion for Stay in Bankruptcy</li> <li><input type="checkbox"/> Motion for Publication    <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC)</li> <li><input type="checkbox"/> Proposed order submitted at request of the court; or,            reduced to writing from motion made in open court per judge's instructions</li> </ul> Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE CODE: _____ Date: _____
<b>CLERK'S VERIFICATION</b> Date Filed: _____ Collected by: _____	

MOTION FEE COLLECTED: \_\_\_\_\_  
 CONTESTED - AMOUNT DUE: \_\_\_\_\_

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )  
  
Ronald Lee Cooper, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Rebecca Sue Fischer, )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
C/A NO.: 2013-CP-32-001368

**MOTION TO SET ASIDE ENTRY OF  
DEFAULT AND FOR ENLARGEMENT  
OF TIME TO ANSWER**

TO: JOHN W. CARRIGG, JR., ESQUIRE, ATTORNEY FOR PLAINTIFF:

The Defendant, by and through her undersigned counsel, hereby moves pursuant to Rules 6(b), 55(c), and 60(b) of the South Carolina Rules of Civil Procedure for an Order setting aside the entry of default and Order entered by the Honorable Thomas A. Russo finding the defendant in Default for good cause shown.

**FACTS**

This suit was filed on April 18, 2013, and it relates to an automobile accident that occurred in 2010 between the Plaintiff and Defendant. The Plaintiff attempted to pass the Defendant as she was making a left hand turn and the Plaintiff's claim against the Defendant's liability insurance carrier was eventually denied on the basis that the carrier did not believe that its insured was at fault in the accident. The Summons and Complaint was served on the Defendant on May 31, 2013. Shortly thereafter the Defendant delivered the suit papers to her insurance agent, Wise Insurance Agency, who in turn faxed the papers to Travelers Insurance Company (hereinafter "Travelers"). See Affidavit of Rebecca Sue Fischer, attached as Exhibit "A", and fax from Wise Insurance Agency attached as Exhibit "B". However, Travelers has no

record of ever receiving the paperwork and thus did not hire counsel to defend Ms. Fischer.<sup>1</sup>

Counsel for the Plaintiff requested an Order of Default, which was entered by the Honorable Thomas A. Russo, and a damages hearing was subsequently scheduled for October 17. Counsel for the Plaintiff sent a letter to Ms. Fischer notifying her of the damages hearing which she received on October 4 and promptly sent to Travelers who hired the undersigned counsel to defend Ms. Fischer.

### ARGUMENT

Rule 55(c), SCRPC, allows the circuit court to set aside an entry of default “for good cause shown.” Rule 6(b), SCRPC, allows for the enlargement of the time prescribed for an act to be done upon motion to be made after the expiration of the specified period “for good cause shown.” This is the same standard for setting aside the entry of default under Rule 55(c), SCRPC, prior to the entry of a default judgment. As the Court of Appeals stated in Ricks v. Weinrauch, 293 S.C. 392, 360 S.E.2d 535, 536 (Ct.App. 1987):

The standard for granting relief from the entry of default is good cause under Rule 55(c) (S.C.R.Civ.P.), while the standard is more rigorous for granting relief from a default judgment under Rule 60(b) (S.C.R.Civ.P.). Relief granted at the point of the entry of default is within the equitable power of the court and excuses previous failure to act promptly.

“Rule 55(c) should be liberally construed so as to promote justice and dispose of cases on the merits.” *Estate of Weeks v. Drawdy*, 329 S.C. 251, 495 S.E.2d 454, 459 (Ct.App. 1997). Whether to grant relief from entry of default is a decision within the sound discretion of the circuit court. *Wham v. Shearson Lehman Bros.*, 298 S.C. 462, 381 S.E.2d 499, 502 (Ct.App. 1989).

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<sup>1</sup> Travelers has informed counsel that the paperwork was not received. Since the damages hearing was scheduled less than two weeks after the Defendant received notice of the hearing, this motion was filed due to the significant time constraints. The record will be supplemented by an affidavit from a Travelers’ representative regarding the paperwork not being received.

In determining whether good cause exists, the trial court should consider these factors: (1) the timing of the defendant's motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted." *Pilgrim v. Miller*, 350 S.C. 637, 567 S.E.2d 527, 528 (Ct.App. 2002).

In this case, the Defendant clearly meets the three criteria for showing good cause. As shown by the affidavit, the Defendant immediately turned over the Summons and Complaint to her insurance agent who then faxed the paperwork to Travelers who for unknown reasons did not receive the fax. After default was entered, the Defendant immediately notified Travelers upon receipt of notice of the default and the within motion was filed less than a week later. Therefore, the Defendant's response upon receiving notice of the default is timely.


Second, there is a meritorious defense as the defendant has claimed all along that she was not negligent in the accident and her insurance carrier denied the plaintiff's claim and received payment from the plaintiff's liability carrier for damages to the defendant's vehicle. The defendant was not injured in the accident and is therefore not filing a counterclaim but comparative negligence has been raised as an affirmative defense in the proposed Answer, attached hereto as Exhibit "C".

Third, there is no prejudice that will result for the plaintiff if the case is allowed to proceed on the merits. The suit was filed on April 18, 2013, and counsel for all parties will have ample opportunity to conduct the appropriate discovery and pre-trial investigation that will be needed.

By finding that good cause exists and thereby setting aside any entry of default against the Defendant and allowing her to respond to the pleadings out of time would enable this case to be tried and litigated on its merits, thereby meeting the policy goals of Rule 55(c), SCRCP, as it

is to be liberally construed so as to promote justice and dispose of cases on the merits.

Therefore, Defendant requests that the entry of default be set aside and that the Defendant be allowed to answer out of time and that the case be allowed to proceed on the merits for good cause shown. Consultation with opposing counsel for the purpose of attempting to resolve the matter contained in this motion would serve no useful purpose.

  
Bradley L. Lanford  
BAKER, RAVENEL & BENDER, LLP  
Post Office Box 8057  
Columbia, SC 29202  
Telephone: (803) 799-9091  
Facsimile: (803) 779-3423  
[blanford@brblegal.com](mailto:blanford@brblegal.com)  
*Attorneys for Defendant*  
Our File: 7746.2002

October 10, 2013

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )  
  
Ronald Lee Cooper, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
Rebecca Sue Fischer, )  
 )  
Defendant. )

IN THE COURT OF COMMON PLEAS  
C/A NO.: 2013-CP-32-001368

**AFFIDAVIT OF  
REBECCA SUE FISCHER**

Personally appeared before me, Rebecca Sue Fischer, who, after being duly sworn, deposes and says:

The information which forms the basis for this Affidavit is personally known by me to be true unless stated on information and belief and, if so stated, is believed to be true.

1. My name is Rebecca Sue Fischer and I am the defendant in this matter and a resident of Lexington County.
2. I was involved in an accident with the plaintiff Ronald Cooper on April 24, 2010, in which I do not believe I was at fault.
3. I was attempting to make a left hand turn with my turn signal activated when Mr. Cooper attempted to pass my vehicle on his motorcycle striking and causing damage to my vehicle.
4. After the accident I saw evidence that Mr. Cooper may have been intoxicated.
5. Mr. Cooper made a claim with Travelers, my liability insurance carrier, who denied the claim.



STATE OF SOUTH CAROLINA )  
)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON )

C/A NO.: 2013-CP-32-001368

Ronald Lee Cooper, )

Plaintiff, )

vs. )

Rebecca Sue Fischer, )

Defendant. )

**AFFIDAVIT OF  
JEFF HUTCHINSON**

Personally appeared before me, Jeff Hutchinson, who, after being duly sworn, deposes and says:

The information which forms the basis for this Affidavit is personally known by me to be true unless stated on information and belief and, if so stated, is believed to be true.

1. My name is Jeff Hutchinson, CPCU, and I am a Technical Specialist for Personal and Business Insurance with Travelers Insurance Company.
2. Travelers first received notice of this lawsuit on October 4, 2013, when a telephone call was received from Rebecca Sue Fischer.
3. We immediately contacted Bradley L. Lanford with Baker, Ravenel & Bender to represent the interests of Ms. Fischer.
4. Since that time I have received a copy of a fax that was sent by Wise Insurance Agency to Travelers with the Summons and Complaint on June 4, 2013.
5. I am not aware of Travelers ever receiving the fax from Wise Insurance Agency.
6. Travelers did not have notice of the suit, and if it had received the paperwork from Wise Insurance Agency on or about that date, it would have been sent to

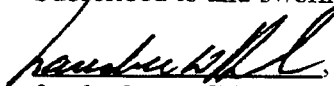
defense counsel so that a timely answer could have been filed on behalf of Ms.

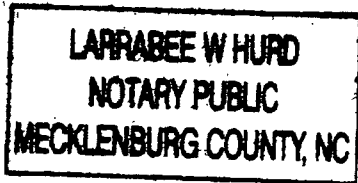
Fischer.

FURTHER AFFIANT SAYETH NOT.

  
Jeff Mitchinson

Subscribed to and sworn before me,

, a Notary Public  
for the State of North Carolina  
on this 16th day of October, 2013  
My Commission Expires: 11/17/2013



# FAX COVER SHEET

**Wise Insurance Agency**  
 607 Meeting Street  
 West Columbia, S.C. 29109  
 E-Mail Address: D1WARING@YAHOO.COM  
 Office: (803) 794-2009  
 Fax: (803) 739-6449

<b>SEND TO</b> Company name	<b>From</b> DARRYL K. WARING
<b>Attention</b> BRAD LANFORD	<b>Date</b> 10/9/2013
<b>Office location</b>	<b>Office location</b>
<b>Fax number</b> 803-779-3423	<b>Phone number</b> 803-754-2009

- Urgent    
  Reply ASAP    
  Please comment    
  Please review    
  For your information

Total pages, including cover: 13

**COMMENTS**

PLEASE FIND DOCUMENTATION THAT WAS FAXED TO TRAVELERS IN REGARDS TO REBEECA FISCHER ENCLOSED.

THANKS

DARRYL K. WARING

TRANSMISSION VERIFICATION REPORT

TIME : 06/03/2013 16:26  
NAME : WISE INSURANCE AGENCY  
FAX : 8037396449  
TEL : 8037342009  
SER.# : 000M9N252843

DATE, TIME	06/03 16:23
FAX NO./NAME	18663047031
DURATION	00:03:27
PAGE(S)	12
RESULT	OK
MODE	STANDARD EOM

FAX COVER SHEET

Wise Insurance Agency  
607 Meeting Street  
West Columbia, S.C. 29169  
E-Mail Address: D1WAFILING@YAHOO.COM  
Office: (803) 794-2009  
Fax: (803) 739-6449

<b>SEND TO</b>	
Company name	From
TRAVELERS	LARRY K. WARING
Attention	Date
CLAIMS DEPT (KIMBERLY FERREIRA)	6/3/2013
Office location	Office location
Fax number	Phone number
803-304-7031	803-794-2009

- Urgent   
 Reply ASAP   
 Please comment   
 Please review   
 For your information

Total pages, including cover: 13

COMMENTS

PLEASE FIND CIVIL ACTION ENCLOSED THAT HAS BEEN ISSUED AGAINST REBECCA FISCHER (CLAIM# 258 AB U8F4476 P). PLEASE PROCESS ACCORDINGLY.

# FAX COVER SHEET

**Wise Insurance Agency**  
 607 Meeting Street  
 West Columbia, S.C. 29139  
 E-Mail Address: D1WAR:NG@YAHOO.COM  
 Office: (803) 794-2009  
 Fax: (803) 739-6449

<b>SEND TO</b>	
Company name	From
TRAVELERS	DARRYL K. WARING
Attention	Date
CLAIMS DEPT (KIMBERLY FERREIRA)	8/3/2013
Office location	Office location
Fax number	Phone number
866-304-7031	803-794-2009

Urgent    
  Reply ASAP    
  Please comment    
  Please review    
  For your information

Total pages, including cover: 13

**COMMENTS**

PLEASE FIND CIVIL ACTION ENCLOSED THAT HAS BEEN ISSUED AGAINST REBECCA FISCHER (CLAIM# 258 AB U8F4476 P). PLEASE PROCESS ACCORDINGLY.

THANKS,

DARRYL K. WARING

4650

# TRAVELERS

The Travelers Home And Marine Insurance Company  
P.O. Box 3022  
Fall River, MA 02722  
(800)925-7693



12/23/2010

Rebecca Fischer  
1365 Sallow Rd  
Gaston, SC 29053

*file 2*

**Our Client:** Rebecca Fischer  
**Claim/File #:** 258 AB U8F4476 P  
**Date of Loss:** 04/24/2010  
**Reference #:**

Dear Rebecca Fischer:

Your claim has been closed; we have recovered 50% of your loss.

We have issued you a check for \$250, which represents the appropriate share of your deductible. You should receive the check within 10 days.

Please call me with any questions you may have.

Sincerely,  
Kimberly Ferreira  
Subro Professional  
(508)324-8323  
Fax: (866)304-7031  
Email: KFERREI1@travelers.com

CC: Wise Ins Agency Inc

33

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

COPY

Ronald Lee Cooper,

Plaintiff(s)

2013 APR 18 P 4 15

13-CP - 32-

vs.

Rebecca Sue Fischer,

Defendant(s)

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

2013 CP 320-368

Submitted By: John W. Carrigg, Esquire

SC Bar #: 0015239

Address: 137 E. Butler Street, Ste. 6, Lexington, S.C. 29072

Telephone #: (803) 785-5511

Fax #: (803) 785-5513

Other:

E-mail: jcarrigg@carrigglaw.com

NOTE: The coversheet and information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed, and dated. A copy of this coversheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

\*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.  NON-JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- |  |  |   |  |
|--|--|---|--|
| <p><b>Contracts</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Constructions (100)</li> <li><input type="checkbox"/> Debt Collection (110)</li> <li><input type="checkbox"/> Employment (120)</li> <li><input type="checkbox"/> General (130)</li> <li><input type="checkbox"/> Breach of Contract (140)</li> <li><input type="checkbox"/> Other (199)</li> </ul> | <p><b>Torts - Professional Malpractice</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Denial Malpractice (201)</li> <li><input type="checkbox"/> Legal Malpractice (210)</li> <li><input type="checkbox"/> Medical Malpractice (220)</li> <li><input type="checkbox"/> Previous Notice of Intent Case # 2 _____-CP-_____</li> <li><input type="checkbox"/> Notice/ File Med Mal (230)</li> <li><input type="checkbox"/> Other (299)</li> </ul>                      | <p><b>Torts - Personal Injury</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Assault/Slander/Libel (300)</li> <li><input type="checkbox"/> Conversion (310)</li> <li><input checked="" type="checkbox"/> Motor Vehicle Accident (320)</li> <li><input type="checkbox"/> Premises Liability (330)</li> <li><input type="checkbox"/> Products Liability (340)</li> <li><input type="checkbox"/> Personal Injury (350)</li> <li><input type="checkbox"/> Wrongful Death (360)</li> <li><input type="checkbox"/> Other (399)</li> </ul>  | <p><b>Real Property</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Claim &amp; Delivery (400)</li> <li><input type="checkbox"/> Condemnation (410)</li> <li><input type="checkbox"/> Foreclosure (420)</li> <li><input type="checkbox"/> Mechanic's Lien (430)</li> <li><input type="checkbox"/> Partition (440)</li> <li><input type="checkbox"/> Possession (450)</li> <li><input type="checkbox"/> Building Code Violation (460)</li> <li><input type="checkbox"/> Other (499)</li> </ul>  |
| <p><b>Inmate Petitions</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> PCR (500)</li> <li><input type="checkbox"/> Mandamus (520)</li> <li><input type="checkbox"/> Habeas Corpus (530)</li> <li><input type="checkbox"/> Other (599)</li> </ul>   | <p><b>Administrative Law/Relief</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Reinst. Drv. License (800)</li> <li><input type="checkbox"/> Judicial Review (810)</li> <li><input type="checkbox"/> Relief (820)</li> <li><input type="checkbox"/> Permanent Injunction (830)</li> <li><input type="checkbox"/> Forfeiture-Petition (840)</li> <li><input type="checkbox"/> Forfeiture-Consent Order (850)</li> <li><input type="checkbox"/> Other (899)</li> </ul> | <p><b>Judgments/Settlements</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Death Settlement (700)</li> <li><input type="checkbox"/> Foreign Judgment (710)</li> <li><input type="checkbox"/> Magistrate's Judgment (720)</li> <li><input type="checkbox"/> Minor Settlement (730)</li> <li><input type="checkbox"/> Transcript Judgment (740)</li> <li><input type="checkbox"/> Lis Pendens (750)</li> <li><input type="checkbox"/> Transfer of Structured Settlement Payment Rights Application (760)</li> <li><input type="checkbox"/> Confession of Judgment (770)</li> <li><input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)</li> <li><input type="checkbox"/> Other (799)</li> </ul> | <p><b>Appeals</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Arbitration (900)</li> <li><input type="checkbox"/> Magistrate-Civil (910)</li> <li><input type="checkbox"/> Magistrate-Criminal (920)</li> <li><input type="checkbox"/> Municipal (930)</li> <li><input type="checkbox"/> Probate Court (940)</li> <li><input type="checkbox"/> SCDOT (950)</li> <li><input type="checkbox"/> Worker's Comp (960)</li> <li><input type="checkbox"/> Zoning Board (970)</li> <li><input type="checkbox"/> Public Service Comm. (990)</li> <li><input type="checkbox"/> Employment Security Comm (991)</li> <li><input type="checkbox"/> Other (999)</li> </ul> |
| <p><b>Special/Complex/Other</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Environmental (600)</li> <li><input type="checkbox"/> Automobile Arb. (610)</li> <li><input type="checkbox"/> Medical (620)</li> <li><input type="checkbox"/> Other (699)</li> </ul>   | <ul style="list-style-type: none"> <li><input type="checkbox"/> Pharmaceuticals (630)</li> <li><input type="checkbox"/> Unfair Trade Practices (640)</li> <li><input type="checkbox"/> Out-of State Depositions (650)</li> <li><input type="checkbox"/> Motion to Quash Subpoena in or Out-of-County Action (660)</li> <li><input type="checkbox"/> Sexual Predator (510)</li> </ul>   |   |  |

Submitting Party Signature: John W. Carrigg

Date: 4-18-13

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. §15-36-10 et seq.

**FOR MANDATED ADR COUNTIES ONLY**

Allendale, Anderson, Beaufort, Clarendon, Colleton, Florence, Greenville, Hampton, Horry, Jasper, Lee, Lexington, Pickens (Family Court Only), Richland, Sumter, Union, Williamsburg, and York

SUPREME COURT RULES REQUIRE THE SUBMISSION OF ALL CIVIL CASES TO AN ALTERNATIVE DISPUTE RESOLUTION PROCESS, UNLESS OTHERWISE EXEMPT.

**You are required to take the following action(s):**

1. The parties shall select a neutral and file a "Proof of ADR" form on or by the 210<sup>th</sup> day of the filing of this action. If the parties have not selected a neutral within 210 days, the Clerk of Court shall then appoint a primary and secondary mediator from the current roster on a rotating basis from among those mediators agreeing to accept cases in the county in which the action has been filed.
2. The initial ADR conference must be held within 300 days after the filing of the action.
3. Pre-suit medical malpractice mediations required by S.C. Code §15-79-125 shall be held not later than 120 days after all defendants are served with the "Notice of Intent to File Suit" or as the court directs. (Medical malpractice mediation is mandatory statewide.)
4. Cases are exempt from ADR only upon the following grounds:
  - a. Special proceeding, or actions seeking extraordinary relief such as mandamus, habeas corpus, or prohibition;
  - b. Requests for temporary relief;
  - c. Appeals
  - d. Post Conviction relief matters;
  - e. Contempt of Court proceedings;
  - f. Forfeiture proceedings brought by governmental entities;
  - g. Mortgage foreclosures; and
  - h. Cases that have been previously subjected to an ADR conference, unless otherwise required by Rule 3 or by statute.
5. In cases not subject to ADR, the Chief Judge, for Administrative Purposes, upon the motion of the court or of any party, may order a case to mediation.
6. Motion of a party to be exempt from payment of neutral fees due to indigency should be filed with the Court within ten (10) days after the ADR conference has been concluded.

**Please Note: You must comply with the Supreme Court Rules regarding ADR.  
Failure to do so may affect your case or may result in sanctions.**

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF LEXINGTON )  
 )  
 Ronald Lee Cooper, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Rebecca Sue Fischer, )  
 )  
 Defendants. )

**FILED**  
 IN THE COURT OF COMMON PLEAS  
 ELEVENTH JUDICIAL CIRCUIT # 15  
 2013 APR 18

C/A No:13-CP-32- **BETH A. CARRIGG**  
 CLERK OF COURT  
 LEXINGTON SC

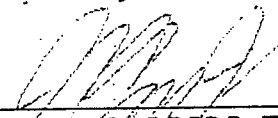
**SUMMONS**

**2013 CP 3201368**

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at his offices, located at 137 E. Butler Street, Suite 6, Lexington, South Carolina 29072, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to answer, appear and defend within thirty (30) days after service hereof, exclusive of the date of such service, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

By:   
 \_\_\_\_\_  
 JOHN W. CARRIGG, JR.  
 137 E. Butler Street, Suite 6  
 Lexington, South Carolina 29072  
 Tel: (803) 785-5511  
 Fax: (803) 785-5513  
 S.C. Bar No.: 015239

Lexington, South Carolina  
4/18, 2013

STATE OF SOUTH CAROLINA )  
 )  
 COUNTY OF LEXINGTON )  
 )  
 Ronald Lee Cooper, )  
 )  
 Plaintiff, )  
 )  
 vs. )  
 )  
 Rebecca Sue Fischer, )  
 )  
 Defendants. )

IN THE COURT OF COMMON PLEAS  
 ELEVENTH JUDICIAL CIRCUIT

**FILED**  
 2013 APR 18 P 4:15

C/A No:13-CP-32-

BETH A. CARRIGG  
 CLERK OF COURT  
 LEXINGTON SC

**SUMMONS**

**2013 CP 3201368**

TO THE DEFENDANT ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to said Complaint on the subscriber at his offices, located at 137 E. Butler Street, Suite 6, Lexington, South Carolina 29072, within thirty (30) days after the service hereof, exclusive of the date of such service; and if you fail to answer, appear and defend within thirty (30) days after service hereof, exclusive of the date of such service, judgment by default will be rendered against you for the relief demanded in the Complaint.

Respectfully submitted,

By:

*[Signature]*  
 JOHN W. CARRIGG, JR.  
 137 E. Butler Street, Suite 6  
 Lexington, South Carolina 29072  
 Tel: (803) 785-5511  
 Fax: (803) 785-5513  
 S.C. Bar No.: 015239

Lexington, South Carolina  
 4/18, 2013

6. That as the Defendant approached the intersection of Secondary Road 100 (Blackville Road) and Secondary Road 101 (Fallaw Road), she initially turned toward the right; however, as Plaintiff came up behind her at the intersection and was preparing to turn left on to Secondary Road 100, the Plaintiff instead, suddenly and without warning, turned sharply to the left, forcefully striking the right side of Plaintiff's motorcycle, knocking over Plaintiff's motorcycle and causing Plaintiff fall off of his motorcycle and land up against the Defendant's vehicle, whereupon he bounced off Defendant's vehicle and fell to the roadway.

7. That on or about the aforementioned date at the said time and place, as the vehicles were proceeding as aforesaid, Defendant negligently, carelessly, recklessly, and with flagrant disregard for other traffic on the roadway, caused his vehicle to run into the right side of the vehicle which Plaintiff was operating.

8. That the aforementioned collision was directly, solely and proximately caused by the negligence, carelessness, recklessness and/or willfulness of Defendant.

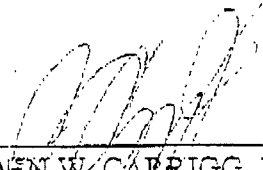
9. That by reason of the negligence, carelessness, recklessness, and/or willfulness of Defendant, and as a direct and proximate result thereof, Plaintiff has been injured and has suffered and will continue to suffer damages in the following respects:

He has sustained injuries in and about various parts of his body including but not limited to his head, neck, arms and back on account of which he has been caused to suffer and endure considerable pain, discomfort and mental anguish; he has incurred various expenses for medical treatment and upon information and belief will incur additional expenses; he has been and will continue to be prevented from attending to his ordinary affairs and duties; he has been and will continue to be deprived of the normal enjoyments of life he otherwise would have;

and he will continue to endure discomforting physical and mental pain and suffering which he otherwise would not have; and he has been otherwise damaged all to his damage.

WHEREFORE, Plaintiff prays for judgment against the Defendant for actual and punitive damages in such an amount as shall fairly, justly, and adequately compensate him for his losses, and for such punitive damages as the Court may deem just and proper.

By:



JOHN W. CARRIGG, JR.  
137 E. Butler Street, Suite 6  
Lexington, South Carolina 29072  
Phone (803) 785-5511

Lexington, South Carolina

Dated: 4/18/13

ATTORNEY FOR PLAINTIFF

STATE OF SOUTH CAROLINA )  
 PLEAS )  
 COUNTY OF LEXINGTON )  
 Ronald Lee Cooper, )  
 )  
 Plaintiff, )  
 vs. )  
 Rebecca Sue Fischer, )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

IN THE COURT OF COMMON  
 ELEVENTH JUDICIAL CIRCUIT  
 Case Number: 13-CP-32-001368

PLAINTIFF'S MEMORANDUM  
IN OPPOSITION TO MOTION TO  
SET ASIDE ENTRY OF DEFAULT

NOW COMES John Carrigg, attorney for Plaintiff, who offers this memorandum in opposition to Defendant's Motion to Set Aside Entry of Default.

**FACTS**

Default was entered against Defendant on August 28, 2013, by the Clerk of Court for Lexington County, due to Defendant's failure to serve an answer on Plaintiff in response to the duly served Summons and Complaint.

The Summons and Complaint were filed with this Court on April 18, 2013 and concerns an automobile/motorcycle accident that occurred in April 24, 2010 between the Plaintiff and Defendant. (Exhibit A) Thereafter, the Summons and Complaint were personally served upon the Defendant on May 31, 2013 at the Lexington County Sheriff's Office located at 521 Gibson Road, Lexington, S.C. (Exhibit B) The Defendant then on or around that date called the office of the attorney for Plaintiff to acknowledge receipt of the Summons and Complaint. However, thereafter, neither the Defendant nor an attorney on her behalf filed any responsive pleadings or answer to this Summons and Complaint,

and no insurance company or attorney representing the Defendant thereafter contacted Plaintiff's attorney in any way whatsoever regarding this matter.

Having received no answer or responsive pleadings to the Summons and Complaint by July 26, 2013, a month and three weeks after service of same, Plaintiff's attorney, on that date, filed an Application for Default and Damages Hearing with the Lexington County Clerk of Court (Exhibit C). This Order of Default granting the Plaintiff a damages hearing was signed by the Honorable Thomas A. Russo on August 5, 2013 and entered by the Lexington County Clerk on August 28, 2013. (Exhibit D) The Damages Hearing was subsequently set for October 17, 2013, which was more than four (4) months after service of the original Summons and Complaint upon Defendant with Plaintiff's attorney, during this time, having received no answer from Defendant and receiving no answer or any communications whatsoever from any insurance company or attorney on behalf of the Defendant.

On October 1, 2013, Plaintiff's attorney mailed a Notice of the Default and Damages Hearing to the Defendant by both certified mail, return receipt requested and by regular mail on October 1, 2013. (Exhibit E). Plaintiff received this Notice of Default and Damages hearing on October 4, 2013 (Exhibit F). On or about October 10, 2013, Plaintiff's attorney received Defendant's Motion for Continuance of Damages Hearing with Notice of Motion to Set Aside Entry of Default and For Enlargement of Time to Answer and Memorandum of Law with supporting attachments, including an Answer. (Exhibit G).

## APPLICABLE LEGAL STANDARDS

S.C. Rules of Civil Procedure, Rule 55 (c), permits a party to move to set aside the entry of default for “good cause” shown. In Sundown Operating Co., Inc vs. Intedger Industries, Inc., 383 S.C. 601, 607, 681 S.E.2<sup>nd</sup> 885, 888 (2009), the South Carolina Supreme Court outlined the requirements for establishing “good cause”. First, the Defendant must provide a satisfactory explanation for the default, giving reasons why vacation of the default entry would serve the interests of justice, *Id.* Only then must the Court consider the Wham factors set forth in Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 465 (Ct. App. 1989); namely: (1) timing of the motion for relief; (2) whether the Defendant has a meritorious defense; and (3) the degree of prejudice to the Plaintiff if relief is granted.

## ARGUMENT

The Defendant’s Motion to Set Aside Default must be denied since the Defendant has failed to show “good cause” in that she has failed to provide a satisfactory explanation for the default. In this case, Defendant was properly served with the Summons and Complaint, yet failed to file any answer or motion in response. Setting aside the Default would therefore not serve the interests of justice since a plain reading of Rule 55 (a) allows entry of default when a pleading or defense is not asserted in a timely manner in compliance with the Rules of Civil Procedure. Unless an extension is granted, “a defendant must serve his or her answer within thirty days after the service of the complaint upon him” Stark Truss Co., vs. Superior Construction Corp., 360 S.C. 503, 509, 602 S.E. 2<sup>nd</sup> 99, 102 (Ct. App. 2004). Failing to file an answer, as required by the Rules, immediately results in a default. *Id.* As such, entry of default “is a ministerial act

to be automatically performed, once an affidavit shows the Defendant having failed to comply with the requirements of the South Carolina Rules of Civil Procedure. *Id.*

Negligent oversight in failing to respond to a Summons and Complaint on the part of the Defendant, her liability insurance carrier and/or her attorney, is not sufficient to show “good cause”. Williams v. Vanvolkenburg, 312 S.C. 373, 375, 440 S.E. 2<sup>nd</sup> 408, 409 (Ct. App. 1993).

A Defendant has a “duty to monitor the progress of his or her case” and a lack of diligence reflects disregard for judicial efficiency and undermines the purpose of court deadlines. See Hill v. Dotts, 354 S.C. 304, 310, 547 S.E. 2<sup>nd</sup> 894, 897 (Ct. App. 2001), citing Goodson vs. Am. Bankers Ins. Co., 295 S.C. 400, 403, 368 S.E. 2<sup>nd</sup> 687, 689 (Ct. App. 1988),, that while it is always a matter of regret that a party should not have his day in court... {where} the appellant was duly served with the Summons and Complaint, it was his duty to answer the complaint. {Therefore,} he must suffer the consequences of his failure to answer” Williams v. Ray, 232 S.C. 373, 383-84, 102 S.E. 2<sup>nd</sup> 368, 373 (1958).

Therefore, it is beyond doubt that in this case that the Defendant was sufficiently served with the Summons and Complaint, yet due to her negligence and/or the negligence of her insurance agent and/or liability insurance carrier, she failed to respond, and while some negligent oversight on the part of the Defendant as a lay person unfamiliar with lawsuits might be understandable, the negligence of her insurance agent and/or her liability insurance carrier, acting on Defendant’s behalf, is not so understandable since they are wholly aware of the requirements for answering set forth in the Rules, Rule 12, 15, SCRCF, as they are in the business of handling, prosecuting and defending liability


claims. In this particular case, the Defendant's insurance agency allegedly merely faxed the Summons and Complaint to Travelers, the liability insurance carrier, and apparently failed to follow-up and confirm its receipt and/or check on the status of the matter in any manner whatsoever, which in itself indicates a definite lack of appropriate and sufficient diligence on their part of Defendant, by and through her insurance agent and liability carrier, especially if they believed the Defendant to have a meritorious defense to the Complaint. Specifically, our courts have ruled in Roche v. Young Brothers, 318 S.C. 207, 456 S.E. 2<sup>nd</sup> 897,900 (1995) that "losing a summons and complaint within the corporation is not a ground to set aside a default judgment". Further, it does appear from the record that the Defendant herself never followed up on the status of her case with either her insurance agent or liability insurance carrier until she was served with the Notice of Default and Order for Damages Hearing.

In conclusion, even if this Court find the Defendant's explanation serves the interest of justice, which the Plaintiff hereby denies, application of the Wham factors would establish that the Defendant has not sufficiently established "good cause". First, South Carolina Courts have refused to set aside entry of default when relief was sought as late as one month after default was entered. Stark Truss Co., 360 S.C. at 510. In this particular case, default was entered on August 28, 2013 and no Motion to Set Aside Entry of Default was filed with this Court until October 10, 2013. Second, the Defendant has not asserted a meritorious defense in their Motion for the Set Aside of Entry of Default as the extremely negligent oversight on the part of Defendant and her insurance agent and/or liability insurance carrier is inexcusable under the entirety of all the circumstances, and the losing of a summons and complaint within a corporation has specifically been

determined in Roche V. Young Brothers not be grounds to set aside a default judgment.

Thirdly, the Plaintiff would be inherently prejudiced if relief is granted in that, unlike the Defendant, he has fully and completely complied with all of the Rules of Civil Procedure.

Accordingly, Plaintiff respectfully requests that this Court uphold the entry of default.

  
\_\_\_\_\_  
John Carrigg  
Carrigg Law Firm  
137 E. Butler Street, Ste. 6  
Lexington, S.C. 29072  
(803) 785-5511 (telephone)  
(803) 785-5513  
Attorney for Plaintiff

Lexington, South Carolina  
October 16, 2013



**ORIGINAL**

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
 ) ELEVENTH JUDICIAL CIRCUIT  
 COUNTY OF LEXINGTON )  
 2013 OCT 28 A 3:51 Case Number: 13-CP-32-01368  
 Ronald Lee Cooper, )  
 )  
 Plaintiff, )  
 )  
 vs. ) ORDER DENYING DEFENDANT'S  
 ) MOTION TO SET ASIDE  
 ) ENTRY OF DEFAULT  
 )  
 Rebecca Sue Fischer, )  
 )  
 )  
 Defendant. )  
 \_\_\_\_\_ )

BEVERLY D. CARRIGG  
 CLERK OF COURT  
 LEXINGTON, SC

This matter came before the Court pursuant to Defendant's Motion to Set Aside that Entry of Default previously filed in this case. A hearing was held before the Court on October 17, 2013 with the Plaintiff being represented by John Carrigg, Esquire and Defendant being represented by Bradley Lanford, Esquire.

**BACKGROUND FACTS**

Plaintiff Ronald Lee Cooper (Plaintiff) filed the referenced lawsuit on April 18, 2013 with the Lexington County Clerk of Court and properly served it upon Rebecca Sue Fischer (Defendant) on May 31, 2013. The defendant does not dispute that she was served nor did she respond to Plaintiff's Complaint within thirty days of service of the suit papers as required by Rule 12 SCRPC. Thereafter, the Clerk of Court for Lexington County filed an entry of default against the Defendant on August 28, 2013 following the procedure set forth in Rule 55(a) SCRPC. On October 10, 2013, the Clerk of Court received and filed Defendant's Motion to Set Aside the Entry of Default. In support of its Motion, the Affidavit of the Defendant was also submitted along with a Memorandum in Support of the Motion to Set Aside the Entry of Default. At the hearing on October 17,

*JRC* 47

2013, the Plaintiff also submitted a Memorandum in Opposition to Plaintiff's Motion To Set Aside the Default.

### FINDINGS OF FACT

- 1) The Summons and Complaint was filed with the Lexington County Clerk of Court on April 18, 2013. The complaint was filed as a result of an automobile/motorcycle accident between the Plaintiff and Defendant, which occurred on April 24, 2010.
- 2) The Defendant was properly served with the Summons and Complaint on May 31, 2013 at the Lexington County Sheriff's Office located at 521 Gibson Road, Lexington, S.C.
- 3) Per the Affidavit of the Defendant, she shortly thereafter carried the Summons and Complaint to her insurance agency, Wise Insurance Agency.
- 4) Per the Affidavit of the Defendant and documents in the record, the Wise Agency then attempted to fax the Summons and Complaint to the liability carrier, Travelers Insurance Company.
- 5) Travelers Insurance Company however denies ever receiving the said Summons and Complaint.
- 6) The Defendant did not serve any answer or responsive pleading upon the Plaintiff within the thirty day requirement of Rule 12 SCRPC and nor did any attorney on her behalf. Consequently, she is in default.

SOP 48

- 7) The Plaintiff made application for an Entry of Default and Damages Hearing with the Honorable Thomas A. Russo, Presiding Judge of the Eleventh Judicial Circuit on July 26, 2013.
- 8) The Honorable Thomas A. Russo signed the Order for Entry of Default on August 5, 2013 and the Entry of Default was thereafter entered by the Lexington County Clerk of Court on August 28, 2013.
- 9) A Default and Damages Hearing was subsequently scheduled by the Lexington County Clerk of Court for October 17, 2013.
- 10) Defendant was served with the Notice of a Default and Damages Hearing on October 4, 2013.
- 11) Defendant filed the Motion to Set Aside the Entry of Default with Supporting Memorandum and attachments with the Lexington County Clerk of Court on October 10, 2013.
- 12) Plaintiff filed its Memorandum in Opposition to Plaintiff's Motion to Set Aside Entry of Default on October 17, 2013 at the time of the previously scheduled Default and Damages Hearing before the Honorable Eugene C, Griffith, Jr.

#### CONCLUSIONS OF LAW

Under South Carolina law, the standard for granting relief from an entry of default under Rule 55(c) is "good cause". Sundown Operating Co., Inc. v. Intedge Industries, Inc., 681 S.E.2d 885 (2009). In order to meet this standard, the party seeking relief from an entry of default must "provide an explanation for the default and give reasons why vacation of the default entry would serve the

interest of justice". Id. The trial court must then upon putting forth a satisfactory explanation for the default by the party seeking the relief consider these three factors: 1) the timing of the defendant's motion for relief; 2) whether the defendant has a meritorious defense; and 3) the degree of prejudice to the Plaintiff if relief is granted. Id. The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support in the record for a finding of the lack of good cause. A motion under Rule 55 (c) to set aside an entry of default or deny same is addressed to the sound discretion of the trial court. Id.

It is apparent from the Affidavit filed by the Defendant and its other supporting documentation in support of its Motion that the subject summons and Complaint were misplaced and/or lost by either the insurance agency or the liability insurance carrier. Therefore, the Defendant and/or the Defendant's agents simply failed to give this matter the proper attention which needs to be given to a properly served Summons and Complaint. Specifically, under Roche v. Young Brothers, 318 S.C. 207, 456 S.E. 2d 897, 900, "[l]osing a summons and complaint within the corporation is not a ground to set aside a default judgment". Likewise, under Sundown Operating Co., Inc., supra 681 S.E. 2d at 889, negligent handling or oversight of a properly served Summons and Complaint, by either the defendant or the defendant's agents, does not constitute "good cause" to justify setting aside an entry of default. This rule holds whether the failure to file an answer or other responsive pleading is the result of the Defendant's own mishandling of the suit papers or is the result of errors by the

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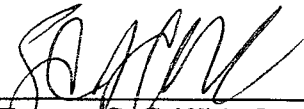
Defendant's insurance agents or attorneys whose actions are imputed to the defendant. Id.

2013 OCT 28 A 8:57  
BETTY S. BRADSHAW  
CLERK OF COURT  
LEXINGTON, SC.

In this case, it is apparent that neither the Defendant nor her insurance agent followed up to confirm that the liability insurance carrier, Travelers Insurance Company, had received the Summons and Complaint and/or to check on the status of the matter until the Defendant received notice of the default and damages hearing. Based on these facts and circumstances, a satisfactory explanation as to why an answer was not timely filed and "good cause" to grant the Defendant's Motion is absent. Specifically, the Defendant's Motion for relief from default was filed with the Clerk of Court on October 10, 2013, one hundred twenty-two (122) days after the Defendant was served with the Summons and Complaint. Therefore, having considered the entirety of the circumstances, the Court finds that the Defendant has not established a "good cause" to set aside the entry of default.

Based on the Findings of Fact, Conclusion of Law, and Discussion as set forth hereinabove, the Court has determined and orders that Defendant's Motion to Set Aside the Entry of Default is denied because good cause does not exist for allowing Defendant relief as required by Rule 55(c), SCRPC.

AND IT IS SO ORDERED.

  
\_\_\_\_\_  
Eugene C. Griffith, Jr.  
Presiding Judge, 11<sup>th</sup> Judicial Circuit

Oct 23, 2013  
Lexington, S.C.

SEM 51

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )

**AGREEMENT AND COVENANT  
NOT TO EXECUTE**

FOR AND IN CONSIDERATION OF the sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars, paid by or on behalf of Rebecca Fischer, her heirs, personal representatives, and assigns, and The Travelers Home and Marine Insurance Company (hereinafter referred to as "covenantees"), the receipt of which is hereby acknowledged, I, Ronald Cooper, do personally discharge, to the extent of the monies herein paid, the said covenantees, their heirs, personal representatives, successors and assigns, under the terms and conditions hereinafter set forth, while reserving any and all rights that I may have to make claims or institute actions against covenantees in order to collect underinsured motorist coverage benefits from any policy or policies under which such coverage is or may be available to me.

I agree that I will not assert any claim against the personal assets of covenantees and that I will refrain and desist from any attempts to satisfy any judgment I might obtain against covenantees from personal assets by levy or any other means and that I will only look to underinsured motorist coverage as a source of satisfaction of any claim asserted or judgment obtained arising from injuries or damage to person or property as a result of a motor vehicle accident that occurred on or about April 24, 2010 in Lexington County, more fully described in a lawsuit filed in Lexington County with civil action number 2013-CP-32-1368.

It is understood that covenantees expressly deny any negligence on their part causing or contributing to said incident and any liability therefor, and that this agreement and covenant is entered into for the purpose of preserving the personal assets of the said covenantees while at the same time preserving any and all of our rights to collect in any manner, including direct actions

against the underinsured motorist carriers, underinsured motorist coverage benefits which may be available to us as a result of said accident.

When any of the following events occurs, this agreement shall be deemed a full and unconditional release and discharge of covenantees from any and all claims, actions, and causes of action of any kind whatsoever on account of our bodily injuries and/or property damage, known and unknown, which have resulted or may in the future develop from the aforementioned incident:

(a) Settlement of my claim for underinsured motorist insurance coverage, and receipt of payment; or

(b) Adjudication that I am entitled to recover underinsured motorist coverage, and receipt of payment; or

(c) Adjudication that I am not entitled to recover underinsured motorist coverage proceeds; or

(d) Expiration of a period of three (3) years after payment of the consideration paid under this agreement, provided that if, prior to the end of that period, I have obtained a judgment against covenantees arising out of the aforementioned incident and have commenced an action against the underinsured motorist carrier on such judgment, the period shall be extended until such time as a final judgment is rendered in said action.

If a judgment against covenantees arising out of the aforementioned incident has been entered prior to the occurrence of any of the foregoing events, I will satisfy it when any one of those events occurs and will at that time file with the appropriate clerk of court such certificate as may be necessary to procure the entry of satisfaction of such judgment upon the public records.

Subject to the foregoing, I may cause to be enrolled or otherwise entered up any judgment against covenantees in an amount not in excess of the total of the amount of the consideration being paid under this agreement (including the additional amount of liability coverage that is available but not being paid) and the amount of the underinsured motorist coverage proceeds claimed to be available. I agree to promptly satisfy the judgment with respect to the amount of the consideration being paid under this agreement and the amount of unpaid liability insurance proceeds, and will file a certification of such partial satisfaction with the clerk of court in whose office the judgment is enrolled. If a judgment against covenantees in excess of that amount is enrolled, I will promptly satisfy the judgment with respect to such excess and will file a certification of such partial satisfaction with the clerk of court in whose office the judgment is enrolled.

This agreement shall constitute a release of any lien upon property that may otherwise arise by reason of entry of a judgment against covenantees and the clerk of court of any county in whose office any such judgment is enrolled is authorized and directed to note the release of all such liens. I will file such certification with the clerk or do such other things that may be necessary to effectuate such release.

The gender and number used herein shall apply with the same effect whether the masculine, feminine, neuter, singular, or plural is called for.

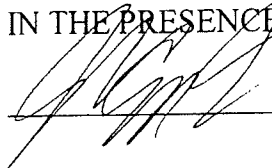
This agreement and covenant not to execute shall be binding upon me, my heirs, personal representatives, assigns, and all other persons claiming or who may claim through them.

I expressly represent and warrant that I have consulted with an attorney and understand the effect of the matters herein agreed to and that no statements or representations made by any

of the covenantees or his agents or representatives have influenced me or induced me to execute and deliver this agreement.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 3 day of January, 2014.

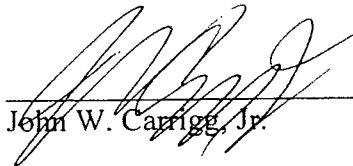
IN THE PRESENCE OF:

  
\_\_\_\_\_

Ronald Cooper  
Ronald Cooper

As attorney for Ronald Cooper, I hereby warrant that any valid, outstanding liens, subrogation claims, or assignments applicable to the aforementioned settlement proceeds, including any claims from Medicare or Medicaid, shall be paid from the proceeds of this settlement in full, or in such lesser amounts as may be agreed upon or adjudicated.

1/3/14  
DATE

  
John W. Carrigg, Jr.

**COPY**

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

CIVIL ACTION NO: 2013-CP-32-1368

Ronald Lee Cooper,

Plaintiff

vs.

Rebecca Sue Fischer,

Defendant.

**NOTICE OF APPEARANCE**

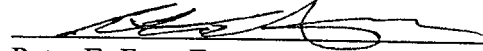
**TO: JOHN W. CARRIGG, JR., ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND TO THE PLAINTIFF ABOVE NAMED:**

The undersigned, as attorney for Progressive Northern Insurance Company , hereby notify and advise this Court, the parties above-named and their attorneys, that they are appearing on behalf of Progressive Northern Insurance Company , an insurance carrier which is alleged to provide underinsured motorist coverage to one or more parties to this action and that, in making this appearance, Progressive Northern Insurance Company specifically preserves and does not waive any rights pursuant to its policy of insurance including, but not limited to, the applicability of underinsured motorist coverage to this action and further intends to preserve all rights which it may have pursuant to Code Section 38-77-160 (1976 as amended).

*(Signature on following page)*

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



Peter E. Farr, Esq.

4406-B Forest Drive

PO Box 6648

Columbia, South Carolina 29260

(803) 782-4100

**Attorneys for Progressive Northern  
Insurance Company**

January 30, 2014

STATE OF SOUTH CAROLINA )

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON )

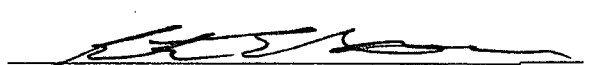
Ronald Lee Cooper, )  
 Plaintiff )

CASE NO.  
2013-CP-32-1368

v. )

MOTION AND ORDER INFORMATION  
FORM AND COVER SHEET

Rebecca Sue Fischer, )  
 Defendant. )

Plaintiff's Attorney: John W. Carrigg, Jr., Esq., Bar No. Address: 137 East Butler Street, Ste. 6, Lexington, SC phone: 785-5511 fax: e-mail:            other:	Defendant's Attorney: Peter E. Farr, Esq., Bar No. 73658 Address: P.O. Box 6648, Columbia, SC 29260 phone: 803-782-4100 fax: 803-782-4140 e-mail: pfarr@murphygrantland.com other:
<input checked="" type="checkbox"/> <b>MOTION HEARING REQUESTED</b> (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> <b>FORM MOTION, NO HEARING REQUESTED</b> (complete SECTIONS II and III) <input type="checkbox"/> <b>PROPOSED ORDER/CONSENT ORDER</b> (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b>	
Nature of Motion: Motion to Dismiss or in the Alternative for Summary Judgment Estimated Time Needed: 15 minutes Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b>	
<input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
 Signature of Attorney for <input type="checkbox"/> Plaintiff / <input checked="" type="checkbox"/> Defendant	January 30, 2014 Date submitted
<b>SECTION III: Motion Fee</b>	
<input checked="" type="checkbox"/> PAID – AMOUNT: \$25.00 <input type="checkbox"/> EXEMPT: <input type="checkbox"/> Rule to Show Cause in Child or Spousal Support (check reason) <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRCP) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: <input type="checkbox"/> Other:	
<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other:	_____ JUDGE  CODE: _____ Date: _____
<b>CLERK'S VERIFICATION</b>	
Date Filed: _____ Collected by: _____	
<input type="checkbox"/> MOTION FEE COLLECTED: _____ <input type="checkbox"/> CONTESTED – AMOUNT DUE: _____	

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS  
CIVIL ACTION NO: 2013-CP-32-1368

Ronald Lee Cooper,

**PROGRESSIVE NORTHERN INSURANCE  
COMPANY'S MOTION TO DISMISS OR IN  
THE ALTERNATIVE FOR SUMMARY  
JUDGMENT**

Plaintiff

vs.

Rebecca Sue Fischer,

Defendant.

**TO: JOHN W. CARRIGG, JR., ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND  
TO THE PLAINTIFF ABOVE NAMED:**

YOU WILL PLEASE TAKE NOTICE that Progressive Northern Insurance Company, the purported underinsured motorist carrier in the above-captioned matter, hereby immediately moves for an order dismissing, or in the alternative granting summary judgment, as to the Plaintiff's claim for underinsured motorist benefits on the grounds that Plaintiff's claim against the Defendant has been previously adjudicated in favor of the Plaintiff and that said adjudication occurred prior to any notice by the Plaintiff to Progressive Northern Insurance Company as the purported underinsured motorist carrier. As set forth below, Progressive would show that any claim for UIM coverage was extinguished by Plaintiff's failure to timely serve it with the pleadings in this case as required by South Carolina law.

**BACKGROUND**

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 and the case was set for a damages hearing. 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. (Covenant Not To Execute, attached as Exhibit A.)

*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 now files its Notice of Appearance along with this Motion to Dismiss or in the Alternative for Summary Judgment. The basis for the motion is 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 has UIM coverage through Progressive with policy limits of \$25,000 per person, \$50,000 per accident, and \$25,000 for property damage. Having settled with Defendant Fischer and Travelers, Plaintiff now seeks UIM coverage under Progressive's policy. Progressive is entitled to dismissal of this action because under South Carolina law, 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.

### ARGUMENT

#### **I. Plaintiff's UIM claim is waived under section 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. . . .

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 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.

**III. Even if the default is set aside (which motion filed by Defendant has already been denied), Plaintiff cannot establish entitlement to UIM benefits under section 38-77-160.**

Even if the default is set aside, Plaintiff cannot comply with the requirements of section 38-77-160. Before serving Progressive, Plaintiff chose to settle with Fischer and Travelers for \$25,000 while using its favorable bargaining position in enforcing the default. This effectively ended the case. It does not matter that Plaintiff may have protected his UIM claim in the settlement documents. Plaintiff's claim against Progressive is not a claim for liability, but a claim for UIM coverage. Having settled with Fischer, this action can no longer serve to establish liability, but relates only to the amount of damages for purposes of determining the amount of benefits to which Plaintiff is entitled.

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). The defendant cannot waive an UIM carrier's right to a jury trial, since after settlement, the defendant no longer has a genuine stake in the outcome. Id. at 341, 61 S.E.2d at 48. An UIM carrier does not have an attorney-client relationship with the underinsured defendant. Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003). The purpose of allowing the UIM

carrier to “step into the shoes” of the defendant is only to determine coverage under its policy. Id. at 398, 589 S.E.2d at 209.

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. The court noted that a liability claim could not be brought because the statute of limitations had run. Id.

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 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.

### CONCLUSION

Progressive respectfully submits that Plaintiff's claim for UIM coverage is not proper under South Carolina law. Plaintiff failed to serve Progressive until after liability had already been established and Plaintiff had begun execution on the judgment. 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 is entitled to a dismissal of this action.

Moreover, Progressive Northern Insurance Company will rely upon the pleadings which have been filed in this matter, correspondence, affidavits, and any and all other evidence and materials properly accepted by the Court at the time of this hearing. Progressive Northern Insurance Company will also rely upon the South Carolina statutory scheme pertaining to underinsured motorist claims as well as any and all case law interpreting that statutory scheme.

*(signature on following page)*

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

---

Peter E. Farr, Esq.  
4406-B Forest Drive  
PO Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
**Attorneys for Progressive Northern  
Insurance Company**

January 30, 2014

STATE OF SOUTH CAROLINA )  
 )  
COUNTY OF LEXINGTON )

AGREEMENT AND COVENANT  
NOT TO EXECUTE

FOR AND IN CONSIDERATION OF the sum of Twenty-Five Thousand and No/100 (\$25,000.00) Dollars, paid by or on behalf of Rebecca Fischer, her heirs, personal representatives, and assigns, and The Travelers Home and Marine Insurance Company (hereinafter referred to as "covenantees"), the receipt of which is hereby acknowledged, I, Ronald Cooper, do personally discharge, to the extent of the monies herein paid, the said covenantees, their heirs, personal representatives, successors and assigns, under the terms and conditions hereinafter set forth, while reserving any and all rights that I may have to make claims or institute actions against covenantees in order to collect underinsured motorist coverage benefits from any policy or policies under which such coverage is or may be available to me.

I agree that I will not assert any claim against the personal assets of covenantees and that I will refrain and desist from any attempts to satisfy any judgment I might obtain against covenantees from personal assets by levy or any other means and that I will only look to underinsured motorist coverage as a source of satisfaction of any claim asserted or judgment obtained arising from injuries or damage to person or property as a result of a motor vehicle accident that occurred on or about April 24, 2010 in Lexington County, more fully described in a lawsuit filed in Lexington County with civil action number 2013-CP-32-1368.

It is understood that covenantees expressly deny any negligence on their part causing or contributing to said incident and any liability therefor, and that this agreement and covenant is entered into for the purpose of preserving the personal assets of the said covenantees while at the same time preserving any and all of our rights to collect in any manner, including direct actions

against the underinsured motorist carriers, underinsured motorist coverage benefits which may be available to us as a result of said accident.

When any of the following events occurs, this agreement shall be deemed a full and unconditional release and discharge of covenantees from any and all claims, actions, and causes of action of any kind whatsoever on account of our bodily injuries and/or property damage, known and unknown, which have resulted or may in the future develop from the aforementioned incident:

- (a) Settlement of my claim for underinsured motorist insurance coverage, and receipt of payment; or
- (b) Adjudication that I am entitled to recover underinsured motorist coverage, and receipt of payment; or
- (c) Adjudication that I am not entitled to recover underinsured motorist coverage proceeds; or
- (d) Expiration of a period of three (3) years after payment of the consideration paid under this agreement, provided that if, prior to the end of that period, I have obtained a judgment against covenantees arising out of the aforementioned incident and have commenced an action against the underinsured motorist carrier on such judgment, the period shall be extended until such time as a final judgment is rendered in said action.

If a judgment against covenantees arising out of the aforementioned incident has been entered prior to the occurrence of any of the foregoing events, I will satisfy it when any one of those events occurs and will at that time file with the appropriate clerk of court such certificate as may be necessary to procure the entry of satisfaction of such judgment upon the public records.

Subject to the foregoing, I may cause to be enrolled or otherwise entered up any judgment against covenantees in an amount not in excess of the total of the amount of the consideration being paid under this agreement (including the additional amount of liability coverage that is available but not being paid) and the amount of the underinsured motorist coverage proceeds claimed to be available. I agree to promptly satisfy the judgment with respect to the amount of the consideration being paid under this agreement and the amount of unpaid liability insurance proceeds, and will file a certification of such partial satisfaction with the clerk of court in whose office the judgment is enrolled. If a judgment against covenantees in excess of that amount is enrolled, I will promptly satisfy the judgment with respect to such excess and will file a certification of such partial satisfaction with the clerk of court in whose office the judgment is enrolled.

This agreement shall constitute a release of any lien upon property that may otherwise arise by reason of entry of a judgment against covenantees and the clerk of court of any county in whose office any such judgment is enrolled is authorized and directed to note the release of all such liens. I will file such certification with the clerk or do such other things that may be necessary to effectuate such release.

The gender and number used herein shall apply with the same effect whether the masculine, feminine, neuter, singular, or plural is called for.

This agreement and covenant not to execute shall be binding upon me, my heirs, personal representatives, assigns, and all other persons claiming or who may claim through them.

I expressly represent and warrant that I have consulted with an attorney and understand the effect of the matters herein agreed to and that no statements or representations made by any

of the covenantees or his agents or representatives have influenced me or induced me to execute and deliver this agreement.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 3 day of

January, 2014.

IN THE PRESENCE OF:

[Signature]

Ronald Cooper  
Ronald Cooper

[Signature]

As attorney for Ronald Cooper, I hereby warrant that any valid, outstanding liens, subrogation claims, or assignments applicable to the aforementioned settlement proceeds, including any claims from Medicare or Medicaid, shall be paid from the proceeds of this settlement in full, or in such lesser amounts as may be agreed upon or adjudicated.

1/3/14  
DATE

[Signature]  
John W. Carrigg, Jr.

ORIGINAL

# 7

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.

**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

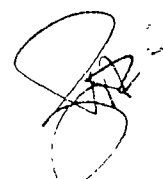
Agreement and Covenant Not To Execute with payment of \$25,000. The settlement documents were executed on January 3, 2014.

*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

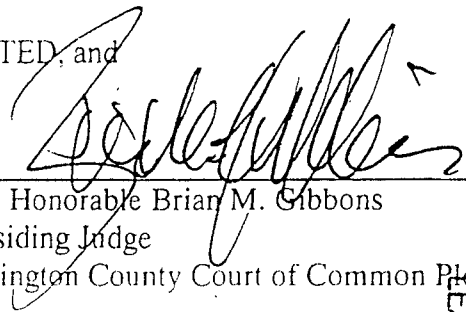


longer be brought because liability has already been established by means of the Order of default and ensuing settlement. Under Williams, this claim for UIM benefits is barred.

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

FILED )

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

COUNTY OF LEXINGTON

COPY

2014 MAR 21 PM 3:19

CASE NO.: 2013-CP-32-1368

RONALD LEE COOPER

BETH A. CARRIGG  
Plaintiff  
CLERK OF COURT  
LEXINGTON, SC

MOTION AND ORDER INFORMATION  
FORM AND COVERSHEET

vs.

REBECCA SUE FISCHER

Defendant.

Plaintiff's Attorney: <u>John Carrigg, Bar No. 0015239</u> Address: <u>137 E. Butler Street, Ste. 6, Lexington, S.C. 29072</u> Phone: <u>(803) 785-5511</u> Fax <u>(803) 785-5513</u> E-mail: <u>jcarrigg@carrigglaw.com</u> Other: _____	Defendant's Attorney: _____, Bar No. _____ Address: _____ Phone: _____ Fax _____ E-mail: _____ Other: _____
<input checked="" type="checkbox"/> MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III) <input type="checkbox"/> FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III) <input type="checkbox"/> PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)	
<b>SECTION I: Hearing Information</b> Nature of Motion: <u>MOTION TO RECONSIDER OR ALTER AND AMEND</u> Estimated Time Needed: <u>15 minutes</u> Court Reporter Needed: <input checked="" type="checkbox"/> YES / <input type="checkbox"/> NO	
<b>SECTION II: Motion/Order Type</b> <input checked="" type="checkbox"/> Written motion attached <input type="checkbox"/> Form Motion/Order I hereby move for relief or action by the court as set forth in the attached proposed order.	
Signature of Attorney for <input checked="" type="checkbox"/> Plaintiff / <input type="checkbox"/> Defendant <span style="float: right;"><u>March 21, 2014</u> Date submitted</span>	
<b>SECTION III: Motion Fee</b> <input checked="" type="checkbox"/> PAID - AMOUNT: \$ <u>25.00</u> <input type="checkbox"/> EXEMPT: (check reason)	
<input type="checkbox"/> Rule to Show Cause in Child or Spousal Support <input type="checkbox"/> Domestic Abuse or Abuse and Neglect <input type="checkbox"/> Indigent Status <input type="checkbox"/> State Agency v. Indigent Party <input type="checkbox"/> Sexually Violent Predator Act <input type="checkbox"/> Post-Conviction Relief <input type="checkbox"/> Motion for Stay in Bankruptcy <input type="checkbox"/> Motion for Publication <input type="checkbox"/> Motion for Execution (Rule 69, SCRPC) <input type="checkbox"/> Proposed order submitted at request of the court; or, reduced to writing from motion made in open court per judge's instructions Name of Court Reporter: _____ <input type="checkbox"/> Other: _____	
<b>JUDGE'S SECTION</b> <input type="checkbox"/> Motion Fee to be paid upon filing of the attached order. <input type="checkbox"/> Other: _____	JUDGE CODE _____ Date: _____
<b>CLERK'S VERIFICATION</b> Collected by: _____ Date Filed: _____ <input type="checkbox"/> MOTION FEE COLLECTED: \$ _____ <input type="checkbox"/> CONTESTED - AMOUNT DUE: \$ _____	

STATE OF SOUTH CAROLINA ) IN THE COURT OF COMMON PLEAS  
COUNTY OF LEXINGTON ) FIFTH JUDICIAL CIRCUIT

2014 MAR 21 PM 3:19  
BETH A. CARRIGO  
CLERK OF COURT  
LEXINGTON, SC

Case Number: 13-CP-32-1368

Ronald Lee Cooper,

Plaintiff,

vs.

Rebecca Sue Fischer,

Defendant.

**MOTION TO RECONSIDER  
OR ALTER AND AMEND  
PURSUANT TO RULE 59(e)**

Plaintiff in this matter moves before the court pursuant to Rule 59(e) SCRPC for reconsideration or to alter and amend its order dismissing the action against the Underinsured Carrier (hereinafter "Carrier").

The UIM Carrier asserts that Ex Parte Allstate Insurance Company, 339 S.C. 202, 528 S.E.2d 679 (Ct. App. 2000), is controlling in this case. However, the facts of the two cases are in no way similar. In Ex Parte Allstate, the Plaintiff filed the lawsuit, served the Defendant and tried the case to a verdict. In that case the Jury returned a verdict of \$36,697.00 and the Liability Carrier had limits of \$15,000.00. The Plaintiff then served the UIM carrier for the first time *after* the verdict and sought to compel payment of the entire limits of coverage under the UIM policy. In the instant case, no verdict has been entered. The UIM Carrier relies on the position that because a default had been entered it is tantamount to a verdict. Nothing could be further from the truth. Rule 55, SCRPC specifically states that entry of default under subsection (a) is different than a default judgment under subsection (b). Further there are two entirely different standards for relief from entry of default and relief from a default judgment. See SCRPC 55(c). To set aside a default judgment our courts have held under Rule 60(b), the trial

judge should consider the following relevant factors: (1) the promptness with which relief is sought, (2) the reasons for the failure to act promptly, (3) the existence of a meritorious defense, and (4) the prejudice to the other parties. Tobias v. Rice, 379 S.C. 357, 366, 665 S.E.2d 216, 221 (Ct.App.2008); [380 S.C. 574] Micronics, Inc. v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E.2d 223, 226 (Ct.App.2001); Hill v. Dotts, 345 S.C. 304, 309, 547 S.E.2d 894, 897 (Ct.App.2001); New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E.2d 377, 378 (Ct.App.1993). On the other hand to set aside an entry of default (which is the case here) our courts have held that the court should employ the "good cause" standard, not the more rigorous standard of "excusable neglect," a standard used under Rule 60(b). To determine whether a party may be relieved from an entry of default the court should consider the following factors: (1) the timing of defendant's motion for relief; (2) whether defendant has a meritorious defense; and (3) the degree of prejudice to plaintiff if relief is granted. Wham v. Shearson Lehman Bros., Inc., 381 S.E.2d 499, 298 S.C. 462 (S.C. App. 1989)

In fact Plaintiff would urge the Court to reexamine the procedural history very carefully in the instant case which should reveal to the Court exactly why the UIM Carrier's position is flawed.

Firstly, in the instant case, when Plaintiff served the Defendant he received no response for Defendant. The default was entered (which is entirely different than a Default Judgment), however no default damages hearing was ever held. When the case was filed and served and the default was entered Plaintiff had no information at that time as to what the liability limits were and in fact had no way of knowing if he even had a potential claim for UIM benefits. For example, if the Defendant had \$50,000.00 or

\$100,000.00 in liability coverage, there would not have been a valid basis for an UIM claim. It was not until after the hearing on the motion to be relieved from default that Plaintiff was informed *for the first time* that Defendant had limits of only \$25,000.00. After being informed of the limits of liability coverage, the Plaintiff was able to negotiate a settlement of the case based upon the Defendant paying the liability limits in exchange for a covenant. At that point, and at no point prior to that time, did Plaintiff become aware that he had a claim for UIM benefits. Carrier's position that all Plaintiffs are required to serve the UIM Carrier at the time they serve the Defendant defies logical thinking in that when a Plaintiff brings a lawsuit they are generally unaware of what the limits of liability are under the Defendant's insurance policy. It is not until Plaintiff receives notification through discovery of what the liability limits are that he can assess whether or not he feels his claim exceeds the amount of coverage available. Otherwise, Plaintiff could in fact be making a frivolous claim if he just automatically made a UIM claim. For example, if in a typical wreck case the Plaintiff has \$10,000.00 in medicals but no permanent injury and the Defendant has limits of \$100,000.00, then it would be almost impossible for the Plaintiff, under any reasonable circumstances, to exhaust the available liability limits. Almost all prudent and experienced attorneys would not under that circumstance put UIM on notice.

Secondly, in the Order the Court states that Plaintiff "settled with Fischer without consenting to set aside the default." That is inaccurate. In fact Plaintiff's attorney stated at the hearing that he would consent to the motion to set aside the default because it is Plaintiff's opinion that under Broome v. Watts, 319 S.C. 337, 61 S.E.2d 46 (1995), the UIM Carrier has a right to assert relief from default separate and distinct from that of

Fischer. The Broome case stands for the proposition that a UIM carrier has the right to defend the case and is not bound by the agreements or the follies of the actual Defendant. In this case the Defendant Fischer allowed her case to go in default; however Broome is clear that the UIM carrier is not bound by that. In Broome the Defendant settled with Plaintiff for the liability limits and agreed to waive a trial by jury. The Supreme Court ruled that the UIM carrier had rights separate and distinct from those of the actual Defendant and the Carrier could *assert* those rights regardless of an agreement made by the named Defendant with the Plaintiff. If one applies that same logic to this case the UIM Carrier would have the right, separate and distinct from Defendant Fischer to be relieved from default. However, the UIM Carrier has ignored that right and instead seeks to dismiss the entire action as opposed to asserting the rights that they have. The UIM Carrier should not be rewarded for their own failure to assert rights that the law plainly and unambiguously provides them.

Further, the Order states “Plaintiff cannot now set aside the very Order upon which the settlement was based and retry the case for UIM purposes.” However, that statement is in direct contradiction to the holding of our Supreme Court in Broome where they clearly said that the UIM carrier has separate and distinct right from the actual defendant. As stated by Plaintiff’s counsel at the hearing on this motion, we agree to consent to set aside the default if Carrier will file the motion, which is the appropriate motion to make under these circumstances. Again, the UIM Carrier should not be rewarded for their own failure to assert rights that the law plainly and unambiguously provides them, which is exactly what they seek to do here.

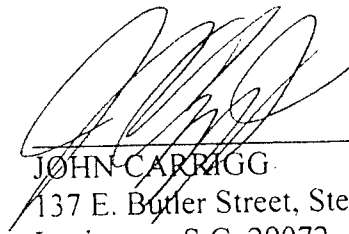
Finally, the UIM Carrier asserts that this case is governed by Williams v. Selective Insurance Company, 315 S.C. 532, 446 S.E.2d 402 (S.C. 1994), however, the facts of that case are entirely different from this instant case. In Williams the Plaintiff negotiated with the liability carrier and settled the case with them on a covenant. Plaintiff then let the statute of limitations run and *after* the statute ran he filed an action against the defendant and served the UIM carrier. The Supreme Court in that case simply said you let the statute of limitations run and you now cannot bring any claim against the actual Defendant and therefore you cannot bring a claim for UIM coverage. While I actually believe that Williams failed to recognize the doctrine of Promissory Estoppel (which was entirely overlooked by the lawyers and the Court) still that case is not "controlling" under the fact scenario at bar. Here, Plaintiff brought his claim within the statute of limitations. As stated by our Supreme Court in Ex Parte The South Carolina Farm Bureau Insurance Company, 314 S.C. 487, 431 S.E.2d 252 (S.C. 1993), the UIM statute (S.C. Code section 38-77-160), is a *notice* statute and *not a statute of limitations*. In Ex Parte Farm Bureau the Plaintiff filed the action and served the Defendant within the statute of limitations but did not serve the UIM carrier until after the statute had expired. The UIM Carrier moved to dismiss because they were not served within the statute of limitations, much like the Carrier in this matter asserts, however the Supreme Court emphatically stated that the UIM statute was not a statute of limitations but a notice statute and remanded the case for trial

In conclusion, the controlling case law in this matter is set forth in Broome not Ex-Parte AllState. Plaintiff concedes that under Broome, the UIM Carrier is not bound by the default of the actual Defendant and is entitled to defend the case, as the UIM

Carrier has rights separate and distinct from those of the actual Defendant. Plaintiff would therefore consent to a motion to set aside the default. However, this instant case differs greatly from Ex-Parte Allstate in that no jury verdict or default judgment was ever entered against the actual Defendant in that the actual Defendant voluntarily settled Plaintiff's claim against her on a Covenant Not to Execute for the policy limits of \$25,000.00. It was not until that time that Plaintiff first became aware that he had a potential UIM claim. The UIM Carrier is not now prejudiced by Plaintiff bringing the UIM claim in that, per Broome, the UIM Carrier can now defend against this action anew without being bound by the actual Defendant's default and subsequent decision to settle the claim against her, rather than await a default judgment hearing. Further, as South Carolina Farm Bureau makes clear, the UIM statute (S.C. Code Section 38-77-160) is a notice statute and not a Statute of Limitations. Therefore, given that the actual Defendant was properly served within the applicable Statute of Limitations, and further given that the UIM Carrier would be allowed to pursue their defense of this claim anew, without regard to the default of the actual Defendant and her subsequent decision to settle this claim with the Plaintiff prior to a default judgment hearing, the UIM Carrier has not been prejudiced in any way by the fact that it was not served until after Plaintiff first would have been able to determine that he has a potential UIM claim. In fact, it would have been premature and illogical for the Plaintiff to have filed the UIM claim prior to him determining the viability of such a claim against the UIM Carrier.

Plaintiff therefore respectfully requests that this Court reconsider its decision to grant the UIM Carrier a dismissal of the Plaintiff's action, reverse that decision and place this action back on the docket for trial.

Respectfully submitted,



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(803) 785-5513 (fax)  
[jcarrigg@carrigglaw.com](mailto:jcarrigg@carrigglaw.com)  
ATTORNEY FOR PLAINTIFF

3/21, 2014  
Lexington, S.C.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

CIVIL ACTION NO: 2013-CP-32-1368

Ronald Lee Cooper,

Plaintiff

vs.

Rebecca Sue Fischer,

Defendant.

**PROGRESSIVE NORTHERN INSURANCE  
COMPANY'S MEMORANDUM IN  
OPPOSITION TO PLAINTIFF'S MOTION  
TO RECONSIDER THE ORDER OF  
DISMISSAL**

**TO: JOHN W. CARRIGG, JR., ESQUIRE, ATTORNEY FOR THE PLAINTIFF AND  
TO THE PLAINTIFF ABOVE NAMED:**

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

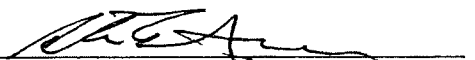
plaintiff was not entitled to UIM benefits because the plaintiff failed to preserve the UIM carrier's right to appear and defend. Id. at 205-06, 528 S.E.2d at 681.

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. Consequently, the Motion for Reconsideration should be denied.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.

  
Peter E. Farr, Esq.  
4406-B Forest Drive  
PO Box 6648  
Columbia, South Carolina 29260  
(803) 782-4100  
**Attorneys for Progressive Northern  
Insurance Company**

April 21, 2014

85

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

FILED

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO: 2013-CP-32-1368

2014 MAY -6 A 10:54

Ronald Lee Cooper,

BETH A. CARRIGG  
CLERK OF COURT  
LEXINGTON, SC

vs.

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

Rebecca Sue Fischer,

Defendant.

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

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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

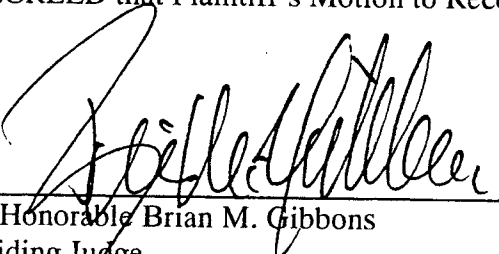
on a UIM carrier after that action has been tried would defeat the purpose of granting the UIM carrier the right to 'appear and defend.'" Id. In Ex Parte Allstate, the court held that even though the UIM carrier was served with the pleadings while post-trial motions were pending, the plaintiff was not 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.

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

4/30, 2014

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 Number: 2013-CP-32-1368

Ronald Lee Cooper..... Appellant

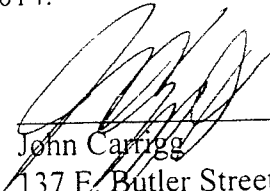
v.

Rebecca Sue Fischer..... Respondent

NOTICE OF APPEAL

Appellant Ronald Lee Cooper appeals the Circuit Court Order of the Honorable Brian M. Gibbons granting Defendant's Motion to Dismiss, dated February 28, 2014, filed with the Lexington County Circuit Court on March 7, 2014. Appellant received this written notice of entry of this Order on March 19, 2014. Appellant filed a Motion to Reconsider on March 21, 2014, and the Order Denying the Plaintiff's Motion for Reconsideration dated April 30, 2014 was filed with the Lexington County Circuit Court on May 6, 2014. Appellant received this written notice of the Order Denying the Plaintiff's Motion for Reconsideration on May 6, 2014.

May 6, 2014.

  
\_\_\_\_\_  
John Carrigg  
137 E. Butler Street, Suite 6  
Lexington, South Carolina 29072  
(803) 785-5511  
Attorney for Appellant

Other Counsel of Record:

Peter E. Farr, Esquire  
Murphy & Grantland, P.A.  
Post Office Box 6648  
Columbia, S.C. 29260  
Attorney for Respondent

**RECEIVED**

MAY 12 2014

**SC Court of Appeals**

STATE OF SOUTH CAROLINA )

COUNTY OF LEXINGTON )

COURT OF COMMON PLEAS  
2013-CP-32-01368

RONALD LEE COOPER )  
PLAINTIFF )

vs. )

TRANSCRIPT OF RECORD

REBECCA SUE FISCHER )  
DEFENDANT )

February 21, 2014  
Lexington, South Carolina

B E F O R E:

THE HONORABLE BRIAN M. GIBBONS, JUDGE.

A P P E A R A N C E S:

JOHN CARRIGG, ESQ.  
Attorney for the Plaintiff

PETER FARR, ESQ.  
Attorney for the Defendant

CAROL M. THUEME, RPR  
Official Court Reporter

I N D E X

(There were no witnesses produced.)

EXHIBITS

(There were no exhibits marked.)

1 THE COURT: The first case is Ronald Lee Cooper  
2 versus Rebecca Sue Fischer. Mr. Carrigg, Mr. Farr.

3 MR. CARRIGG: Your Honor, I'm John Carrigg. I  
4 represent the plaintiff.

5 THE COURT: Okay.

6 MR. FARR: Your Honor, Pete Farr here for  
7 Progressive.

8 THE COURT: All right. I'll be glad to hear the  
9 motion.

10 MR. FARR: Thank you, Your Honor.

11 THE COURT: Yes, sir.

12 MR. FARR: This is a case -- in the motion  
13 itself I have set forth a time line that will be helpful  
14 for reference purposes, but this is a matter from a car  
15 wreck. And the accident occurred back in April 2010.

16 The complaint was filed in April 2013 just  
17 before the statute ran. The defendant apparently failed  
18 to answer, got into default, liability carrier got  
19 involved at some point, tried to get the defendant out of  
20 default.

21 They had a hearing and the judge issued an order  
22 denying their motion to set aside entry of default so the  
23 case was in default. That order was never challenged,  
24 appealed, otherwise revoked, and so the case is in  
25 default.

1           Now it was set for a damages hearing and then  
2 the liability carrier settled the liability case based on  
3 being in default, and looking at the damages hearing they  
4 went ahead and settled and then a covenant not to execute  
5 was signed. There was never any attempt to set aside the  
6 default and that case ended.

7           And now following the covenant being signed by  
8 the plaintiff, the plaintiff went and served UIM after the  
9 other matter was over.

10           So Progressive is the UIM carrier. We filed  
11 this motion to dismiss because of their ex parte Allstate.  
12 Once liability has been established, the UIM carrier does  
13 not then have the ability to appear and defend as set  
14 forth in the statute, Section 160, or 180 rather -- and it  
15 is 160 -- and the case at this point has gotten to the  
16 point where the UIM carrier cannot -- to have the benefit  
17 of that statute, to step in, appear and defend as the  
18 statute requires, that would require a service on the UIM  
19 at the time the case is still ongoing, or setting aside  
20 the entry of default and then serving the UIM would have  
21 allowed it at that point, but instead the default remained  
22 in place.

23           The defendant has now realized that they have no  
24 potential exposure. They have no incentive to cooperate.  
25 They've already tried to get the case out of default and

1       been denied by the judge.

2               It's been a year since the case was filed, and  
3       at this point UIM is prejudiced and under ex parte  
4       Allstate this case should be dismissed because the claim  
5       is too late as to the UIM carrier.

6               THE COURT: Got it.

7               Mr. Carrigg.

8               MR. CARRIGG: Your Honor, I would argue somewhat  
9       differently in this matter.

10              One, there is no prejudice to the underinsured  
11       carrier. As I read their motion which contained some  
12       authorities, they relied on a case called Williams versus  
13       Selective Insurance saying that, you know, it's too late  
14       to bring the action.

15              Now, let's talk about exactly where this case  
16       is, because in their motion they sort of want to wash  
17       together entry of default and default judgment, and those  
18       are two very different stages.

19              Entry of default is tantamount to saying you  
20       don't get to answer, liability is admitted. A default  
21       judgment is tantamount to after the jury's rendered a  
22       verdict.

23              Now, clearly I think that they would be right if  
24       there was a default judgment entered, although I have  
25       questions based on my legal research even about that. But

1 that's not happening. No default judgment has been  
2 entered, only an entry of default.

3           What happened in this case was we filed a  
4 lawsuit; we served the defendant, had the sheriff's  
5 department serve her; waited, I don't know, 45 days or so,  
6 she never answered; sent in the default paperwork, hearing  
7 was set, sent her notice of hearing. At that point a  
8 lawyer shows up and says, hold on, we're here to represent  
9 her. They moved to set aside the default.

10           The judge finds that under the law he could not  
11 set aside the default based on the circumstances of the  
12 default. But no default -- no damages hearing has been  
13 held.

14           This is not like it's after the trial has been  
15 done. No damages hearing has been held.

16           So where they stand, if they come in, one,  
17 really they're in no position different than the case  
18 where you sue a defendant and they admit liability  
19 effectively. I mean, there's plenty of cases, a rear-end  
20 wreck case where you sue the defendant, the defendant in  
21 their answer admits liability. There is no issue as to  
22 liability, you get the case settled. Months later you  
23 serve the UIM carrier. That's the same thing.

24           I will tell you I've researched this diligently  
25 and I find it somewhat telling that nowhere in South

1 Carolina jurisprudence can I find a case that involves  
2 this issue.

3 But I will tell you what I did find. I found  
4 the case of Stanley versus Wright, which is a 1992 Supreme  
5 Court case, and although it doesn't deal with the issue  
6 directly, it really dealt more with worker's comp's  
7 exclusive benefit, what you had was a city employee who  
8 was in a wreck and injured because of the negligence of  
9 another driver.

10 In that case, he brought a case against the  
11 other driver, got a default judgment that's like after the  
12 trial is over with, then brought a DJ action to say whose  
13 underinsured motorist is supposed to pay me. And I assume  
14 they were both notified after the default judgment because  
15 there wouldn't have been a default judgment otherwise, and  
16 the Supreme Court said City of Columbia, you've got to pay  
17 uninsured motorist benefits.

18 So, I mean -- and like I said, I'm not going to  
19 tell the Court that this case directly deals with that  
20 issue head on, but it does indicate to me that our South  
21 Carolina Supreme Court when looking at the case said even  
22 after default, uninsured, which is basically the same as  
23 underinsured, must pay.

24 The case they rely on, which is Williams versus  
25 Selective Insurance, was a completely different type of

1 case. What happened in that case is the Williamses  
2 brought a claim against an at fault defendant. No lawsuit  
3 was ever filed. And they settled the claim with the  
4 carrier and signed a covenant not to execute.

5 At that point they made a claim against the  
6 underinsured coverage, but then they let the statute run  
7 on the case without settling the claim.

8 They then brought -- instead of trying -- they  
9 knew they couldn't bring a traditional case against the at  
10 fault party, so they sued Selective Insurance for bad  
11 faith. And the Court said, you know, you got to be able  
12 to bring the case before you can make your UIM claim. And  
13 so that case really is totally different factually than  
14 the case at bar.

15 THE COURT: Was the UIM carrier ever notified?  
16 I mean, in the three years prior -- this thing was filed a  
17 week or two before the statute.

18 MR. CARRIGG: Right. Well, the UIM carrier was  
19 put on notice when the liability carrier agreed to pay  
20 the -- I mean, you know, right after they agreed to pay.  
21 Matter of fact, I think before we had the final paperwork  
22 done they were put on notice.

23 THE COURT: What are your specials?

24 MR. CARRIGG: I've got about ten thousand in  
25 medicals and we had about twenty-five thousand in -- I

1 mean, the thing about it is this: Under the statute they  
2 get to step into the shoes of the defendant.

3 Now, yes, they technically are stepping in the  
4 shoes that are in default, but the fact of the matter is,  
5 is that's no different than stepping into the shoes of  
6 someone who's admitted liability for all intents and  
7 purposes. Because if the defendant admits liability, they  
8 can't -- I mean, if the defendant and their initial  
9 liability carrier lawyer admits liability, the  
10 underinsured can't come back and say, oh, we don't like  
11 that, you know. You admit liability, admit DUI, admit  
12 whatever in your answer and they say, oh, well, we want to  
13 litigate all those issues. They don't get the benefit of  
14 that.

15 But, I mean, they would have the benefit -- I  
16 understand there was a motion made by the additional  
17 liability carrier to be relieved of default, but I think  
18 they have the right to make a motion to be relieved from  
19 default. I don't see anything that would prevent them  
20 from doing that.

21 MR. FARR: Your Honor, the situation we're in is  
22 this is a suit by a plaintiff against a defendant. The  
23 UIM carrier is permitted to come in and in a defense role  
24 make arguments on behalf of the defendant, just like the  
25 issue goes to the jury as plaintiff against defendant

1 without respect to insurance coverage.

2 As to setting aside the default, that is the  
3 defendant's motion to make, and that motion has been made  
4 and denied by order. This would essentially be making  
5 that same motion again on behalf of the defendant, because  
6 that's how a UIM carrier steps in, they defend on behalf  
7 of the defendant.

8 THE COURT: Did you agree to let them out of  
9 default?

10 MR. CARRIGG: Sure.

11 MR. FARR: Well, the problem is --

12 MR. CARRIGG: Your Honor, I think they should  
13 file a motion, but I --

14 THE COURT: Right.

15 MR. FARR: But it's as I was discussing before,  
16 when you have a defendant with a liability carrier, there  
17 are incentives for that defendant to cooperate. There are  
18 incentives for that defendant to act. And those  
19 incentives have been taken away from this defendant  
20 because the defendant had a lawyer come in and request to  
21 the Court can we try this case on the merits, and the  
22 Court said no, you cannot.

23 At that point this defendant has no incentive to  
24 come in and cooperate, to come in and defend, to come in  
25 and do what would naturally happen in the course of a

1 lawsuit decided upon the merits. And the UIM provider  
2 coming in is now not able to have the benefit of that,  
3 which if the UM provided had been served at the time the  
4 lawsuit was commenced like they should have been, then the  
5 UIM has the opportunity to make sure the defendant never  
6 goes into default in the first place.

7 And it changes that defendant's position. We  
8 don't have -- on the defense side there's not the money  
9 incentive to come in and talk to a lawyer and cooperate  
10 and appear.

11 And so the UIM carrier should have been served  
12 before the case ever went into default so there is an  
13 opportunity to get in at that early stage.

14 Now we're a year later, we're four years  
15 post-accident at this point, the defendant has been told  
16 you did not have the opportunity to come into court and  
17 now the liability carrier has paid such that the defendant  
18 is under the impression that it's over. The defendant  
19 hasn't done anything for six months, hasn't been  
20 contacted. It has changed the UIM carrier's position.

21 And that was the point. If that's all we care  
22 about then ex parte Allstate would not mean anything and  
23 the Selective case wouldn't mean anything because the  
24 Court would just say, all right, we've had round one,  
25 let's go and have round two and start a new trial over

1 from the beginning. That's what letting us out of default  
2 at this point would do is say, okay, we're scrapping  
3 everything and going back to zero, and the courts have  
4 already said that's not happening.

5 The UIM carrier needed to be involved at the  
6 first. But instead, the UIM carrier didn't find out about  
7 this suit until nine months after the statute ran. The  
8 UIM carrier didn't find out about this suit until after  
9 all these attempts to set aside default, because the UIM  
10 carrier could have kept it from going into default, been  
11 standing there to talk to the judge when the judge denied  
12 the setting aside of the default, and now that order has  
13 become final, the period to request that order to be set  
14 aside is over.

15 THE COURT: Correct. But even if Mr. Carrigg  
16 let's you back in and let's you depose and let's you argue  
17 liability and all that stuff, you still say you're  
18 prejudiced?

19 MR. FARR: I still say I'm prejudiced.

20 THE COURT: How?

21 MR. FARR: Because this defendant has been  
22 through a year of being denied this and the defendant's  
23 motivations for cooperation have changed in a manner that  
24 the defendant has no incentive now to show up.

25 The defendant has no incentive now to even say

1 this wasn't my fault because obviously if they were  
2 requesting the default to be set aside they believe they  
3 had some defense, and they were told no, we're not even  
4 going to let you talk about it, this case is done. And so  
5 they have changed their mental approach to this such that  
6 the UIM carrier is prejudiced for that.

7 We're also prejudiced by this being four years  
8 post-accident now: The ability to find witnesses that may  
9 exist, the ability for contemporaneous recollection, the  
10 ability to discuss with first responders that may have had  
11 some memory.

12 There's a reason that there's a three-year  
13 statute, and that's to provide some finality. And now  
14 we're looking at starting four years later from the date  
15 of the accident, it seriously puts the UIM in a bad  
16 position to appear and defend, which is what this statute  
17 is all about.

18 It's not saying step into the shoes of somebody  
19 who's admitted liability because that is a different  
20 situation where you have a defendant take the step to say  
21 I'm at fault. In our case, we didn't have that. We had  
22 the defendant take the step to say, no, wait a second,  
23 I've got defenses, and the Court said we're not going to  
24 hear them. It's a different situation.

25 THE COURT: All right. Thank you.

1 Mr. Carrigg, anything further?

2 MR. CARRIGG: Just briefly, Your Honor.

3 They don't have -- they couldn't have done  
4 anything if they had wanted to until the defense is  
5 tendered to them. They always come in after the  
6 defendant's -- I mean, the only way a UIM carrier is  
7 actively defending a case on its own is after the  
8 plaintiff's carrier has paid their liability, Your Honor.

9 THE COURT: Which is what happened.

10 MR. CARRIGG: Which is what happened here.

11 THE COURT: I understand.

12 MR. CARRIGG: I mean, that's the only time these  
13 guys get up to the table.

14 THE COURT: But he's arguing that the statute  
15 require that you give notice of the lawsuit to the UIM  
16 carrier?

17 MR. CARRIGG: And there are just -- there's case  
18 after case after case that says I'm not required to do  
19 that.

20 THE COURT: Okay. All right, gentlemen. You  
21 all have given me a lot of think about. I'm going to take  
22 the matter under advisement. My law clerk will be back in  
23 touch with you soon.

24 MR. FARR: Thank you, Your Honor.

25 MR. CARRIGG: Thank you, Your Honor.

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THE COURT: Thank you.

(The proceedings were concluded.)

\*\*\* END OF REQUESTED TRANSCRIPT OF RECORD \*\*\*

CERTIFICATE OF REPORTER

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STATE OF SOUTH CAROLINA )

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COUNTY OF LEXINGTON )

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I, CAROL M. THUEME, RPR, Official Court Reporter for

9

the 11th Judicial Circuit of the State of South Carolina,

10

do hereby certify that the foregoing is a true, accurate

11

and complete Transcript of Record of the proceedings had

12

and evidence introduced in the trial of the captioned

13

case, relative to appeal, in the Court of Common Pleas for

14

Lexington County, South Carolina, on the 21st day of

15

February, 2014.

16

I do further certify that I am neither of kin,

17

counsel nor interest to any party hereto.

18

19

May 8, 2014

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21



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23

CAROL M. THUEME, RPR  
Circuit Court Reporter

24

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THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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MAR 30 2016

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Case No. 2013-CP-32-1368  
Appellate Case No: 2014-001026

Ex parte:

Progressive Northern Insurance Company.....Respondent,

In re:

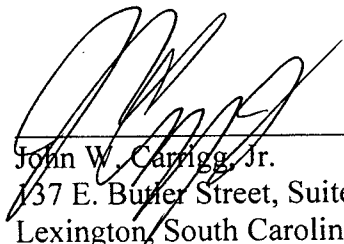
Ronald Lee Cooper, .....Appellant,

v.

Rebecca Sue Fischer.....Defendant.

**CERTIFICATE OF COUNSEL**

The undersigned certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

  
\_\_\_\_\_  
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Dated: 3-27-15

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**MAR 30 2015**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**SC Court of Appeals**

APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

The Honorable Brian M. Gibbons, Circuit Court Judge

Case Number: 2013-CP-32-1368  
Appellate Court No: 2014-001026

Ex Parte:

Progressive Northern Insurance Company.....Respondent

In re:

Ronald Lee Cooper.....Appellant

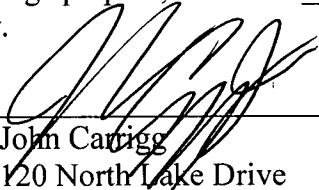
v.

Rebecca Sue Fischer.....Defendant

**PROOF OF SERVICE**

I certify that I have served the Record on Appeal on the above-listed Respondent by depositing a copy of it in the United States Mail, postage prepaid, on March 30, 2015, addressed to Respondent's attorney of record as detailed below.

March 30, 2015

  
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