THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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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.

FINAL BRIEF OF APPELLANT

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STATEMENT OF FACTS

This case is presented on appeal based upon procedural issues only. The relevant facts are that this case arose out of a lawsuit filed by the Appellant against the Respondent on April 18, 2013, seeking damages for the personal injuries he sustained in an automobile/motorcycle accident involving Appellant and Respondent in Lexington County on April 24, 2010. (R.pp.1-6). Respondent was personally served with the Summons and Complaint, but failed to answer or otherwise respond to the Summons and Complaint in a timely manner. (R.p.46). Appellant therefore subsequently filed an Application for Judgment of Default and Determination of Damages with the Circuit Court, and an Order of Default was subsequently granted to Appellant with a Determination of Damages Hearing set and scheduled for October 17, 2013. (R.pp.7-12).

Upon Appellant notifying the Respondent of the Default and Determination of Damages Hearing (R.pp.13-15), Respondent's counsel filed with the Circuit Court on October 10, 2013, a Motion to Set Aside Entry of Default and For Enlargement of Time to Answer. (R.pp.20-32). However, on October 28, 2013, the Honorable Eugene C. Griffith, Jr. denied Respondent's Motion to Set Aside Entry of Default. (R.pp.47-51).

Thereafter, on January 3, 2014, Appellant's claim against the Respondent's liability carrier was resolved upon an Agreement and Covenant Not to Execute. (R.pp.52-55). Based upon the Agreement and Covenant Not to Execute, Appellant then proceeded to pursue an underinsured motorist coverage claim against Appellant's insurance carrier, Progressive Northern Insurance, serving same with the Summons and Complaint in this matter. However, Progressive Northern Insurance objected to the underinsured motorist coverage claim, and on January 30, 2014, Respondent filed a Motion to Dismiss or in the alternative for Summary Judgment of the underinsured motorist coverage claim. (R.pp.58-69). A hearing was held on Respondent's Motion to Dismiss on February 21, 2014 before the Honorable Brian M. Gibbons, (R.pp.90-105) and on February 28, 2014, Judge Gibbons granted Respondent's Motion and signed and Order of Dismissal, filed with the Circuit Court on March 7, 2014.(R.pp.70-74). Upon receipt of the Order of Dismissal, Appellant filed his Motion for Reconsideration on March 21, 2014.R.pp.75-82). Appellant Motion was subsequently denied by the Honorable Brian M. Gibbons in his Order dated April 30, 2014.(R.pp.86-88). Appellant then filed a Notice of Appeal with this Court on May 12, 2014. (R.p.89).

STATEMENT OF THE CASE

On April 18, 2013, Appellant filed a Summons and Complaint with the Lexington County Clerk of Court against the Respondent, seeking damages for the personal injuries he sustained as a result of the automobile/motorcycle accident that occurred on April 24, 2010 between the Appellant and Respondent. (R.pp.1-6). On May 31, 2013, Respondent

was personally served with the Summons and Complaint by the Lexington County Sheriff's Department (R.p.46).. However, in the following thirty (30) days, thereafter, neither the Respondent 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 Respondent contacted Appellant's counsel in any way whatsoever regarding this pending action.

Having received no answer or responsive pleading to the Summons and Complaint by July 26, 2013, Appellant's counsel thereafter filed an Application for Default and Damages Hearing with the Lexington County Clerk of Court. (R. pp.7-11). On August 5, 2013, the Honorable Thomas A. Russo signed an Order of Default granting the Appellant a damages hearing, and said Order of Default was entered by the Lexington County Clerk of August 28, 2014. (R.p.12) A Damages Hearing was subsequently set for October 17, 2013.

On October 1, 2013, Appellant's attorney mailed the Respondent the Notice of Default and Damages Hearing. (R.pp.14-15). Respondent received the Notice of Default and Damages Hearing on October 4, 2013 as evidenced by the Certificate of Service filed with the Court (R.p.13), and on October 10, 2013, Respondent's attorney filed a 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 and a proposed Answer. (R.pp.16-39). On October 16, 2013, Appellant filed his Memorandum in Opposition to Motion to Set Aside Entry of Default with his supporting documentation. (R.pp.40-45) The Honorable Eugene C. Griffith, Jr.

denied Respondent's Motion to Set Aside Entry of Default on October 23, 2014, and his Order denying same was filed on October 28, 2013. (R.pp.47-51).

The Appellant's liability claim against Respondent's liability carrier, Traveler's Home and Marine Insurance Company, was resolved by way of an Agreement and Covenant Not to Execute on January 3, 2014. (R. pp.52-55). Appellant then proceeded with an underinsured motorist claim against his automobile insurance carrier, Progressive Northern Insurance, based upon the Agreement and Covenant Not to Execute. However, on January 30, 2014, counsel for Respondent and Progressive Northern Insurance filed a Notice of Appearance along with their Motion to Dismiss or in the alternative for Summary Judgment on the underinsured motorist coverage claim of Appellant. (R. pp.56-69). A Hearing on Respondent's Motion to Dismiss was held on February 21, 2014 before The Honorable Brian M. Gibbons, (R.pp.90-105) and Judge Gibbons granted Respondent's Motion to Dismiss in his Order dated February 28, 2014, filed March 7, 2014. R.pp.70-74). In response, Appellant filed his Motion to Reconsider or alter and amend this Order of Dismissal on March 21, 2014. (R.pp.75-82). On April 30, 2014, the Honorable Brian M. Gibbons signed an Order Denying Plaintiff's Motion to Reconsider, filed with the Circuit Court on May 6, 2014.(R.pp.86-88). On May 12, 2014, Appellant filed his Notice of Appeal with this Court. (R.p.89).

ARGUMENT

I. DID THE CIRCUIT ERR IN GRANTING RESPONDENT'S MOTION TO DISMISS?

A) APPELLANT'S CLAIM FOR UIM COVERAGE BENEFITS SHOULD NOT HAVE BEEN DISMISSED AS BEING NON-COMPLIANT WITH THE REQUIREMENTS OF S.C. CODE SECTION 38-77-160.

The general procedure for obtaining UIM benefits is set forth in South Carolina Code Section 38-77-160 which provides:

No action may be brought under the 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 that automobile insurance insurer for the putative at-fault insured chooses to settle in part the claim 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..... (R. p.61).

However, questions of statutory interpretations are questions of law, which the Appellate Court is free to decide without any deference to the lower Court below. *CFRE, LLC v. Greenville Cnty. Assessor, 395 S.C. 67, 716 S.E. 2d, 877 (2011).* In that regard, while the Appellate Court must ascertain and effectuate the intent of the legislature and as a standard rule should follow the plain and unambiguous language in a statute (*Hodges v. Rainey, 341 S.C. 79, 533 S.E. 2d 578 (2000)),* it does not have to apply the words literally if that would lead to a patently absurd result, and when that is the case, the Appellate Court should look beyond the statute's plain language. *Cabines v. Town of James Island, 393* S.C. 176, 712 S.E.2d 416 (2011).

The legislative intent of S.C. Code Section 38-77-160 is for the UIM carrier to receive timely notice of actions in which they may be liable for UIM benefits so that they can protect their interests. *Ex Parte Allstate Insurance Co., 339 S.C. 202, 205, 528 S.E. 2d 680, 681 (Ct. App. 2000).* In that regard, Respondent asserts that *Ex Parte Allstate* is controlling in this case. However, the facts of the two cases are in no way similar, and

Appellant would therefore urge this Court to reexamine very carefully the facts and procedural history in the instant case. (R.p.76). In *Ex Parte Allstate*, the facts are that the Plaintiff in that case filed the lawsuit, served the Defendant and tried the case to a verdict; specifically, the jury in the *Ex Parte Allstate* case returned a verdict of $36,697.00 and the liability carrier for the at-fault party had limits of $15,000.00. (R.p.76). It was then only after the jury verdict had been rendered that the Plaintiff then served the UIM carrier, seeking the limits of the Plaintiff's UIM coverage under that policy. (R. p.76). In the instant case, Respondent takes the position that because a default had been entered against her this is also tantamount to a verdict. (R. p.76). However, Appellant would assert that there was no verdict in the instant case, and clearly there is a difference between an entry of default and a default judgment; specifically, an entry of default is addressed under Rule 55 (a), SCRCP and a default judgment is addressed separately under Rule 55 (b), and in the instant case, only an entry of default applies to Appellant's case as no default hearing was every held. (R.p.76)

Further, there are two entirely different standards for relief from entry of default and relief from a default judgment. See SCRCP 55 (c). With regard to setting aside a default judgment, our courts have held in interpreting Rule 60 (b) that 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 other parties. *Tobias v. Rice, 379 S.C. 357, 366, 665 S.E. 2d 216, 221 (Ct. App. 2008); Mictronics, Inc., v. S.C. Dep't of Revenue, 345 S.C. 506, 510-11, 548 S.E. 2d 223, 226 (Ct. App. 2001); New Hampshire Ins. Co. v. Bey Corp., 312 S.C. 47, 50, 435 S.E. 3d 377, 378 (Ct. App. 1993); Hill v. Dotts, 345 S.C. 304, 309, 547*

S.E. 2d 894, 897 (Ct. App. 2001). (R.pp.76-77). On the other hand, with regard to setting aside an entry of default (the situation that applies in the instant case), the courts have held that they should employ a "good cause" standard instead of the more rigorous standard of "excusable neglect" under SCRCP Rule 60 (b). Specifically under *Wham v. Shearson Lehman Bros., Inc., 381 S.E. 2d 499, 298 S.C. 462 (S.C. App. 1989)*, the Court considers 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. (R.p.77).

Therefore, the Courts have different standards with regard to entry of default and default judgments, and in the instant case, an entry of default was recorded by the Court, but no damages hearing was ever held, and no default judgment was ever entered against Respondent, and up to that point, Appellant had no way of knowing if he even had a potential claim for UIM benefits, as he had not received any response or any information whatsoever from Respondent's liability carrier as to their position as to liability and/or coverage limits. It was not until after the hearing on Respondent's motion to be relieved from default that Appellant was informed ***for the first time*** that Respondent's limits of liability coverage were only $25,000.00. (R.pp.77-78).

It was not until after the motion hearing that Appellant was able to pursue negotiations to settle the case, ultimately resolving the liability case with the Respondent paying the policy limits of the liability coverage in exchange for a Covenant Not to Execute. (R.p.78). At that point in January 2014, and at no point prior to that negotiated settlement did Appellant become aware that he had a viable claim for UIM coverage benefits.(R.p.78). After obtaining the Covenant Not to Execute, Appellant immediately

thereafter served the UIM carrier with the Summons and Complaint, putting the UIM carrier on notice of the claim; this UIM action, however, in no way prevented the UIM Carrier from contesting any aspect of the claim against the Respondent, including the liability of Respondent for the accident, as it then stepped into the shoes of the Respondent in every way. Therefore, the Respondent's position that Appellant was required to serve the UIM Carrier at the same time as it initially served the Respondent defies logical thinking in that it would require a Plaintiff to almost always simultaneously and automatically serve the at-fault party and the UIM Carrier. However, in reality, the Plaintiff bringing the initial lawsuit against the alleged at-fault party is likely unaware, at that point in time, of the applicable policy limits, and hence is factually unaware of whether or not a UIM claim is viable or would instead be considered a frivolous claim. (R.p.78). It is not until the Plaintiff receives notification through discovery of what the liability limits are that he can assess whether or not the claim likely exceeds the amount of liability coverage available. (R.p.78) The legislative intent would not have been to encourage frivolous lawsuit.

In addition, Appellant was willing to set aside the default and said so at the hearing on Respondent's motion to dismiss. (R.p.78). In that regard, Appellant asserts that the case that actually applies to this instant case is *Broome v. Watts, 319 S.C. 337, 61 S.E. 2d 46 (1995).* The *Broome* case stands for the proposition that the UIM Carrier has the right to defend the case and is not bound by the agreement or the follies of the actual Defendant. (R.pp.78-79). In this instant case, Respondent Fischer allowed her case to go into default; however, *Broome* is clear that the UIM Carrier is not bound by that default. (R.p.79).In *Broome*, 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. (R.p.79). As in *Broome*, the Appellant in this case settled with the Respondent Fischer for the liability limits after she defaulted. Therefore, applying the same logic to this instant case, the UIM Carrier would have the right, separate and apart from Respondent Fischer to be relieved from the default. Nevertheless, the UIM carrier in this instant case has instead sought to dismiss the entire action as opposed to asserting the rights that they do have, namely to be relieved from Respondent Fischer's default and to defend the entire case anew.(R.p.79). Nothing in Appellant's actions would prevent the Respondent from now asserting all its legal defenses, including its right to deny Respondent's liability for this accident claim; Appellant should not be now punished for asserting all of his rights against Respondent Fischer and Respondent should not be now unfairly rewarded when they have clearly not been deprived of their legal rights by Appellant to defend the entire case anew. The prior Order of the Circuit Court dismissing Appellant's action against the UIM Carrier is simply factually and legally incorrect when it states that the "Plaintiff cannot now consent to set aside the very Default Order upon which the settlement was based and retry the case for UIM purposes" (Order of Dismissal signed by the Honorable Brian M. Gibbons, dated February 28, 2014, filed with Circuit Court on March 7, 2014) , as this is in direct contradiction to the holding of our Supreme Court in *Broome,* (R.p.79)which clearly stated that the UIM Carrier has separate and distinct rights from the actual defendant, and where as in this instant case, Appellant's counsel agreed to consent to set aside the default for the UIM Carrier if they made that motion. (R.p.79).

Finally, the Circuit Court was incorrect in holding that the instant case is governed by *Williams vs. Selective Insurance Company of the Southeast, 315 S.C. 532, 446 S.E. 2d 402 (1994).* (R.p.80). The fact situations in these two cases are entirely different. Specifically, in *Williams,* the Plaintiff negotiated with the liability carrier and settled the case with them on a covenant. Plaintiff, in *Williams,* then allowed the applicable statute of limitations to run, and then after the applicable statute of limitations had run filed an action against the UIM Carrier. The action in *Williams* against the UIM Carrier was therefore barred on statute of limitations grounds. However, in the instant case, the Appellant filed his claim against Respondent Fischer within the statute of limitations, and the claim would not have been barred on that basis, and therefore this case is not in the same procedural posture as *Williams.* 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. Therefore, in *Ex Parte The South Carolina Farm Bureau Insurance Company* case, the alleged at fault party was served within the statute of limitations but the UIM Carrier was not served within the statute of limitations, which are the same facts in the instant case, but as the Supreme Court held in *Ex Parte The South Carolina Farm Bureau Insurance Company*, the UIM statute was not a statute of limitations but a notice statute and it therefore remanded the case for trial. (R.p.80).

Clearly, S.C. Code Section 38-77-160, the UIM Statute, is a notice statute, not a statute of limitations (R.p.81), and Respondent UIM Carrier received adequate and appropriate notice within the requirements of this code section in that the Respondent UIM Carrier steps into the shoes of the Respondent Fischer, not bound by the prior

default, negotiations and liability settlement, but rather steps into the Respondent Fischer's shoes with its own separate and distinct rights to defend this action anew, including retaining the right to fully dispute Respondent Fischer's liability for the accident. Specifically, Respondent UIM Carrier could have made a motion to be relieved of the default entered against Respondent Fischer and said motion would have been consented to by Appellant in this case. As such, Respondent UIM Carrier had not be unduly prejudiced by Respondent Fischer's default in this case, but Appellant would be unduly punished if his entire UIM Claim is barred.

CONCLUSION

Accordingly for the reasons stated above the ruling of the lower court should be reversed and this matter should be remanded to the lower court for trial.

Respectfully submitted,

April 15, 2015

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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: 4/15/15

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CERTIFICATE OF SERVICE

I, the undersigned attorney for Appellant, hereby certify that copies of the Final Brief of Appellant and Certificate of Counsel were served on all parties, by mailing in the United States Mail, postage prepaid, a copy therefore, to attorney for all parties, this 20 day of April 2015, addressed as follows:

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