THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JAN 28 2016
SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001452

Levern McCray, Appellant,

v.

Jose W. Valle, Respondent,

FINAL REPLY BRIEF OF APPELLANT

Pamela R. Mullis
MULLIS LAW FIRM
1229 Elmwood Avenue
Post Office Box 7757
Columbia, SC 29202
(803) 799-9577

COUNSEL FOR APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

Allstate asserts in its "Introduction" the familiar argument that Appellant improperly sought to execute against the property of the insurer, "a non-party to the lawsuit," to collect on a judgment of costs and fees awarded "on an offer of judgment entered as to the defendant in the lawsuit, Jose W. Valle." However, Allstate then concedes by footnote: "Valle is identified as the "respondent" in this appeal. However, Valle is not the respondent in the appeal, and Allstate and Liberty Mutual Fire Insurance Company filed the motions upon which the appeal is based." (*See* Brief of Allstate p. 2, fn 1). Allstate indicates by this language that this Court may simply disregard the caption's identification of the respondent as Jose Valle because the insurers were the actual parties responding to the motions brought by Appellant.

Ironically, the appeal before the Court is due to the insurers' insistence before the Circuit Court that, regardless of the conduct of the insurers before the court, the caption was controlling so that, even where the insurers had acted as the defending party and had actually invoked the Offer of Judgment statute themselves by making an offer of judgment to Plaintiff, the insurers could not be considered or treated as the actual defending parties and could not be found to have made the offer of judgment, because they were not parties identified in the caption. Thus, apparently, it is only when the insurers choose to label themselves as the opposing party and to concede that their participation was on their own behalf and not on behalf of the named defendant that the insurers will agree that they are bound by and subject to the orders of the court.

This has been the pattern of this case: the insurers make filings, appear, argue, and act before the court in all matters as the opposing, defending, parties right up until an Order is issued directing the payment of money - - at which point the insurers magically transform into "non-party" participants; insist that they are uninvolved; and that the only "party" responding or defending the case is the person named in the caption, Jose Valle. Thus, the insurers appeared at

the hearing to argue against the imposition of costs and interest. These efforts were plainly made solely for the purpose of protecting the assets of the insurers, regardless of the caption's identification of Jose Valle as the defendant. However, upon the judge's rejecting the majority of the insurers' arguments and issuing an Order of Offer of Judgment Costs and Interest in the amount of $80,816.11, the insurers failed to pay the monies awarded to Plaintiff, relying upon the excuse that they were "non-parties" and claiming that the Order was not against them but that it could only possibly have been directed to and against "the only other party to the lawsuit, Jose Valle." The insurers should be held responsible for their conduct in the case and required to answer to the court where the insurers appear and act as parties before the court for the purpose of protecting their interests. The insurers should not be allowed to pick and choose if and when the name in the caption effectively identifies the opposing party defending against the arguments of Appellant.

Appellant appreciates Allstate's now conceding before *this* Court that the insurers *are* the actual parties responding in opposition in this appeal and that Jose Valle is not and has never been involved in the case; however, Appellant would argue that the insurers should be treated as parties whenever they act as parties before the court and not only when it pleases the insurers to acknowledge and concede the fact that they are the opposing parties.

II. MISSTATEMENTS OF FACT

In several instances on brief, the responding insurers misstate the facts:

1. The insurers' appeal was actually not limited to the "amount of the verdict."

First, the insurers, in an apparent attempt to falsely cast themselves as having acted reasonably and as not having caused needless proceedings and cost, assert that the appeal taken by the insurers was limited to their challenging "the amount of the verdict." (Allstate Brief at page 4). This is clearly not the case, as most easily shown by the Opinion affirming the jury verdict. This Court's decision indicates that insurers' appeal involved not a single issue as to the amount of the

verdict, but instead, five issues of asserted error, including "(1) charging the jury with language from section 56–5–2950(G) of the South Carolina Code (Supp.2014) (the "Implied Consent Statute"); (2) admitting the result of Valle's blood alcohol test; (3) allowing the investigating officer to testify; (4) failing to grant a new trial absolute, a new trial nisi remittitur, or a new trial pursuant to the thirteenth juror doctrine; and (5) failing to strike or reduce the punitive damages award." *McCray v. Valle*, No. 2014-UP-313, 2014 WL 3845087 (S.C. Ct. App. Aug. 6, 2014).

Plainly, the insurers did not appeal only the amount of the verdict, despite the insurers' assertion on brief. This clear misstatement of fact is not particularly egregious or of great importance to the resolution of the issues on appeal; however, it is a clear example of the fact that these insurers casually, habitually, and provably make misstatements of fact before the courts.

2. The insurers filed an Offer of Judgment against Appellant on January 18, 2011

Similarly, but more significantly, it is a fact that on January 18, 2011, the insurers filed and served an Offer of Judgment for $135,000 on the Appellant. (R. p. 30). However, the insurers maintained below and on appeal that the January 18, 2011, Offer of Judgment was not made on their behalf. The insurers maintain instead that the offer to settle the case by paying a judgment of $135,000 was actually made by *the uninsured driver, Jose Valle*, who had made no appearance and who was uninvolved in the case. This assertion is absolutely false. The January 18, 2011, Offer of Judgment was signed, served, and filed by counsel for the principle insurer, Allstate. (R. p. 31).

The insurers' Offer of Judgment was served upon the Appellant, but it was, of course, not served upon Jose Valle. The insurers' counsel's failure to serve Jose Valle was not an oversight; given that Mr. Valle made no appearance; was never involved in the case; and was presumably not aware of or involved in the decision to make an Offer of Judgment. Contrary to insurers' assertions on brief, it is clear that counsel for the insurers made the Offer of Judgment on behalf of their

clients, the two insurers, and not on behalf of Jose Valle, a person the insurers' counsel did not represent and with whom the insurers' counsel had no contact or relationship. *See Crawford v. Henderson, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003),* holding that there is no attorney client relationship between counsel for the insurer defending the liability case and the named defendant because the attorney is not representing his interests, but instead the interests of the insurance company.

The insurers' repeated denial that it was the insurance companies that filed the Offer of Judgment against Plaintiff on January 18, 2011, is false and it should be easily rejected. In fact, before the Federal Court, although the insurers had attempted to avoid admitting that the Offer of Judgment was made by the insurers and not by the uninsured driver, the District Court Judge directed the insurers to "provide Plaintiff with a clear and straightforward answer" to his request to admit. Accordingly, by their Supplemental Response to Plaintiff's Requests to Admit, Allstate admitted that the Offer of Judgment was made to Plaintiff on January 18, 2011, by the principle insurer, Allstate. (R. *325).* Accordingly, the insurers should be judicially estopped to deny that the Offer of Judgment was made by the insurers. *See Sims v. Amisub of S. Carolina, Inc.*, 408 S.C. 202, 213, 758 S.E.2d 187, 193 (Ct. App. 2014). This Court should accept as undisputed fact that it was the insurers and not Jose Valle that filed the Offer of Judgment against Appellant on January 18, 2011.

3. The February 15, 2011, Offer of Judgment was made to and filed against the insurers

Similarly, Appellant's Offer of Judgment within the policy limits was made to and filed against the insurers on February 15, 2011. (R. p. 33). Nevertheless, the insurers seek to convince the Court that Plaintiff's Offer of Judgment was actually made to and filed against the uninsured driver and not against the insurers. This is simply not true; Plaintiff's Offer of Judgment was not made in reference to Jose Valle and he was not provided a copy. Appellant was well aware that it was the insurers who controlled the funds within the available coverage under his insurance policy

and that the named defendant had no authority or ability to settle the case by accepting judgment. Accordingly, Plaintiff's Offer of Judgment was made against the insurers and it was served only upon both defending uninsured carriers, Allstate and Liberty Mutual. Thus, it was the insurers that received but failed to accept Plaintiff's Offer of Judgment within the policy limits. There is no reason to believe that Jose Valle ever had any idea that Plaintiff had made an Offer of Judgment against the insurers and he naturally did not respond to an Offer of Judgment not directed against or provided to him.

The Court should reject the notion now put forward by the insurers that Plaintiff's Offer of Judgment was actually made against, directed to, and rejected by *Jose Valle*. Instead, the Court should accept as fact that it was the insurers and not Valle, against whom Plaintiff filed and served his Offer of Judgment.

4. The Order of Costs and Interest imposed as a penalty for the rejected Offer of Judgment was against the insurers who had rejected the Offer of Judgment

Upon the appellate court's affirming the jury verdict in the liability case on September 2, 2014, Appellant moved for an order of costs and interest pursuant to his rejected Offer of Judgment as provided by S.C. Code Ann. § 15-35-400. The motion was served on the insurers, not on Jose Valle, and there is no indication that Jose Valle was notified of the September 11, 2012, hearing set on Appellant's motion for costs and interest as a penalty for the rejected Offer of Judgment.

The insurers participated in the hearing on Plaintiff's motion for an award of Offer of Judgment Costs and Interest on September 11, 2012, represented by lead counsel for Allstate. The insurers made no objection to the undisputed fact that the named defendant in the liability case, Jose Valle, had not been served and made no argument that the hearing should not proceed in the absence of a necessary party. Instead, the insurers conceded Plaintiff was entitled to costs and interest, but attempted to diminish the award. (R. pp. 36; 38-43; 48-49; 55-56; 61-62). The insurers

suggested a method for structuring the Order and as to how the interest would be calculated. However, the trial judge indicated that she had seen the interest calculated on a per diem rate, correctly observing, "Otherwise it defeats the purpose of the rule. The purpose of the rule is punitive. Basically it is to penalize a person who did not make an accurate assessment of their position, and to reward the person for the loss of money and the loss of use of their money during the time that the case was pending." (R. pp. 41-42).

Counsel for the insurers agreed that "the offeror shall be able to recover any administrative, filing or other courts costs and I agree that she's entitled to the filing fees, and would be entitled to subpoena fees and mileage for witnesses, but...clearly some of this other stuff I don't think is ..." (R. p. 43, lines 10-17). Thus, the insurers questioned and challenged costs and debated the calculation of the interest award; however, the insurers made no argument that the Order of Offer of Judgment Costs and Interest could be imposed as a penalty only upon the named defendant rather than upon the insurers - - the parties arguing before the court who had actually rejected the Offer of Judgment. The insurers made no request for reconsideration and took no appeal from the January 14, 2013, Order awarding to Plaintiff Costs and Interest due to the rejected Offer of Judgment; however, the costs and interest ordered were not paid.

The insurers attempt to excuse their failure to pay the Order of Costs and Interest imposed as a penalty for the rejection of Plaintiff's Offer of Judgment by maintaining that the Order of Costs and Interest for the rejected Offer of Judgment was not directed to them - - suggesting instead that it must have been directed to the defendant named in the caption, Jose Valle. The notion is absurd; however, these insurers actually ask this Court to believe that the insurance companies directed and paid counsel to attend a hearing to argue against the imposition of Offer of Judgment Costs and Interest as a penalty for the rejection of the Offer of Judgment *upon Jose Valle*. As shown by the transcript, counsel for the insurers attended the hearing and argued against the

imposition of costs upon the insurers, without making any effort to argue on behalf of the absent, uninvolved, and unrepresented Jose Valle.

If the insurers actually intended at the time of the hearing to place the responsibility for paying the Order of Costs and Interest upon the named defendant, Jose Valle, it was incumbent upon the insurers to alert the judge to the fact that Valle had not been served or notified of the hearing on Appellant's Motion for Offer of Judgment Costs and Interest. However, rather than alerting the judge to the absence of Jose Valle and making no argument at that hearing that the penalties could only be imposed upon the named defendant, the insurers proceeded to participate in the hearing by arguing against or attempting to diminish the award of costs and interest. Counsel for the insurers actually agreed that the insurers would attempt to reach an agreement with counsel for Appellant as to amount of costs and interest which would be imposed and that he thought an agreement and consent order was possible. (R. pp. 61-62). The Court must be able to assume that Allstate's attorney, agreeing to attempt to reach an agreement as to a consent order, was speaking on behalf of his clients, the insurers. Plainly, regardless of the caption, the Order of Offer of Judgment Costs and Interest was imposed upon and directed to the insurers - - the only litigants who had made and rejected Offers of Judgment. To borrow the insurers' phrasing, "Valle was identified as the "defendant" in this proceeding seeking an award of costs and interest as a penalty for a rejected offer of judgment. However, Valle was not the defendant in this proceeding and Allstate and Liberty Mutual Fire Insurance Company were the litigants whose rejection of the Offer of Judgment prompted the order of penalties for the rejected Offer of Judgment. (*See* Brief of Allstate p. 2, fn. 1).

This Court should reject the insurers' argument that the Order of Offer of Judgment Costs and Interest was actually issued not against the insurers, but against the uninvolved Jose Valle.

5. Judge Harrington ruled in favor of Appellant, instructing him to execute his judgment with supplemental proceedings.

Likewise, the Court should reject the insurers' current attempt to mischaracterize Judge Harrington's decision. Plaintiff's September 2, 2014, Motion to Enforce the Judgment and for a Rule to Show Cause stated in relevant part "Therefore, Plaintiff respectfully moves for this Court to enforce the Order of Judgment and issue a Rule to Show Cause directly against the insurers ordering payment of the award pursuant to the statute; as the Plaintiff's Insurers are duly licensed in the state of South Carolina and owe this valid Order for costs and pre-judgment interest – as penalties pursuant to the above statute and Order. The Plaintiff requests this Court issue an Order and a rule to show cause why the insurers Allstate and Liberty Mutual should not be required to comply with the terms and conditions of the Order of the Court filed on January 14, 2013, for the rejected offer of judgment; why it should not be held in contempt; and why it should not be required to pay the attorney's fees and costs of Plaintiff for the institution and prosecution of this proceeding." (R. pp. 89-90).

On October 22, 2014, the parties appeared before Judge Harrington on Plaintiff's Motion to Enforce Order of Judgment and for a Rule to Show Cause against the insurers Counsel for Allstate, argued on behalf of the insurers, while the other four attorneys appearing at the hearing on behalf of Liberty Mutual and Allstate were not permitted to argue because those attorneys maintained before Judge Harrington that their clients, the insurers, were not parties in the action for penalties before the court. (Appendix, pp. 8-14). Furthermore, the insurers' attorneys had not filed notices of appearance despite being served with the Motion to Enforce the Judgment and for Rule to Show Cause against the insurers when the Motion was filed well over a month before the hearing was held. There is no indication that Jose Valle was served or otherwise notified of the hearing.

At that point, the insurers' initial position was that the award of Offer of Judgment Costs and Interest would be paid by the insurers' including the judgment within their policy limits as damages and then subtracting that amount from the Appellant's damages that he had collected in the case. (Appendix, pp. 6-8). Appellant argued to the contrary that the Offer of Judgment statute was punitive, providing a sanction for the insurers' rejection of the Offer of Judgment. Counsel for Appellant argued that the insurer was not permitted to deduct an award of penalties imposed for a rejected offer of judgment from the policy limits because such an award was not properly considered as damages, but instead constituted a penalty as a matter of South Carolina law. (Appendix, p. 8). As for Jose Valle, the judge was informed that Jose Valle had not appeared and was not involved in the case. Plaintiff made no request to execute against Jose Valle, who had not refused Plaintiff's Offer of Judgment.

Plaintiff filed a Memorandum of law in support of his Motion to Enforce Judgment and for a Rule to Show Cause against the insurers in response to the insurers' failing to pay the Order of Offer of Judgment Costs and Interest. (R. p. 101). Plaintiff asserted before Judge Harrington that it was proper to address the insurers' failure to pay through a Rule to Show Cause. The insurers conceded before Judge Harrington that it was the insurers that had extended to Plaintiff the Offer of Judgement on January 18, 2011. Nevertheless, the insurers argued that a Rule to Show Cause was not the proper procedure by which to enforce the Order of Costs and Interest and that the penalties for the rejected Offer of Judgment could not be imposed against the insurers because they were not the named party and because such an award would exceed their policy limits. (Appendix, pp. 22-24)

On December 1, 2014, Judge Harrington issued her Order, instructing Plaintiff: "Under SCRCP 69, the Court hereby finds that a writ of execution together with supplementary proceedings is the proper procedure to enforce the underlying judgment." (R. p.15). Having

identified the correct procedure for Plaintiff to follow to enforce the award of Offer of Judgment Costs and Interest, Judge Harrington further ruled that Plaintiff's request for a Rule to Show Cause was denied. Accordingly, on February 2, 2015, Counsel for Plaintiff requested that the Clerk of Court issue an Execution against Property of the insurers and the Execution was issued on February 23, 2015. (R. 192). It was this attempt to execute the judgment of costs and interest against the insurers in compliance with Judge Harrington's Order that was halted by Judge Jefferson's granting the insurers' Motions to Quash. However, the insurers now argue for the first time on appeal that Judge Harrington's Order did not actually indicate that, in seeking a Rule to Show Cause, Appellant had pursued the wrong avenue in his attempt to execute the judgment against the insurers and that Judge Harrington did not, by her December 1, 2014, Order direct Plaintiff to more properly proceed with execution and supplementary proceedings against the insurers rather than by a Rule to Show Cause.

The insurers actually now argue for the first time that Judge Harrington's Order should instead be interpreted as a ruling that Plaintiff could not execute the judgment of Offer of Judgment Costs and Interest against the parties responsible for rejecting the Offer of Judgment, the insurers, but that he was required to proceed instead with execution of the Order of Offer of Judgment Costs and Interest against *Jose Valle* - - a party who had neither made nor rejected an Offer of Judgment and against whom Plaintiff did not seek to execute. On appeal, the insurers for the first time suggest that Plaintiff must have misunderstood Judge Harrington's Order and that, if the order was "unclear," Plaintiff should have moved for reconsideration rather than simply complying with the judge's instructions. To the contrary, Judge Harrington's Order was not "unclear" when taken in context. Judge Harrington was asked to execute the judgment by way of a Rule to Show Cause against the insurers; she decided that a Rule to Show Cause was not the proper procedure to execute the judgment and instead that execution with supplemental proceedings was the proper course.

The Judge's meaning could only be misunderstood if taken out of context. When considered in the context of the filings and arguments presented, it is unreasonable to assume that the Judge made a nonsensical decision, ordering futile proceedings against an uninvolved party, and making no response to the actual motion before the Court.

It is clear from the record that, despite the current argument, these insurers never actually themselves believed that Judge Harrington's Order had instructed Plaintiff to execute the judgment imposing a penalty as a consequence for *their* rejecting the Offer of Judgment against Jose Valle. This idea has apparently occurred to the insurers only on appeal and it is now raised for the first time before this Court. The insurers appeared before Judge Jefferson through counsel to argue against the filed execution of the Judgment of Offer of Judgment Costs and Interest against them and yet the insurers failed to inform Judge Jefferson during that proceeding that Judge Harrington had supposedly already ruled in their favor and instructed Plaintiff that he could only execute the judgment against Jose Valle. (R. pp. 72-73).

The insurers each filed Motions to Quash the execution against them. By their Motions insurers advised only that Judge Harrington had denied the Rule to Show Cause without ever suggesting that Judge Harrington had supposedly ruled on December 1, 2014, that Plaintiff could not execute his judgment against the insurers but that he was required to execute the judgment against Jose Valle. Surely, had the insurers believed that that was the actual import of Judge Harrington's Order or even that that was a reasonable interpretation of her Order, that would have been the first thing they said in their Motions to Quash. Instead, counsel for insurers filed motions and participated in the hearing before Judge Jefferson advising only that the Rule to Show Cause had been denied without suggesting that the very issue presented before the judge had supposedly already been decided in their favor by Judge Harrington. Plainly, the reason the insurers made no such suggestion is that, when properly taken in context, Judge Harrington's Order clearly provided

that the Rule to Show Cause sought was not the proper procedure, and that Appellant should more properly pursue execution of his judgment by way of execution against the responsible parties - - the insurers.

The insurers indicate that the Order of Costs and Interest Pursuant to Offer of Judgement was made "as to Valle." However, to the contrary, there is no indication in the Order of Offer of Judgment Costs and interest that it was directed to Jose Valle rather than to the insurers who had rejected the offer of judgment and appeared before the court. The Order is titled, "Order for Costs and Interest Pursuant to Offer of Judgment," and it specifies that it was issued "in regard to the setting of the proper amount of costs and interest, pursuant to S.C. Code Ann. § 15-35-400 in regard to Plaintiff's Offer of Judgment filed on February 15, 2011...." Of course, the February 15, 2011, Offer of Judgment was rejected by the insurers and not by Jose Valle. While the Order's caption identifies the "defendant" as "Jose Valle," the "defendant's attorney" is identified as Julian K. Allen - - the attorney representing the insurer, Allstate. (R. p. 11).

The insurers point out that the Order signed by Judge Jefferson granting their Motions to Quash indicated that the judge concluded that Appellant's Offer of Judgment was filed "as to Valle" and further that Appellant had not filed any offers of judgment as to the insurers, Allstate and Liberty Mutual. Indeed, the judge made these erroneous factual findings from which she reached the erroneous legal conclusion that "because the Order of Judgment was issued as to the Offer of Judgment, which was made as to Valle, Appellants could not seek to enforce the Order of Judgement against Allstate." (R. pp. 3-4). However, as argued, these factual conclusions were wholly erroneous, contradicted by the record, and contradicted by Judge Jefferson herself

Having reached these faulty conclusions, the judge based her decision to quash execution against the insurers upon her understanding that an offer of judgment could only be made to and rejected by a named party; that the insurers were not named parties to the liability suit; and that,

therefore, the offers of judgment must actually have been made by and to Jose Valle - - even though the judge herself acknowledged that this was not, in fact, true and that, as a matter of fact, Jose Valle did not make an offer of judgment. During the hearing, Judge Jefferson observed, "And certainly, the Defendant [Valle] would never have filed an Offer of Judgment. He's not a lawyer; he doesn't have enough knowledge to do that. That doesn't - - it doesn't make a whole lot of sense to me." (R. p. 84, lines 5-8). Nevertheless, before Judge Jefferson, the caption's identification of Jose Valle as the defendant was dispositive despite the judge's herself indicating that the caption was inconsistent with the facts and posture of the case. Counsel for Appellant responded, indicating, "The offer of judgment wasn't filed against Jose Valle - - no authority to offer the insurance policy - -" However, Judge Jefferson disagreed, indicating, "That's the only way it could have been filed; he's the only party." (R. p. 82, lines 5-14).

Notably, before Judge Jefferson, the insurers did not helpfully advise that although the caption identified the defending party as Jose Valle, he was not the defendant; that the defending parties were the insurers, or that it was the insurers that made and rejected offers of judgment. Instead, before the Circuit Court, the insurers insisted that even though Jose Valle had not appeared and had not participated in the case and even where the insurers had appeared to oppose the award of Offer of Judgment Costs and Interest on their own behalf; because the caption named Jose Valle as the defendant, Jose Valle was the only litigant who could possibly have participated in the Offer of Judgment process by making an Offer of Judgment to Plaintiff and by rejecting Plaintiff's Offer of Judgment. Unfortunately, Judge Jefferson accepted this argument despite noting that, under this premise, the case made no sense to her.

III. Mischaracterizations of Appellant's Arguments on Appeal

The insurers mischaracterize Appellant's arguments on appeal. Allstate argues that it is Appellant's argument that "just because Allstate provided uninsured motorist coverage to

Appellant, it suddenly became a party to the tort lawsuit brought to determine liability and damages." To the contrary, Appellant argues not that Allstate *became* a party to the liability lawsuit because it provided coverage, but instead that the insurers were parties, at the very least for purposes of the Offer of Judgment process and for purposes of the Order for Costs and Interest Pursuant to Offer of Judgment assessed against the party rejecting the offer of judgment, where the insurers were the only parties that had rejected the offer of judgment and insisted on proceeding to trial.

The insurers argue that Appellant has improperly attempted to combine the tort lawsuit with a "coverage claim." To the contrary, there is no coverage issue involved in this appeal. The insurers indicate that the "coverage issue" would be whether there would be "any obligation to pay in excess of the policy limits that have already been tendered, which is the very subject of Appellant's lawsuit currently pending in the United State District Court..." In fact, the subject of the bad faith lawsuit which was removed to federal court is insurers' bad faith breach of the insurance contract in failing to accept a policy limits settlement when such was the only reasonable, good faith, course of action. Just as in this case, in the federal case Appellant argued that the imposition of costs and penalties in response to rejection of an Offer of Judgment is not improper as exceeding the policy limits where such costs are imposed as a penalty, not as damages, and where costs and interest are not to be included within the policy limits under South Carolina law.

Appellant must assume that the insurer is now feigning confusion as to the meaning of Appellant's argument referencing the statutory process whereby the insurers are permitted to step into the shoes of the uninsured driver to defend the liability lawsuit without being named as the result of the legal fiction whereby the party named as defendant is the uninsured driver rather than the actual defending insurers, the parties required to pay benefits upon liability's being established. The insurers have never indicated any confusion with this concept in all the arguments before the

Circuit Court or in the arguments before the Federal Court. Nevertheless, on appeal, Allstate now argues that Appellant argues "[T]hat the entire lawsuit and every other lawsuit involving uninsured and potentially underinsured motorist, are legal fictions thereby making the insurance carrier a 'party' to the lawsuit." (Brief of Allstate at p. 7).

To the contrary, Appellant's argument is simply that the reason the name in the caption is "Jose Valle" and not Allstate and Liberty Mutual is due to the requirement in South Carolina of a legal fiction that the opposing party is the uninsured driver who must be named as the "defendant." Appellant has argued that this legal fiction is for the benefit of the insurers and that the beneficiaries of a legal fiction must not be permitted to rely upon the legal fiction for purposes inconsistent with the pursuit of justice. Appellant argues that, therefore, where the insurers sought to rely upon the legal fiction for the purposes of avoiding a just and valid imposition of costs and interest against them, the judge erred in failing to simply disregard the legal fiction. Allstate concedes that the standard procedure in South Carolina is that the uninsured driver must be named in the liability lawsuit with service on the insurers. However, Allstate then points out that, "If necessary, the insured may bring a second action to address any coverage issues that may have arisen." However, there are no such ""coverage issues" or "policy defenses" involved in this case - - Appellant is simply seeking to execute the judgment awarding him costs and interest for the rejected Offer of Judgment against the insurers - - the litigants that rejected his Offer of Judgment.

The insurers argue, "The clear language of the statute does not make the insurers a party to the lawsuit involving the tortfeasor." Again, Appellant has not argued that the language of the statute made the insurers the actual named defendant in the liability lawsuit; instead, Appellant has argued that it was the conduct of the insurers in rejecting his offer of judgment that made the insurers the responsible party in the Offer of Judgment proceeding and the party responsible for paying the Order of Offer of Judgment Costs and Interest as a penalty. The Offer of Judgment

statute imposes a penalty as a "consequence" for non-acceptance of an offer of judgment. In uninsured motorist cases, the only parties with authority to bind the insurers and to offer in settlement the funds in the hands of the insurers, are the insurers themselves. *See Broome v. Watts*, supra.

Finally, Allstate asserts that Appellant "essentially argues that because the insurance companies are the entities with resources, they should be considered parties simply based on that fact." (Brief of Allstate p. 22). Of course, that is not Appellant's argument. During the hearing on the insurers' Motions to Quash, Counsel for Appellant certainly mentioned that the insurers are the only entity with access to and authority to offer in settlement the coverage available within the limits of Appellant's insurance policy. (R. pp. 76-77). However, counsel's point was that it was ridiculous and false for the insurers to suggest that Jose Valle was the party that extended to Plaintiff the $135,000 Offer of Judgment on January 18, 2011. Counsel repeatedly and consistently, albeit unsuccessfully, sought to convince Judge Jefferson that the Offer of Judgment filed by Counsel for Allstate was made by the insurers and not by Jose Valle, who had no authority to offer the funds available within the policy limits.

IV. LEGAL ARGUMENTS

1. Appellant's arguments were properly preserved for appeal

The insurers argue that Appellant has raised "new arguments on appeal that are not properly before this Court." (Brief of Allstate, p. 13) However, the insurers fail to identify any such "new" arguments and Appellant is at a loss to identify any arguments raised on appeal that were not presented below. Appellant has consistently argued before the Circuit Court and before this Court that (1) the parties responsible for paying the costs and interest ordered as a sanction for the rejected Offer of Judgment were the insurers; (2) the case was brought and captioned against the named defendant/uninsured driver, Jose Valle, only to maintain the legal fiction required by

statute; (3) an Offer of Judgment was made to and against Appellant by the insurers; (4) Appellant responded by making an Offer of Judgment to and against the insurers; (5) the insurers rejected that offer of judgment which was then exceeded by the jury verdict; (6) the penalties imposed for the rejected Offer of Judgment as a sanction were not properly considered as damages within the insurance policy's limits; (7) that Judge Harrington ruled the Appellant could not pursue a Rule to Show Cause but that he should proceed to execute his judgment against the insurers with supplemental proceedings; and (8) that, therefore, Judge Jefferson erred in ruling that Plaintiff could not execute the judgment against the insurers, but that he was required instead to execute the judgment awarding Costs and Interest as a result of the rejected Offer of Judgment against the uninsured driver. These arguments were raised before the Circuit Court and properly preserved for appeal.

Allstate indicates that Appellant "now argues that the insurers are bound to pay the costs and interest because the statute creating uninsured motorist coverage states that the mandatory limits were to be 'exclusive of interest and costs.'" (Brief of Allstate p. 24). To the contrary, Appellant actually argues that the insurers are bound to pay the costs and interest from the rejected Offer of Judgment because the insurers rejected the Offer of Judgment and insisted instead on proceeding with a jury trial from which the verdict far exceeded the Offer of Judgment the insurers had rejected. Appellant has pointed out that the insurers' defense that they could not be held responsible for paying the ordered costs and interest as a matter of law because such an order would exceed their policy limits, was unavailing where such costs and interest are not properly considered or treated as damages, but as a penalty for the insurers' conduct. Appellant pointed out that the insurer's argument as to it being impossible for a South Carolina Court to impose penalties and interest upon the insurers where such would exceed the policy limits of the insurance contracts

is inconsistent with the law in South Carolina which indicates that the policy limits of an insurance contract apply to damages, not including costs and interest.

This was Appellant's argument in the proceedings before Judge Harrington and Judge Jefferson and on appeal; therefore, the issues argued on appeal were properly preserved. Otherwise, as to its claim that Appellant's arguments are unpreserved, Allstate specifies only that Appellant's arguments regarding "statutory construction" were not presented in the circuit court. To the contrary, Appellant argued below that the plain language of the Uninsured Motorist Act and of the Offer of Judgment statute should prevail. While Counsel for Appellant did not cite precedent to the Circuit Court in support of the proposition that the statutory language should be followed, Counsel did repeatedly cite to and reference the plain language of the relevant statutes. Surely the insurers do not argue that, in order to preserve arguments for appeal, Counsel for Appellant was required not only to cite the statutes, but she was further required to read the statutes word-for-word during the hearing in order to preserve her arguments for appeal. To the contrary, it is sufficient to fairly place the issues related to the relevant statutes before the Court for counsel to cite the statutes, requesting that the judge abide by their plain language.

2. Rule 60, SCRCP Modification of the Judgment of Offer of Judgment Costs and Interest

The insurers indicate that the time limit for modification of the Judgment of Offer of Judgment Costs and Interest pursuant to Rule 60, SCRCP has passed and that, therefore, any effort to modify, open, or avoid the consequences of the Order of Costs and Interest from the rejected Offer of Judgment is precluded by law. Of course, Appellant has made no such request or any effort to modify or alter the scope of the judgment of Costs and Interest issued against the insurers. Rule 60, SCRCP, permits a litigant to avoid the consequences of an Order; however, here, Appellant does not seek to **avoid** the consequences of the Order of Offer of Judgment Costs and

Interest - - he seeks to execute the judgment. Regardless of the caption's identifying the defendant as Jose Valle as required by law, the Judgment of Costs and Interest from the rejected Offer of Judgment was directed to and issued against the insurers who litigated the Offers of Judgments. Appellant argued that the Order, as issued, properly imposed upon the insurers the responsibility to pay the costs and interest ordered. The insurers argue that the Order *must have* been directed to Jose Valle solely because he is named in the caption as required by law while Appellant argues that the Order *was* directed to the insurers because the insurers were the participating opposing party and because it was the conduct of the insurers in rejecting Plaintiff's Offer of Judgment which justified the imposition of costs and interest as a "consequence for non-acceptance," according to the statute.

To again borrow Allstate's transformative phrasing, the caption of the Order of Offer of Judgment Costs and Interest identifies Jose Valle as the Defendant; however, Jose Valle was not the actual defendant, and the filings, motions, and conduct of Allstate and Liberty Mutual led to the imposition of costs and interest for the rejected offer of judgment. (*See* Brief of Allstate, p. 2, fn. 1).

3. The Circuit Court erred in granting the Motions to Quash execution against the insurers of the Judgment of Offer of Judgment Costs and Interest

The insurers' legal argument is based on the false premise that there is no judgment as to the insurers. As indicated, in fact, the Order of Offer of Judgment Costs and Interest **was** issued as to the insurers and it constitutes a judgment against the insurers. As required by South Carolina law, the order of costs and interest imposed in the liability case continued the caption identifying the defendant as Jose Valle; however, the Order of sanctions imposed as a consequence for the non-acceptance of Plaintiff's Offer of Judgment pursuant to the plain language of the Offer of

Judgment statute, S.C. Code Ann. Section 15-25-400 was against the insurers, the litigants who had rejected the Offer of Judgment.

The insurers again argue that the Order of Offer of Judgment Costs and Interest could not have been directed to and against the insurers because the Offer of Judgment statute, S.C. Code Ann. Section 15-25-400, provides that an offer of judgment is to be issued as to the opposing party and, because the insurers were not the named defendant, the penalty Order could not have been issued against the insurers. Appellant addressed this contention on brief, pointing out that the insurers, despite claiming to be "non-parties" in the litigation case, were the actual parties opposing Appellant's efforts to obtain penalties for the rejected Offer of Judgment, where the insurers had themselves extended an Offer of Judgment to Plaintiff, explicitly referencing the statute and, thereby, assuming the role of parties under the Offer of Judgment statute. However, the insurers' further statement is telling: The insurers conclude their footnote devoted to the plain language of the Offer of Judgment statute by indicating, "Appellant has a judgment that he is able to execute upon against Valle, the tortfeasor and party who caused his injuries." (Brief of Allstate, pg. 17) The insurers then indicate, "Here, Appellant's judgment is against Valle, the tortfeasor who caused the harm complained of in the Complaint." (Brief of Allstate at p. 18). The insurers fail to recognize that the imposition of costs and interest as the result of non-acceptance of an offer of judgment is distinct from the establishment of liability for the automobile accident. Certainly Jose Valle was "the tortfeasor" who caused the injuries Appellant sustained in the automobile accident. However, Jose Valle has not been seen or heard from since the accident in 2010.

Valle had no authority to engage in settlement negotiations or to bind the insurers by agreeing to settle the case for the policy limits and he made no attempt to do so. Therefore, as regards the proceedings on the rejected Offer of Judgment, the parties opposing Plaintiff **were** the insurers. It was the insurers that rejected Plaintiff's Offer of Judgment, insisting instead on

proceeding to trial so that it was years after the accident before Appellant finally received the funds available within the policy limits of the uninsured motorist policy for which he had contracted with the insurers. Meanwhile, Appellant was forced to incur costs in prosecuting the unnecessary jury trial and appeal while the insurers retained and enjoyed the benefits of the money which should have been paid to Appellant pursuant to the insurance contract and in response to his Offer of Judgment. Therefore, as regards the Offer of Judgment, the parties who opposed Plaintiff and caused him damage and who withheld the funds to which he was entitled, thereby injuring Plaintiff, were the insurers and not Jose Valle.

4. This was a claim for penalties as the result of a rejected Offer of Judgment which did not involve a "coverage issue."

The insurers next argue that Appellant has cited no precedent establishing that an insurance company that rejects an Offer of Judgment filed under the statute may be held responsible for paying the penalties imposed in response to such rejection. Again, the *Broome* Court's decision stands for the proposition that the insurers are the actual defendant before the Court who must pay damages in the event of liability; accordingly, an insurer rejecting an offer of judgment is properly held responsible for paying an award of costs and interest under the Offer of Judgment statute. However, as indicated below and on appeal, Appellant has found no South Carolina authority so interpreting the Offer of Judgment statute; therefore, Appellant relied upon the plain language of the statute and he referenced numerous decisions from jurisdictions with similar "Offer of Judgment" statutes wherein the courts determined that the award of costs and interest was not properly considered part of the damages awarded because the award is a penalty, properly awarded against the insurer refusing the Offer of Judgment..(R. p. 101).

The insurers argue that the Circuit Court lacked jurisdiction to issue the Order of Offer of Judgment Costs and interest against the insurers because they were not the named defendant in the

liability lawsuit. To the contrary, the Circuit Courts had jurisdiction to issue Orders in the matter before the court where the insurers were properly served and had subjected themselves to the jurisdiction of the Court by appearing for the purpose of protecting their interests and arguing against the imposition of costs and interest in response to the rejected Offer of Judgment's being exceeded by the jury verdict.

V. Arguments not presented by Appellant

The insurers argue that the Appellant makes various unavailing arguments on appeal which the Appellant actually does not make. For example, the insurers argue that Appellant has contended "throughout his brief that Allstate and Liberty Mutual are obligated to pay the entire judgment on behalf of Valle." (Brief of Allstate p. 24; Liberty p. 18). The insurers assert that such an argument is inconsistent with South Carolina law and not properly before the Court. For once, Appellant is able to wholeheartedly agree with the insurers - - no such issue is properly before the Court where no such issue is argued by Appellant. Appellant has consistently argued that it is the Order of Offer of Judgment Costs and Interest which the insurers should be required to pay as the result of the action on appeal.

The insurers argue, "As the Circuit Court astutely surmised, Appellant essentially argues that because the insurance companies are the entities with resources they should be considered parties simply based on that fact. The insurers then point out that such a premise is not the law in South Carolina. (Brief of Allstate at p. 22). Of course, this has never been Appellant's argument; Appellant has always maintained that the insurers were properly treated as parties to the Offer of Judgment proceeding and properly held responsible for paying the Costs and Interest awarded upon the rejected Offer of Judgment's being exceeded by the jury verdict.

The insurers argue that appellant has raised an issue of "coverage" which should have more properly have been brought in a separate action on the insurance contract where the insurers could

raise policy defenses. The insurers cite language from the decision in *Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 392, 134 S.E.2d 206, 207 (1964), indicating that the standard procedure was for the plaintiff to first bring an action to establish liability and thereafter the plaintiff could bring a separate action on the insurance companies' endorsement. However, the *Laird* Court's opinion plainly indicates that the single question before the Court was "whether or not the appellant [insurer] was required to pay the portion of the judgment which is for punitive damages." Thus, the language quoted as to the usual procedure is actually dicta, inapplicable here particularly where the Offer of Judgment statute was not involved or addressed by the *Laird* court.

Appellant's action seeking an Order of Costs and Interest as a sanction under the Offer of Judgment statute sought the penalties as explicitly set out in the statute as consequences for non-acceptance of an Offer of Judgment. Appellant makes no claims regarding coverage and there are no policy defenses which would be effective against the Order of costs and interest imposed as a penalty for the insurers' rejecting an Offer of Judgment. The insurers' arguments that there can only be one action and one defendant is inconsistent with the holding in *Broome*. Again, the named defendant and the uninsured motorist carrier defending the liability case are not one and the same party - - they have distinct roles, responsibilities, and rights before the Court. The authority and right to engage in a settlement and to waive the right to a jury trial by accepting an Offer of Judgment is in the purview of the defending insurers. As argued, the Court in *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995), ruled that the uninsured driver, although the only defendant named in the liability case, had no authority to enter a settlement and could not actually bind the insurer or give up the insurer's right to a jury trial. The *Broome* Court, relying upon Section 38-77-160 found that the attempted waiver of the jury trial by the named defendant, was "not tantamount to a waiver by USAA, because it blurs the distinction between the named defendant

(Watts) and the actual defendant (USAA) which must pay damages on behalf of the named defendant in the event of liability." *Broome*, 319 S.C. at 340, 461 S.E.2d at 48).

Finally, the insurers assert that Appellant made no showing that Allstate has acted in bad faith in this lawsuit and could not do so because "this case only involves issues related to Valle's actions with regard to the automobile accident." (Brief of Allstate, p. 25) To the contrary, Appellant has made no effort to establish through this action to collect costs and interest that the insurers acted in bad faith breach - - that showing will be made in the lawsuit which the insurers had removed to federal court. However, it is difficult to discuss the actions taken by the insurers in rejecting the offer of judgment and in insisting on a jury trial without leaving the impression that the insurers acted in bad faith; however, that is not the point of the action on appeal. The purpose of this action pursuant to the Offer of Judgment statute is to execute the Order of Costs and Interest as sanctions for rejection of an Offer of Judgment against the assets of the parties rejecting the Offer of Judgment.

CONCLUSION

For all the forgoing reasons, the Orders granting the insurers' Motions to Quash the Execution of the Judgment of Offer of Judgment Costs and Interest should be reversed and the execution permitted to proceed against the insurers.

Respectfully submitted,

Pamela R. Mullis
MULLIS LAW FIRM
Post Office Box 7757
Columbia, South Carolina 29202
(803) 799-9577

ATTORNEYS FOR THE APPELLANT

Columbia, South Carolina
January 28, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001452

Levern McCray, Appellant,

v.

Jose W. Valle, Respondent,

CERTIFICATE OF COUNSEL

Counsel for Appellant hereby certifies that the Final Reply Brief of Appellant complies with Rule 211(b) SCACR.

January 28, 2016

Pamela R. Mullis
Mullis Law Firm
Post Office Box 7757
Columbia, S.C. 29202
(803) 799-9577

COUNSEL FOR APPELLANT