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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court Of Common Pleas

The Honorable Deadra L. Jefferson, Judicial Circuit Court Judge
Case No.: 2012-CP-08-1801

Appellate Case No. 2015-001452

Lavern McCray.....Appellant,

v.

Jose W. Valle. ..... Respondent.

Of Whom Allstate Insurance Company is the ..... Respondent.

FINAL BRIEF OF RESPONDENT ALLSTATE INSURANCE COMPANY

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ATTORNEYS FOR RESPONDENT
ALLSTATE INSURANCE COMPANY

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ALLSTATE INSURANCE COMPANY

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STATEMENT OF ISSUE ON APPEAL

I. DID THE CIRCUIT COURT CORRECTLY GRANT ALLSTATE'S MOTION TO QUASH PLAINTIFF'S EXECUTION AGAINST PROPERTY WHERE PLAINTIFF HAS NO JUDGMENT AGAINST ALLSTATE UPON WHICH TO EXECUTE AND DID NOT, AND COULD NOT, FILE AN OFFER OF JUDGEMENT AS TO ALLSTATE IN CONNECTION WITH THE LAWSUIT AGAINST DEFENDANT JOSE. W. VALLE?

INTRODUCTION

The circuit court's grant of the Motion to Quash Plaintiff's Execution Against Property ("Motion to Quash") filed by non-party Allstate Insurance Company ("Allstate") should be affirmed because Appellant Levern McCray ("Appellant") has improperly sought to execute against the property of Allstate, a non-party to the lawsuit, to collect on a judgment and costs and fees awarded on an offer of judgment entered as to the defendant in the lawsuit, Jose W. Valle ("Valle").[1] While Appellant has tried to raise a host of issues on appeal, the only real issue is whether the circuit court correctly determined that Appellant could not execute against a non-party under an Order of Judgment based on an Offer of Judgment issued to the only other party to the lawsuit, Valle. Because Allstate is not a party to the lawsuit and no judgment was issued as to Allstate pursuant to the Order of Judgment, the circuit court correctly granted Allstate's Motion to Quash.

This case arises from an automobile accident that occurred on December 20, 2008 when Appellant's vehicle was struck when Valle's vehicle crossed the center line. As a result of the accident, Appellant sustained bodily injuries.

Appellant was a listed driver under an automobile policy issued by Allstate, which included uninsured motorist coverage. In addition, Appellant was insured under a policy issued by Liberty Mutual Fire Insurance Company ("Liberty Mutual"), which also included uninsured motorist coverage. Valle did not appear in the lawsuit, pursuant to

[1] Valle is identified as the "respondent" in this appeal. However, Valle is not the respondent in this appeal, and Allstate and Liberty Mutual Fire Insurance Company filed the motions upon which the appeal is based. Pursuant to Rule 208, SCACR, Allstate adopts and incorporates by reference as if fully stated herein, any and all arguments raised by Liberty Mutual Fire Insurance Company in this appeal.

South Carolina law, and Allstate and Liberty Mutual filed answers and participated in the defense of the lawsuit.

Appellant filed an Offer of Judgment ("Offer") against Valle and offered to accept $300,000 in full compromise and settlement of the claim against Valle. Ultimately, the jury returned a verdict in favor of Appellant and a judgment was entered against Valle in the total amount of $647,000, with $500,000 in actual damages and $147,000 in punitive damages.

The trial court correctly determined that the Offer was filed as to Valle, the only other party to the lawsuit, and that Appellant had no judgment against Allstate, a non-party, upon which to execute. Because Appellant has failed to demonstrate any error by the circuit court in determining that he was not entitled to execute against the property of Allstate, a non-party against which there is no judgment, the circuit court's decision should be affirmed.

STATEMENT OF THE CASE

On May 21, 2010, Appellant filed a Summons and Complaint against Valle alleging causes of action for negligence and recklessness arising from an automobile accident that occurred on December 20, 2008. Appellant sought to serve Valle by publication on August 10, 2010, which service was done on September 2, 6, and 16, 2010. Valle did not make an appearance or otherwise respond to the Complaint, and Allstate and Liberty Mutual filed Answers pursuant to Section 38-77-150 of the South Carolina Code of Laws on September 27, 2010 and October 20, 2010, respectively.

On February 15, 2011, Appellant filed an Offer of Judgment against Defendant Valle. Valle did not respond to the Offer of Judgment. The case proceeded to trial on August 13, 14, 15, and 16, 2012. Following the trial, the jury returned a verdict in favor of Appellant in the amount of $500,000 in actual damages and $147,000 in punitive damages. On August 16, 2012 judgment was filed against Valle in the amount of $647,000. On January 14, 2013, the circuit court issued an Order for Costs and Interest Pursuant to Offer of Judgment as to Valle, which provided that Appellant was entitled to $3,247.01 in costs and $77,569.10 in interest.

On September 18, 2012, a notice of appeal was filed with regard to amount of the verdict. On August 6, 2014, the South Carolina Court of Appeals affirmed the verdict.

On September 14, 2014, Appellant filed a Motion to Enforce Order of Judgment and Rule to Show Cause against Allstate and Liberty Mutual. Allstate filed its response to the motion on October 29, 2014, and Liberty Mutual filed its response on December 1, 2014. A hearing was held on October 22, 2014, and by Order dated December 1, 2014, the circuit court denied Appellant's motion. The circuit court denied

the motion finding that "a writ of execution, together with supplementary proceedings, [wa]s the proper procedure to enforce the underlying judgment." (R. p. 15)

On February 12, 2015, Appellant filed an Execution Against Property seeking to execute against the property of Allstate and Liberty Mutual. On February 9, 2015, Liberty Mutual filed a Motion to Quash Writ of Execution. On February 12, 2015, Allstate filed a Motion to Quash Execution Against Property. On May 12, 2015, the circuit court heard oral argument of the parties. After hearing oral argument and considering the written materials, by Order filed on June 10, 2015, the circuit court granted both Allstate's Motion to Quash. In granting the Motion to Quash, the court determined that "[b]ecause [Appellant] did not file an order of judgment specifically stating that the order was filed as to Allstate, he c[ould] not now seek to enforce the Order of Judgment against Allstate" and that Appellant "must execute his judgment against Valle, not Allstate." (R. p. 3-4) Further, the court also reasoned that Appellant's "effort to enforce his judgment against Allstate through the Writ [wa]s improper" because Allstate was a non-judgement creditor, failed to follow the procedure mandated by South Carolina law, and was impermissibly seeking to change the scope of the judgments previously entered in the case in contravention of South Carolina law. (R. p. 3-5) By ordered filed on June 15, 2015, the circuit court granted Liberty Mutual's motion.

Appellant did not file a motion for reconsideration pursuant to Rule 59(e), SCRCP. Rather, Appellant filed a Notice of Appeal as to the grant of Allstate's Motion on August 21, 2015.[2] Appellant had previously filed a Notice of Appeal as to the grant of

[2] Appellant contends he did not receive a copy of the Order granting Allstate's Motion until August 19, 2015.

Liberty Mutual's motion on July 6, 2015.

STATEMENT OF FACTS[3]

A. Suit Against Valle

On December 20, 2008, Appellant was involved in an automobile accident with Valle. (R. p.18 ¶ 3) Appellant's vehicle was struck when Valle's vehicle crossed the center line. (R. p. 18 ¶ 3) Appellant alleged the collision was "a direct and proximate result" of Valle's negligence and recklessness specifically "in driving under the influence;" "in pulling into the [Appellant]'s lane of travel;" "in speeding;" "in failing to maintain a proper lookout;" "in operating his vehicle in an unsafe manner;" and "in failing to use the degree of care and caution a reasonable and prudent person would have used under the same or similar circumstances." (R. p. 18-19 ¶ 4) Appellant further alleged that as a result of Valle's negligence and recklessness, he was injured in the following respects: injury to his left ankle, right thumb, left shoulder, left knee, left foot, left leg, and left hip; incurred medical expenses; suffered pain and mental anguish; suffered impairment to ability to enjoy his life; and suffered loss of wages and impairment of ability to earn future wages. (R. p. 19 ¶ 5) Appellant contended that he was "entitled to recover actual and punitive damages against [Valle]." (R. p. 19 ¶ 6)

Appellant filed suit against Valle on May 21, 2010 and sought to serve him by

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[3] Appellant's brief on appeal is replete with bald assertions disguised as "facts," specifically with regard to the alleged attempts regarding settlement of the claims. *See* Initial Brief of Appellant, pp. 3-4 These purported "facts" find no support in the record, were not presented to the circuit court, and were not considered by the circuit court in any context. *See Becker v. Uhe*, 221 S.C. 334, 339, 70 S.E.2d 346 (1952) ("[F]acts improperly stated in the brief will not be considered."). In addition, Appellant incorrectly refers to Allstate and Liberty Mutual as "Defendants." Neither Allstate nor Liberty Mutual were defendants in this matter.

In addition, Appellant fails to include proper reference to the materials from which the statements are included in Appellant's Statement of Fact were taken. *See* Rule 208(b)(4), SCACR.

publication on August 10, 2010. (R. p. 194-199) The service by publication was completed on September 2, 6, and 16, 2010. (R. p. 200) Allstate issued an automobile insurance policy number 0 90 746371 12/06 ("the policy"), which included uninsured motorist coverage, to Named Insured, Ollie E. Walton-McCray, and Appellant was a listed driver on the policy. (R. p. 269-272) Valle did not make an appearance in the lawsuit, on October 20, 2010, and Allstate filed an Answer to the Complaint pursuant to Section 38-77-150 of the South Carolina Code of Laws.[4]

During the pendency of the lawsuit against Valle and before trial, Appellant filed an Offer of Judgment against the defendant, Valle, on February 15, 2011. Specifically, the Offer of Judgment provided:

> ...Plaintiff...offers the total sum of Three Hundred Thousand ($300,000) Dollars as full compromise and settlement of his claim against the ***Defendant*** for personal injury....***Defendant*** has twenty (20) days from the date indicated below to accept this offer and, if notice of acceptance is not given by the ***Defendant***, in writing, the offer is withdrawn and cannot be given in evidence.

(R. p. 33) (emphasis added). Appellant did not file a similar Offer of Judgment as to Allstate.

The trial was held on August 13, 14, 15, and 16, 2012, and the jury returned a verdict in favor of Appellant in the amount of $500,000 in actual damages and $147,000 in punitive damages. On August 16, 2012, the judgment was filed against Valle in the amount of $647,000. (R. p. 264-265) Specifically, the judgment provided:

[4] Liberty Mutual filed an Answer on September 27, 2010.

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)
Levern McCray	Jose W. Valle	$647,000.00

Following a hearing "in regard to the setting of the proper amount of costs and interest . . . in regard to Plaintiff's Offer of Judgment," on January 14, 2013, the circuit court issued an Order for Costs and Interest Pursuant to Offer of Judgment as to Valle, which provided that Appellant was entitled to $3,247.01 in costs and $77,569.10 in interest.[5] (R. p. 13-14)

B. Appellant's Efforts to Collect on the Judgment

After the remittitur was filed, on September 22, 2014, Appellant filed a Motion to Enforce Order of Judgment and Rule to Show Cause. In the motion, Appellant requested that the court enforce the Order of Judgment in which the court determined that Appellant was entitled to a total of $80,816.011 in costs and interest. Appellant further requested that the court issue a rule to show cause as to Allstate and Liberty Mutual regarding why the insurers had not paid the costs and interest. Appellant contended that as the insurers "who defended the underlying case," Allstate and Liberty Mutual were required to pay the costs and interest. (R. p. 90) Both Allstate and Liberty Mutual filed responses to the

[5] The hearing was held before the trial judge, the Honorable Judgment Deadra Jefferson, who also issued the Order for Costs and Interest Pursuant to Offer of Judgment.

motion, and a hearing was held on October 22, 2014.[6]

Following the hearing on Appellant' motion, the court issued an order on December 1, 2014 denying the motion. Specifically, the circuit court stated: "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) Rather than institute supplementary proceedings and issuing a writ of execution as to Valle, the party against whom Appellant had obtained a judgement, on January 27, 2015, Appellant sent to the Berkeley County Clerk of Court a document entitled Execution Against Property. Specifically, in the Execution Against Property, Appellant erroneously contended that the costs and interest had been awarded against Allstate and Liberty Mutual. (R. p. 192)

Both Allstate and Liberty Mutual filed motions to quash Appellant's Execution Against Property. In Allstate's Motion to Quash, filed on February 12, 2015, Allstate sought to quash the writ because Appellant possessed no judgment against Allstate and was improperly seeking to recover a judgment against a non-party entity. (R. p. 232-233) Further, Allstate argued that Appellant was improperly seeking to alter the scope of the circuit court's order regarding the costs and interest in violation of South Carolina Rule of Civil Procedure 60. (R. p. 233-235) In response to the motions of Allstate and Liberty Mutual, Appellant submitted the same memorandum of law that was submitted in support of his Motion to Enforce Order of Judgment and Rule to Show Cause that had been

[6] Notably, during the hearing, the court determined that because neither Allstate nor Liberty Mutual were parties to the lawsuit, counsel for the respective insurers were not permitted to argue before the court.

previously denied.

A hearing was held on Allstate and Liberty Mutual's Motions on May 12, 2015. After considering the arguments and motions of Allstate and Liberty Mutual and the arguments and memorandum of law provided by Appellant, the circuit court granted the motion and quashed the writs to execute. Specifically, the court explained that it could "find no case support for [the writs], nor any statutory support to allow an individual to execute judgment against the nonparty." (R. p. 85, ll. 19-22) Further, the court reasoned:

> If I were to follow this logic to what can only be characterized as this illogical extreme, every time an insurance company met its limit of coverage and a party was judgment proof, then a party could sue the insurance company for the deficit in coverage. And I cannot find any support for that. And I've looked and I've not found any cases on point to support that position.
>
> 15-35-400, in its plain and ordinary language, refers to a party. The only person that can be a party is someone listed in a pleadings that's been sued. The insurance company is not a party to this action.

(R. pp. 85, ll. 22-25 – 86, ll. 1-10)

Following the hearing, the court issued a written order with regard to the grant of Allstate's Motion to Quash, which was filed on June 10, 2015. In the written order, the court found that Appellant had filed the Offer of Judgment as to Valle and did not file any offers of judgment as to Allstate and Liberty Mutual. (R. p. 2-3) Further, the circuit court found that "neither Allstate nor Liberty Mutual was identified in the Order for Costs." (R. p. 3) The circuit court determined that because the Order of Judgment was issued as to the Offer of Judgment, which was made as to Valle, Appellant could not seek to enforce the Order of Judgment against Allstate. (R. pp. 3-4) The court concluded that Appellant "improperly filed the Writ to enforce the judgment against a non-judgment

creditor" and that under Rule 69, SCRCP, "[Appellant] [wa]s required to seek a writ of execution issued by the sheriff as to Valle to attempt to collect on the judgment." (R. p. 4)

Further, the court concluded that Appellant was prohibited from changing the scope of the Order of Judgment under South Carolina law. (R. p. 4) The court explained that South Carolina Rule of Civil Procedure 60(b) provides that a judgment cannot be altered more than one year after the judgment had been entered. (R. pp. 4-5) (citing Rule 60, SCRCP *and Coleman v. Dunlap*, 306 S.C. 491, 495, 413 S.E.2d 15, 17 (1992)). In addition, the circuit court explained that it was prohibited from changing the scope of the judgment. (R. p. 5 (quoting *Dion v. Ravenel, Eiserhardt Assocs.*, 316 S.C. 226, 230, 449 S.E.2d 251, 253-254 (Ct App. 1994)) The circuit court also determined that Rule 60, SCRCP provides for relief from judgment, but "'not the enforcement of that judgment against non-parties.'" (R. p. 5 (quoting *Ex parte S.C. Dep't of Revenue*, 350 S.C. 404, 408, 566 S.E.2d 196, 198 (Ct. App. 2002))

C. Lawsuit Against Allstate and Liberty Mutual

On March 19, 2014, Plaintiff filed suit against Allstate and Liberty Mutual for "bad faith breach of contract."[7] The claims against both Allstate and Liberty Mutual arise out of the December 20, 2008 accident with Valle. In his Complaint, Plaintiff specifically alleges:

[7] Plaintiff initially filed the lawsuit in the Court of Common Pleas for Richland County, South Carolina. Liberty Mutual filed a Notice of and Petition for Removal on June 27, 2014. The lawsuit is currently pending in the United States District Court for the District of South Carolina styled, *Levern McCray v. Allstate Insurance Company and Liberty Mutual Fire Insurance Company*, C/A No. 3:14-cv-02623-TLW.

> Plaintiff now contends that the Defendants are now liable to the Plaintiff for the total verdict including post judgment interest, the total amount of the awarded Offer of Judgment, as well as, costs, actual and punitive damages separate and apart from the underlying damages for this bad faith breach of contract.

(R. p. 324 ¶ 16)

ARGUMENT

For the reasons outlined below, the circuit court properly determined that Appellant's attempts to execute against the property of Allstate to satisfy the costs and interests awarded in connection with the Offer of Judgment issued as to Valle were improper. Specifically, the circuit court properly determined that the court could not enforce a judgment against a nonparty and could not provide relief from a judgment or order more than one year after the judgment. (R. pp. 4-5). Because Appellant has failed to demonstrate that the circuit court committed any error, the court's grant of Allstate's Motion to Quash should be affirmed.

I. Appellant Cannot Rely Upon Facts And Arguments That Were Never Presented To, Nor Considered By, The Circuit Court.

Before delving into the merits of the circuit court's decision, it is important to define the contours of Appellant's theory regarding why Allstate, a non-party, should be required to pay the costs and fees that were awarded as to Valle because he has raised new arguments on appeal that are not properly before this Court. Rather than respond to the specific arguments raised in the Motion to Quash, Appellant merely presented the same arguments that were previously rejected by the circuit court on his Motion to Enforce Offer of Judgment and Rule to Show Cause. The time had passed for seeking to appeal the circuit court's order on that motion, so it is unclear why Appellant submitted

the same memorandum of law to the court for its consideration in connection with the Motion to Quash. *See* Rule 203, SCACR ("A notice of appeal shall be served on all respondents within thirty (30) days after receipt of written notice of entry of the order or judgment.").

Nevertheless, the arguments raised in Appellant's brief on appeal present new arguments that were not previously raised to the circuit court. In his brief, Appellant has referenced so-called "facts" that were not previously before the circuit court such as the statements that Appellant's counsel sent letters to Allstate and Liberty Mutual regarding settlement and that the insurers rejected the offers of settlement at that time. (Appellant Brief, pp. 3-4, 19) With regard to the legal issues, 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." In addition, Appellant has now espoused a statutory construction argument regarding the uninsured motorist statute that was not previously before the circuit court. (Appellant Brief, pp. 7, 25-26) These arguments regarding statutory construction were never presented to, nor considered by, the circuit court, and Appellant's characterization regarding pre-suit settlement discussions is self-serving at best and not relevant to any issue in this lawsuit. Therefore, these issues should not be considered on appeal.

The law is clear that only issues "fairly and properly raised to the lower court and passed upon by that court" can be appealed. *State v. Oxner*, 391 S.C. 132, 134, 705 S.E.2d 51, 52 (internal quotations omitted). *See also Pye v. Estate of Fox*, 369 S.C. 555, 565, 633 S.E.2d 505, 510 (2006). For this Court to have "a platform for meaningful appellate review," *Herron v. Century BMW*, 395 S.C. 461, 465, 719 S.E.2d 640, 642

(2011), the circuit court must have had the opportunity *for each theory advanced by Appellant* "to rule properly after it has considered all relevant facts, law, and arguments," *I'On, LLC v. Town of Mt. Pleasant,* 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). Appellant cannot keep "ace card[s] up [its] sleeve - intentionally or by chance - in the hope that an appellate court will accept th[ose] ace card[s] and, via a reversal, give [it] another opportunity to prove [its] case." *I'On,* 338 S.C. at 422, 526 S.E.2d at 724. However, that is exactly what Appellant attempts to do in this appeal. Because these new arguments are outside the scope of arguments presented to and considered by the circuit court, they are not on appeal.

II. The Circuit Court Properly Granted Allstate's Motion to Quash.

The circuit court properly determined that because Appellant did not file an offer of judgment upon which an order could be issued specifically stating that the offer as to Allstate, he cannot now seek to enforce the Order of Judgment against Allstate. Further, the circuit court correctly determined that it could not alter the order on the Offer of Judgment because more than a year had passed, it had no authority to enforce judgment against a non-party, and the scope of the judgment could not be changed. (R. pp. 3-5). Therefore, the circuit court's decision should be affirmed.

A. The circuit court correctly determined that Appellant is required to follow proper South Carolina procedure to execute on the judgment as to Valle.

The established procedure on executing on a judgment is well established in South Carolina. Appellant is unable to justify his actions in attempting collect against a nonparty that is not the judgment debtor or a non-judgment creditor. The circuit court's decision is clearly supported by South Carolina law and should be affirmed.

1. Per the express terms of the Offer of Judgment and the Order of Judgment, Allstate is not the judgment debtor.

South Carolina Rule of Civil Procedure 69 provides:

> Process to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise. The procedure on execution, in proceedings supplementary to and in aid of judgment, and in proceedings on and in aid of execution shall be as provided by law. In the aid of the judgment or execution, the judgment creditor or his successor in interest when that interest appears of record, may examine any person, including the judgment debtor, in the manner provided in these rules for obtaining discovery.

Rule 69, SCRCP. Clearly, Rule 69 provides that South Carolina law allows for two methods whereby a plaintiff may execute on a judgment: writ of execution and supplementary proceedings. *See Ex parte Wilson*, 367 S.C. 7, 14, 625 S.E.2d 205, 209 (2005) (explaining that in addition to execution on a judgment by "writs of execution issued to the sheriff," "[s]upplementary proceedings also 'furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution, such as choses in action.'") (quoting *Lynn v. Int'l Bhd. of Firemen & Oilers*, 228 S.C. 357, 362, 90 S.E.2d 204, 206 (1995)) *and Johnson v. Serv. Mgmt., Inc.*, 319 S.C. 165, 167, 459 S.E.2d 900, 902 (Ct. App. 1995), *aff'd*, 324 S.C. 198, 478 S.E.2d 63 (1996) ("[j]udgments are enforced by way of writs of execution issued to the sheriff" and "[i]f a judgment is

unsatisfied, the judgment creditor may institute supplementary proceedings to discover assets" and that "[i]n addition to their discovery functions, supplementary proceedings 'furnish a means of reaching, in aid of the judgment, property beyond the reach of an ordinary execution, such as choses in action.'"). This rule and the case law interpreting the rule also necessarily presuppose the existence of a judgment.[8]

Here, there is no judgment as to Allstate. In considering the terms of the Offer of Judgment, the circuit court correctly determined that it "was specifically made as to Valle, not Allstate or Liberty Mutual." (R. p. 3) Obviously recognizing this fact, Appellant attempts to argue that 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. As the circuit court reasoned, "Legal fiction

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[8] Appellant also argues that the clear, unambiguous language of the Offer of Judgment statute, S.C. Code § 15-35-400, should be disregarded. Section 15-35-400 provides, in part:

> [A]fter commencement of any civil action based upon contract or seeking the recovery of money damages...any party may...file with the clerk of the court a written offer of judgment signed by the offeror or his attorney, directed to the opposing party, offering to take judgment in the offeror's favor, or as the case may be, to allow judgment to be taken against the offeror, for a sum stated therein, for property, or to the effect specified in the offer.

The statute clearly states that the offer of judgment is to be issued as to the "opposing party." Contrary to Appellant's arguments, nothing in the statute demonstrates that an offer of judgment can be issued as to a nonparty. The intent of the legislature is clear—offers of judgment can only be made as to parties. *See State v. Landis*, 362 S.C. 97, 102, 606 S.E.2d 503, 506 (Ct. App. 2004) ("When a statute's language is plain and unambiguous, and conveys clear and definite meaning, there is no occasion for employing rules of statutory interpretation and a court has no right to look for or impose another meaning.") (citing *City of Camden v. Brassell*, 326 S.C. 556, 486 S.E.2d 492 (Ct. App. 1997)). Applying the statute as written does not lead to an absurd result and does not negate the purpose underlying the statute. Appellant has a judgment that he is able to execute upon—against Valle, the tortfeasor and party who caused his injuries.

doesn't make them a party," and such an argument is not supported by South Carolina law. (R. p. 77, ll. 16-17)

The circuit court explained: "You can only execute judgments against parties. That's black letter precedent." (R. p. 77, ll. 17-18) Here, Appellant's judgment is against Valle, the tortfeasor who caused the harm complained of in the Complaint. The judgment following the trial was entered as to Valle. The Order of Judgment was issued as to Valle, the party to whom the Offer of Judgment was made. Valle is a real and known individual against whom Appellant was directed to proceed against to satisfy the judgment. Appellant has cited no South Carolina authority that is contrary to this black-letter precedent. Therefore, the circuit court's ruling should be affirmed. *See Hardaway Concrete Co. v. Hall Contracting Corp.*, 374 S.C. 216, 234, 647 S.E.2d 488, 497 (Ct. App. 2007) (citing *Joubert v. S.C. Dep't of Soc. Servs.*, 341 S.C. 176, 192-193, 534 S.E.2d 1, 9-10 (Ct. App. 2000)).

2. Appellant's arguments regarding a so-called "legal fiction" are unavailing and the uninsured motorist statute does not confer "party" status on Allstate.

As noted above, the Offer of Judgment and subsequent Order of Judgment were issued as to Valle. In an attempt to distract the Court from these facts, Appellant argues 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. Appellant improperly attempts to combine the tort lawsuit with a coverage lawsuit, which would involve issues related to the scope of coverage, such as 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 States District

Court of South Carolina captioned, *Levern McCray v. Allstate Insurance Company and Liberty Mutual Fire Insurance Company.*

The lawsuit against Valle does not create a legal fiction, and the case not was "nominally" captioned in his name. In cases involving a known uninsured motorist, the well-established procedure in South Carolina is to bring suit against the tortfeasor—the uninsured motorist—first, and then the insured, if necessary, may bring a second action to address any coverage issues that may have arisen. *See Laird v. Nationwide Ins. Co.*, 243 S.C. 388, 394, 134 S.E.2d 206, 209 (1964) ("Recovery under the uninsured endorsement is subject to the condition that the insured establish legal liability on the part of the uninsured motorist. Such an action is one *ex delicto* and the only issues to be determined therein are the liability and the amount of damage. After judgment is entered against the uninsured motorist, a direct action *ex contractu* can be brought to recover from the insurance company on its endorsement, and policy defenses may be properly raised by the insurance company.) (citing *Doe v. Brown*, 203 Va. 508, 125 S.E.2d 159 (Va. App. 1962) *and Rodgers v. Danko*, 204 Va. 140, 129 S.E.2d 828 (Va. App. 1963).[9] The

[9] A similar issue was addressed in South Carolina's federal district court. The federal district court reasoned that under South Carolina law, the claims against the tortfeasor and the uninsured motorist carrier were not properly joined. In making this determination, the court considered the reasoning in *Laird* and explained:

> ...The sequential proceedings contemplated by the statute and explained in *Laird* provide Plaintiff with a full opportunity to present her case against the uninsured motorist (and owner) while also allowing the insurer a full opportunity to step into the shoes of the uninsured motorist to defend, all without joining the insurer in the action . . . Should a dispute then arise as to the extent to which the judgment against the uninsured motorist is *covered by the insurance contract* or whether any claims handling procedure was improper, that dispute may be handled in a separate action with no need to involve the uninsured motorist.

current lawsuit against Valle does not create a legal fiction. Rather, it is a necessary step in the process, and South Carolina precedent demonstrates that any potential coverage issues should not be addressed in this lawsuit.

As previously noted, Appellant did not previously raise issues regarding the interpretation of the uninsured motorist statute before the circuit court. Notwithstanding that fact, the interpretation that Appellant espouses is not in keeping with the plain language of the statute and previous South Carolina authority. There is no mystery surrounding the operation and meaning of the uninsured motorist statute. "Where the statute's language is plain and unambiguous and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000) (citing *In re Vincent J.*, 333 S.C. 233, 233, 509 S.E.2d 261, 262 (1998). Further, "[w]hat a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Hodges*, 341 S.C. at 85, 533 S.E.2d at 581) (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)).

South Carolina courts have determined that the purpose of Section 38-77-150 is to provide for a mechanism to provide notice to an uninsured motorist carrier and does not confer status as a party on the uninsured motorist carrier. In addition, South Carolina courts have not treated the statute as conferring such status on a carrier. *See Franklin v. Devore*, 327 S.C. 418, 489 S.E.2d 651 (1997), cert. denied (1998) (determining that the

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Pollock v. Goodwin, C/A No. 3:07-3983-CMC, 2008 WL 216381, *5 (D.S.C. Jan. 23, 2008).

plaintiff did not need to serve the insurer within the three-year statute of limitations period as if it were a party defendant because the statue was a notice statute). *See also Ex parte S.C. Farm Bureau Mut. Ins. Co.*, 314 S.C. 487, 431 S.E.2d 252 (1993), overruled on other grounds, ("Farm Bureau argues that the language 'in the manner provided by law' of § 38-77-160 mandates that it be served within three years, as must a party-defendant pursuant to § 15-3-30 (Supp. 1992). We disagree."). The clear language of the statute does not make the insurers a party to the lawsuit involving the tortfeasor. In addition, South Carolina courts have not treated carriers in cases involving uninsured and underinsured issues as parties. Therefore, the circuit court correctly determined that Allstate and Liberty Mutual were not parties to the lawsuit against Valle.

Appellant's reliance upon the decisions in *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995) and *Crawford v. Henderson*, 56 S.C. 389, 395-397, 589 S.E.2d 204, 208-209 (Ct. App. 2003) is misplaced, and it is unclear how the courts' reasoning in those cases support Appellant's argument that Allstate is somehow a party to this lawsuit. In *Broome* the court explained that, under the underinsured motorist statute, the underinsured motorist carrier and the underinsured motorist have "separate and distinct" rights. *Broome*, 319 S.C. at 340, 461 S.E.2d at 48. The court determined that where the underinsured motorist settled with the plaintiff and waived a right to a jury trial, such waiver was not binding upon the insurer where the statute provided that after such a settlement, "the underinsured motorist insurer may assume control of the defense of action for its own benefit." *Id.* at 339, 461 S.E.2d at 48. The court determined that "[t]he right to defend includes the right to a jury trial." *Id.* at 340, 461 S.E.2d at 48. What the court did not state was that the underinsured motorist carrier was a party to the lawsuit.

Likewise, this Court in *Crawford* did not make such a leap. Rather, the Court reasoned "the attorney for the UIM carrier represents the carrier and not the named defendant" and that "[e]ven though the UIM carrier 'steps into the shoes' of the named defendant, the procedure is not in totality but merely to the point of coverage." *Crawford*, 356 S.C. at 398, 589 S.E.2d at 209. The Court ultimately determined that "there was no direct relationship between the UIM carrier's attorney and the named defendant." *Id.* at 398, 589 S.E.2d at 209. Again, the Court did not determine that the underinsured motorist carrier was a party to the lawsuit.

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. *See* R. p. 84. That is not the law in South Carolina, and Appellant has failed to point to any authority of any other jurisdiction with a similar statutory scheme to support his contentions. Appellant's argument contravenes the plain language of the statute and South Carolina law. The circuit court committed no error, and there is no basis to reverse the decision of the circuit court.

B. The circuit court correctly determined that Appellant could not modify the Order of Judgment.

Essentially, Appellant seeks to modify the Order of Judgment to change who would be responsible for satisfying the award of costs and interest. The circuit court correctly determined that the Order of Judgment could not be altered to apply to Allstate and Liberty Mutual versus Valle. Under South Carolina, [w]hether to grant or deny a motion under SCRCP 60(b) is within the sound discretion of the judge," and "[a]bsent an abuse of discretion, an appellate court should not disturb the trial court's discretionary

decision on appeal." *Coleman v. Dunlap*, 306 S.C. 491, 494, 496, 413 S.E.2d 15, 17 (1992) (citing *Tri-Country Ice & Fuel Co. v. Palmetto Ice Co.*, 303 S.C. 237, 399 S.E.2d 779, 782 (1990)). Further, "[t]he power to open, modify or vacate a judgment is possessed solely by the court that rendered the judgment." *Coleman*, 306 S.C. at, 494, 413 S.E.2d at 17 (citing 46 Am. Jur.2d *Judgments*, § 681 (1969) *and Bagley v. Bagley*, 415 A.2d 1080 (Me. 1980)). Here, Appellant has made no showing that the circuit court abused its discretion in determining that the Order of Judgment could not be modified, nor can he do so. Therefore, the circuit court should be affirmed.

C. The circuit court's grant of Allstate's Motion did not overrule the prior order on Appellant's Motion to Execute on Order of Judgment and Rule to Show Cause.

Appellant erroneously contends that the circuit court's Order granting Allstate's Motion overruled the court's previous order denying his Motion to Execute on Order of Judgment and Rule to Show Cause. (Appellant's Brief, pp. 22-25) Appellant's contention demonstrates a fundamental misunderstanding of the court's order on his motion and of South Carolina law regarding execution on judgments.

As previously explained, to execute on a judgment, the judgment creditor actually needs a judgment against the party against whom the judgment creditor is attempting to execute. Appellant does not have a judgment against Allstate against which he could execute. If the court's ruling on this issue was unclear to Appellant regarding whom the writ of execution could be issued and the supplemental proceedings could be had, Appellant had the opportunity to seek clarification of the order, which he did not. Allstate is not a party against which Appellant has a judgment. Furthermore, because Allstate was not a party to the lawsuit, the court would not have had jurisdiction to issue

any order directed as to its property. *See Green Tree Servicing, LLC v. Adams*, 375 S.C. 583, 586, 654 S.E.2d 100, 102 (Ct. App. 2007) ("A court may not act against a party without personal jurisdiction.") (citing *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006)). Therefore, the circuit court's grant of Allstate's Motion is consistent with its earlier ruling and should be affirmed.

D. Appellant's contentions that Allstate has an obligation to pay the entire judgment is not properly before this Court and is not supported under South Carolina law.

Appellant contends throughout his brief that Allstate and Liberty Mutual are obligated to the pay the entire judgment on behalf of Valle. Appellant's contentions are not supported by South Carolina law and this issue is not properly before this Court.[10] *See Hardaway Concrete Co.*, 374 S.C. at 234, 647 S.E.2d at 497 (determining that where the matter was not addressed in the final order and the party did not file a Rule 59(e) SCRCP motion for reconsideration the issues was not preserved for appellate review) (citing *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543, 546 (2000)).

Even if this issue were properly preserved for appellate review, the issue of coverage under the policy is not an issue properly considered in connection with this lawsuit. *See Laird*, 243 S.C. at 394, 134 S.E.2d at 209. Furthermore, under South Carolina, the law governing policy interpretation and application is certainly not novel and does not support Appellant's contentions.[11] Insurance policies are subject to the general rules of contract

[10] The circuit court's Order did not address this issue, and as previously noted Appellant did not seek clarification regarding the issue pursuant to Rule 59(e).

[11] Appellant's citation to and reliance upon the cases in his Memorandum of Law is misplaced, and the circuit court correctly found it to be so. Appellant fails to consider that the plain language of policy limits the coverage afforded under the policy to the policy limits, and South Carolina courts will enforce the express terms of the contract

construction. *See Nationwide Mut. Ins. Co. v. Commercial Bank*, 325 S.C. 357, 479 S.E.2d 524 (1996). The insurer's duties under a policy of insurance are set forth by the terms of the policy and cannot be enlarged by judicial construction. *See South Carolina Ins. Co. v. White,* 301 S.C. 133, 390 S.E.2d 471 (Ct. App. 1990). The policy has stated limits of uninsured motorist coverage and Allstate is only obligated to pay the policy limits and is released from any further liability in excess of those limits.

Further, in spite of Appellant's assertion that an insurer's ability to deny a meritorious claim is unfettered, South Carolina law states otherwise. Under South Carolina law, there is an implied covenant of good faith and fair dealing that neither party will do anything to impair the other party's rights to receive benefits under the contract. *See Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 339, 306 S.E.2d 616, 618 (1983) ("The *Gruenberg* decision is premised on an implied covenant of good faith and fair dealing that neither party will do anything to impair the other's rights to receive benefits under the contract.") (citing *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal.Rptr. 480, 510 P.2d 1032 (1973)). Appellant has not made any 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. Therefore, whether Appellant is entitled to recover more than the limits of the policy is not an issue properly before the circuit court and cannot be considered on appeal.[12]

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between the parties. Further, as the circuit court explained, Appellant has also failed to consider that the law of the other states is different from South Carolina law such that those decisions are not analogous.

[12] Appellant's contention that the Order of Judgment was calculated based on the verdict returned does not lend support to his argument that ***Allstate*** must pay this amount. Rather, Appellant brought suit against Valle. Any judgment against Valle does not affect

CONCLUSION

The circuit court properly granted Allstate's Motion to Quash. The Offer of Judgment upon which Appellant was seeking to execute was not directed to Allstate by its express terms and because Allstate was not a party to the suit. Further, the court correctly determined that Appellant could not modify the Order of Judgment to substitute Allstate and Liberty Mutual in place of Valle, who was the only other party to the lawsuit. South Carolina law simply does not support Appellant's attempt to execute against the property of Allstate, a nonparty against which a judgment has not been issued. Appellant cannot flout the well-established law of this state and seek to circumvent the well-established procedures in place to seek satisfaction of the judgment entered against Valle. For all of these reasons, Allstate respectfully requests this Court to affirm the circuit court's grant of its Motion to Quash.

January 28, 2016

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the limits of the policy issued by Allstate. *See, e.g., Taddei v. State Farm Indem. Co.*, 951 A.2d 1041, 1049 ("We reject plaintiff's argument that the trial court lacked authority to mold the verdict to enter judgment in plaintiff's favor in the amount of the policy limits....").

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court Of Common Pleas

The Honorable Deadra L. Jefferson, Judicial Circuit Court Judge
Case No.: 2012-CP-08-1801

Appellate Case No. 2015-001452

Lavern McCray.....Appellant,

v.

Jose W. Valle. ..... Respondent.

Of Whom Allstate Insurance Company is the..... Respondent.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that the Final Brief of Respondent Allstate Insurance Company complies with Rule 211(b), SCACR.

Respectfully Submitted,

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