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,

Of Whom Allstate Insurance Company and Liberty Mutual Fire Insurance Company are Respondents.

FINAL BRIEF OF APPELLANT

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2. Did the judge err in refusing to permit execution of the judgment of Costs and Interest from the rejected offer of judgment against the insurers on the basis that imposition of such penalties would improperly exceed the limits of the insurers' policies?

3. Did the judge err in deciding that the Order of penalties could not possibly be executed against the insurers with supplemental proceedings pursuant to Rule 69, SCRCP where such decision served to overrule the prior decision of another Circuit Court judge?

STATEMENT OF THE CASE

Plaintiff was injured in an automobile collision with an uninsured, drunk driver. Plaintiff brought suit in the name of the uninsured motorist and the case was defended by Plaintiff's uninsured motorist insurance providers. The defending insurers made an Offer of Judgment which was rejected by Plaintiff, Plaintiff made an Offer of Judgment to the insurers, which was rejected by the insurers. The jury verdict resulting from the liability trial far exceeded Plaintiff's Offer of Judgment which the insurers had rejected. Therefore, Plaintiff sought and obtained an Order of costs and interest as the result of the insurers' rejection of his Offer of Judgment. Upon Plaintiff's attempting to enforce the judgment through a Rule to Show Cause, his request for a Rule to Show Cause was denied and Plaintiff was instructed the proper procedure was to proceed with execution of the judgment and supplemental proceedings if necessary, under Rule 69, SCRCP. Upon Plaintiff's obtaining an Execution of Judgment against the property of the insurers, the insurers moved to quash the Execution Against Property. After a hearing on May, 2010, Judge Deadra Jefferson granted both insurers' Motions to Quash, finding that Plaintiff could not properly execute the judgment of Offer of Judgment costs and interests against his insurers. This appeal follows.

STATEMENT OF FACTS

In the early morning hours of December 20, 2008, 55 year old Levern McCray, Plaintiff, was driving to his job as a heavy equipment operator at a large construction site. Plaintiff was driving near Moncks Corner, South Carolina, when his vehicle was hit head on by a vehicle driven by a drunk driver. The uninsured drunk driver, Jose Valle, crossed the center line as he came around a curve and hit the Plaintiff's vehicle head on, causing a collision between the two vehicles and injuries to the Plaintiff. Plaintiff had to be cut from his vehicle by emergency

personnel using the Jaws of Life. He suffered injuries including a fractured left leg and ankle, requiring surgical implantation of hardware into his leg; injuries to his head including loss of consciousness - - a concussion/traumatic brain injury; and injuries to his neck, lower back, left knee, chest, laceration to his right thumb, and injuries to both his shoulders. These injuries resulted in permanent impairment to Plaintiff and difficulty walking, as a result of which he suffered wage loss and a loss of the ability to earn wages in the future.

Plaintiff had contracted with two insurers providing uninsured motorist coverage. Defendant Allstate Insurance Company (Allstate) insured Plaintiff at the time of the subject accident pursuant to a valid auto insurance policy with $100,000.00 in uninsured bodily injury coverage on the vehicle in the accident and $100,000.00 on two additional vehicles at Plaintiff's residence, for a total of $300,000.00 in available coverage for damages both actual and punitive, including an additional owed $2,000.00 in personal injury protection. Defendant Liberty Mutual Insurance Company (Liberty Mutual) also insured Plaintiff at the time of the subject accident pursuant to an uninsured insurance policy with $50,000.00 in available excess coverage for actual and punitive damages and $10,000.00 in medical payments coverage.

On April 14, 2010, Counsel for the insured Plaintiff wrote to the insurers in an attempt to settle the claims related to the December 20, 2008 accident. Counsel indicated that her letter was an attempt to settle the matter fairly and without resort to litigation. Counsel reminded the insurer that the at-fault driver was uninsured; driving drunk; and indisputably liable as he was driving under the influence when he crossed the center line to hit the Plaintiff's vehicle head on. Counsel advised that the insured was making a claim under his policy's uninsured motorist coverage which was in good standing and in effect at the time of the accident.

Counsel indicated that the insured was requesting that the insurers tender the entire policy limits without forcing their insured to resort to litigation. Counsel's letter reminded the insurers that their insured was trapped in the vehicle until extricated by the Fire Department with injuries including a fracture to the left ankle at the fibula and tibia. Along with her letter demand, Counsel included medical reports and a listing of the medical costs with a total "specials" to date of $70,654.50. Counsel advised that Mr. McCray had continued pain and that his permanent impairments resulting from the accident had been rated at 28% to the left leg and 20% to the left foot. Counsel advised the insurer that the insured's occupation in construction required him to be on his feet throughout the work day and that the injuries sustained in the accident had prevented his successfully completing his work and that the injuries were preventing this exceptional employee from advancing in what had, prior to the accident, been a very successful career in construction as a heavy equipment operator.

Plaintiff demanded the tender of the entire available coverage from both Defendants Allstate Insurance Company and Liberty Mutual for actual and punitive damages pursuant to their contracts of insurance. Plaintiff's demand of the policy limits was reasonable and a duty properly owed by both insurers pursuant to their contracts with Plaintiff. Said contracts include not only the express duties that the Defendants treat the Plaintiff fairly, reasonably, and in good faith evaluate the Plaintiffs claim pursuant to the contract of insurance, but also include the implied covenant of good faith and fair dealing. Nevertheless, neither insurer tendered the policy limits within the coverage for which he had contracted to Plaintiff as demanded.

As required by Section 38-77-140, Plaintiff's Summons and Complaint was brought in the name of the uninsured motorist, Jose Valle, with copies of the pleadings served upon insurers, Allstate and Liberty in the manner provided by law, i.e., through the Department of

Insurance, on May 21, 2010. (R. 17). Allstate answered on October 19, 2010 (R. 28); Liberty answered on September 23, 2010 (R. 21). Thus the insurers each elected to defend the action pursuant to the uninsured motorist provision. Having elected to appear and defend the case in the name of the uninsured motorist, the defending carriers participated in discovery and conducted depositions. On January 18, 2011, the defending carriers served an Offer of Judgment against the Plaintiff for $135,000.00. (R. 30). Plaintiff filed an Offer of Judgment against the insurers for $300,000.00 on January 30, 2011, which was properly served pursuant to Rule 5, SCRCP, upon both defending uninsured carriers, Allstate and Liberty Mutual. (R. 33). Plaintiff's Offer of Judgment was not served upon the named defendant, uninsured motorist, Jose Valle, as Valle had made no Offer of Judgment and he had no authority to tender the defending insurers' available policy limits. (R. 34). Neither insurer accepted Plaintiff's Offer of Judgment within the policy limits.

Upon the insurers rejecting Plaintiff's Offer of Judgment, the liability action proceeded to a four-day jury trial, with the carriers appearing to defend the case in the name of the uninsured motorist, Jose Valle pursuant to Section 38-77-140. The jury awarded the Plaintiff a total of Six Hundred Forty Seventy Thousand ($647,000.00) Dollars in damages. Upon the appellate court's affirming the jury verdict on September 2, 2014, Plaintiff moved for an order of costs and interest pursuant to the rejected Offer of Judgment as provided by S.C. Code Ann. §15-35-400. (R. The carriers 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 (R. 35; 38-43). Upon unsuccessfully arguing against the imposition of costs and interest from the rejected 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. (R. 11).

On September 18, 2014, Plaintiff filed a motion to enforce payment of the Offer of Judgement costs and interest as awarded almost two years earlier. (R. 89). The motion 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. 90).

On October 22, 2014, the parties appeared before Judge Kristi L. Harrington on Plaintiff's Motion to Enforce Order of Judgment and for a rule to show cause against the insurers Allstate Insurance Company and Liberty Mutual Insurance Company (Appendix to ROA). 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. 85). Having identified the correct procedure for Plaintiff to follow to enforce the award of Offer of Judgment costs and interest, Judge Harrington further indicated that the instant motion for a rule to show cause against the insurers 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). However, the Execution with supplemental proceedings Plaintiff had instituted were halted pending resolution of the insurers' February 10, 2015, Motion to Quash the Execution. (R. 230). After a hearing on May 12, 2015, the Insurers' motions to Quash Plaintiff's Writ of Execution was granted by Judge Jefferson. (R. 1). This appeal follows.

ARGUMENT

I. The insurers are responsible for the costs and interest awarded to Plaintiff as a penalty for the rejected offer of judgment.

The uninsured motorist provision, South Carolina Code Ann. §38-77-150 (2002), requires that automobile insurance policies in South Carolina contain a provision "undertaking to pay the insured all sums which he is legally entitled to recover as damages from the owner or operator of the uninsured motor vehicle, within limits which may be no less than the requirements of Section 38-77-140." The referenced section, S.C. Code Ann. §38–77–140, provides "An automobile insurance policy may not be issued or delivered in this State...unless it contains a provision insuring the persons defined as insured against loss...imposed by law for damages arising out of the ownership, maintenance, or use of these motor vehicles...subject to limits **exclusive of interest and costs** with respect to each motor vehicle...." (emphasis added). The statute goes on to spell out the minimum limits required for automobile insurance in the state of South Carolina.

The uninsured motorist statute further provides,

> "No action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the uninsured motorist provision. The insurer has the right to appear and defend in the name of the

> uninsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear."

Thus, the statute required Plaintiff to bring suit in the name of the uninsured driver and to serve copies of his pleadings on his uninsured motorist carriers. The statute allowed, but did not require, the uninsured motorist carriers to appear and defend the claim "in the name of the uninsured motorist," Jose Valle. Counsel for Plaintiff explained, "Because in South Carolina, we operate in the uninsured context in a legal fiction unlike most states in this country. We are not permitted to sue as a plaintiff the actual insurance company and....the insurance company elects to either defend the case in the name of the motorist pursuant to the statute...." (R. 78 line 16-79, line 3).

Pursuant to the mandate of S.C. Code Ann. §38–77–140, Plaintiff's Summons and Complaint was brought on May 21, 2010, in the name of the uninsured motorist, Jose Valle, with copies of the pleadings served upon the real parties in interest - - the insurers, Allstate and Liberty Mutual, through the Department of Insurance. (R. p. 17). Allstate Insurance Company and Liberty Mutual Insurance Company came within the jurisdiction of the Court upon being properly served with the Summons and Complaint in 2010-CP-08-1801. Allstate answered on October 19, 2010; Liberty answered on September 23, 2010 (R. 28). Thus, the insurers were properly served and each elected to defend the action pursuant to the above statute and subject themselves to the jurisdiction of the court. The defending carriers availed themselves of the jurisdiction of the Court as permitted by the uninsured motorist statute in their unsuccessful effort to avoid a jury verdict for Plaintiff at trial. Having lost the trial; having lost the appeal; and having failed in their arguments against the award to Plaintiff of Offer of Judgment costs and

interest as set out in the unappealed January 14, 2013, Order, the insurers were responsible to pay the costs and interest awarded as the result of the rejected offer of judgment. (R. 11).

The plain language of South Carolina's Offer of Judgment statute, §15-35-400, establishes Plaintiff's entitlement to costs and interest as set out and awarded by the January 14, 2013, Order. The statute provides that a Plaintiff is entitled to recover court costs and prejudgment interest where his rejected Offer of Judgment is exceeded by the jury verdict. Section 15-35-400(B), provides the Consequences of Non-acceptance:

> If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer....

Thus, our legislature provided a statutory procedure whereby a party settling a claim by accepting an Offer of Judgment, thereby avoiding protracted litigation, is rewarded. In contrast, where a defending insurer rejects an Offer of Judgment, gambling on a defense verdict, if the gamble does not pay off and the verdict for the Plaintiff exceeds the Offer of Judgment the insurer had rejected, the insurer shall be required to pay to the Plaintiff costs and prejudgment interest. In this case, Plaintiff obtained a verdict well in excess of the Offer of Judgment the insurers had rejected and he was, therefore, entitled to costs and interest for the rejected Offer of Judgment pursuant to the plain terms of South Carolina Code §15-35-400(B). By her Order awarding costs and interest to Plaintiff, the trial judge properly found that, as the result of the verdict's exceeding the rejected Offer of Judgment, Plaintiff was entitled to an award of costs of $ 3,247.01 and entitled to $77,589.10 in interest according to the Offer of Judgment statute's provision requiring that interest be calculated from the date of the Offer of Judgment until the

date of the verdict. Here, the date of Plaintiff's Offer of Judgment was February 15, 2011; and the Offer of Judgment was directed to, served upon, and rejected by the insurers, Allstate and Liberty Mutual (R. 11-14).

Having rejected Plaintiff's Offer of Judgment in the amount of $300,000, apparently as the result of their strategic decision to withhold the available policy limits, the insurers were bound under the terms of the Offer of Judgment statute to pay costs and interest upon the jury's returning a verdict for Plaintiff in an amount over $600,000. Counsel for Plaintiff argued, "....they still owe the offer of judgment because they filed the offer of judgment against us. That's the purpose of the loser pays statute. That is the purpose of 15-35-400. They filed the offer of judgment against the Plaintiff and they owe the offer of judgment. The offer of judgment statute would be useless if they didn't owe it when they filed it against the Plaintiff." (R. 79, lines 15-24).

Indeed, if the insurers' interpretation of the Offer of Judgment statute and their argument that, because the liability case is captioned in the name of the uninsured driver, were correct, an insurance company would never be held responsible for the penalties imposed pursuant to its rejection of an Offer of Judgment in an uninsured motorist case. Under the insurers' theory, accepted by the trial judge, only the defendant driver named in the underlying liability lawsuit may be assessed penalties and interest for a rejected Offer of Judgment. Of course, plaintiffs are required to name the uninsured driver and not allowed to name the insurance company in the liability case.

"When interpreting a statute, the Court's primary function is to ascertain the intention of the legislature. The words used must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation." "The cardinal rule of

statutory construction is to ascertain and give effect to the intent of the legislature." *Sloan Constr. Co. v. Southco Grassing, Inc.*, 395 S.C. 164, 170, 717 S.E.2d 603, 606 (2011). When interpreting a statute, the "language must also be read in a sense which harmonizes with its subject matter and accords with its general purpose." *Jones v. State Farm Mut. Auto. Ins. Co.*, 364 S.C. 222, 230, 612 S.E.2d 719, 723 (Ct. App. 2005); *Hitachi Data Sys. v. Leatherman,* 309 S.C. 174, 420 S.E.2d 843 (1992).

The statute as a whole must receive a practical, reasonable, and fair interpretation consonant with the purpose, design, and policy of the lawmakers. "Courts will reject a statutory interpretation which would lead to a result so plainly absurd that it could not have been intended by the legislature or would defeat the plain legislative intention." *Unisun Ins. Co. v. Schmidt,* 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). The "goal of statutory construction is to harmonize conflicting statutes whenever possible and to prevent an interpretation that would lead to a result that is plainly absurd." *Davis v. Sch. Dist. of Greenville Cnty.,* 374 S.C. 39, 45, 647 S.E.2d 219, 222 (2007); *Bass v. Isochem,* 365 S.C. 454, 617 S.E.2d 369 (Ct.App.,2005); *Hodges v. Rainey,* 341 S.C.79, 85, 533 S.E.2d 578, 581 (2000). *Kiriakides v. United Artists Communications, Inc.,* 312 S.C. 271, 440 S.E.2d 364 (1994). Here, the insurers' interpretation of the Offer of Judgment statute would eviscerate the statute's efficacy because, as so interpreted, the statute would serve to prevent and discourage settlements. In *Bradley v. Doe*, 374 S.C. 622, 632-33, 649 S.E.2d 153, 159 (Ct. App. 2007), the Court found that the purpose of a statute being construed was to prevent fraud. The Court rejected an interpretation which failed to promote or satisfy the statute's mandate of fraud prevention. In this case, where the purpose of the statute being construed is to encourage settlement and to avoid unnecessary litigation, an interpretation which discourages settlement and encourages unnecessary litigation must be rejected.

The insurers convinced Judge Jefferson that Offer of Judgment penalties are not properly imposed upon an uninsured motorist carrier because the underlying litigation is brought in the name of the uninsured driver and not in the name of the insurer. However, the insurer is the real party responsible for paying damages to the Plaintiff on behalf of the uninsured driver. Where an insured plaintiff such as Mr. McCray, whose claim was brought in the name of the uninsured driver and not in the name of his insurance company, as required by statute, extends an Offer of Judgment within the policy limits to his insurer and, where the insurer rejects an Offer of Judgment which is then exceeded by the liability jury's verdict, the plain language of the Offer of Judgment statute mandates that costs and interest be imposed upon the insurer rejecting the Offer of Judgment. However, under Judge Jefferson's erroneous interpretation of the statute, where the offending party which had refused settlement and insisted on litigation is the unnamed insurance company, defending the case against its insured from the cover of the named uninsured driver, that insurance company will not be required to pay to the plaintiff the penalties the Offer of Judgment Statute mandates.

Under the insurers' erroneous interpretation of the statute, the only party available to pay the Offer of Judgment penalties awarded to a plaintiff is the uninsured driver - - while the litigious insurance company, the party responsible for rejecting the offer to settle, supposedly may not be penalized. Under the insurers' faulty theory, even where it is undisputed that it was the insurance company and not the uninvolved, uninsured, driver who refused a policy limits settlement and insisted on needless litigation and consumption of judicial resources, the insurance company may not be penalized because it is not the named defendant in the underlying lawsuit. Under this absurd theory, the insurers that refused to cooperate in settlement efforts and rejected an Offer of Judgment may not be penalized. However, the predictable result of such a

flawed interpretation and application of the Offer of Judgment statute would be to discourage settlement and to encourage litigation. Under the insurer's theory, the penalties imposed for the rejected Offer of Judgment can only fall upon the named driver; in this case, a party who was uninvolved in the failed effort to settle the case and a party who did not receive or reject an Offer of Judgment. This is a result wholly at odds with the legislature's purpose and plainly absurd such that this could not possibly be the result intended by the Legislature.

South Carolina courts will not adopt a statutory interpretation which leads to an absurd result clearly unintended by the legislature. *Bass v. Isochem,* 365 S.C. 454, 471-72, 617 S.E.2d 369, 378 (Ct. App. 2005); *Original Blue Ribbon Taxi Corp. v. S. Carolina Dep't of Motor Vehicles*, 380 S.C. 600, 608-09, 670 S.E.2d 674, 678 (Ct. App. 2008); *Unisun Ins. Co. v. Schmidt,* 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000); *Miller v. Lawrence Robinson Trucking,* 333 S.C. 576, 582, 510 S.E.2d 431, 434 (Ct.App.); *see also Ray Bell Constr. Co. v. Sch. Dist. of Greenville County,* 331 S.C. 19, 26, 501 S.E.2d 725, 729 (1998) ("However plain the ordinary meaning of the words used in the statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature...."). In that situation, the true purpose and intentions of the legislature will prevail over the literal import of the words. *Browning v. Hartvigsen,* 307 S.C. 122, 125, 414 S.E.2d 115, 117 (1992); *accord New York Times Co. v. Spartanburg County Sch. Dist. No. 7,* 374 S.C. 307, 310–311, 649 S.E.2d 28, 30 (2007).

In this case, there were two statutes construed and applied: the uninsured motorist law, §38–77–140 and the Offer of judgment statute, §15-35-400(B). The purpose of the uninsured motorist law is to provide benefits and protection against the "peril of injury or death by an uninsured motorist to an insured motorist, his family, and the permissive users of his vehicle."

Unisun Ins. Co. v. Schmidt, supra. The established purpose of the Offer of Judgment statute and Rule of Court is to encourage settlement and avoid protracted litigation. "There is no substantive difference between Rule 68, SCRCP, which allows a defending party to recover costs incurred following an offer of judgment where the plaintiff obtains a judgment in his favor in an amount less than was offered by the defendant, and FRCP, Rule 68; although the language of the rules is not identical, both were intended to encourage settlements and avoid protracted litigation." *Black v. Roche Biomedical Laboratories, a Div. of Hoffman-LaRoche, Inc.* 315 S.C. 223, 433 S.E.2d 21 (Ct.App. 1993).

An award of prejudgment interest imposed as a consequence for rejecting an Offer of Judgment as required by §15-35-400, furthers the legislature's purpose to encourage settlement and avoid protracted litigation. In contrast, if the insurers' theory were correct, it is actually difficult to conceive of a situation where a plaintiff's Offer of Judgment within the policy limits of his uninsured coverage would ever be accepted by the defending insurer. Under those circumstances, there would be no motivation for the insurer to accept a policy limits settlement instead of proceeding to trial - - where the insurer could do no worse than the policy limits and where an insurer is, under the insurers' theory, penalty proof because not named. Under this theory, even in a case where the insurer needlessly insists on wasteful and unnecessary litigation by rejecting an Offer of Judgment within the policy limits, the insurer would not be subject to any penalty or cost for rejecting an Offer of Judgment.

Such a result is clearly not the legislature's intended purpose in promulgating the Offer of Judgment statute. It is undisputed that the purpose and goal of the Offer of Judgment statute is to encourage and reward settlement. The statute is rendered useless and ineffective under the

insurer' absurd interpretation, which was erroneously accepted and applied by the judge in granting the insurer's Motion to Quash.

A. The trial judge erred in refusing to hold the insurers responsible for paying the costs and interest ordered where the insurers were the actual parties in interest who had rejected Plaintiff's Offer of Judgment.

Judge Jefferson granted the insurers' Motion to Quash the Execution of Judgment on the basis that the verdict in the liability case was not in the name of the insurance companies, but instead was in the name of the uninsured driver, Jose Valle. The judge ruled that the insurers were not named parties to the liability lawsuit and, therefore, that the insurers were not implicated in or bound by the Order of Offer of Judgment Costs and Interest. Of course, in South Carolina, under Section 38-77-150, an injured plaintiff is forced to comply and participate in the legal fiction that his claim is against the named uninsured driver in presenting the liability case; however, this is nothing more than a legal fiction which shields from the trial jury the fact that the actual defendant, the real party in interest, is an insurance company. (R. pp. 76-77; 83).

This fiction is created for the benefit of the insurers; however, the insurers must not be allowed to wrongfully benefit from that fiction at the expense of the injured insured. Legal fictions are invented and instituted for the promotion of justice. "As Lord Mansfield said, 'It is a certain rule that a fiction of law shall never be contradicted so as to defeat the end for which it was invented, but for every other purpose it may be contradicted.' There is no sound reason why the principles applicable to fictions in general should not apply to the fiction that a corporation is a person. Where, therefore, the corporate fiction is urged for fraudulent or perverted purposes, the courts may properly disregard it..." *Nettles v. Sottile*, 184 S.C. 1, 191 S.E. 796, 801 (1937). "It is a well settled doctrine that while a fiction may be used for the promotion of justice it

cannot be employed to hinder it." *Thornton v. Atl. Coast Line R. Co.*, 196 S.C. 316, 13 S.E.2d 442, 450 (1941).

Here, the legal fiction that an insured seeks payment of his damages from an uninsured driver rather than the party actually responsible - - the insurance company, was created and is followed for the purpose of preventing unfair prejudice to insurance companies. However, the beneficiaries of that legal fiction must not be permitted to rely upon the legal fiction for purposes inconsistent with the pursuit of justice. *See City of New Orleans v. Stemple*, 175 U.S. 309, 318, 20 S. Ct. 110, 113, 44 L. Ed. 174 (1899)('Blackstone, speaking of legal fictions, says, 'This maxim is invariably observed, that no fiction shall extend to work an injury, its proper operation being to prevent a mischief or remedy an inconvenience that might result from the general rule of law.'); *Nettles v. Sottile*, 184 S.C. 1, 191 S.E. 796, 802-04 (1937)(And it is now well settled, as a general doctrine, that, when [a legal] fiction is urged to an intent not within its reason and purpose, it should be disregarded). Where these 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 Court erred in failing to simply disregard the legal fiction whereby the liability lawsuit was nominally brought against the uninsured driver rather than the parties actually responsible for paying damages - - the insurers.

The insurers, while unnamed, were actually the real parties in interest in the liability case brought by their insured. The insurers were parties in interest where the companies had a real, material, or substantial interest in the outcome of the litigation. See *Bank of America, N.A. v. Draper,* 405 S.C. 214, 746 S.E.2d 478 (Ct.App. 2013). Our Supreme Court has held the rights of the UIM carrier and the named defendant are not synonymous, and, in fact, may be conflicting." In *Broome v. Watts,* 319 S.C. 337, 461 S.E.2d 46 (1995), the Broomes asserted that

the insurer was bound by a settlement agreement entered by the named defendant driver, Watts. Because Watts was the named defendant, the Broomes contended the named defendant's waiver of a jury trial bound the insurer even though it was not a party to the settlement agreement. Our Supreme Court rejected the Broomes' argument, finding that even though he was the named party, Watts could not actually bind the insurer or give up USAA's right to a jury trial. *Broome,* 319 S.C. at 340, 461 S.E.2d at 48.

Citing section 38–77–160, the *Broome* Court found that a waiver by Watts 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 (emphasis added). The Court concluded, "[a]lthough the UIM carrier 'steps into the shoes' of the underinsured motorist, it has rights separate and distinct from those of the underinsured motorist." *Broome,* 319 S.C. at 340, 461 S.E.2d at 48. In *Crawford v. Henderson*, 356 S.C. 389, 395-97, 589 S.E.2d 204, 208-09 (Ct. App. 2003), the Court concluded that there is no attorney client relationship between counsel for the insurer defending the liability case and the named defendant on trial because the attorney is not representing his interests, but instead the interest of the insurance company in defending the liability case.

Similarly, here, the liability case was nominally captioned and defended in the name of Jose Valle, but the actual defendants who were obligated to pay damages on behalf of the named defendant, were Allstate and Liberty Mutual Insurance Companies. Therefore, the trial judge erred in finding that the insurers were not parties to the liability lawsuit and that the insurers could not, therefore, be assessed penalties and interest under the Offer of Judgment statute. In

fact, the insurers were the parties responsible for paying the judgment and for paying the costs and interest awarded to Plaintiff and ordered to be paid by the January 14, 2013, Order.

Accordingly, where the insurers were actually the party against whom the Order of Costs and Interest was imposed, but the insurers had failed to pay the award, Judge Jefferson should have disregarded the legal fiction through which the case was brought against the name of the uninsured driver; found that the insurers were the actual party upon whom the penalties were imposed; and required compliance with the order by the insurers. Failing that, the judge should have allowed the execution to proceed so that the issue as to responsibility for payment of Offer of Judgment costs and interest could be determined through supplemental proceedings, as ordered by Judge Harrington. (R. 15).

Regardless of the fact that the insurers were not the named defendants, the insurers rejected an Offer of Judgment which was then exceeded by the jury verdict; the insurers were the actual parties against whom costs and interest were sought and assessed; and the insurers were the parties obligated to pay the award to Plaintiff. Upon Plaintiff's moving to enforce the Order of costs and interest against the insurers, Judge Jefferson erred in finding that, at that point, the insurers were not interested parties and not obligated to pay the costs and interest awarded to Plaintiff as the result of the rejected Offer of Judgment.

B. The trial judge erred in refusing to hold the insurers responsible for paying costs and interest imposed as a penalty for their rejection of Plaintiff's Offer of Judgment

Even assuming that the insurers were not properly treated as parties to the underlying liability lawsuit itself, the insurers were the only parties who made an Offer of Judgment against Plaintiff and the only parties opposing Plaintiff in seeking penalties related to his rejected Offer of Judgment. Counsel for Plaintiff asserted, "Allstate Insurance Company filed against the

Plaintiff an Offer of Judgement. It was signed by Allstate Insurance Company. They're the only people that had the authority to offer the policy limits in this case, because Jose Valle did not have any authority to offer any money in this case." (R. 76, lines 6-12). The Judge observed, "The offer of judgment statute still refers to a party. The insurance company does not become a party by virtue of defending an action." (R. 82, lines 5-8). Counsel for Plaintiff responded, "The offer of judgment wasn't filed against Jose Valle - - no authority to offer the insurance policy - - ." However, the judge disagreed, indicating, "That's the only way it could have been filed; he's the only party." (R. 82, lines 9-14).

To the contrary, as indicated, the uninsured driver, Jose Valle, had never appeared in the case and he was not actually involved in the parties' attempts to reach settlement. The uninsured driver neither extended nor received any Offers of Judgment. In fact, the judge herself 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. 84, lines 5-8). Nevertheless, Judge Jefferson erroneously ruled that if Plaintiff sought to execute the judgment awarding Offer of Judgment Costs and Interest for the rejected Offer of Judgment, "he must execute against Valle, not LMFIC [or Allstate]." (R. 4, 8).

The judge's ruling ignores the plain language of the statute which mandates payment of costs and interest as a penalty for the rejection of an Offer of Judgment and the refusal to settle a case without litigation. Here, it was the insurers that refused to settle and it was the insurers that rejected Plaintiff's Offer of Judgment within the policy limits. It was the insurers that made an Offer of Judgment to Plaintiff and it was to the insurers that Plaintiff's Counter Offer of Judgment was directed. Despite being put on notice that if his Offer of Judgment was rejected and then exceeded by the jury verdict in the liability case, Plaintiff would be entitled to an award

of costs and interest against those rejecting his offer; both of these insurer's rejected Plaintiff's Offer of Judgment - - thereby waiving the opportunity to settle the case for the policy limits without requiring a trial. Thus, it was the insurers whose conduct as described by the statute justified imposition upon them of the "Consequences of Non-acceptance" the legislature had provided by statute:

> If an offer of judgment is not accepted and the offeror obtains a verdict or determination at least as favorable as the rejected offer, the offeror shall be allowed to recover from the offeree: (1) any administrative, filing, or other court costs from the date of the offer until judgment; (2) if the offeror is a plaintiff, eight percent interest computed on the amount of the verdict or award from the date of the offer....

S.C. Code Ann. Section 15-35-400 (B). Under the plain language of the statute, in this situation, there should be no doubt that the relevant "offeror" was the Plaintiff and the "offerees" were the insurers, Allstate and Liberty Mutual. Again, it was to the insurers that Plaintiff's Offer of Judgment was made and directed and it was the insurers that chose to reject the Offer of Judgment and to insist on proceeding to a jury verdict despite the fact that liability was not disputed, but was actually admitted by Defense Counsel in his opening statement before the jury. Plainly, it is just this sort of behavior - - refusing a good faith offer to settle within policy limits and insisting on needless litigation - - that our legislature sought to curtail through enacting the Offer of Judgement procedure.

The imposition of such penalties furthers the legislature's goal and purpose to encourage settlement and to deter needless litigation. Plainly, it is not the named uninsured drivers who will be so encouraged and deterred; it is the insurance carriers who have undertaken the defense of the liability action. As the Connecticut Supreme Court explained in *Cox v. Peerless Ins. Co.,*

> An award of prejudgment interest arises from a defense attorney's strategic decision to reject an offer of settlement, and proceed to trial. Therefore, an award of prejudgment

> interest does not arise out of the action's underlying controversy, and is not taxed to the defendant's policy's $50,000 limit of liability as "damages," but rather is an expense associated with the "defense costs" and strategy of the case. In the instant action, the defense of the case was controlled and directed by the defendant, as was the decision to reject the plaintiff's offer of judgment. To allow the insurer total control over all pre-trial settlement negotiations, and ultimately tax the insured for the insurer's decision not to settle within the insured's liability limit would discourage settlement, and would be in opposition to the statutory goal of prejudgment interest awards.

774 F. Supp. 83, 86-87 (D. Conn. 1991); (R. pp. 108-109). Likewise, in South Carolina, if the insurers are allowed to control the settlement negotiations and to make and reject Offers of Judgment, and then to claim that the only party responsible for paying the penalties earned through rejection of settlement is the uninsured driver, the legislature's enactment of the Offer of Judgment statute is rendered pointless. Under the theory put forward by these insurers and accepted by Judge Jefferson, the insurance companies are safe from the imposition of costs and interest due to a rejected Offer of Judgment, and, therefore, free to insist on a jury trial in every case without any possible cost to the company. Such an interpretation of the Offer of Judgment statute would surely discourage settlement in the bulk of cases where uninsured driver coverage is involved - - the opposite of the result the legislature intended.

According to the plain language of Section 15-35-400, upon Plaintiff's obtaining a verdict in excess of his rejected Offer of Judgment, Plaintiff was entitled as a matter of law to an award of costs and interest against those who had rejected his offer of judgment - - the insurers. However, Judge Jefferson accepted the insurers' erroneous argument that they were not properly considered parties to the underlying lawsuit and that, therefore, they could not be implicated by the Offer of Judgment statute which refers only to "parties." Where these insurers consistently acted as parties in all matters related to the offers of judgment; particularly where the insurers themselves invoked the Offer of Judgment statute in extending to Plaintiff an Offer of Judgment,

even where not named in the liability lawsuit, the insurers were certainly parties for purposes of the Offers of Judgment.

Indeed, Section 15-35-400 does explicitly provide that "any party" may file a written Offer of Judgment signed by the offeror and directed to the opposing party. Presumably, these insurers were aware that they were adopting and accepting the rights and responsibilities of a "party" when the insurers filed a written Offer of Judgment against Plaintiff pursuant to Section 15-35-400 (R. 31). Obviously, the insurers sought the protection of the Offer of Judgment statute in the hopes of a defense verdict or at least a verdict less than the insurers' Offer of Judgment. This is understandable where, had the jury verdict been less than the amount of the insurers' Offer of Judgment, the insurers would have benefitted because, under the statute, if it is the Plaintiff who rejected an offer of judgment which exceeded the jury verdict, the consequences of the Plaintiff's non-acceptance are a reduction from the judgment or award of eight percent interest computed on the amount of the verdict or award from the date of the offer. *See* Section 15-35-400.

Without question, in this case, had the liability jury's verdict been less than the amount of the insurers' Offer of Judgment, the insurers would have eagerly claimed the identity of "offeror" and "defendant" in order to gain an 8% reduction of the jury's verdict pursuant to Section 15-35-400. Where the insurers' gamble did not pay off and, instead, the jury's verdict far exceeded their offer of judgment, the insurers should have been estopped to disclaim responsibility for paying the award of costs and interest imposed upon them as a penalty for **their** rejection of Plaintiff's Offer of Judgment.

Judge Jefferson erred in ruling that it would be unreasonable to treat the insurers as parties under the Offer of Judgment statute even where the insurers had invoked the statute and

acted as parties before the Court regarding the costs and interest awarded for the rejected Offer of Judgment. The parties ordered to pay the Offer of Judgment costs and interest to Plaintiff were the insurers, not the named driver. Therefore, the judge erred in refusing to permit execution with supplemental proceedings of the Order awarding costs and interest against the insurers pursuant to Rule 69, SCRCP.

C. The trial judge erred in overruling the decision of another circuit court judge.

On September 18, 2014, upon the case being affirmed by the South Carolina Court of Appeals, the Plaintiff filed his motion to enforce payment of the Offer of Judgement costs and interest awarded to him almost two years earlier. Plaintiff's motion stated in relevant part "Therefore, the 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 Judgment 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 insurer 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, and 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. 89)

On October 22, 2014, the parties appeared before Judge Kristi Harrington on Plaintiff's Motion to Enforce Order of Judgment and for a rule to show cause against the insurers, Allstate Insurance Company and Liberty Mutual Insurance Company (Appendix to ROA). 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. 15). Having identified the correct procedure for Plaintiff to follow to enforce the award of Offer of Judgment costs and interest, Judge Harrington further indicated that the "instant motion for a rule to show cause' against the insurers was denied.

Judge Harrington, by her December 1, 2014, Order, instructed Plaintiff to "proceed under Rule 69, SCRCP, to execute the judgment with supplemental proceedings if necessary." Accordingly, on February 2, 2015, Counsel for Plaintiff requested that the Clerk of Court issue an Execution Against Property of the insurers; the Execution was issued on February 23, 2015. However, the execution and supplemental proceedings Plaintiff had instituted were halted pending resolution of the insurers' February 23, 2015, Motion to Quash the Execution. After a hearing on May 12, 2015, the Insurers' motions to Quash Plaintiff's Writ of Execution was granted by Judge Jefferson.

Rule 69, SCRCP is entitled "Execution" and 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 a 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." However, upon Plaintiff's attempting to execute the judgment according to Rule 69, SCRCP, as he had been directed by Judge Harrington to do, Judge Jefferson ruled, to the contrary, that Plaintiff was not permitted to execute the judgment against the insurers with supplemental proceedings if necessary, pursuant to Rule 69.

Therefore, Judge Jefferson's Order has the effect of improperly overruling the decision of another Circuit Court judge. It is well established that one circuit court judge is prohibited from reversing the standing order of another circuit court judge. For example, in *Cook v. Taylor,* the Court held that a circuit court judge does not have the authority to reverse another circuit court judge's determination of the proper mode of trial. 272 S.C. 536, 538, 252 S.E.2d 923, 924 (1979). Similarly, a circuit court judge cannot deny the use of an amended complaint in light of an order of another circuit judge that permitted use of the amended complaint. *Enoree Baptist Church v. Fletcher,* 287 S.C. 602, 603, 340 S.E.2d 546, 547 (1986).

Accordingly, where Judge Jefferson's Order quashing Plaintiff's Writ of execution pursuant to Rule 69, SCRCP, effectively overruled Judge Harrington's prior decision that Order should be reversed and the matter remanded for execution with supplemental proceedings pursuant to Rule 69, SCRCP.

D. To the extent the trial judge ruled on the basis that the policy limits had been exhausted, that ruling was an error.

Judge Jefferson noted by her Order that the insurer had denied any liability for costs beyond the limits of its insurance coverage. Indeed, the insurers argued below that enforcement of the Order of Costs and Interest against them as the result of their rejecting Plaintiff's Offer of Judgment would be improper because the policy limits of Plaintiff's insurance coverage had been exhausted. (R. pp. 72; 114-115; 142). To the contrary, an award of costs and interest as specifically provided in the Offer of Judgment statute is proper without reference to an insurance policy's limits of coverage for bodily injury and property damage. Limiting the full measure of costs and interest mandated by §15-35-400, in order to avoid exceeding the policy limits for

bodily injury and property damage coverage, would be inconsistent with the plain language and established purpose of the statute. (R. 113).

An award of costs and interest pursuant to the Offer of Judgment Statute is not limited to the insurance company's policy limits as such costs and interest are not 'damages' awarded to the Plaintiff which would be included in those policy limits. Further, costs and interest are expressly excluded by the South Carolina statute setting the minimum limits as required by law. The statute setting the minimum limits of coverage for bodily injury and property damage which must be offered by an insurer, §38-77-140, provides that such coverage is "subject to limits exclusive of costs and interest." The uninsured motorist provision, §38-77-150, references the coverage limits established by §38-77-140 which are explicitly "exclusive of costs and interest."

In South Carolina, "damages" are defined by statute, §38-77-30(4), to include *actual and punitive damages*; however, costs and interest are not included as "damages." Therefore, the insurers' assertion that the imposition of costs and interest is limited by and subject to the policy limits of coverage for bodily injury and property damage, is wholly inconsistent with the plain meaning of the statutory language. Again, the imposition of costs and interest pursuant to a rejected Offer of Judgment is a penalty, not properly included in the insured's policy limits for coverage of bodily injury and property damage. However, Counsel for the insurers repeatedly informed Judge Jefferson that the policy limits had been exhausted and the judge confirmed that the policy limits had been exhausted, so that there was no "other coverage out there to satisfy this judgment," before reaching her decision to quash the Execution. (R. pp. 72; 85; 114-115; 142).

To the extent that the Judge granted the insurers' Motion to Quash Execution of the judgment on the basis that the insurers' policy limits had been exhausted, such a decision was clearly erroneous.

CONCLUSION

The Court should reverse the trial judge's ruling quashing the writ of execution and preventing Plaintiff from recovering costs and interest due him pursuant to Rule 69, SCRCP and the plain language of the Offer of Judgment statute.

Respectfully submitted,

January 28, 2016

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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 Brief of Appellant complies with Rule 211(b) SCACR.

January 28, 2016

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