

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

JAN 28 2016
SC Court of Appeals

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 REPLY BRIEF OF APPELLANT

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

COUNSEL FOR APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the judge err in ruling as a matter of law that the Order awarding penalties pursuant to the rejected Offer of Judgment statute could only be imposed on the named uninsured driver and not upon the insurers?
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, SCRCR 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, SCRPC. 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 Seven 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 Judgment 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 SCRC 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, SCRCF, 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 Judgment. 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 Judgment 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 Judgment 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, SCRCF, 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, SCRCF 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, SCRCF, 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, SCRCF, 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, SCRCF.

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, SCRPC and the plain language of the Offer of Judgment statute.

Respectfully submitted,

January 28, 2016

A handwritten signature in black ink, appearing to read "Pamela R. Mullis", is written over a horizontal line.

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

COUNSEL FOR APPELLANT

**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



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

COUNSEL FOR APPELLANT

RECEIVED

JAN 28 2016

SC Court of Appeals

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I. INTRODUCTION

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

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

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

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

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

II. MISSTATEMENTS OF FACT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

III. Mischaracterizations of Appellant's Arguments on Appeal

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

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

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

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

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

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

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

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

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

IV. LEGAL ARGUMENTS

1. Appellant’s arguments were properly preserved for appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

V. Arguments not presented by Appellant

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

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

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

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

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

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

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

CONCLUSION

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

Respectfully submitted,



Pamela R. Mullis

MULLIS LAW FIRM

Post Office Box 7757

Columbia, South Carolina 29202

(803) 799-9577

Columbia, South Carolina
January 28, 2016

ATTORNEYS FOR THE APPELLANT

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2015-001452

Levern McCray,

Appellant,

v.

Jose W. Valle,

Respondent,

CERTIFICATE OF COUNSEL

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

January 28, 2016



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

COUNSEL FOR APPELLANT

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