STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF ANDERSON

CIVIL ACTION NO: 2016-CP-04-0633

Tina Kelly individually, and as Guardian ad Litem of Z.G. a minor,

Plaintiff,

vs.

Harold E. Morris,

Defendant.

ORDER DENYING DEFENDANT'S MOTION TO MARK JUDGMENT SATISFIED

This matter came before the Court on Defendant's motion for an Order, pursuant to South Carolina Code of Laws § 15-35-400 and Rule 68, *SCRCP*, to mark the judgment of the Court as to Plaintiff Tina Kelly satisfied. The motion came before this court for a hearing on March 23, 2017. Present at the hearing were David R. Price, Jr., Esquire, for the Plaintiff, Tina Kelley, and Peter E. Farr, Esquire, for the Defendant, Harold E. Morris. After hearing the able arguments of counsel and careful consideration of the applicable law of this state, the Court denies Defendant's Motion to Mark Plaintiffs' Judgment Satisfied.

Based on court records and confirmed by the parties, it appears that an Offer of Judgment as to the personal injury claims by Tina Kelly, individually, was filed on or about November 15, 2016 (hereinafter referred to as the "Kelly Offer of Judgment."). The Kelly Offer of Judgment was signed and filed by attorneys for both the Defendant

and the underinsured motorist ("UIM") carrier, each being individually represented by counsel, and stated in part as follows:

> Defendant Harold E. Morris, pursuant to South Carolina Code of Laws § 15-35-400 and SCRCP 68, hereby offers to allow judgment *to be taken against him* in the amount of Seventy-Five Thousand and 00/100 ($75,000.00) Dollars ($25,000.00 from the liability carrier on behalf of the Defendant and $50,000 from USAA as the underinsured carrier) with respect to the claims of Tina Kelly, individually, for damages relating to her bodily injuries. (Emphasis supplied).

On November 28, 2016, Plaintiff's counsel filed her Written Acceptance of Defendant's Offer of Judgment to Tina Kelly (hereinafter referred to as the "Tina Kelly Acceptance of Judgment"), which stated in part as follows:

> [Tina Kelly] hereby accepts the Defendant's Offer of Judgment filed November 15, 2016, to allow judgment to be entered against the Defendant Harold E. Morris, in favor of the Plaintiff, in the amount of Seventy-Five Thousand and No/100ths ($75,000.00) Dollars, with respect to the claims of Tina Kelly, individually, for damages relating to her bodily injuries. *The Plaintiff accepts the offer of judgment against the Defendant Harold E. Morris, personally, but the collateral source rule applies to preclude set-off of underinsurance proceeds against the judgment as proposed by Defendant. See* Rattenni v. Grainger, 298 S.C. 276, 379 S.E.2d 890 (1989). (Emphasis added).

Upon filing of the Tina Kelly Acceptance of Judgment, the Clerk of Court for Anderson County entered judgment against Defendant Harold E. Morris, personally, in the amount of $75,000.00, on November 29, 2016.

Following the entry of the Tina Kelly Acceptance of Judgment, the Defendant's counsel, Mr. Farr, forwarded a letter dated December 19, 2016, enclosing a check in the amount of $25,000.00 and a Satisfaction of Judgment. The letter directed Plaintiffs' counsel to "hold the settlement proceeds in trust until the Satisfaction of Judgment has been properly executed." Plaintiff's counsel responded by letter dated December 14,

2016, wherein Plaintiffs' counsel advised Defendant's counsel that Tina Kelly did not "settle" Tina Kelly's claims for a $25,000.00 payment from Defendant Morris, rather Ms. Kelly accepted an offer to enter judgment against Defendant Morris personally for $75,000.00, and expressly declined to set off any portion of the judgment with her own UIM proceeds. Plaintiff then declined to execute a Satisfaction of Judgment until Defendant Morris paid the full $75,000.00 judgment, and requested that Defendant's counsel advise within seven (7) days whether he wished for Plaintiffs' counsel to return the check for $25,000.00 or disburse it as partial payment against the $75,000.00.

Rather than reply directly to Plaintiff's counsel's letter, Defendant's counsel filed a Motion to Mark Judgment Satisfied on December 27, 2016. On January 4, 2017, Defendant filed his Amended Motion to Mark Judgment Satisfied, which states in part:

> The Offer of Judgment in this matter specified an amount of $75,000.00 to be paid by the liability carrier and UIM carrier, both of whom are involved in the case. The checks have both been sent to Plaintiff's counsel in compliance with the judgment of this Court, and Defendant is entitled to have that judgment marked satisfied.

Subsequent to Defendant's Amended Motion, the Plaintiffs' UIM carrier honored its contractual obligation to pay the difference between the amount of the judgment and the amount of liability coverage, and tendered $50,000.00 to Tina Kelly without requiring her to execute any sort of settlement document or "satisfaction."

The specific question before the Court is whether the Defendant is entitled to an Order of the Court forcing the Plaintiff Tina Kelly to mark the resulting judgment against Defendant Morris satisfied as a result of Defendant Morris's payment of one-third (1/3) of the total judgment, and Plaintiff's UIM carrier's payment of the other two-thirds (2/3) of the total judgment. If the judgment against Defendant Morris had resulted from a trial

of this case, then the law is crystal-clear in South Carolina: UIM benefits are subject to the collateral source rule, which applies to preclude set-off of underinsured motorist benefits against a jury's damages verdict. *See* Rattenni v. Grainger, 298 S.C. 276, 379 S.E2d 890 (1989) (holding that "We find no persuasive reasons to distinguish underinsurance proceeds from other insurance proceeds that are subject to the collateral source rule."). This rule of law was stated in no uncertain terms by the Supreme Court in Rattenni and was again stated expounded upon in detail by the Court of Appeals in Pustaver v. Gooden, 350 S.C. 409, 566 S.E.2d 199 (Ct. App. 2002)[1], which explained as follows:

> The collateral source rule acts to prevent a benefit directed to the insured party from resulting in a windfall for the tortfeasor. A tortfeasor cannot take advantage to a contract between an injured party and a third person, no matter whether the source of funds received is an insurance company, an employer, a family member or other source [source citations omitted]. It is the tortfeasor's responsibility to compensate the injured party for all the harm that he causes, not the net loss the injured party receives [source citations omitted]. At times, then, 'while a Plaintiff's recovery under the ordinary negligence rule is limited to damages which will make him whole, *the collateral source rule allows a Plaintiff further recovery under certain circumstances even though he has suffered no loss* [source citations omitted] (emphasis in original). *Id.*

Despite the well-settled law set-out above for cases that result in judgment after trial by jury, this Court must now determine whether the terms of Plaintiff's acceptance of Defendant's artfully-drafted Offer of Judgment somehow obligates this Court to compel satisfaction of the judgment after set-off by UIM proceeds by operation of S.C.

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[1] Defendant's Motion in this case asks the Court to compel satisfaction of a $75,000.00 judgment against the Defendant based on payment by Defendant of his liability policy limits totaling only $25,000.00. This case is frankly the exact same scenario as in Pustaver, where the Court denied Defendant's motion requesting that the circuit court

Code § 15-35-400 and Rule 68, *SCRCP*. This Court notes after reviewing the reported cases that historically the cases challenging the application of the collateral source rule to UIM benefits have arisen after changes to the statutory law regarding UIM benefits. In 1989, the Rattenni Court addressed former statute S.C. Code Ann. § 56-9-831 (Supp. 1986), which stated that optional UIM coverage is available whenever damages sustained exceed the liability coverage of the at-fault motorist. In 2002, the Pustaver Court revisited the issue after the current UIM statute, S.C. Code § 38-77-160, was amended to delete the provision allowing UIM carriers the right of subrogation or assignment. In both cases, the Court expressly held that: "[h]ad the General Assembly intended to abrogate the collateral source rule in regard to this particular class of insurance proceeds, it would have done so." Rattenni, 298 S.C. at 278, 379 S.E.2d at 891; Pustaver, 350 S.C. 350 S.C. at 414, 566 S.E.2d at 202.

This Court also finds that had the General Assembly wished to abrogate the collateral source rule by allowing at-fault drivers to condition offers of judgment on set-off by UIM benefits, it would have expressly done so. However, the procedure set out by S.C. Code § 15-35-400 does not address the issue at all. "A rule of statutory construction is that any legislation which is in derogation of common law must be strictly construed and not extended in application beyond clear legislative intent. Therefore, a statute is not to be construed in derogation of common law rights if another interpretation is reasonable." Doe v. Marion, 361 S.C. 463, 473, 605 S.E.2d 556, 561 (Ct. App. 2004), aff'd, 373 S.C. 390, 645 S.E.2d 245 (2007). This Court therefore finds that, without an

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compel Pustaver to accept the Defendant's $50,000.00 liability policy limits in full satisfaction of a $140,000.00 judgment.

express legislative abrogation of the collateral source rule, the statutory procedure for Offers of Judgment must be interpreted in a manner that is consistent with the rule.

If this Court granted Defendant the relief requested in his motion, it would necessarily have to interprettatutory procedure for Offers of Judgment in a manner that is not consistent with the collateral source rule, and this Court would effectively grant this Defendant and all other underinsured Defendants in future cases a procedural end-around the collateral source rule, by which Offers of Judgment could be utilized to penalize Plaintiffs for refusing to allow their UIM benefits to set-off the obligations of at-fault drivers. This irreconcilable tension between the collateral source rule and the statutory procedure advocated by Defendant is obvious when this Court considers the practical effects below on the present case if the statutory procedure was applied as sought by Defendant's motion.

The procedure for Offers of Judgment set out by S.C. Code § 15-35-400 and Rule 68, *SCRCP,* provides a penalty where an offer of judgment is not accepted and the offeror obtains a verdict at least as favorable as the rejected offer. If the Offer of Judgment could be conditioned on set-off by a Plaintiff's UIM proceeds as argued by the Defendant here, it would unfairly penalize Plaintiffs for refusing to allow their UIM benefits to set-off the obligations of tortfeasors. For illustration, consider the following scenarios:

1. ***$75,000 Offer of Judgment ACCEPTED:***

   $25,000 from At-Fault Driver + $50,000 from UIM

   = $75,000 Total Recover

2. ***$75,000 Offer of Judgment REJECTED, with $70,000 VERDICT at Trial:***

   $70,000 from At-Fault Driver + $45,000 from UIM

= $115,000 Total Recovery.

Of the two scenarios set forth above, the scenario that results in the $115,000 total recovery is clearly a much better practical result for the Plaintiff. However, under the procedural interpretation advocated by Defendant, the Defendant would actually be entitled to payment of costs and reduction of the judgment of eight percent interest computed on the amount of the verdict from the date of the offer.

Based on the legal authorities and reasoning set forth above, this Court finds that it lacks the legal authority to force the Plaintiff Tina Kelly to mark her judgment satisfied based on payment of only one-third (1/3) of the total judgment by Defendant's liability carrier, with the balance of the judgment paid by her UIM. The Court is not persuaded by Defendant's argument that this Court is not only authorized but is actually required to mark the judgment satisfied by Rule 68's language, which states that, upon the filing of an acceptance, "the court shall immediately issue the judgment and the clerk shall enter the judgment *as provided in the offer of judgment.*" (Emphasis supplied). In considering this argument, this Court notes that S.C. Code § 15-35-400(A) does not contain this specific phrasing, providing instead that: "Upon the filing, the clerk shall enter immediately judgment of the stipulation." This Court further notes that it was the intention of the legislature that Rule 68 be consistent with S.C. Code § 15-35-400, as provided in the "Note to 2006 Amendment," which states that: "This amendment makes this provision consistent with S.C. Code Ann. Section 15-35-400, which became effective July 1, 2005." *See* In Re: Amendments to South Carolina Rules of Civil Procedure, dated May 3, 2006, Administrative Order No. 2006-05-3-03. Rule 68 does not permit the

Court to simply ignore the collateral source rule just because Defendant sought to make a set-off of UIM proceeds a term of his Offer of Judgment.

Having determined that Defendant is not entitled to set-off Plaintiff's UIM proceeds against the $75,000 judgment entered against him in favor of Plaintiff Tina Kelly, the Court must also consider whether it is obligated to simply vacate Plaintiff's judgment based on a failure of Plaintiff to accept the terms of Defendant's Offer of Judgment. It is important to note that neither party has actually filed a motion requesting that the Court vacate the judgment. Defendant has asked the Court to mark the judgment satisfied based on a partial payment by the Defendant's liability carrier and payment of the balance by Plaintiff's UIM carrier, and Plaintiff simply argues that the collateral source rule precludes such a set-off of UIM proceeds against the judgment.

Defendant has at times insinuated that perhaps the Court should just vacate the judgment, referencing an unpublished opinion by the Fourth Circuit where, in an appeal of the entry of the judgment, the court determined that Plaintiff "never validly accepted [Defendant's] Offer of Judgment" and vacated that judgment that had been entered. *See* Henderson v. Sterling, Inc., 139 F.3d 889 (4th Cir. 1998).[2] In considering this possibility, however, this Court notes that in Henderson the parties actually failed to agree on a stated sum. There the Defendant offered to pay $10,000 plus costs and attorney fees accrued through a specific date in an amount determined by the U.S. District court, but the

[2] In reviewing federal court cases regarding the application of Rule 68, this Court notes that the provisions of Rule 68 of the *South Carolina Rules of Civil Procedure* after the 2006 amendment are substantially different from the provisions of Rule 68 of the *Federal Rules of Civil Procedure*. Therefore, although federal court cases regarding the application of Rule 68 are somewhat instructive, their persuasiveness is limited, as are South Carolina state court cases interpreting Rule 68, *SCRCP*, prior to the amendment.

Plaintiff sought to "accept" the offer by requesting that the court enter judgment in the amount of $28,865.88, comprised of $10,000.00 in damages plus $18,865.88 for attorney's fees and costs. This Court finds that in the present case the parties did not fail to agree on a stated sum for the judgment, they simply failed to agree on the application of the collateral source rule to payment of the judgment. Indeed, Defendant's offer of judgment expressly provided that: "Defendant Harold E. Morris, pursuant to South Carolina Code of Laws § 15-35-400 and SCRCP 68, hereby offers to allow judgment *to be taken against him* in the amount of Seventy-Five Thousand and 00/100 ($75,000.00) Dollars (emphasis supplied)."

Based on the foregoing, the Court finds that the judgment against Defendant Morris in favor of Plaintiff Tina Kelly should not be vacated. First, no party has requested such relief. Second, this Court finds that the parties did not fail to agree on the sum to be entered against the Defendant. His Offer of Judgment set out a judgment to be entered against the Defendant in a specific sum, which was accepted by Plaintiff Tina Kelly. Although the Defendant may have hoped to condition the judgment on Plaintiff's agreement to reduce the judgment by the amount of proceeds received from her UIM carrier, Plaintiff did not agree to set-off her UIM proceeds against the judgment, and this Court is without authority to force her to do so in violation of the collateral source rule.

Accordingly, Defendant's Motion to Mark Judgment Satisfied is DENIED.[3]

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[3] By his, April 17, 2017, "reply to the proposed Order of Plaintiff," the attorney for the Defendant's liability carrier, states that "[t]his was a joint offer made by two different attorneys, one for the Defendant and one for the underinsured motorist carrier." By this combination, the Defendant seeks to vitiate the well settled holding where, "[i]n *Rattenni*, [298 S.C. 276, 379 890 (1989)] our supreme court ruled that UIM benefits are subject to the collateral source rule." *Pastaver v. Gooden*, 350 S.C. 409, 414, 566 S.E. 199 (Ct. App. 2002). Nevertheless, the Defendant asserts in his reply that "the collateral source rule does not apply when no payment has yet been made by the UIM carrier and when the UIM carrier is part of the offer, as is

AND, IT IS SO ORDERED.

ALEXANDER S. MACAULAY, Presiding Judge
Tenth Judicial Circuit

Anderson, South Carolina
April 20, 2017

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the case here." This is a distinction without a difference, or even *petitio principii*, inasmuch as our courts have uniformly rejected such arguments that "our statutory insurance scheme . . . contemplates that damage awards will be paid from the combined limits of the liability and underinsured motorist coverages." *Pustaver, supra.*

> "A tortfeasor cannot take advantage of a contract between an injured party and a third person, no matter whether the source of the funds is 'an insurance company. . . .' 'It is the tortfeasor's responsibility to compensate the injured party for all the harm he causes, not the net loss the injured party receives. . . .' 'At times, then, 'while a Plaintiff's recovery under the ordinary negligence rule is limited to damages which will make him whole, *the collateral source rule allows a Plaintiff further recovery under certain circumstances even though he has suffered no loss.*' "*Haselden v. Davis,* 341 S.C. 486, 502-03, 534 S.E.2d 295, 304 (Ct.App. 2000)" [emphasis that of the court]; *aff'd,* 353 S.C. 481, 579 S.E.2d 293 (2003).

Ibid.

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COUNTY OF ANDERSON	C.A. NO.: 2016-CP-04-00633
Tina Lynn Kelly, individually, and as Guardian ad Litem for Z.G., a Minor, Plaintiff, vs. Harold Morris, Defendant.	**CERTIFICATE OF MAILING**

This is to certify that the undersigned did cause a copy of the **Order Denying Defendant's Motion to Mark Judgment Satisfied** in this matter to be served upon the parties listed below by placing a copy of the same in an envelope addressed as shown below and depositing the same in the United States mail with proper postage affixed thereto on the 26th day of April, 2017.

Peter E. Farr, Esq.
Murphy & Grantland, PA
PO Box 6648
Columbia, SC 29260

Dawn Brown
Dawn Brown
Paralegal to David R. Price, Jr.

SWORN to and subscribed before me this
26th day of April, 2017.

Carolyn B Couch
NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 7/24/2024