

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF RICHLAND)	FIFTH JUDICIAL CIRCUIT
)	
Eddie Andre Patterson,)	CIVIL ACTION No.: 2018-CP-40-6303
)	
Plaintiff,)	
)	
vs.)	ORDER
Douglass Fludd,)	
)	
Defendant.)	

RECEIVED
 OCT 31 2019
 SC Court of Appeals

This matter comes before the Court on a motion for a protective order filed by Zurich American Insurance (“Zurich”), the underinsured motorist carrier, governing the extent of its rights to participate in discovery and the trial of this matter. The hearing occurred on September 25, 2019. Robert F. Goings, Esquire appeared on behalf of the Plaintiff. William Bowman, Esquire appeared on behalf of Defendant Douglass Fludd. Robert L. Reibold, Esquire appeared on behalf of Zurich American Insurance, the underinsured motorist carrier.

This case involves a motor vehicle collision that occurred on November 4, 2018. A settlement has not been reached between Defendant Douglass Fludd, his liability insurance carrier and the Plaintiff. The liability insurance carrier has agreed to pay the minimum limits policy of \$25,000 only if the Plaintiff would sign a written agreement to not hold the Defendant personally liable for his alleged conduct. Plaintiff has not agreed to this settlement proposal.

This motion was filed by Zurich regarding its attempt to assume the defense of this case without a settlement between the parties. Counsel for the Defendant and counsel for Zurich have both attempted to conduct discovery, and in depositions, both affirmatively examined witnesses as if they are two separate parties. Plaintiff has objected to counsel for Zurich being allowed to examine witnesses because the underinsured motorist carrier has not taken over the defense of this

case. At the hearing, Zurich argued that the underinsured motorist carrier was entitled to fully participate in discovery and trial, regardless of the fact that a settlement has not been reached between the at-fault driver and the Plaintiff. Zurich contends that at trial it should be allowed to fully participate in trial, such as making opening statements, name fact and expert witnesses, call witnesses and cross-examine witnesses, make evidentiary and trial motions, and participate in closing arguments.

Zurich is not a party to this action. *See also Sizelove-Farmer v. Johnson*, No. 1:13-CV-03041-JMC, 2014 WL 4056267, at *3 (D.S.C. Aug. 13, 2014) (Judge M. Childs) (holding that an underinsured motorist carrier is *not* a party to the tort case, and therefore it lacked removal authority) (other citations omitted). Zurich's rights to appear is only limited to "defending in the name of the underinsured motorist." Defendant Douglass Fludd is not underinsured at this point because there is has been no adjudication as to the Plaintiff's damages, and he is being represented by William Bowman, Esquire. The interests and strategy of the Defendant in defending this case may not be aligned with the underinsured motorist carrier. Until there is a settlement with the Defendant, the Defendant has personal liability exposure and is entitled to control of the defense of the case. The role of the underinsured motorist carrier, on the other hand, is to simply 'steps into the shoes' of the named defendant once a settlement with the liability carrier is reached. *Crawford v. Henderson*, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003).

The Underinsured Motorist Statute, S.C. Code § 38-77-160, provides in pertinent part that:

[n]o action may be brought under the underinsured 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 underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event

the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit.

The operative language in the statute provides, “*In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit.*” (Emphasis added). Until there is a settlement with the defendant, referred to in the statute as the “putative at-fault insured,” the underinsured motorist carrier does not control the defense of the action.

In this case, Zurich, as the underinsured motorist carrier, does not have a right to control the defense of the case until such time as the Plaintiff may reach a settlement with the Defendant. When an underinsured motorist carrier lacks control of the defense, for purposes of trial, the carrier is not allowed to give opening statements, name fact and expert witnesses at trial, call or cross-examine witnesses, make motions, or offer closing arguments. Zurich is attempting to be a named party to an action that it is not a party. The case will be defended at trial by the attorney for the putative at-fault insured unless there is a settlement prior to trial. Zurich is not allowed to take over the defense of this case until and unless a settlement with Defendant and his carrier is reached. This is in keeping with how automobile accident cases are traditionally handled at the trial court level in circumstances when there has not been a settlement with the defendant— in those situations the underinsured motorist carrier does not take active participation at trial.

However, for purposes of discovery depositions noticed by the parties, counsel for Zurich is permitted to attend the deposition and may question witnesses as to facts not covered by counsel for Defendant. Allowing this would be in the interest of justice so that discovery can be timely

completed and that Zurich would not be prejudiced in conducting discovery in the event that a settlement is reached with the Defendant before trial and takes over the control of the defense.

IT IS SO ORDERED.



Richland Common Pleas

Case Caption: Eddie Andre Patterson vs Douglass Fludd , defendant, et al
Case Number: 2018CP4006303
Type: Order/Other

So Ordered

s/ R.E. Hood #2164