THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Robert E. Hood, Circuit Court Judge

Circuit Court Case No. 2018-CP-40-6303
Appellate Case No.: 2019-001836

Eddie Andre Patterson .....Respondent,

v.

Douglass Fludd .....Defendant.

MOTION TO DISMISS APPEAL AND REQUEST FOR EXPEDITED RULING

Eddie Andre Patterson hereby moves to dismiss the appeal filed by a non-party, Zurich North American Insurance Company ("Zurich"), acting as the underinsured motorist carrier. This appeal derives from a discovery motion filed by Zurich. The appeal was filed on October 31, 2019, from an Order on Zurich's Motion for a Protective Order. A copy of the Motion for Protective Order is attached as Exhibit 1 and the Order is attached hereto as Exhibit 2.

Zurich filed a discovery motion seeking a protective order on various objections as to its involvement in discovery. A party— and in this case— a non-party like Zurich should not be allowed to file an appeal of a discovery order just because it disagrees with the court's order. This is highly prejudicial to the rights of the parties, and only creates a substantial delay in justice to the merits of the case, and piecemeal litigation.

Zurich filed a motion in discovery for a protective order to prohibit the taking of depositions until the court could rule on objections as to the extent that the attorney for Zurich could be involved in examining witnesses. Additionally, Zurich used this motion to move before the court to have the opportunity to control the defense of the case, allowing Zurich to fully participate in trial, including giving opening statements, calling fact and expert witnesses, cross-examining witnesses, making trial motions, and closing arguments. As Zurich stated in its motion, the manner in which Zurich desired to defend the case conflicted with the rights of the Defendant, and how defense counsel believed the case should be defended. *See* Motion for Protective Order p. 3, ("the rights of the UIM carrier and the named defendant are not synonymous, and, in fact, may be conflicting). As the Circuit Court's Order pointed out, "The interests and strategy of the Defendant in defending this case may not be aligned with the underinsured motorist carrier." (Order p. 2). The Court denied the requests sought by Zurich because at this stage there has not been a settlement with the Defendant and its carrier, and thus, Zurich does not control the defense as required under the governing statute.

The Court merely concluded that, without a settlement, Zurich, as the underinsured motorist carrier, is not allowed to take control over the defense at this stage in the litigation. The Underinsured Motorist Statute, S.C. Code § 38-77-160, provides *"[i]n 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 Court determined that Zurich cannot take over control of the defense at this stage, but held that Zurich was entitled to assume control of the defense of the action for its own benefit once a settlement was reached with the Defendant. Of course, Zurich would be allowed to take control over the

defense once there is a settlement with the Defendant and his carrier. This Order finding that Zurich is limited in its participation in discovery until there is a settlement is not immediately appealable.

A. This Order Is not Immediately Appealable and Should be Dismissed.

There is no legal precedent that allows Zurich to file this notice of appeal. As a general rule, only final judgments are appealable. *Culbertson v. Clemens*, 322 S.C. 20, 23, 471 S.E.2d 163, 164 (1996). "An order which does not finally end a case or prevent a final judgment from which a party may seek appellate review usually is considered an interlocutory order from which no immediate appeal is allowed." *Hagood v. Sommerville*, 362 S.C. 191, 195, 607 S.E.2d 707, 709 (2005). "The final judgment rule serves the laudatory goal of preventing piecemeal review of matters that are merely steps toward a final judgment. In light of the policy underpinnings of the final judgment rule, exceptions should be recognized cautiously." *Doe v. Howe*, 362 S.C. 212, 216, 607 S.E.2d 354, 356 (Ct. App. 2004), *opinion on rehearing at* 367 S.C. 432, 626 S.E.2d 25 (Ct. App. 2005).

The immediate appealability of an interlocutory order depends on whether the order falls within one of the several categories listed in S.C. Code § 14-3-330. *See Woodard v. Westvaco Corp.*, 319 S.C. 240, 460 S.E.2d 392 (1995). Under S.C. Code Ann. § 14-3-330(1), this Court may review any intermediate order that involves the merits of the action. An order involving the merits "must finally determine some substantial matter forming the whole or a part of some cause of action or defense in the case in which the order is entitled." *Duncan v. Gov't Employees Ins. Co.*, 331 S.C. 484, 485, 449 S.E.2d 580, 580 (1994). Further, S.C. Code Ann. § 14-3-330(2), allows an immediate appeal of an interlocutory order only it if affects a substantial right and in effect determines the action and prevents a judgment from which an appeal may be taken or

discontinues the action may be reviewed by this Court. The Order does not fit within either of these subsections.

This Order is from a motion for a protective order, denying the requests sought by Zurich. First, this order does not affect the "merits" of the action, and in no way does the order adjudicate any issue of liability or damages in this civil action. The Order does not finally determine a substantial matter forming the whole or a part of some cause of action or defense in the case. Thus, this interlocutory appeal is not permitted under S.C. Code Ann. § 14-3-330(1). As to S.C. Code Ann. § 14-3-330(2), this Order does not affect a substantial right. It does not determine the action or prevent a judgment from which an appeal may be taken. "Orders affecting a substantial right 'discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense.'" *Ex parte Wilson*, 367 S.C. 7, 13, 625 S.E.2d 205, 208 (2005). This Order does not discontinue an action, prevent an appeal, grant or refuse a new trial, or strike out an action or defense, but rather sets forth the conduct of discovery until such time that there may be a settlement with the Defendant. Zurich does not have a substantial right at this time because its rights to control the defense are not triggered at this time. The Order was designed to prevent Zurich from hijacking the defense of this case and potentially taking positions in this litigation that are contrary to the rights of the Defendant as a party to this action with personal liability exposure.

Moreover, this Order is not appealable because it concerns a discovery order. This Order derives from a discovery motion filed by Zurich related to deposition testimony and the extent of its ability to participate in questioning witnesses. Ordinarily, discovery orders are not immediately appealable. *See, e.g. Ex parte Wilson*, 367 S.C.7, 625 S.E.2d 205 (2005) (finding an order quashing a subpoena issued to a non-party is not immediately appealable); *Waddell v. Kahdy*, 309 S.C.1, 419 S.E.2d 783 (1992) (holding an order requiring a party to submit to a deposition is not

immediately appealable); *Wallace v. Interamerican Trust Co.*, 246 S.C. 563, 144 S.E.2d 813 (1965) (an order requiring the production of records in connection with the preparation for trial was not immediately appealable). As the court in *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008), held "[t]hough these issues raise interesting questions, the fact remains that discovery orders, in general, are interlocutory and are not immediately appealable because they do not, within the meaning of the appealability statute, involve the merits of the action or affect a substantial right." *Grosshuesch v. Cramer*, 377 S.C. 12, 30, 659 S.E.2d 112, 122 (2008).

To the extent that the Order involves rulings that relate to the conduct of discovery or trial, this Order is not immediately appealable. South Carolina appellate courts have routinely held that orders affecting the conduct of trial are not immediately appealable. For example, courts have held that orders directing a party or a non-party on participating in discovery are not immediately appealable, *Ex parte Whetstone*, 289 S.C. 580, 580, 347 S.E.2d 881, 881 (1986); orders granting or denying a change of venue are not immediately appealable, *Breland v. Love Chevrolet Olds, Inc.* 339 S.C. 89, 529 S.E.2d 11 (2000); orders granting a motion to intervene are not immediately appealable, *Duncan v. Gov't Emps Ins. Co.*, 331 S.C. 484, 449 S.E.23d 580 (1994); orders bifurcating discovery are not immediately appealable, *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 533 S.E.2d 331 (2000); orders denying or granting a motion for a continuance are not immediately appealable, *Townsend v. Townsend*, 323 S.C. 309, 474 S.E.2d 424 (1996); *Walker v. Springs Indus., Inc.*, 298 S.C. 249, 379 S.E.2d 729 (Ct. App. 1989), orders denying a motion to sever are not immediately appealable, *N.C. Fed. Sav. & Loan Ass'n v. DAV Corp.*, 294 S.C. 27, 364 S.E.2d 308 (Ct. App. 1987), docketing orders to restore case are not immediately appealable, *Shields v. Martin Marietta, Corp.* 303 S.C. 469, 402 S.E.2d 482 (1991); orders granting a stay are not immediately appealable, *Edwards v. SunCom*, 369 S.C.91, 631 S.E.2d 529 (2006); and rulings

upon the admissibility of evidence are not immediately appealable, *Wallace v. Interamerican Trust Co.*, 246 S.C. 563, 144 S.E.2d 813 (1965). This Order falls within the type of rulings that our appellate courts have routinely held to be not subject to immediate appeal.

Because this Order does not meet the threshold required for an immediate appeal, this appeal should be dismissed.

B. Zurich is not a Party to this Case

Rule 201, SCACR provides that "only a party aggrieved by an order, judgment sentence or decision may appeal." (emphasis added). Zurich is not a party to this case. Zurich is not listed on the caption, and a non-party cannot institute an appeal of a civil action in an attempt to halt litigation that involves the actual plaintiff and defendant in this case.

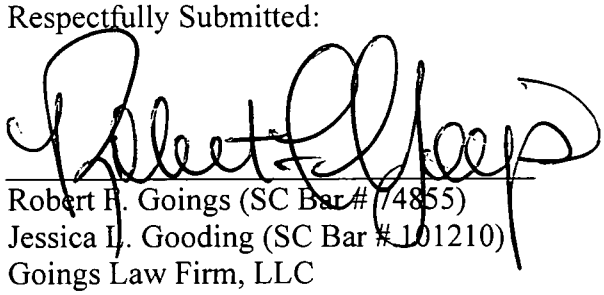
In the Order, the Court found that "Zurich is not a party to this action." Order p. 2. S.C. Code § 38-77-160 does not provide that the underinsured motorist carrier is a party. Nor does this statute provide that an underinsured motorist carrier has the right to file an appeal. In a similarly related posture, the United States District Court of South Carolina has routinely held that an underinsured motorist carrier is not a party, and, therefore, is not permitted to file a notice of removal from state court to federal court. *See 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); *Hickman v. Hinson*, No. 2:12–cv–03160–DCN, 2013 WL 375230 (D.S.C. Jan. 31, 2013) (holding that an underinsured motorist carrier is *not* a party to the tort case, and, therefore, it lacked removal authority).

Since Zurich is not a party to this action, and does not have control over defense, it cannot effectuate this Notice of Appeal.

CONCLUSION

For these reasons, this appeal is premature and should be dismissed in an expedited fashion and remanded to the trial court.

Respectfully Submitted:

By: 

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Attorneys for Respondent Eddie Andre Patterson

Columbia, South Carolina
November 5, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
Robert E. Hood, Circuit Court Judge

Circuit Court Case No. 2018-CP-40-6303
Appellate Case No.: 2019-001836

Eddie Andre Patterson .....Respondent,

v.

Douglass Fludd .....Defendant.

PROOF OF SERVICE

I certify that I have served the Motion to Dismiss Appeal and Request for Expedited Ruling on counsel by serving a copy of the same, via hand-delivery, on November 5, 2019, to the following:

William H. Bowman, III, Esquire
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Robert L. Reibold, Esquire
Haynsworth, Sinkler, Boyd, P.A.
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Respectfully submitted,

By: _____

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Columbia, South Carolina
November 5, 2019

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF RICHLAND	)	Civil Action No. 2018-CP-40-6303
	)	
Eddie Andre Patterson,	)	
	)	
Plaintiff,	)	ZURICH AMERICAN INSURANCE
	)	NOTICE OF MOTION AND MOTION FOR
v.	)	A PROTECTIVE ORDER
	)	
Douglass Fludd,	)	
	)	
Defendant.	)	
	)	

TO: ROBERT GOINGS, ESQ. AND LEIGH LEVENTIS, ESQ., ATTORNEYS FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that on the tenth day after service hereof or at such other times as may be convenient for the Court, the UIM Carrier, Zurich American Insurance, will, pursuant to Rules 26(c) and 16, SCRCP, move before the Presiding Judge of the Richland County Court of Common Pleas at the Richland County Courthouse for: (1) a protective order prohibiting the trial deposition of Dr. Eric Brown, which has been scheduled by the Plaintiff for Friday, July 18, 2019 at 10:00 am, and all such other trial or discovery depositions until such time as the Court may rule on the Plaintiff's objection to participation by counsel for Zurich (discussed below) and (2) an order overruling Plaintiff's objection.

As grounds for this motion, Zurich would show the Court that:

1. At the conclusion of the trial deposition of Thomas Fleming, an EMT, Plaintiff's counsel objected to all questions asked by Zurich's counsel on the ground that UIM counsel may not participate until or unless the underlying carrier and its defense counsel are released;

2. Zurich anticipates Plaintiff will make the same objection with respect to Dr. Brown's trial deposition and other depositions going forward;

EXHIBIT 1

3. Clarity on whether or to what extent UIM counsel will be able to participate in questioning of trial witnesses is therefore necessary immediately. If Plaintiff's objection is later sustained, and UIM counsel's questions are stricken before a trial deposition is submitted to the jury, valuable evidence may be omitted from trial. The extent and manner in which participation in trial will be permitted will affect trial strategy and the type and content of questioning at Dr. Brown's deposition and other trial or discovery depositions in this case.[1]

4. Plaintiff's objection is improper. The UIM carrier has a statutory right to appear and defend in this action. 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.

S.C. Code Ann. § 37-88-160 (2012) (emphasis added).

5. This right is not conditional on whether insurance policy proceeds for the defendant have been paid.[2] Our Court of Appeals has specifically stated that:

> [w]e further hold Donaldson has misinterpreted Section 38–77–160 with regard to Allstate's right to participate in Tixier's defense. *Although the statute specifically allows the UIM carrier to "assume control of the defense of [the] action for its own benefit" only when the liability carrier for the underinsured defendant "chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured," the UIM carrier always has the right to "appear and defend in the name of the underinsured in any action which may affect its liability," notwithstanding the fact that it may not have the right to "control" the defense.*

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[1] A discovery deposition can become a trial deposition if a witness is later unavailable under Rule 32, SCRCP.

[2] Defendant Fludd's carrier has tendered its $25,000 limits but Plaintiff has refused to accept them.

Ex parte Allstate Ins. Co. , 339 S.C. 202, 528 S.E.2d 679 (Ct.App. 2000) (emphasis added). Moreover, the rights of the UIM carrier and the named defendant are not synonymous, and, in fact, may be conflicting. *Crawford v. Henderson*, 356 S.C. 389, 589 S.E.2d 204 (Ct.App. 2003).

I certify that have I consulted with other counsel in this case about the matters raised by this motion. Counsel for Defendant Fludd consents to this motion. I spoke with Counsel for Plaintiff and the underlying issue could not be resolved.

Respectfully submitted,

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July 18, 2019

ATTORNEYS FOR ZURICH AMERICAN INSURANCE COMPANY

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.	)	

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

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November 5, 2019

VIA HAND-DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

Re: Eddie Andre Patterson v. Douglass Fludd
Appellate Case No.: 2019-001836

Dear Ms. Kitchings:

Please find enclosed for filing the original and seven (7) copies of the Motion to Dismiss Appeal and Request for Expedited Ruling in the above-referenced matter. I am also enclosing herewith a check in the amount of $25.00 for the required filing fee. Please return the filed-stamped copy of the same to me.

Thank you for your time and attention. Should you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

Robert F. Goings

RFG:lcc
Enclosures
cc: William H. Bowman, III, Esquire
Robert L. Reibold, Esquire