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 .....Respondent,

Zurich American Insurance Company .....Appellant.

RETURN TO MOTION TO DISMISS APPEAL

Zurich American Insurance Company ("Zurich") hereby submits this Return to Plaintiff's Motion to Dismiss this Appeal. The motion should be denied. This appeal is properly before the Court. The trial court's order is immediately appealable because it:

- affects a substantial right;
- affects the mode of trial; and
- effectively strikes Zurich's Answer.

South Carolina law grants Zurich, as an underinsured motorist ("UIM") carrier, a right to both appear and defend in this action. S.C. Code Ann. § 38-77-160 (2015).[1] A separate provision

[1] S.C. Code § 38-77-160 provides in pertinent part that:
No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner

of this statute also provides that a UIM carrier may assume complete control of the defense of the case if the insurer for the putative at-fault driver "chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured." *Id.* The underlying liability carrier in this case chose to settle and tendered the full limits of its liability policy. Rather than accept settlement funds which would benefit his client, Plaintiff's counsel refused to accept the tender for tactical reasons. Plaintiff argues that as long as he continues to refuse the tender, Zurich may take no action in defense of the case, and the underlying carrier must continue its defense despite having no economic motivation to do so. Plaintiff would hold Zurich bound by the outcome of trial, but deny Zurich the ability to contest that outcome.

These tactics are fundamentally unfair to Zurich. The alleged damages in this case far exceed the minimum liability limits of the underlying liability coverage, making Zurich the real party in interest in defending this case. Yet Plaintiff attempts to freeze Zurich out and prevent it from exercising its statutory right to defend.

The trial court's order sanctions this gamesmanship, and divests Zurich of the very rights § 38-77-160 was meant to protect. *Williams v. Selective Ins. Co. of Southeast*, 315 S.C. 532, 534, 446 S.E.2d 402, 404 (1994) ("the intent of § 38–77–160 is to protect an insurance carrier's right to contest its liability for underinsured benefits"). The trial court's order is no mere

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> 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 . . .

(emphasis added).

discovery order. It regulates the conduct of trial, precludes Zurich from defending the case, and wholly denies Zurich the ability to protect its interest.

Zurich stands aggrieved by the trial court's order and is entitled to appeal.

I. Factual Background

Plaintiff Eddie Patterson filed this automobile accident case against Defendant Douglass Fludd. Plaintiff alleges Fludd was grossly intoxicated. Plaintiff claims medical expenses of approximately $365,000, as well as lost wages, pain and suffering, and punitive damages. Because Fludd carried only minimum liability limits, Plaintiff sought underinsured motorist benefits under his employer's commercial automobile policy, which carries a policy limit of $1,000,000.[2] Given the amount of claimed damages, Zurich is the real party in interest for purposes of defending this case.

As the statute requires, Plaintiff served Zurich as the underinsured motorist carrier. Zurich properly appeared, filing its Notice of Appearance and Conditional Answer.

Plaintiff subsequently noticed the trial deposition of an emergency medical technician who responded to the accident scene. After counsel for Zurich had questioned the witness, Plaintiff moved to strike all examination by Zurich's counsel, arguing that Zurich was not entitled to participate in the trial deposition in any manner. Plaintiff asserted that Zurich had no right to control the defense of the case under S.C. Code Ann. § 38-77-160 because, although Mr. Fludd's carrier had tendered its liability limits, Plaintiff refused to accept the tender.

When Plaintiff noticed another trial deposition, Zurich filed a motion for a protective order, precluding further discovery and/or trial activities until a court determined whether Zurich was

[2] Mr. Patterson occupied a work vehicle at the time of the accident.

entitled to participate in such activities. A hearing on the matter was held before the Honorable Robert E. Hood on September 25, 2019.

Plaintiff's motion describes certain arguments made by Zurich at this hearing, but does so in accurately. Zurich did *not* argue, as Plaintiff asserts, that it should be entitled to assume control of the defense. Rather, it argued that it had a right to defend and participate at trial, *subject to* the underlying liability carrier's right to control the defense of the case. Zurich argued that there must be some middle ground between the two extremes of wholly forfeiting its right to contest its liability and assuming complete control over the case. Similarly, Zurich did not argue, as Plaintiff suggests, that the manner in which Zurich desired to defend the case conflicted with the rights of the Defendant and how Mr. Fludd's counsel believed the case should be tried. At all times, Zurich acknowledged that it could not make decisions which amounted to control of the defense.

The trial court signed Plaintiff's proposed order and prohibited Zurich from taking any action other than attending "discovery depositions" and questioning witnesses as to facts "not covered by counsel for the Defendant." Under the circumstances of this case, the trial court has therefore prohibited Zurich from participating in trial activities in any way. Zurich has lost any ability to defend its interest in this case.

III. The Trial Court's Order Is Immediately Appealable Because It Affects a Substantial Right.

Appellate jurisdiction for interlocutory orders exists for:

> (2) An order affecting a substantial right made in an action when such order (a) in effect determines the action and prevents a judgment from which an appeal might be taken; (b) grants or refuses a new trial; or (c) strikes out an answer or any part thereof or any pleading in any action.

S.C. Code Ann. § 14-3-330(2). In construing this code section, the South Carolina Supreme Court has stated on numerous occasions that "when a trial court's order deprives a party of a mode of

trial to which the party is entitled as a matter of right, such order is immediately appealable." *Flagstar Corp. v Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000). Not only is such an order immediately appealable, such orders must be immediately appealed. *Id.*

The trial court's order affects a substantial right and effectively strikes Zurich's Answer. It also affects the mode of trial. It is therefore immediately appealable pursuant to S.C. Code Ann. § 14-3-330.

A. The Trial Court's Order Affects a Substantial Right.

Section 38-77-160 governs UIM insurance in South Carolina. This statute requires that UIM insurance be offered to South Carolina residents, but it is also "the intent of § 38–77–160 is to protect an insurance carrier's right to contest its liability for underinsured benefits." *Williams v. Selective Ins. Co. of Southeast*, 315 S.C. 532, 534, 446 S.E.2d 402, 404 (1994). To this end, § 38-77-160 specifically vests UIM carriers with "the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability." S.C. Code Ann. § 38-77-160 (2015).

This right to defend is a substantial right. It exists even when a UIM carrier has not assumed control of the defense. As this Court held in *Ex Parte Allstate Ins. Co.*, 339 S.C. 202, 528 S.E.2d 679 (Ct.App. 2000):

> [a]lthough 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 the 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.*

Id. at 206, 528 S.E.2d at 681 (emphasis added).

The trial court's order denies Zurich this right to defend. It places Zurich in the same, or worse, position as if the trial court had stricken its answer. A defendant who appears in an action but later has its answer stricken by the court is bound by the results of the proceeding, but can take no action to defend the case. It cannot subpoena records, depose witnesses, cross-examine liability witnesses, or introduce evidence.

Zurich finds itself in this same position. Plaintiff served Zurich with process as required by § 38-77-160. Zurich will therefore be bound by the result of the trial. However, Zurich is not permitted to take any action to protect its interest.

The order is therefore immediately appealable.

B. The Trial Court's Order Affects the Mode of Trial.

When a trial court's order deprives a litigant of a mode of trial to which it is entitled, the order is immediately appealable. *Flagstar Corp.*, 341 S.C. at 68, 533 S.E.2d at 333. South Carolina cases addresses the mode of trial in this context have historically focused on whether a litigant was improperly denied a trial by jury in a law case or required to submit a case to a jury in an equity case. *Salmonsen v. CGD, Inc.*, 377 S.C. 442, 453, 661 S.E.2d 81, 87 (2008).

However, the mode of trial analysis also includes the availability of trial. *Id.* The denial of a trial is intrinsic. *Id.* As discussed above, the trial court's order effectively places Zurich in the same position as if its answer has been stricken or it had defaulted for failure to appear. Zurich will not receive a trial – it will be forced to sit idle while others determine its fate. The trial court's order is therefore immediately appealable.

IV. Zurich Is An Aggrieved Party for Purposes of Appeal.

Citing Rule 201, SCACR, Plaintiff alternatively argues that Zurich is not listed as a "party" on the case caption and therefore cannot appeal. This argument of course addresses the merits of

this appeal. If Zurich is a party, then it has a right to participate. Plaintiff essentially seeks dismissal of the appeal on the ground that the trial court was correct. Zurich submits that this issue is intertwined with the merits issues submitted in the parties' appellate briefs.

To the extent that the argument can be considered at this time, it lacks merit for two reasons. First, Zurich is, by statutory design, an undisclosed party, and the real party in interest in this case. Second, Plaintiff's proposed construction of Rule 201, SCACR, leads to an absurd result in this case.

A. Zurich Is a Party.

Zurich is a party for all practical purposes. Like every other party, Zurich was served with process by the Plaintiff in this case. Zurich appeared and answered. It is Zurich who stands at risk of paying the lion's share of any potential judgment. Indeed, our Supreme Court has acknowledged that a UIM carrier can be the real defendant in a given action. *Broome v. Watts*, 319 S.C. 337, 461 S.E.2d 46 (1995). In *Broome*, the Court discussed the distinction between the named defendant, Watts, and the UIM carrier USAA. It stated:

> [w]e reject the Broomes' argument that a waiver by the Watts is 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.*

Id. at 340-41, 461 S.E.2d at 48 (emphasis added). As was the UIM carrier in *Broome*, Zurich is the de facto defendant in this case.

The only reason Zurich's name does not appear in the case caption is because of the peculiar design of South Carolina's UIM statute. In some states, a UIM carrier is identified as a party defendant and appears on the case caption. *E.g., Lamz v. Geico General Ins. Co.*, 803 So.2d 593 (Fla. 2001). South Carolina's General Assembly chose another path. Under South Carolina's statute, the UIM carrier does not appear in its own name; rather, the UIM carrier

appears and defends "in the name of the underinsured motorist." S.C. Code Ann. § 38-77-160 (2015). Moreover, "[t]he evidence of service upon the [UIM] insurer may not be made a part of the record." *Id.* This statutory prohibition prevents the jury from learning that insurance coverage exists because a UIM carrier has elected to appear and defend, but it does not alter the fact that in many cases the UIM carrier is the real party in interest. The UIM carrier is a party, albeit an undisclosed one.

The two federal cases cited by Plaintiff, *Sizelove-Farmer v. Johnson*, No. 1:13-CV-03041-JMC, 2014 WL 4056267 (D.S.C. Aug. 13, 2014) and *Hickman v. Hickman*, NO. 2:12-cv-03160, 2013 WL 375230 (D.S.C. Jan. 31, 2013) are not to the contrary. Both of these cases address whether a UIM carrier can remove an action to federal court, and their holdings, are, as Judge Norton noted in *Hickman*, "governed by federal law." *Hickman* 2013 WL 375230 at * 2. In particular, these cases are controlled by the specific language of federal removal statutes, which address removal only "by the defendant or defendants," *e.g.,* 28 U.S.C. 1441 and 1446(a), and must be strictly construed because federal courts are courts of limited jurisdiction, *e.g., Md. Stadium Auth. v. Ellerbe Becket, Inc.*, 407 F.3d 255, 260 (4th Cir. 2005). In contrast, our Supreme Court has stated that South Carolina court rules and statutes should be construed liberally in favor of appeal. *Stroup v. Duke Power Co.*, 216 S.C. 79, 84, 56 S.E.2d 745, 747 (1949).

B. Plaintiff's Construction of Rule 201(b), SCACR Leads to an Absurd Result.

Plaintiff's argument concerning Rule 201(b), SCACR, can be summarized as follows: (1) Rule 201(b) provides that only a "party" aggrieved by a judgment or order may appeal; (2) to be a "party," a litigant's name must appear on the case caption; (3) Zurich's name does not appear on the case caption; (4) Zurich is not a party permitted to appeal. If this construction were adopted,

it would lead to an absurd result; namely, it would lead to the conclusion that there are no circumstances under which a UIM carrier could ever lodge an appeal.

If, as Plaintiff argues, appearance in the case caption as a defendant is condition precedent to the ability to appeal, it is a condition that a UIM carrier can never satisfy. Section 38-77-160 prohibits the appearance of a UIM carrier as a party defendant in the case caption. All UIM carriers, even those who assume control after the underlying carrier has tendered its policy limits, appear not in their own name, but in the name of the underinsured motorist. Evidence that a UIM carrier has been served in the action must be withheld from the jury. Simply put, if a UIM carrier must appear in the case caption to appeal, and UIM carriers cannot appear in the case caption, then UIM carriers cannot appeal.

This situation cannot be what the General Assembly intended; it is an absurd result and Plaintiff's argument should be rejected. *See Kiriakides v. United Artist Commc'ns, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (citing *Stackhouse v. Cnty. Bd. of Comm'rs for Dillon Cnty.*, 86 S.C. 419, 422, 68 S.E. 561, 562 (1910)) (regardless of how plain the ordinary meaning of the words in a statute or rule may appear, courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not have been intended).

V. Conclusion

The trial court's order is immediately appealable, and Plaintiff's motion to dismiss the appeal should be denied.

Respectfully submitted,

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November 13, 2019

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PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have caused the foregoing to be served via U.S. mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the addresses shown below.

1. **Return to Motion to Dismiss Appeal**

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November 13, 2019
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