

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE ROBERT E. HOOD
CIRCUIT COURT JUDGE

CASE NO. 2018-CP-40-06303
APPELLATE CASE NO. 2019-001836

Eddie A. Patterson, Respondent,

v.

Douglass Fludd, Respondent.

Zurich American Insurance Company,
Appellant.

RECEIVED

DEC 02 2019

SC Court of Appeals

RETURN TO RESPONDENT'S MOTION TO DISMISS

At the outset of this appeal, prior to any briefing or review, Respondent Patterson asserts this court has no jurisdiction to review the circuit court's order because the circuit court found Zurich American Insurance Company not to be a party to this dispute. If the court accepts Patterson's argument, Zurich will never be allowed to challenge a decision precluding it from participating in a case where it has \$1,000,000 at stake. For the following reasons, Patterson's motion to dismiss should be denied.¹

¹ Defendant Fludd adopts Respondent Zurich's statement of the factual background of this case and analysis and offers the following arguments as a supplement to Zurich's position.

ARGUMENT

Patterson asserts two bases upon which to grant his motion to dismiss: (1) that the circuit court's order is not immediately appealable and (2) that Zurich is not a party to the appeal as contemplated by Rule 201, SCACR. The thrust of those arguments can be succinctly stated thusly—because the circuit court found Zurich is not a party, this court cannot review such a finding because Zurich is not a party. Such circular reasoning should not be the basis for an order dismissing this case.

1. Appealability

The question raised to the circuit court was whether Zurich has a right to participate in the defense of a case in which it has substantial exposure. The circuit court held Zurich had no such right and must be forced to sit quietly while its fate is decided by others. Such a decision certainly affects Zurich's substantial right to participate in a trial where it faces liability and it acts as an injunction. Accordingly, an immediate appeal is proper.

“The right of appeal arises from and is controlled by statutory law.” *Hagood v. Sommerville*, 362 S.C. 191, 194, 607 S.E.2d 707, 708 (2005). “An appeal ordinarily may be pursued only after a party has obtained a final judgment.” *Id.* “The determination of whether a party may immediately appeal an order issued before or during trial is governed primarily by S.C. Code Ann. § 14-3-330. *Id.* at 195, 607 S.E.2d at 708.

An order affects a substantial right and is immediately appealable when it ‘(a) in effect determines the action and prevents a judgment from which an appeal might be taken or discontinues the action, (b) grants or refuses a new trial or (c) strikes out an answer or any part thereof or any pleading in any action[.]’

Id. at 195, 607 S.E.2d at 709 (quoting S.C. Code Ann. § 14-3-330(2)). Furthermore, the appellate courts of this state have jurisdiction to review “an interlocutory order or decree in a

court of common pleas granting, continuing, modifying, or refusing an injunction.” S.C. Code Ann. § 14-3-330(4).

As asserted by Zurich, the circuit court’s order most certainly affects a substantial right and denies Zurich a mode of trial to which it is entitled, or, in this case, whether it is entitled to any trial at all. Accordingly, the order is immediately appealable.

The circuit court’s order prohibits Zurich from “giv[ing] opening statements, nam[ing] fact and expert witnesses at trial, call[ing] or cross-examin[ing] witnesses, mak[ing] motions, or offer[ing] closing statements.” Exhibit 1 at p. 3. Further, while Zurich is permitted to attend depositions, it may only ask questions “as to facts not covered by counsel for Defendant” Fludd. *Id.* “The UM 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.” *Ex Parte Allstate*, 339 S.C. 202, 206, 528 S.E.2d 679, 681 (Ct. App. 2000) (quoting S.C. Code Ann. § 38-77-160).

The right to defend one’s self from a potentially seven-figure judgment is a substantial one; and the circuit court has precluded Zurich from availing itself of that right. The circuit court’s order prohibits any meaningful participation by Zurich’s chosen counsel and instead requires Fludd’s counsel to carry the burden of defending the case for both parties. Such an order cannot be said to be merely a discovery order.

Furthermore, the plain language of the court’s order demonstrates its applicability to the mode of trial, an issue far aside from whether Zurich can participate in discovery. Certainly, the order deals in part with discovery and whether Zurich will be allowed to participate in

depositions, but, as previously noted, it also enjoins Zurich from participation during the trial of the case.

Essentially, the circuit court has allowed Patterson to choose defense counsel for trial, despite Zurich's attempts to defend itself. Fludd has tendered its policy limits to the plaintiff in exchange for covenants not to execute. In the normal course, such an offer would be accepted and Zurich's retained counsel would *control* the defense. However, because of Patterson's strategic decision not to accept the policy limits tender by Fludd, the circuit court found Patterson can choose to essentially disqualify Zurich's counsel from *participation* in the defense of this case. Such an order is immediately appealable. See *Hagood*, 362 S.C. at 194, 607 S.E.2d at 708 (finding an order disqualifying counsel to be immediately appealable).

Finally, as previously noted, an order granting an injunction is immediately appealable. See S.C. Code Ann. § 14-3-330(4). The circuit court's order is properly characterized as an injunction because it prohibits Zurich from acting in accordance with its statutory rights. See Black's Law Dictionary 649 (8th ed. 2005) (defining an injunction as "a court order commanding or preventing an action"). Thus, an immediate appeal is proper.

2. Zurich's Status as a Party

Zurich provides a logical and well-supported argument in its reply to the motion to dismiss regarding its status as a party and Fludd adopts those arguments.²

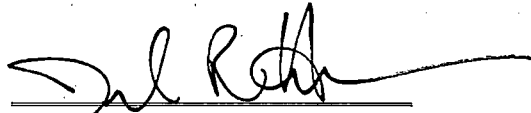
Additionally, it is important to look at the plain language of Rule 201. "Only a party aggrieved by an order, judgment, sentence or decision may appeal." Rule 201, SCACR. Black's

² Fludd filed and served his own notice of appeal from Judge Hood's order on November 15, 2019.

Law Dictionary defines "aggrieved party" as "a party whose personal, pecuniary, or property rights have been adversely affected by another person's actions or by a court's decree or judgment." Black's Law Dictionary 945 (8th ed. 2005). Zurich most certainly satisfies those requirements. Zurich's statutory right to participate in the defense of this case have been severely curtailed by the circuit court's order. Zurich must have a right to proceed with the appeal when its rights have been so affected. A dismissal by this court forecloses any right UIM carriers have to seek clarity on this issue either at this stage or after final judgment.

CONCLUSION

Based on the foregoing and the arguments made by Zurich in its return, Patterson's motion to dismiss should be denied and the parties' appeal should be allowed to continue.



Joshua R. Hinson, Esq. (S.C. Bar No. 102270)
William H. Bowman, III (S.C. Bar No. 810)
Rogers Townsend & Thomas, PC
PO Box 100200
Columbia, SC 29202
(803) 771-7900
Joshua.hinson@rtt-law.com
Bo.Bowman@rtt-law.com

Counsel for Douglass Fludd

Other Counsel of Record:

Robert F. Goings
Goings Law Firm
1510 Calhoun Street
Columbia, SC 29201
(803) 350-9230

Robert L. Reibold
Haynsworth, Sinkler, Boyd, P.A.
Post Office Box 11889
Columbia, SC 29211
(803) 779-3080

*Counsel for Respondent Eddie Andre
Patterson*

*Counsel for Zurich North 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

Electronically signed on 2019-10-21 12:18:35 page 5 of 5

ELECTRONICALLY FILED - 2019 Oct 21 2:27 PM - RICHLAND - COMMON PLEAS - CASE#2018CP4006303

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM RICHLAND COUNTY
IN THE COURT OF COMMON PLEAS
THE HONORABLE ROBERT E. HOOD
CIRCUIT COURT JUDGE

CASE NO. 2018-CP-40-06303
APPELLATE CASE NO. 2019-001836

Eddie A. Patterson, Respondent,

v.

Douglass Fludd, Respondent.

Zurich American Insurance Company,
Appellant.

RECEIVED

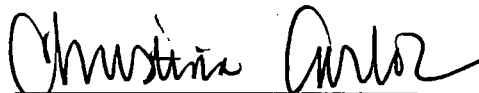
DEC 02 2019

SC Court of Appeals

PROOF OF SERVICE

I certify that I have served Eddie Andre Patterson and Zurich American Insurance Company with a copy of the Return to Respondent's Motion to Dismiss by depositing a copy of it in the United States Mail, postage prepaid, on December 2, 2019, addressed to its attorney of record, Robert F. Goings, Esq, 1510 Calhoun Street, Columbia, SC 29201 and Robert Lawrence Reibold, Esq, PO Box 11889, Columbia, SC 29211-1889 respectively.

December 2, 2019



Christina Carlos
Paralegal

ROGERS TOWNSEND & THOMAS, PC
POST OFFICE BOX 100200 (29202)
1221 MAIN STREET, 14TH FLOOR
COLUMBIA, SOUTH CAROLINA 29201
P 803.771.7900 F 803.343.7013
W RTT-LAW.COM

JOSHUA R. HINSON, ESQUIRE
ASSOCIATE
JOSHUA.HINSON@RTT-LAW.COM
P 803.744.1839



RECEIVED

December 2, 2019

DEC 02 2019

SC Court of Appeals

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: *Eddie A. Patterson v. Douglass Fludd*

Dear Ms. Kitchings,

Enclosed for filing is the Return to Respondent's Motion to Dismiss in the above case.
Please let me know if you have any questions or concerns.

Sincerely,

A handwritten signature in black ink, appearing to read "Josh R. Hinson", with a long horizontal flourish extending to the right.

Joshua R. Hinson

cc: Robert F. Goings, Esq.
Robert L. Reibold, Esq.
Britton Bailey