THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger C. Young, Circuit Court Judge

Case No. 2018-CP-08-01079
Appellate Case No. 2020-000915

Latarsha Docena-Guerrero, Appellant,

v.

Rafael Docena-Guerrero, Defendant

and

Government Employees Insurance Company, as underinsured motorist insurance carrier, Respondent.

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS APPEAL

Appellant Latarsha Docena-Guerrero respectfully submits that the matter before the Court of Appeals is immediately appealable pursuant to Section 14-3-330 of the South Carolina Code as affecting the mode of trial and a substantial right. Appellant respectfully submits the Court of Appeals should not dismiss this appeal as interlocutory because this appeal is not an appeal from the grant of a motion for relief for default as it has been characterized by Respondent and instead, is an appeal of the trial court permitting a UIM carrier to untimely take over the defense of a tortious driver under Section 38-77-160 of the South Carolina Code. As such, the Order is one "affecting a

substantial right" and is immediately appealable under Section 14-3-330.

PROCEDURAL HISTORY

Appellant filed this motor vehicle collision case on June 15, 2018. On August 26, 2019, having determined that Appellant's damages would likely exceed Defendant Rafael Docena-Guerrero's liability policy limits, Appellant served Respondent Government Employees Insurance Company, the UIM carrier, through the South Carolina Department of Insurance pursuant to Section 38-77-160 of the South Carolina Code. In addition to being the UIM carrier for Appellant, Respondent also was the liability insurer for Defendant.

Section 38-77-160 provides: "The [underinsured motorist] 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." On August 28, 2019, Appellant filed a copy of the acceptance of service by the South Carolina Department of Insurance and waited more than thirty days for Respondent to appear. On December 19, 2019, one hundred fifteen days after serving Respondent, Appellant entered into a Covenant Not to Execute with Defendant settling the liability portion of the claim and protecting Defendant from any judgments against him.

On February 19, 2020, one hundred seventy seven days after Appellant served Respondent, Respondent filed its Answer and its Motion for Relief from Default. In response, Appellant filed her Motion to Quash the Answer and Appearance by UIM Carrier and Counsel. The trial court heard the motions and on April 30, 2020, entered its Order Denying Motion to Quash the Answer and Appearance by UIM Carrier and Counsel and Granting Motion for Relief from Default. Appellant moved for reconsideration, and the trial court denied the motion for reconsideration. This appeal followed.

ARGUMENT

Appellant does not dispute Respondent's assertion that "[a]n order setting aside an entry of default is not appealable until after final judgment." (Resp.'s Mem. in Supp. of Mot. to Dismiss 2.) However, Respondent, Appellant, and the trial court below all agreed that there was no default in this case and that the issue before the trial court was whether Respondent should be permitted to appear on behalf of Defendant as Appellant's underinsured motorist insurance carrier pursuant to Section 38-77-160 of the South Carolina Code, *not* whether Respondent should be relieved from a default. For example, the trial court's Order denying Appellant's motion to quash, attached hereto as Exhibit A, finds: "there has not been an entry of default entered by any court." (Ex. A. at 1.) Respondent's Memorandum in Support of Motion for Relief from Default, attached hereto as Exhibit B, states: "There has been no entry of default." (Ex. B at 2.) Respondent's Memorandum in Opposition to Plaintiff's Motion to Reconsider, attached hereto as Exhibit C, states: "There was no entry of default in this case. No Default Judgment was ever obtained or filed." (Ex. C at 2.) Finally, the trial court's Order denying Appellant's motion for reconsideration, attached hereto as Exhibit D, finds: "After reviewing the briefs from counsel, the Court still finds that good cause exists to set aside any default (though none has been entered by the Court) . . . ." (Ex. D at 1.)

The appeal here not arising from any default below, the issue for determination is whether an order permitting a UIM insurer to take over the defense despite failing to comply with the time limit set forth in Section 38-77-160. That determination is controlled by Section 14-3-330 of the South Carolina Code which covers the appealability of trial court orders, not Rule 72 of the South Carolina Rules of Civil Procedure or Rule 201 of the South Carolina Appellate Court Rules as Respondent

contends. *See, e.g., Hagood v. Sommerville*, 362 S.C. 191, 194–95, 607 S.E.2d 707, 708 (2005) ("The right of appeal arises from and is controlled by statutory law. . . . 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."); *N.C. Fed. Saving & Loan Assn. v. Twin States Devel. Corp.*, 289 S.C. 480, 481, 347 S.E.2d 97, 97 (1986) ("The right of appeal arises from and is controlled by statutory law. The jurisdiction of appellate courts is prescribed by S.C. Code Ann. § 14-3-330.")

Contrary to Respondent's contention that "[o]nly final decisions may be appealed," Section 14-3-330 provides for the appeal of a number of orders in addition to final judgments, including providing for an appeal from an "order affecting a substantial right." South Carolina courts have long recognized that the denial of a right to a particular mode of trial is immediately appealable as an order affecting a substantial right. *See, e.g., Hagood*, 362 S.C. at 196, 607 S.E.2d at 709 ("In a well-established exception to the general rule, we repeatedly have held that the denial of a party's right to a particular mode of trial is immediately appealable as a substantial right under Section 14-3-330(2)."); *Flagstar Corp. v. Royal Surplus Lines*, 341 S.C. 68, 72, 533 S.E.2d 331, 333 (2000) ("Pursuant to § 14-3-330(2), this Court has held on numerous occasions that when a trial court's order deprives a party of a mode of trial to which it is entitled as a matter of right, such order is immediately appealable.").

As stated, the issue before the Court through Respondent's Motion to Dismiss is whether a trial court's decision to permit a UIM insurer to take over the defense of a tortious driver despite the UIM insurer's failure to comply with the requirements of Section 38-77-160 of the South Carolina Code is a decision that is immediately appealable. Appellant has been unable to locate any appellate decisions regarding a UIM insurer being permitted to take over the defense despite failing to comply

with the thirty day requirement of Section 38-77-160, much less an appellate decision addressing whether such a decision is immediately appealable. Lacking any precedent on the issue, Appellant submits the Court should find that a trial court's decision to permit a UIM insurer to take over the defense despite failing to comply with the requirements of Section 38-77-160 affects the mode of trial for the plaintiff and thus affects a substantial right and is immediately appealable under Section 14-3-330.

Here, had Respondent complied with the statutory requirements to do so, Respondent would be permitted to take over the defense of this action as an underinsured motorist insurance carrier solely by virtue of Section 38-77-160 of the South Carolina Code. UIM insurance coverage is a "creature of the legislature" and the right to recover from a first-party insurer for a loss caused by an uninsured or underinsured driver does not exist "except for the statute." *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 290, 188 S.E.2d 459, 462 (1972). UIM coverage is a form of first-party insurance, and a first-party insurer normally has no right to participate in a suit against a third-party. *See Burgess v. Nationwide Mut. Ins. Co.*, 373 S.C. 37, 41, 644 S.E.2d 40, 42 (2007); *Criterion*, 258 S.C. at 290, 188 S.E.2d at 462; *Squires v. Nat'l Grange Mut. Ins. Co.*, 247 S.C. 58, 66, 145 S.E.2d 673, 677 (1965); *Uptegraft v. Home Ins. Co.*, 662 P.2d 681, 684 (Okla. 1983); 9 Couch on Ins. § 122:1.

Accordingly, South Carolina common law provides that a plaintiff proceeds solely against the tortfeasor and not against her own insurer, and the common law has been narrowly modified in the instance of UIM insurance where a UIM insurer can take over the defense in the limited circumstances and subject to the requirements of Section 38-77-160. A trial court permitting a UIM insurer to take over the defense where the requirements of Section 38-77-160 have not been met

affects the mode of trial for the plaintiff and therefore affects a substantial right and is immediately appealable. By permitting a UIM insurer to take over the defense, the plaintiff no longer has the common law mode of trial in which she proceeds solely against the tortfeasor and does not have to litigate against her own insurer. By permitting a UIM insurer to take over the defense, the trial court creates a right for the UIM insurer where one did not previously exist and eliminates the plaintiff's right to not have to litigate against one's own first-party insurer in an action against a third-party. Moreover, in the situation here where the UIM carrier did not attempt to take over the defense or to make any appearance until after the plaintiff entered into a covenant not to execute with the at-fault driver for a portion of her damages, the plaintiff would have the option to resolve the case through an abbreviated bench trial. With the UIM carrier permitted to appear after the period provided for in Section 38-77-160, the plaintiff no longer has the option to select an abbreviated bench trial mode of trial.

Recognizing that a decision to permit a UIM insurer to take over the defense pursuant to Section 38-77-160 affects the mode of trial and is immediately appealable comports with existing South Carolina caselaw on which trial court decisions affect the mode of trial and a substantial right. In *Hagood v. Sommerville*, the Court held that an order disqualifying a party's attorney affected a substantial right and was immediately appealable. The Court reasoned that such an order may be immediately appealed because of the importance of the right and because "an appeal after final judgment and a new trial, if granted, would not adequately protect a party's interests because it would be difficult or impossible for the affected party or the appellate court to ascertain by any objective standard whether prejudice resulted from the disqualification." *Hagood*, 362 S.C. at 198, 607 S.E.2d at 710. The same reasoning applies here. A plaintiff has an important, common law

right to proceed solely against the tortfeasor and resolve a matter against that tortfeasor without interference by and opposition from the plaintiff's own first-party insurance carrier, except in the narrow instance of where a UIM insurer satisfies the requirements of Section 38-77-160.

Also, like *Hagood*, were a trial court's order permitting a UIM insurer to take over the defense not immediately appealable, the plaintiff's interests would not be adequately protected because it may be very difficult to ascertain whether prejudice to the plaintiff resulted from that decision. Generally, South Carolina's appellate courts require an appellant to show prejudice from an error below for that error to warrant reversal. *See, e.g., Owners Ins. Co. v. Clayton*, 364 S.C. 555, 563, 614 S.E.2d 611, 615 (2005) ("Error without prejudice does not warrant reversal."); *JKT Co., Inc. v. Hardwick*, 247 S.C. 413, 419, 265 S.E.2d 510, 513 (1980) ("An error not shown to be prejudicial does not constitute grounds for reversal."); *Brown v. Stewart*, 348 S.C. 33, 51, 557 S.E.2d 676, 686 (Ct. App. 2001) ("To warrant reversal, the appellant must show both the error of the ruling and resulting prejudice." (internal quotations omitted)). As an example of the difficulty in showing prejudice that may result were the Court not to find this matter immediately appealable, were Respondent permitted to take over the defense in this case pursuant to Section 38-77-160 and the jury then returned a verdict in an amount below Appellant's damages, Appellant would then have to appeal following the final judgment. At that point, if the appellate courts required Appellant to show prejudice resulted from the trial court's erroneous decision to permit Respond to take over the defense, how could Appellant show that the inadequate verdict was the result of the erroneous decision? Permitting Respondent to take over the defense plainly changes the remainder of the case thereafter for Appellant, but there may be no adequate appellate avenue available at the end of the case to assess and rectify an erroneous decision to permit Respondent to take over the defense.

CONCLUSION

For the reasons set forth herein, Appellant submits that the trial court orders appealed here affect the mode of trial and a substantial right and therefore the orders are immediately appealable under Section 14-3-330. Appellant accordingly submit that Respondent's Motion to Dismiss should be denied.

June __, 2020

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger C. Young, Circuit Court Judge

Case No. 2018-CP-08-01079

Latarsha Docena-Guerrero,	Appellant,
v.	
Rafael Docena-Guerrero,	Defendant
and	
Government Employees Insurance Company, as underinsured motorist insurance carrier,	Respondent.

PROOF OF SERVICE

I certify that I served the Memorandum in Opposition to Motion to Dismiss Appeal on Rafael Docena-Guerrero and Government Employees Insurance by depositing a copy of it in the United States Mail, postage prepaid, on June 26, 2020, and by e-mail on June 26, 2020, addressed to their attorneys of record, Jonathan S. Altman, Derfner & Altman, LLC, 575 King Street, Suite, B, Charleston, South Carolina 29403, jaltman@derfneraltman.com and Thomas H. Milligan, Milligan & Herns, PC, 721 Long Point Road, Suite 401, Mount Pleasant, South Carolina 29464, tom@milliganlawfirm.com.

June 26, 2020

s/ F. Elliotte Quinn IV
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Exhibit A

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NUMBER: 2018-CP-08-01079
Latarsha Docena-Guerrero,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
Rafael Docena-Guerrero,	)	**ORDER DENYING MOTION TO QUASH THE ANSWER AND APPEARANCE BY UIM CARRIER AND COUNSEL AND GRANTING MOTION FOR RELIEF FROM DEFAULT**
	)	
	)	
	)	
	)	
Defendant.	)	
	)	

This matter came before the Court on March 10, 2020 upon the motion of the Plaintiff to Quash the Answer and Appearance of UIM Carrier and Counsel, as well as GEICO Insurance Company's corresponding motion as the underinsured motorist carrier ("UIM Carrier") for relief from default or to accept the filing of the Notice of Appearance more than thirty (30) days after service upon it through the Department of Insurance. No default had been entered and no judgment taken.

After hearing argument from counsel, the Court hereby finds that good cause exists to set aside any default (though none has been entered by the court) and to allow the late appearance by the UIM carrier pursuant to SCRCP Rule 55(c). From the evidence submitted and arguments advanced at the hearing, the failure to assign the UIM coverage to a separate lawyer was an inadvertent mistake on the carrier's part which resulted in no prejudice to the plaintiff. Furthermore, there are contested issues of damages. As stated above, there has not been an entry of default entered by any court.

The Court disagrees with the position of Plaintiff's counsel that the UIM carrier has a thirty

(30) day of Statute of Limitations to answer any lawsuit served upon it. It is therefore

ORDERED, ADJUDGED and DECREED that the motion for relief by GEICO Insurance Company is granted, Plaintiff's motion to Quash is denied, and the Notice of Appearance and Conditional Answer is accepted as if timely filed.

_____, 2020
Moncks Corner, SC

_____
Honorable Roger C. Young
Presiding Judge
Ninth Judicial Circuit

Berkeley Common Pleas

Case Caption: Latarsha Docena-Guerrero VS Rafael Docena-Guerrero

Case Number: 2018CP0801079

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

Exhibit B

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NUMBER: 2018-CP-08-01079
Latarsha Docena-Guerrero,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**MEMORANDUM IN SUPPORT OF MOTION FOR RELIEF FROM DEFAULT**
	)	
Rafael Docena-Guerrero,	)	
	)	
Defendant.	)	
	)	

GEICO Insurance Company, as the underinsured motorist carrier, submits the following in support of its motion for relief from default.

I. STATEMENT OF FACTS:

The Plaintiff Latarsha Docena-Guerrero was a passenger in the vehicle being driven by her husband Rafael Docena-Guerrero when the accident giving rise to this lawsuit occurred. The Guerreros were insured with GEICO Insurance Company at the time of the accident. GEICO provided liability coverage and underinsured motorist coverage on the vehicle.

This case arises from an automobile accident that occurred on February 4, 2016 on I-26. Mr. Guerrero was driving to work early in the morning. It was raining at the time of the accident. Jarrett Wright was in the vehicle traveling in front of Mr. Guerrero. Traffic slowed down on I-26. Mr. Guerrero slowed down but failed to stop in time, bumping into the rear of the Mr. Wright's vehicle. This was a minor accident that does not appear to justify any significant injuries.

Although it is admitted that Mr. Guerrero was negligent in causing the contact between the vehicles, proximate cause and damages are strongly contested. Thus, there is a meritorious defense to the Plaintiff's claim.

On June 15, 2018, the Plaintiff Latarsha Docena-Guerrero filed suit against her husband Rafael Docena- Guerrero. GEICO assigned the defense of Mr. Guerrero to attorney Meg Horn under the liability portion of the lawsuit. Ms. Horn timely answered the Complaint and defended the case.

On or about August 26, 2019, counsel for the Plaintiff served GEICO as the underinsured motorist carrier through the South Carolina Department of Insurance. When the notification from the Department of Insurance was received in the mail room at GEICO, it was mistakenly classified as a redundant copy of the lawsuit, instead of a new claim for UIM coverage. It was sent to the adjuster handling the liability defense, instead of having a separate adjuster assigned. (Affidavit of Stacie Dumas, attached hereto as Exhibit # 1). Because of this mistake, the UIM portion of the case was not immediately assigned to defense counsel.

Counsel for the Plaintiff never placed GEICO into default as the UIM carrier. There has been no entry of default. The Plaintiff could not have possibly changed her position in reliance on any entry of default or default judgment.

The Plaintiff Latarsha Docena-Guerrero settled the claim against her husband and GEICO as the liability carrier for less than the liability limits. On or about December 23, 2019, counsel for the Plaintiff returned the signed Covenant Not to Execute to defense counsel Meg Horn. Attorney Meg Horn remained as the defense counsel until an order substituting counsel was filed on February 21, 2020.

The undersigned counsel was retained by GEICO as the UIM carrier on or about February 18, 2020. On February 19, 2020, the undersigned filed a Notice of Appearance and Conditional Answer with the court. Although there had never been any entry of default filed, and even though the case was still being actively defended by attorney Meg Horn, the undersigned filed a Motion for Relief from Default because the Notice of

Appearance had not been filed within thirty (30) days of the date of service upon the insurance commissioner.

Counsel for the Plaintiff takes the position that a UIM carrier has no recourse at all if the Notice of Appearance is not filed within thirty (30) days of service. Such a position is unreasonable and ignores the South Carolina Rules of Civil Procedure and South Carolina common law on relief from default.

In this case, there is a meritorious defense to this lawsuit between husband and wife, that the impact was too minor to justify the Plaintiff's claim for injuries and need for treatment. Good cause exists to set aside failure to file the Notice of Appearance within thirty (30) days, as it occurred due to a mistaken classification by the mailroom of the Complaint as a redundant copy. The Plaintiff, who is suing her husband, has incurred no prejudice as no change in position occurred in reliance on the delay in filing the Notice of Appearance.

I. Legal argument:

SCRCP Rule 60(b) governs motions for relief from judgment or orders. Rule 60(b) provides:

> **Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment order, or proceeding, for the following reasons:
>
> 1) Mistake, inadvertence, surprise, or excusable neglect;
> 2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);
> 3) Fraud, misrepresentation, or other misconduct of an adverse party;
> 4) The judgment is void;
> 5) The judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or vacated, or it is no longer equitable that the judgment should have prospective application.

The decision to grant relief from default is solely within the sound discretion of the trial court. *Wham v. Shearson Lehman Brothers, Inc.*, 289 S.C. 462, 381 S.E. 2d 499 (S.C. App. 1989).

In determining if relief should be granted from a simple entry of default, the court should examine the following factors:

1. The timing of the motion for relief;
2. Whether the Defendant has a meritorious defense; and
3. The degree of prejudice to the Plaintiff if relief is granted.

Maxwell v. Genez and Doe, 350 S.C. 563, 567 S.E. 2d 496 (S.C. App., 2002); *Wham*, supra. Courts should strive so as to promote the ends of justice and dispose of cases on their merits. *In re Estate of Weeks*, 329 S.C. 251, 495 S.E. 2d 454 (S.C. App. 1997).

The standard for relief from failure to timely file a Notice of Appearance is not governed by the strict requirements of Rule 60, as no judgment has been entered. The standard is the much lower standard of only having to show good cause for relief under SCRCP Rule 55.

In this case, there is a meritorious defense to this lawsuit between husband and wife, that the impact was too minor to justify the Plaintiff's claim for injuries and need for treatment. Good cause exists to set aside failure to file the Notice of Appearance within thirty (30) days, as it occurred due to a mistaken classification by the mailroom of the Complaint as a redundant copy. The Plaintiff, who is suing her husband, has incurred no prejudice as no change in position occurred in reliance on the delay in filing the Notice of Appearance.

The UIM carrier has shown that good reason exists for relief from the default judgment in this case. The Defendant respectfully requests that this motion for relief from default be granted.

MILLIGAN & HERNS, PC

s/ *Tom Milligan*

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ATTORNEYS FOR GEICO INSURANCE COMPANY, as the purported UIM Carrier

February 26, 2020
Mount Pleasant, SC

Exhibit C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	CASE NUMBER: 2018-CP-08-01079
Latarsha Docena-Guerrero,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**MEMORANDUM IN OPPOSITION**
	)	**TO PLAINTIFF'S MOTION TO**
Rafael Docena-Guerrero,	)	**RECONSIDER**
	)	
Defendant.	)	
	)	

GEICO Insurance Company, as the underinsured motorist carrier, submits the following in opposition to the Plaintiff's Motion for Reconsideration of the Court's order denying the Plaintiff's Motion to Quash GEICO's Notice of Appearance and Conditional Answer.

STATEMENT OF FACTS:

This matter arose from GEICO's Motion for Relief from Default and the Plaintiff's Motion to Quash the appearance by GEICO as the UIM Carrier. The Court agreed that the UIM carrier should have the right to defend this claim, denied the Plaintiff's Motion to Quash, and accepted GEICO's Notice of Appearance as if timely filed. Counsel for the Plaintiff filed a Motion for Reconsideration, asserting that the only law that applied to this situation is S.C. Code of Laws §38-77-160 and that GEICO cannot seek relief under the South Carolina Rules of Civil Procedure. The Plaintiff claims that §38-77-160 sets forth a thirty (30) day Statute of Limitations. The Court disagreed and denied the Plaintiff's Motion to Quash.

The Statement of Facts concerning GEICO's Motion for Relief was set forth in the original memorandum in support of its Motion for Relief from Default and will not be repeated here. The prior statement of facts is incorporated herein by reference.

The Plaintiff asserts that she relied on the late response by GEICO in determining to settle with GEICO as the primary carrier for less than the primary limits. However, the Plaintiff actually offered to settle with GEICO for less than the limits on a full release prior to the lawsuit being filed. On April 28, 2017, the Plaintiff made a demand to settle within the primary liability limits for $24,000 on a full release. (Letter from Steven Goldberg dated 4/28/17, attached hereto as Exhibit # 1). Thus, the current position that the Plaintiff was prejudiced by settling for less than the policy limits is inconsistent with the prior written demand.

Counsel for the Plaintiff never filed for an Entry of Default nor placed GEICO into default. There was no entry of default in this case. No Default Judgment was ever obtained or filed. The Plaintiff could not have possibly changed her position in reliance on any Entry of Default or Default Judgment in this case, as there was none.

Counsel for the Plaintiff claims that the thirty (30) day time limit in S.C. Code of Laws §38-77-160 is a Statute of Limitations, beyond which there is no means for a UIM carrier to file an appearance and defend a case. The Plaintiff is attempting to prohibit her own insurance carrier from defending this claim on the merits. Such a position is improper. There is no Statute of Limitations under South Carolina law that is so short and eliminates the rights of any party or entity. The acceptance of the late filing should be handled under the South Carolina Rules of Civil Procedure, just as any filing of an answer, motion for relief from default, or motion to extend the time to answer.

To further undermine the UIM carrier's ability to defend the claim, counsel for the Plaintiff then sent a message to the Defendant Rafael Docena through his client Latarsha Docena to retain Mr. Goldberg's friend Jonathan Altman as personal counsel. Emails from Steven Goldberg to Tom Milligan dated 2/21/20, attached hereto as Exhibit # 2). This action occurred when the Defendant was already personally protected by a

covenant and there was no known legitimate need for him to retain personal counsel. The Defendant and Plaintiff's spouse Rafael Docena then hired Mr. Goldberg's friend Jonathan Altman to represent him. (Letter of Representation from Jon Altman, attached hereto as Exhibit # 3.) This means that the associated attorneys are now representing both the Plaintiff and the Defendant in the case.

Counsel for the Plaintiff takes the position that (1) a UIM carrier has no recourse at all if the Notice of Appearance is not filed within thirty (30) days of service and (2) that it is proper for the Plaintiff's team to represent both the Plaintiff and the Defendant at trial. The apparent purpose of these actions is to prevent the UIM carrier from having any ability to defend the claim against it by its insured. Indeed, if counsel for the Plaintiff has his way, the Plaintiff's team would be conducting both the offense and defense at the trial of this matter with no input from the target UIM carrier. Unless there is some rational, legitimate explanation for these actions, this is not proper and should not be allowed.

LEGAL ARGUMENT:

The very first rule of the South Carolina Rules of Civil Procedure state that the laws of South Carolina are to be construed to secure the **JUST** determination of every action. SCRCP Rule 1. The United States Constitution and the South Carolina Constitution prohibit takings without Due Process of Law. S.C. Code of Laws §38-77-160 was enacted for the very purpose of ensuring that the UIM carrier have the right to contest its liability for underinsured motorist's benefits. *Williams vs. Selective Insurance Company,* 315 S.C. 532, 446 S.E. 2d 402 (1994). The statute specifically states that the UIM carrier has the right to appear and defend the claim against it.

The Courts have repeatedly stated that they will not stand for underhanded tactics to unfairly thwart the UIM carrier's rights. See, *Broome vs. Watts,* 319 S.C. 337, 461 S.E. 2d 46 (1995)(The Court refused to allow the Plaintiff to get the Defendant to waive the

rights of the UIM carrier.) The South Carolina Department of Insurance addressed the issue that §38-77-160 does not sanction collusive settlements or to otherwise circumvent the underinsured motorist insurer's right or opportunity to defend. S.C. Dept. of Ins. Bulletin No. 4-89(1989)(Bulletin 4-89 withdrawn by Bulletin 2002-10).

In this case, Counsel for the Plaintiff claims that the Plaintiff is somehow unfairly prejudiced because she accepted an amount less than the policy limits on a covenant. This position is inconsistent with the pre-trial demand to settle on a full release for less than the policy limits. The only "prejudice" to the Plaintiff in this case is that she will have to try her case on the merits, with someone actually defending the case on behalf of the UIM carrier. Having to try a case on the merits should not be considered to be "prejudicial".

It should also be pointed out that the obligation of good faith in a first party setting is a two-way street. The court in the seminal case of *Nichols vs. State Farm Mutual Insurance Company,* 279 S.C. 336, 306 S.E. 2d 616 (1983) stated that the obligation of good faith is an obligation that ***NEITHER PARTY*** will do anything to impair the other's rights to received benefits under the contract. The attempt by the insured to prohibit the UIM carrier from defending a claim and substituting a member of the Plaintiff's team as counsel for the Defendant is a clear violation of the Plaintiff's duty of good faith to the insurance carrier. It takes twisted logic to think that this scenario is in any way "just".

Courts should strive so as to promote the ends of justice and dispose of cases on their merits. *In re Estate of Weeks*, 329 S.C. 251, 495 S.E. 2d 454 (S.C. App. 1997). In this case, the Plaintiff's Motion for Reconsideration should properly be denied. The Court should also examine the appropriateness of this tactic of Plaintiff's counsel getting his

friend to represent the Defendant, effectively establishing the Plaintiff's team as representing both the Plaintiff and the Defendant.

MILLIGAN & HERNS, PC

s/ *Tom Milligan*

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ATTORNEYS FOR GEICO INSURANCE COMPANY, as the purported UIM Carrier

May 21, 2020
Mount Pleasant, SC

Exhibit D

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY)	CASE NUMBER: 2018-CP-08-01079
Latarsha Docena-Guerrero,)	
)	
Plaintiff,)	
)	
vs.)	
)	
Rafael Docena-Guerrero,)	**ORDER DENYING PLAINTIFF'S MOTION**
)	**FOR RECONSIDERATION.**
Defendant.)	
)	

This matter came before the Court upon the motion of the Plaintiff's Motion for Reconsideration of the denial of her Motion to Quash the Notice of Appearance by GEICO Insurance Company as the underinsured motorist carrier in this matter.

After reviewing the briefs from counsel, the Court still finds that good cause exists to set aside any default (though none has been entered by the Court) or late appearance by the UIM carrier pursuant to SCRCP Rule 55(c) and that the UIM carrier has the right to appear and defend this claim pursuant to S.C. Code of Laws §38-77-160 and the South Carolina Rules of Civil Procedure.

The Court disagrees with the position of Plaintiff's counsel that the UIM carrier has a thirty (30) day of Statute of Limitations to answer any lawsuit served upon it. The issue of whether or not the UIM carrier has the right to appear and defend this matter under the circumstances is to be handled under the South Carolina Rules of Civil Procedure to determine the just determination of the action. The South Carolina Rules of Civil Procedure apply to every action in the South Carolina Court of Common Pleas.

The very first rule of the South Carolina Rules of Civil Procedure state that the laws of South Carolina are to be construed to secure the **JUST** determination of every action. SCRCP Rule 1. The United States Constitution and the South Carolina Constitution prohibit takings without Due Process of Law. S.C. Code of Laws §38-77-160 was enacted for the very purpose of ensuring that the UIM carrier have the right to contest its liability for underinsured motorist's benefits. *Williams vs. Selective Insurance Company,* 315 S.C. 532, 446 S.E. 2d 402 (1994). The statute specifically states that the UIM carrier has the right to appear and defend the claim against it.

The Court recognizes that the obligation of good faith in a first party setting is a two-way street. The court in the seminal case of *Nichols vs. State Farm Mutual Insurance Company,* 279 S.C. 336, 306 S.E. 2d 616 (1983) set forth this principle when it stated that the obligation of good faith is an obligation that ***NEITHER PARTY*** will do anything to impair the other's rights to received benefits under the contract. The court would caution the parties against attempting a collusive arrangement that would deprive and party or entity involved in the action from a fair trial.

Courts should strive so as to promote the ends of justice and dispose of cases on their merits. *In re Estate of Weeks*, 329 S.C. 251, 495 S.E. 2d 454 (S.C. App. 1997). In order to fulfill this purpose to promote the ends of justice and have cases decided on the merits, the Plaintiff's Motion for Reconsideration must be properly denied. It is therefore

ORDERED, ADJUDGED and DECREED that the Plaintiff's Motion for Reconsideration is denied.

_____, 2020
Moncks Corner, SC

_____
Honorable Roger C. Young
Presiding Judge
Ninth Judicial Circuit

Berkeley Common Pleas

Case Caption: Latarsha Docena-Guerrero VS Rafael Docena-Guerrero

Case Number: 2018CP0801079

Type: Order/Other

It is so ordered.

/s Roger M. Young, Sr. S.C. Circuit Judge 2134

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas
Roger C. Young, Circuit Court Judge

Case No. 2018-CP-08-01079

Latarsha Docena-Guerrero, Appellant,

v.

Rafael Docena-Guerrero, Defendant

and

Government Employees Insurance Company, as underinsured motorist insurance carrier, Respondent.

PROOF OF SERVICE

I certify that I served the Memorandum in Opposition to Motion to Dismiss Appeal on Rafael Docena-Guerrero and Government Employees Insurance by depositing a copy of it in the United States Mail, postage prepaid, on June 26, 2020, and by e-mail on June 26, 2020, addressed to their attorneys of record, Jonathan S. Altman, Derfner & Altman, LLC, 575 King Street, Suite, B, Charleston, South Carolina 29403, jaltman@derfneraltman.com and Thomas H. Milligan, Milligan & Herns, PC, 721 Long Point Road, Suite 401, Mount Pleasant, South Carolina 29464, tom@milliganlawfirm.com.

June 26, 2020

s/ F. Elliotte Quinn IV
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June 26, 2020

VIA U.S. MAIL

Hon. Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Latarsha Docena-Guerrero vs. Rafael Docena-Guerrero
Case No. 2018-CP-08-01079
Appellate Case No. 2020-000915
Notice of Appeal

Dear Clerk of Court Kitchings,

Enclosed for filing, please find the original and six copies of a Memorandum in Opposition to Motion to Dismiss Appeal in the above referenced case. Thank you for your assistance, and please do not hesitate to contact me should you have any questions.

Regards,

Elliotte Quinn
equinn@steinberglawfirm.com
843-871-6522

FEQ/mbc

Enclosures

cc: via U.S. mail and e-mail

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Attorney for Respondent Government Employees Insurance Company (as underinsured motorist insurance carrier)

STEINBERG

RECEIVED

JUN 29 2020

SC Court of Appeals

Hon. Jeany Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211