

STATE OF SOUTH CAROLINA	)	COURT OF COMMON PLEAS
	)	NINTH JUDICIAL CIRCUIT
COUNTY OF BERKELEY	)	
	)	
Latarsha Docena-Guerrero,	)	CASE NO. 2018-CP-08-01079
	)	
PLAINTIFF,	)	TRANSCRIPT OF RECORD
	)	
VS.	)	ORIGINAL
	)	
Rafael Docena-Guerrero,	)	
	)	
DEFENDANT.	)	

March 10, 2020

Moncks Corner, South Carolina

B E F O R E:

The Honorable Roger Young

A P P E A R A N C E S:

Steven E. Goldberg, Esquire  
For the Plaintiff

Thomas H. Milligan, Esquire  
For the Defense

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SC Court of Appeals

Certified Transcript Provided For: Steven Goldberg

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I N D E X

HEARING -- 03

EXHIBITS - None Proffered

CERTIFICATION OF TRANSCRIPT -- 16

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1 THE COURT: Somebody tell me what is going on here. It  
2 says his client isn't in default.

3 MR. GOLDBERG: Correct, Your Honor. I guess I will go  
4 first and then Mr. Milligan can kind of answer. Yes, so, Your  
5 Honor, this matter started -- Steven Goldberg here on behalf  
6 of the plaintiff, Latarsha Docena-Guerrero.

7 The summons and complaint was filed back in June of 2018.  
8 Geico assigned Meg Van Horn to be the attorney for the  
9 defendant in defense of the case. Through the course of  
10 discovery we thought that we could exceed the limits of the  
11 minimum on this policy so therefore we filed on August 26,  
12 2019, pleadings upon the Department of Insurance against the  
13 UIM carrier which also happens to be Geico.

14 We did receive a letter from the Department of Insurance  
15 verifying that service has been effectuated. And then I  
16 actually filed that letter with the court immediately and send  
17 it electronically to all of the parties involved.

18 No answer, no appearance, no demur. Had been filed on  
19 behalf of the UIM carrier within 30 days. In fact, it was  
20 about six or seven months; but I will get back to that.

21 So eventually the matter between the defendant and  
22 plaintiff was settled by way of a covenant not to execute in  
23 December of 2019. And then two months later on February 19th  
24 a conditional answer on behalf of the UIM was filed. In that  
25 filing the filing states that Mr. Milligan represents only the

1 UIM carrier.

2 But also -- and again, this is now seven months now  
3 post-service. But also on that date Mr. Milligan files a  
4 motion, relief from default. As you have kind of noted and as  
5 Mr. Altman stated, there is no order of default.

6 You know, he says he is also filing on behalf of the  
7 defendant. I think that was just a mistake, because he  
8 doesn't represent the defendant technically. But, again, as  
9 mentions in his conditional answer, he only represents UIM.

10 Too -- or more importantly, like I said, there is no  
11 order of default. Never was. So I think we can all agree  
12 that motion -- I don't even know if the word fail is  
13 appropriate. There is -- there is nothing to get out of  
14 default. There is no order. There is no post-judgment  
15 relief.

16 I have, and as you see, filed a motion to strike the  
17 answer of the UIM carrier and the appearance based on the  
18 clear terms of 38-77-160 which I will be able to discuss.

19 Then the UIM carrier file a memorandum in support of the  
20 relief from default. Again, just for arguments sake, I don't  
21 believe that was necessary because there is no default.

22 And I assume - I am making assumptions here. Mr.  
23 Milligan will get to talk after me obviously - that he is  
24 using the terms of getting out of default under 60(b), Rule  
25 60(b) or 55 and will make the same considerations that he

1 should be allowed to jump in seven months later.

2       And his memo obviously -- or his memo doesn't even  
3 address the statutory requirement, so I am not sure what his  
4 argument is going to be.

5       Again, the trial judge has wide discretion to interpret  
6 the Rules of Civil Procedure. But in this case we believe the  
7 statute controls.

8       Remember, UIM is not a party to this case. They have no  
9 rights until they go through the appropriate methods and that  
10 of being served and then answering within those 30 days.

11       The insurer has a right to appear to defend in the name  
12 of the underinsured motorist in any action which may affect  
13 its liability and has 30 days after service of process in  
14 which to appear. You know, in essence this is a statute of  
15 limitations for them.

16       Again, according to the affidavit that was filed by Mr.  
17 Milligan, they received it. That's not an issue here whether  
18 they got it or didn't get it. They stated they got it from  
19 the Department of Insurance. They thought it was duplicative  
20 so they didn't do anything with it. We will get back to that  
21 in a second.

22       But I'm not sure what the Court can rule on this at this  
23 point. Because this, again, I compare this to a statute of  
24 limitations case. Let's say I miss a statute of limitations  
25 by a month because I forgot to file it, I thought my associate

1 did, I don't think I can come here and say Judge can you  
2 expand the statute of limitations by another 30 days for me.

3 Sure, you can make determinations on what a date of an  
4 event is -- I mean the date of discovery or last injurious  
5 exposure and those type of cases. But once the date of events  
6 happens I have got three years to file that or else I am out  
7 on the statute of limitations.

8 I don't think I can invoke the Rules of Civil Procedure,  
9 like Rule 55 or Rule 60 and say well it was a mistake and I  
10 have a good argument and, you know, they didn't change their  
11 positions or the things he is going to argue. I don't think  
12 that the Court has really jurisdictional on this matter to  
13 allow them in.

14 So, again, they didn't file and now they cannot make  
15 appearance by the strict statute - by the strict  
16 interpretation of the statute.

17 So but for arguments sake let's go through the arguments  
18 that -- let's say that the rules under 60(b) they do apply.  
19 The first thing they talk about is it was a mistake, it was  
20 just -- you know, they thought it was duplicative, they got  
21 the pleadings, they just didn't do anything with it because  
22 they thought they already had done something.

23 Well, I would take exception to that argument because it  
24 can't be duplicative. Sure they got a copy of the summons and  
25 complaint; but they also got the letter which I referenced

1 earlier which is made a part of this file of August 26th,  
2 2019, which states you have been served -- as Geico has been  
3 served as the UIM carrier in the matter and you have, you  
4 know, a time to -- here is the statute, go figure out what you  
5 need to do.

6 So for them to say, well, I got it and it was just  
7 duplicative, it was a simple mistake, kind of negates the fact  
8 that there was a letter with it and it wasn't duplicative.

9 This letter, you know, I have checked with the Department  
10 of Insurance. They have admitted in their affidavit they got  
11 this from the Department of Insurance.

12 One of the other things that Mr. Milligan argues is that,  
13 well, I didn't change my -- nothing has changed for me because  
14 of this, because of the 30 days, I have incurred no prejudice  
15 as a change in position based on the reliance on the delay and  
16 the notice of appearance.

17 Well, I have. And here's how: I settled this matter on  
18 a covenant not to execute for a little bit less than the full  
19 amount. And why did I do that? Well, it was four months post  
20 UIM having a right to file. And I think, well, if they are  
21 not going to have a lawyer it may make, I admit, an easier  
22 path to get to the UIM coverage. Also I have given up my  
23 right for Tiger River in case we got an excess verdict and  
24 they didn't want to pay it. I have given up rights to  
25 appeals. I have given up a lot. I have changed my

1 complete -- I have actually changed the way I have handled  
2 this case based on the fact that they failed to make an  
3 appearance. So for them to say, well, I haven't done anything  
4 differently is just not correct.

5       Again, this case was, you know -- by the way, the case  
6 was settled for months post there period where the UIM should  
7 have filed. So it wasn't like it was filed the next day. We  
8 spend four months. I never got -- maybe if they would have  
9 filed in that period they can make the argument. But I  
10 settled this case based on that reliance.

11       So, again, Your Honor, to recaptulate-- -- to recapture  
12 what I've talked about, we believe statutory construction  
13 governs how a non defendant can appear in a filed case, not  
14 the Rules of Civil Procedure. And even if the Rules of Civil  
15 Procedure were to apply, it is not duplicative; it is not a  
16 mistake. It may have been a mistake for them not answering,  
17 but it wasn't -- you know, they -- there is nothing -- there  
18 is no reason why they shouldn't have or didn't know to. And  
19 also that I relied heavily on this.

20       THE COURT: Okay. Mr. Milligan.

21       MR. MILLIGAN: May it please the Court. Your Honor, I  
22 think it is ridiculous to classify this statute as a statute  
23 of limitations. It is not. It is a time period for filing  
24 notice of appearance after service, just like it is for the  
25 defendant to file an answer after they have been served. And

1 those things are frequently allowed to be answered late,  
2 either by consent or by order from the court.

3 And in this case what happened is -- and, first of all,  
4 this is a wife suing a husband under the same policy. The  
5 husband is the driver. He is the at-fault person in here.  
6 And so there's obviously a big opportunity here for collusion  
7 in this case.

8 But it is a very minor accident that doesn't justify any  
9 significant claim for injuries. And, in fact, Mr. Goldberg  
10 originally offered to settle this case within the limits for a  
11 complete release, not just a covenant.

12 And so in this case they filed suit. They served Geico  
13 on August 26, 2019, through the Department of Insurance.  
14 Geico admits that the complaint was received in their mail  
15 room. It was mistakenly classified as a redundant complaint  
16 and sent to the same adjuster who was defending the case as  
17 opposed to a separate adjuster, which is what they normally  
18 do, they separate out liability from UIM coverage. And  
19 because of that mistake it wasn't assigned out to defense  
20 counsel.

21 Geico had hired Meg Horn who was actively defending the  
22 case. And the case didn't settle until December of 2019. And  
23 the case never got put into default. The case got assigned to  
24 us in February. We filed our notice of appearance. It wasn't  
25 in default. I filed a motion for relief from default simply

1 because the answer hadn't been made within the 30 days, the  
2 appearance hadn't been made within the 30 days.

3 But there is no default. There is no prejudice at all to  
4 the plaintiff. And this is a case in which the standard for  
5 allowing us to file this notice of appearance is the lowest  
6 standard, good cause shown. And when there is a mistake like  
7 this made, no prejudice, there is certainly the grounds for  
8 allowing us to file this answer and defend this case.

9 What Mr. Goldberg wants is to be able to prosecute this  
10 case without the UIM carrier having any right to defend it.  
11 And that is what shouldn't be allowed. We should try this  
12 case for the merits.

13 Now, as you know, the case law states that the court  
14 should strive to have cases tried on their merits and not this  
15 type of collusive, you know, atmosphere where the wife is  
16 suing the husband.

17 And this is a case in which Mr. Goldberg suggested to the  
18 wife that the husband get Mr. Altman, his friend, involved.  
19 And so now I have to go through Mr. Altman in order to contact  
20 the defendant.

21 And so those are situations that just aren't right and  
22 shouldn't be allowed. We should be allowed to defend this  
23 case.

24 MR. GOLDBERG: If I could just briefly. He -- Mr.  
25 Milligan makes my exact point in argument. He is mushing

1 these things together. He says that there is 30 days to  
2 answer and you can always let them out. There is 30 days to  
3 answer under the Rules of Civil Procedure which you control.  
4 And if you thought it was a mistake and they missed that  
5 30-day period there is nothing statutory which says if I file  
6 a summons and complaint that the defendant has 30 days to  
7 answer. That is under the Rules of Civil Procedure. And if  
8 they miss that then I can go to default. And if they then say  
9 we want to get relief from that default you can relieve them  
10 from that default.

11 But the statute says they have 30 days in which to file  
12 an answer. What is the purpose of that? The Legislature  
13 didn't say 30 days unless good cause is shown. It says you  
14 have got 30 days. It is exactly like a statute of  
15 limitations. It is exactly it is.

16 And as far as -- he says, well, Geico should have a right  
17 to defend. They had a right to defend. They should have  
18 filed within the 30-day period. They didn't.

19 To say this is collusion -- yes, John is my friend; but  
20 John is going to advise his client, and I don't think John is  
21 going to risk his career -- his reputation and all for this  
22 guy just to help me out. He wrote a letter. He says he's not  
23 taking a position on that second thing. He could have taken a  
24 position and say yeah, kick them out. He didn't.

25 So, again, we are putting together Rules of Civil

1 Procedure and statutory construction. And what he said was  
2 the 30 days. There is nothing in the statute that says you  
3 have 30 days to file an answer to a complaint. That is under  
4 the Rules of Civil Procedure; and, yes, Your Honor, you are  
5 the master of that domain.

6 But as far as the statutory is concerned, they have 30  
7 days. It is a policy that my client bought. And he talks  
8 about fairness. My client bought.

9 They say, well, it is not a bad injury. Why did they pay  
10 \$22,000 on a case that was minor injuries on it; for Geico,  
11 for all people.

12 She needs surgery. They want -- so, again, my lady buys  
13 a policy. They have to -- it is captive what her UIM limits  
14 are, which is I think minimum limits. I am sorry that they  
15 didn't -- you know, these are tough things. But Geico could  
16 have settled with me beforehand. If we want to go back far  
17 enough before it had to file the suit for a reasonable amount  
18 we wouldn't be here. They take the risk of saying, hey, let's  
19 go play by the rules -- let's go play by the court rules. We  
20 are not going to pay you, so I had to file a suit. Their  
21 first offer was \$8,000. That is why I filed this suit.

22 And now we go through the system that they made me go  
23 through and they are now upset that, well, I know we didn't  
24 follow the rules but why should everybody else.

25 So, again, we just think that -- I understand try it on

1 the merits and all that. It will be tried on the merits, and  
2 the person will have -- you know, a defendant will be  
3 protected. And UIM is not a party to this case. Geico --  
4 there's only one way they can be a party to this case, and  
5 that is following the statute that I quoted earlier.

6 Thank you.

7 THE COURT: Do you want to respond?

8 MR. MILLIGAN: Just briefly, Your Honor. The court in  
9 Williams versus Selective Insurance Company stated that the  
10 very intent of this statute is to allow the UIM carrier the  
11 right to defend itself.

12 In Broome versus Watts the Supreme Court described the  
13 UIM carrier as the actual defendant in the case when the  
14 primary carrier had settled out and the defendant was  
15 protected.

16 The only person -- the only entity exposed to the -- for  
17 the loss in this case is the UIM carrier, and they should have  
18 the right to defend this case.

19 Our motion for relief from default was filed before Meg  
20 Horn got out of this case. And so the case has always been  
21 defended by an attorney who was hired by Geico.

22 There is absolutely no prejudice, no reason not -- for  
23 this motion not to be granted.

24 MR. GOLDBERG: Your Honor, I would only respond that Ms.  
25 Horn does not represent Geico. There's lots of case law I

1 didn't bring with me. And so she represents the defendant. I  
2 don't know if she is the one that told Geico or how Geico  
3 found out nine months later.

4 But, again, Your Honor, I have been prejudiced. I have  
5 given up my -- I have signed a covenant not to execute that I  
6 would not have signed had they have filed their pleadings. So  
7 I have been prejudiced.

8 And, you know, again, those cases he cites talks about  
9 them having the right. And here's the mechanism on how they  
10 need to do it, by filing an answer within 30 days. They get a  
11 letter from the South Carolina Department of Insurance. This  
12 letter was sent to Geico's lawyer. Meg Horn had this letter.  
13 I am sure Meg sent it on to the insurance company.

14 You know, it is like me missing the statute of  
15 limitations. You would be like, Mr. Goldberg, I'm sorry, I -  
16 I thought -- my computer was broken. You would be like I  
17 can't extend the statute of limitations for you. You know.  
18 Thank you.

19 THE COURT: I haven't had to deal with this one before.  
20 Let me think it over. I haven't got an answer right now. So  
21 I am not one to say poor insurance company. That doesn't  
22 usually go in the same sentence with me. But at the same time  
23 we usually try to -- people just make a mistake on a  
24 procedural matter we usually try to fix it and get a case  
25 tried on its merits. But I will take a look at it and give it

1 some thought. I will let you know.

2 MR. MILLIGAN: Thank you, Your Honor.

3 MR. GOLDBERG: Thank you, Your Honor.

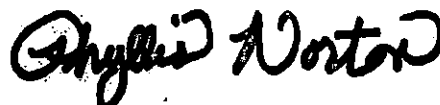
4 (WHEREUPON, the hearing adjourned.)

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### CERTIFICATE

I, the undersigned Phyllis Norton, Official Court Reporter for the Ninth Judicial Circuit of the State of South Carolina, do hereby certify that the foregoing is a true, accurate, and complete transcript of record of all proceedings had and evidence introduced in the captioned case, relative to appeal, in the court for South Carolina, on March 10, 2020.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.



PHYLLIS NORTON, CVR

Date: April 1, 2020

Certified Transcript Provided For: Steven Goldberg

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