THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

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

Appellate Case No. 2020-000915
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.

INITIAL BRIEF OF APPELLANT

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ISSUE PRESENTED

I. Did the circuit court err in ordering that a UIM carrier may appear and defend more than thirty days after service on the UIM carrier?

STATEMENT OF THE CASE

Appellant Latarsha Docena-Guerrreo commenced this action on June 15, 2018, to recover for injuries suffered as the result of the negligent operation of a motor vehicle by Defendant Rafael Docena-Guerrero. (Compl.) On July 16, 2018, Defendant filed an answer denying Appellant's claims. (Ans.) On August 26, 2019, the South Carolina Department of Insurance accepted service of Appellant's Summons and Complaint for Respondent Government Employees Insurance Company as Appellant's underinsured motorist carrier, and Appellant filed the Department of Insurance's Acceptance of Service with the Court on August 28, 2019. (Dep't of Ins. Acceptance of Service.) On February 19, 2020, Respondent filed a Notice of Motion and Motion for Relief from Default and a Notice of Appearance and Conditional Answer for the Defendant. (Mot. for Relief from Def.; Cond. Ans.) In response, on February 20, 2020, Appellant filed a Motion to Quash the Answer and Appearance by UIM Carrier and Counsel. (Mot. to Quash.)

On March 10, 2020, the Honorable Circuit Court Judge Roger C. Young held a hearing on Appellant's Motion to Quash and on Respondent's Motion for Relief from Default. (April 30, 2020 Order.) On April 30, 2020, Judge Young entered an order denying Appellant's Motion to Quash and granting Respondent's Motion for Relief from Default. (April 30, 2020 Order.) On May 11, 2020, Appellant moved for reconsideration, and on May 27, 2020, Judge Young denied Appellant's Motion for Reconsideration. (Mot. for Recons.; May 27, 2020 Order.) On June 12, 2020, Appellant noticed this appeal.

STATEMENT OF FACTS

On February 4, 2016, Appellant was a passenger in a motor vehicle driven by Defendant, her husband, and she was injured in a crash resulting from Defendant's negligent operation of the

motor vehicle. (Compl. ¶¶ 3–5.) Thereafter she filed suit against Defendant seeking to recover for her injuries caused by Defendant's negligence. (Compl.) Defendant appeared through counsel and filed an answer. (Ans.) After learning that her damages exceed the limits of Defendant's automobile liability insurance coverage, on August 26, 2019, Appellant served Respondent, as her underinsured motorist insurance carrier, through the South Carolina Department of Insurance. (Dep't of Ins. Acceptance of Service.) Respondent was both the automobile liability insurance carrier for Defendant and the UIM carrier for Appellant. (Mot. for Relief from Default 1; Cond. Ans. 1.)

On December 19, 2019, after more than thirty days elapsed following service on Respondent through the Department of Insurance, Appellant and Defendant entered into a Covenant Not to Execute whereby in exchange for payment of an agreed upon sum, Appellant agreed that if she obtained a judgment against Defendant she would not execute the judgment against him. (Mot. for Relief from Default 2; Mot. to Quash 1–2.)

On February 19, 2020, after more than 150 days since Appellant served Respondent, Respondent filed a "Motion for Relief from Default" and a "Conditional Answer." (Mot. for Relief from Default; Cond. Ans.) Respondent moved "for an Order setting aside the default and default judgment, if any," and moved solely pursuant to Rule 55 of the South Carolina Rules of Civil Procedure. (Mot. for Relief from Default.) Respondent's Conditional Answer was made "on behalf of Government Employees Insurance Company" and not on behalf of Defendant. (Cond. Ans. 1). The Conditional Answer states that the attorney filing the pleading "does not represent the Defendant and is not at this time undertaking such representation but is specifically reserving the option to assume control of the defense in the name of the Defendant pursuant to the underinsured motorist statute, should the carrier choose to exercise that option. (Cond. Ans.

1) The Conditional Answer further states that Respondent, "as the purported underinsured motorist carrier," is "responding to the Complaint of the Plaintiff in place of the Defendant." (Cond. Ans. 2.) The attorney making the Conditional Answer for Respondent signed the pleading "Attorney for Government Employees Insurance Company appearing pursuant to S.C. Code § 38-77-160 on behalf of Government Employees Insurance Company." (Cond. Ans. 4.)

In response, Appellant moved to quash the Conditional Answer and the appearance by Respondent. (Mot. to Quash.) Appellant asserted that Section 38-77-160 provides that a UIM carrier has thirty days after service of process to appear, Respondent did not appear within thirty days of service, and therefore Respondent cannot appear in this action.

At the hearing on the motions, the parties agreed that Respondent was not in default. (Tr. 3:1–3, 4:4–5, & 10:3.) Appellant argued the plain language of Section 38-77-160 does not permit Respondent to make a late appearance, and Respondent argued that despite the statutory language, the Court could permit Respondent to make a late appearance for "good cause." The Court entered an order granting Respondent's Motion for Relief from Default and denying Appellant's Motion to Quash. Therein, the Court found "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)." (April 30, 2020 Order 1.) The order does not mention and contains no discussion of Section 38-77-160.

Appellant then moved for reconsideration, arguing that Rule 55(c) which the Court used as the basis for permitting Respondent to appear does not apply because there was no default. Appellant argued that the applicable law is Section 38-77-160 which does not contain any exception, much less a "good cause" exception, to the requirement that UIM carriers appear within thirty days of service. The circuit court denied Appellant's Motion for Reconsideration,

again providing no explanation as to how an exception can be read into Section 38-77-160's plain language requiring that a UIM carrier appear within thirty days of service to participate in the defense of an action. (May 27, 2020 Order.) The circuit court found that "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." (May 27, 2020 Order 1.) The circuit court then reasoned that the South Carolina Rules of Civil Procedure are intended to promote the just resolution of every action and Section 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," and therefore, "to promote the ends of justice and have the cases decided on the merits" Respondent should be permitted to make a late appearance. (May 27, 2020 Order 2.)

STANDARD OF REVIEW

The issue before the Court is one of statutory interpretation and therefore a question of law the Court is to decide *de novo* without any deference to the circuit court's decision below. *S.C. Dep't of Social Servs. v. Boulware*, 422 S.C. 1, 7, 809 S.E.2d 223, 226 (2018).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN INTERPRETING SECTION 38-77-160 OF THE SOUTH CAROLINA CODE AS PERMITTING A UIM CARRIER TO APPEAR WHEN THE UIM CARRIER FAILED TO APPEAR WITHIN THIRTY DAYS OF SERVICE.

Determination of the issue before the circuit court and now before this Court is an exercise in statutory interpretation, and the statute at issue here, Section 38-77-160, plainly and unambiguously provides that a UIM carrier may only appear and participate in an action if it does so within thirty days of being served. Therefore, the circuit court erred in permitting Respondent to appear and participate in this action.

"The cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature." *Hodges v. Rainey*, 341 S.C. 79, 85, 533 S.E.2d 578, 581 (2000). "Where the statute's language is plain and unambiguous, and conveys and clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning." *Id.* "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." *Id.* (quoting Norman J. Singer, *Sutherland Statutory Construction* § 46.03 at 94 (5th ed. 1992)).

After the first paragraph of Section 38-77-160 which establishes and defines UIM coverage, the second paragraph of that section provides in full:

> 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 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. No underinsured motorist policy may contain a clause requiring the insurer's consent to settlement with the at-fault party.

The language of Section 38-77-160 is plain, unambiguous, and conveys a clear and definite meaning: a UIM carrier may appear and defend in the name of the defendant if the UIM carrier does so within thirty days of service on it. The statute contains no exception to that thirty day requirement, and more specifically, neither contains any "good cause" exception nor any language that could be read as suggesting such a "good cause" exception. The language of Section 38-77-160 plainly provides that a UIM carrier has a right to appear but only if the UIM carrier appears within thirty days after service. Accordingly, South Carolina's courts are to give

effect to the plain language of the statute and bar any appearance by a UIM carrier more than thirty days after service on that carrier.

The circuit court erred in not applying the plain language of Section 38-77-160 and further erred in instead applying Rule 55(c) of the South Carolina Rules of Civil Procedure. Rule 55(c) does not apply here because that rule applies only where there has been "an entry of default" or "a judgment by default," and here, the circuit court found and the parties agree that there was no entry of default or default judgment. (April 30, 2020 Order 1 ("No default had been entered and no judgment taken."); May 27, 2020 Order 1 ("[T]he Court still finds that good cause exists to set aside any default (though none has been entered by the Court) . . . .").) Furthermore, Rule 55(c) has no application to and cannot supersede or alter the application of a statute like Section 38-77-160. The South Carolina Constitution provides that the "Supreme court shall make rules governing the practice and procedure in all such courts," but specifically provides that such rules are made "[s]ubject to the statutory law." S.C. Const. art. V, § 4. Addressing the relationship between statutes and rules of civil procedure, South Carolina courts hold the effect of Article V, Section 4 of the South Carolina Constitution is that statutes control and may not be altered by a rule of civil procedure. *See Hendricks v. State*, 387 S.C. 221, 223, 692 S.E.2d 892, 893 (2010) ("Where, as here, the General Assembly has provided a specific procedure to be followed in PCR cases, and that method is inconsistent with the more general procedure of the SCRCP, the statutory procedure must be followed."); *State v. Cottingham*, 224 S.C. 181, 187, 77 S.E.2d 897, 900 (1953) ("Statutes override rules of court, if in conflict."); *Marichris, LLC v. Derrick*, 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009) ("A rule of civil procedure may not limit the provisions of a statute." (citing S.C. Const. art. V, § 4)).

While there is no ambiguity in Section 38-77-160 and Rule 55(c) has no impact on the application of the plain language of Section 38-77-160, even were the Court to consider anything beyond the plain language to determine the General Assembly's intent in enacting the statute, which the Court should not do given the unambiguous plain language of the statute, the Court would reach the same result. Moreover, consideration of material beyond the language of the statute reinforces the conclusion that Section 38-77-160's language is plain and unambiguous in providing that a UIM carrier can only appear and defend if it does so within thirty days of service.

First, South Carolina courts previously considered analogous language in statutes of limitations and statutes of repose and held the statutes applied as written without any good cause exceptions. In *Columbia/CSA-HS Greater Columbia Healthcare System, LP v. South Carolina Medical Malpractice Liability Joint Underwriting Association*, the South Carolina Supreme Court considered whether the medical malpractice statute of repose in Section 15-3-545 of the South Carolina Code barred a hospital's equitable indemnification claim against a doctor. 411 S.C. 557, 769 S.E.2d 847 (2015). The Court found the statute of repose's language covered the claim and applied the statute to bar the claim. *Id.* In doing so, the Court rejected an argument that an exception should be read into the statute of repose and instead applied the plain language of the statute. *See id.* at 561–63, 769 S.E.2d at 849–50. The Court explained its rejection of the argument for reading in an exception as arising from the fact that "[i]f the General Assembly desires to expand [the] exceptions [to the statute of repose] to include the situation presented here, that decision lies exclusively in the Legislative Branch." *Id.* at 562, 769 S.E.2d at 849.

Similarly, in *Sims v. Amisub of South Carolina, Inc.*, the Supreme Court considered whether an insanity tolling exception exists for the three-year statute of limitations for medical

malpractice claims. 414 S.C. 109, 777 S.E.2d 379 (2015). Finding the "clear language" and "unambiguous language" of the statute did not provide for such an exception, the Court held that insanity did not toll the statute of limitations. *Id.* at 116, 777 S.E.2d at 383. The Court noted the appellant's "equitable argument that fairness dictates" such an exception to the statute of limitations but rejected that argument because the plain language of the statute set forth the General Assembly's intent and "the fairness of such decisions remains within the prerogative of the legislature." *Id.* at 117, 777 S.E.2d at 383.

The principles of statutory application and interpretation applied in *Columbia/CSA-HS* and *Sims* apply with equal force here. While one rational policy choice may be to allow a UIM carrier to participate in an at-fault driver's defense even when the carrier does not appear within thirty days of service, another rational policy choice is to permit a UIM carrier to participate in an at-fault driver's defense only when the carrier appears within thirty days of service. The weighing of the policy options and the decision as to which policy option to enact is for the General Assembly. Here, the General Assembly set out in the plain language of Section 38-77-160 that UIM carriers have a limited right to participate in the defense of at-fault drivers, and one limitation on that statutory right is that the UIM carrier must appear within thirty days of service. Like a statute of limitation or statute of repose, courts cannot create exceptions to the statute to permit a UIM carrier to participate in the defense where the UIM carrier failed to appear within the statutory time period.

Second, "[t]he General Assembly is presumed to know the law." *Williams v. Gov't Employees Ins. Co. (GEICO)*, 409 S.C. 586, 602, 762 S.E.2d 705, 714 (2014). The General Assembly is aware of Rule 55(c) and the good cause standard in the rule because the General Assembly reviews proposed rules of civil procedure in deciding whether to disapprove them or

permit them to take effect. S.C. Const. art. V, § 4A. The General Assembly also knows how to provide for a good cause exception when it intends to do so as evidenced by the General Assembly employing a "good cause" standard in numerous statutes.[1] Therefore, had the General Assembly intended to provide a good cause exception to the thirty-day requirement in Section 38-77-160, the General Assembly would have included such an exception in the statute, and the absence of such an exception in the statutory language indicates the General Assembly did not intend to provide for such an exception. *See Columbia/CSA-HS*, 411 S.C. at 562–63, 769 S.E.2d at 849–50 (finding that where the General Assembly provided a specific exception in one statute but did not provide that exception in the language of a second statute, that meant the General Assembly did not intend for such an exception to apply to the second statute).

Third, in essentially the opposite situation as present here, South Carolina courts applied Section 38-77-160 to bar an insured from pursing a UIM carrier where the insured did not precisely comply with the requirements of Section 38-77-160, and the courts did so without applying any good cause exception. In *Williams v. Selective Ins. Co.*, the South Carolina Supreme Court considered the grant of summary judgment for a UIM carrier where the plaintiff insured settled with the at-fault driver's liability carrier for the policy limits in exchange for a covenant not to execute, then filed a claim with the plaintiff's UIM carrier. 315 S.C. 532, 533,

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[1] *See, e.g.*, S.C. Code Ann. § 23-50-45 (South Carolina Crimestoppers Act: "Except as otherwise provided by this section, evidence of privileged communications, protected information, and protected identities is not admissible in a civil proceeding unless good cause is shown to the court."); § 49-19-1840 (Drainage Districts under 1920 Act: "All suits instituted under the preceding sections shall stand for trial as other equitable actions unless a continuance be granted for good cause shown within the discretion of the court."); § 56-16-40 (Regulation of Motorcycle Manufacturers, Distributors, Dealers, and Wholesalers: "Thereafter, the manufacturer shall not establish or relocate the proposed new motorcycle dealership unless the court has determined that there is good cause for permitting the establishment or relocation of the motorcycle dealership."); § 58-33-140 (statute governing certification of major utility facilities: "The commission may, in extraordinary circumstances for good cause shown, and giving consideration to the need for timely start of construction of the facility, grant a petition for leave to intervene as a party to participate in subsequent phases of the proceeding . . . ."); § 63-9-780 (South Carolina Adoption Act: "No person may have access to the records except for good cause shown by order of the judge of the court in which the decree of adoption was entered."); § 63-9-1110 (South Carolina Adoption Act: providing that the court may waive certain requirements "upon good cause shown").

446 S.E.2d 402, 403 (1994). The UIM carrier refused to pay the UIM benefits, and the plaintiff insured filed suit against the UIM carrier. *Id.* On appeal from the grant of summary judgment for the UIM carrier, the Court held Section 38-77-160's requirement that the insured serve the UIM carrier in the liability action is an absolute prerequisite to recovering from a UIM carrier. *Id.* at 534, 446 S.E.2d at 404. The Court did not consider whether the insured had good cause for failing to serve the UIM carrier and did not give any indication that any exception may exist for the requirement that the insured file suit against the at-fault driver and serve the UIM carrier in that suit.

Similarly, in *Ex parte Allstate Ins. Co.*, the plaintiff insured did not serve the UIM carrier with the lawsuit against the at-fault driver until after a trial of the claims against the at-fault driver. 339 S.C. 202, 203–04, 528 S.E.2d 679, 679–80 (Ct. App. 2000). The trial court granted summary judgment for the UIM carrier as required by Section 38-77-160. *Id.* at 204, 528 S.E.2d at 680. On appeal, the Court of Appeals rejected the plaintiff insured's explanations as to why it was permissible to serve the UIM carrier after the trial against the at-fault driver on the basis that the language of "the statute is absolute." *Id.* at 205, 528 S.E.2d at 680. The Court of Appeals held that because the plaintiff insured had not complied with the requirements stated in Section 38-77-160, the plaintiff insured had no right to UIM benefits. *Id.* at 205, 528 S.E.2d at 681. The Court of Appeals did so without any consideration of whether the plaintiff insured had good cause for failing to serve the UIM carrier until after the trial against the at-fault driver. If the language of "the statute is absolute" for insureds, then it also must be "absolute" for insurers.

Fourth and finally, permitting a UIM carrier only thirty days in which to appear and participate in the defense without any good cause exception to that thirty-day requirement comports with the larger statutory scheme for UIM enacted by the General Assembly. 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. Hoffman*, 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. Homes Ins. Co.*, 662 P.2d 681, 684 (Okla. 1983); Steven Plitt et al., 9 *Couch on Ins.* § 122.1 (3rd ed. 2020).

Having created the UIM form of first-party insurance and given the unusual nature of that coverage where an insured's carrier pays for the liability of a third-party, the General Assembly decided to provide a UIM carrier with a limited right to participate in the defense of the at-fault driver. *See Ex parte Allstate Ins. Co.*, 339 S.C. at 207, 528 S.E.2d at 681. That limited right is an exception to the normal rule that a first-party insurer has no right to defend litigation between an insured and a third-party tortfeasor. The General Assembly could have not provided any right for the UIM carrier to defend the litigation, and then the UIM carrier would be limited to contesting coverage through a later action between the insured and the insurer. *Squires*, 247 S.C. at 66, 145 S.E.2d at 677. Instead, weighing the policy options, the General Assembly decided to provide a limited right for UIM carriers to participate in the defense and one of the limitations on that right to participate is that the UIM carrier must appear within thirty days of service.

Even with a right to participate in litigation between an insured and an at-fault driver, there are reasons that a UIM carrier may elect not to participate in certain cases. The UIM carrier may believe an insurance policy provision bars coverage regardless of the outcome in the liability litigation. The UIM carrier may believe the claim against the at-fault driver is so strong

that the UIM carrier will be obligated to pay its policy limits and any defense it were to make in the liability litigation would be an unwise expenditure on attorney's fees. The UIM carrier may believe the claim against the at-fault driver is so weak or the damages so small that the UIM coverage will never be obligated to pay and therefore any defense mounted would be an unwise expenditure on attorney's fees. Given that there are reason a UIM carrier may choose not to participate in the defense of an at-fault driver, the General Assembly presumably intended to provide a limited period of time in which a UIM carrier can choose to participate in the defense and after which the injured party can know the UIM carrier will not participate and carry on with the litigation accordingly.

Here, Appellant followed the statute and relied upon the procedure mandated by the General Assembly. Having served Respondent as the UIM carrier in this action, Appellant waited more than thirty days for Respondent to appear and defend. When Respondent did not appear, Appellant reasonably relied on that as an indication that Respondent did not intend to appear and contest the liability and damages components of Appellant's claim for UIM benefits. Appellant entered into a covenant not to execute with the at-fault driver in exchange for the at-fault driver agreeing to pay less than the limits of the at-fault driver's liability policy. Appellant did so because Respondent did not appear and in doing so, Appellant relinquished her options to make a *Tyger River*[2] policy limits demand for Defendant's automobile liability insurance and to proceed to trial against defendant to recover the full amount of Defendant's liability policy. Appellant substantially relied on and altered her position due to Respondent's failure to appear, and permitting Respondent to make a late appearance would result in substantial prejudice to Appellant.

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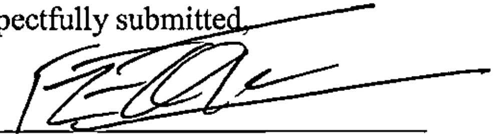
[2] *Tyger River Pine Co. v. Md. Cas. Co.*, 170 S.C. 286, 170 S.E. 346 (1933).

CONCLUSION

The plain language of Section 38-77-160 provides that a UIM carrier has thirty days after service in which to appear and defend and does not provide any exceptions for where a UIM carrier fails to appear within thirty days of service. Moreover, even were the Court to need to look beyond the plain language of the statute, the overarching statutory scheme, comparison of Section 38-77-160 to other statutes, courts' interpretations of Section 38-77-160, and courts' interpretations of analogous statutes all indicate that Section 38-77-160 cannot be interpreted as containing a good cause exception to the thirty-day requirement. Accordingly and for the reasons set forth herein, the Court should reverse and order that Respondent's answer and appearance be quashed.

Respectfully submitted,



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

CERTIFICATE OF SERVICE

The undersigned certifies on October 9, 2020, he caused a copy of the foregoing Initial Brief of Appellant to be served on all parties of record by e-mail and by placing copies in the U.S. Mail, first class, postage prepaid, and addressed as follows:

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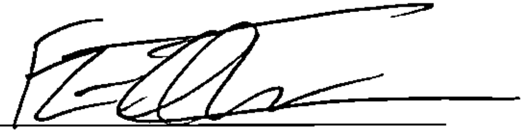

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October 9, 2020

VIA U.S. MAIL AND E-MAIL

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

Dear Hon. Clerk Kitchings,

Enclosed please find the Initial Brief of Appellant and the Appellant's Designation of Matter to be Included in the Record on Appeal.

Regards,

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Enclosures (as stated)

cc: (via U.S. mail and email)

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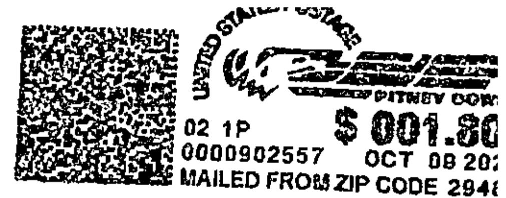

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