THE STATE OF SOUTH CAROLINA
In The 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 REPLY BRIEF OF APPELLANT

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ATTORNEYS FOR APPELLANT

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I. THE APPEALED ORDERS AFFECT THE MODE OF TRIAL AND A SUBSTANTIAL RIGHT AND ARE THEREFORE IMMEDIATELY APPEALABLE.

Respondent argues this matter is not appealable at this juncture because the appealed orders are not final judgments. However, Appellant does not contend that the appealed orders are not final judgments. Appellant contends the appealed orders are immediately appealable pursuant to Section 14-3-330 of the South Carolina Code because the orders affect the mode of trial and a substantial right.

Respondent does not make any argument that the appealed orders do *not* affect the mode of trial and a substantial right, and merely makes the conclusory assertion: "These decisions do not involve the merits of the action and do not affect a substantial right of the parties." (Resp. Br. 14.) Because this is an entirely conclusory assertion lacking any supporting argument or authority, the Court should reject this assertion and proceed to the substance of this appeal. *First Sav. Bank v. McLean*, 314 S.C. 361, 363, 444 S.E.2d 513, 514 (1994) (holding an assertion not supported by any argument or authority is abandoned and not considered by the appellate court).

While the Court need not expend further effort considering the appealability of this matter given Respondent's deficient conclusory assertion on the issue, further examination shows this matter is immediately appealable because the orders below affect the mode of trial and a substantial right. Section 14-3-330 of the South Carolina Code, which governs appealability here, provides for an immediate 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 v. Sommerville*, 362 S.C. 191, 196, 607 S.E.2d 707, 709 (2005) ("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.").

The appealability issue before the Court here 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 submits that a trial court's decision to permit a UIM insurer to appear and take over the defense despite failing to comply with the thirty day requirement 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 requirement of Section 38-77-160 for doing so, Respondent would be permitted to take over the defense of this action as a UIM carrier solely by virtue of Section 38-77-160. 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. 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 provided in 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 because the plaintiff then 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 otherwise 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. In *Hagood v. Sommerville*, the Court held 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 to resolve the matter against that tortfeasor without interference by and opposition from the plaintiff's own first-party insurer, except in the narrow instance 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."). As an example of the difficulty in showing prejudice that may result were this matter not immediately appealable, were Respondent permitted to take over the defense in this case at this point and the jury then returned a verdict for Appellant in an amount below Appellant's damages, Appellant would then have to appeal following that final judgment. At that point, if the appellate courts required Appellant to show prejudice resulted from the trial court's erroneous decision to permit Respondent 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 significantly 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.

Because the appealed orders allow Appellant's first-party insurance carrier to litigate against Appellant rather than Appellant litigating against just the tortfeasor as provided for by the

common law, because the appealed orders eliminate the option for Appellant to resolve the remainder of this action through an abbreviated bench trial, and because not permitting an immediate appeal would not adequately protect Appellant's mode of trial rights given the difficulty Appellant would encounter in showing prejudice from the appealed orders after a final judgment, the appealed orders affect the mode of trial. The orders thus affect a substantial right and are immediately appealable under Section 14-3-330.

II. APPELLANT DOES NOT CONTEND THAT SECTION 38-77-160 IS A STATUTE OF LIMITATIONS.

Respondent sets up and knocks down a straw man, asserting that Appellant erroneously claims Section 38-77-160 is a statute of limitations. Appellant's argument is not, and never has been, that Section 37-77-160 *is* a statute of limitations. Appellant's argument is, and always has been, that Section 38-77-160 is *like* a statute of limitations—is equivalent to a statute of limitations—for purposes of statutory interpretation and application. (Tr. 5, 11, 14; Appellant's Mot. for Recons. 5.)

Appellant's argument is that unlike the deadline by which a defendant must answer under the South Carolina Rules of Civil Procedure, the process for placing a defendant in default, and the standard for letting a defendant out of default, all of which are governed by the South Carolina Rules of Civil Procedure, Section 38-77-160 is a statutory deadline, like a statute of limitations or statute of repose. Statutory deadlines like statutes of limitations and statutes of repose are not subject to any exceptions to or processes for excusal from a failure to comply with a deadline provided by the South Carolina Rules of Civil Procedure. Statutes of limitations and statutes of repose are only subject to any exceptions provided in the statutory language. *See Columbia/CSA-HS Greater Columbia Healthcare Sys., LP v. S.C. Medical Malpractice Liability Joint Underwriting Assn.*, 411 S.C. 557, 561–63, 769 S.E.2d 847, 849–50 (2015); *Sims v. Amisub of*

S.C., Inc., 414 S.C. 109, 116–17, 777 S.E.2d 379, 383 (2015). This result follows from the fact that, pursuant to Article V, Section 4 of the South Carolina Constitution, 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); *State v. Cottingham*, 224 S.C. 181, 77 S.E.2d 897 (1953); *Marichris, LLC v. Derrick*, 384 S.C. 345, 353, 682 S.E.2d 301, 305 (Ct. App. 2009). As a statutory deadline, like a statute of limitations or statute of repose, the thirty day requirement in Section 38-77-160 is only subject to any exception stated in the statutory language, and the South Carolina Rules of Civil Procedure cannot apply to create an exception to the thirty day requirement in the statute. Therefore, Rule 55(c) of the South Carolina Rules of Civil Procedure does not apply to Section 38-77-160 and cannot create an exception to the thirty day requirement in the statute, and the trial court erred in applying Rule 55(c). Because the language of Section 38-77-160 does not provide any exception whereby a UIM insurer can appear and defend after failing to appear within thirty days of service, Section 38-77-160's thirty day requirement is like a statute of limitations which does not provide for any exception to the statutory deadline for filing suit, and a trial court accordingly may not create exceptions to Section 38-77-160's thirty day requirement or excuse an insurer's failure to comply on the basis that the insurer had good cause for its failure.

III. RESPONDENT PRESENTS NO ARGUMENT AS TO HOW AN EXCEPTION TO THE THIRTY DAY REQUIREMENT CAN BE READ INTO THE LANGUAGE OF SECTION 38-77-160.

This appeal is a matter of statutory interpretation and application. The issue before the Court is whether a trial court can excuse a UIM insurer's failure to appear within thirty days of service as required by Section 38-77-160 because the trial court finds the insurer had "good cause" for failing to timely appear. Appellant argues, and the text of Section 38-77-160 incontrovertibly

supports her argument, that there is no exception in the language of the statute. The thirty day requirement is a strict deadline for which there are no exceptions.

Absent from Respondent's brief is any argument as to how an exception can be read into Section 38-77-160's thirty day requirement. Respondent acknowledges that Section 38-77-160 is the controlling statute here, but then immediately jumps to an application of Rule 55(c) of the South Carolina Rules of Civil Procedure as permitting a UIM insurer's failure to appear within thirty days to be excused when the insurer shows good cause for its failure to timely appear. The unexplained, unsupported assumption in Respondent's argument is that Rule 55(c) can apply to create an exception to the thirty day deadline in Section 38-77-160. Appellant's brief explains how the South Carolina Rules of Civil Procedure do not alter statutes and how statutory deadlines are not subject to judicially created exceptions and are only subject to exceptions, if any, stated in the statutory language. Appellant's arguments on those points are uncontested. Respondent presents no argument to the contrary. Respondent presents no argument as to how the language of Section 38-77-160 can be read as providing any exception to the requirement that a UIM insurer appear within thirty days of service. Respondent presents no argument as to how Rule 55(c) of the South Carolina Rules of Civil Procedure can be used to create an exception to a statutory deadline despite South Carolina law providing that the South Carolina Rules of Civil Procedure do not alter statutes. Not only does Appellant submit that she presents the correct argument as to how Section 38-77-160's thirty day deadline is to be read and applied, Appellant submits that Respondent's lack of any argument on these issues means Respondent fails to present *any* basis, regardless of the validity of such a legal basis, on which the Court could decide this appeal for Respondent.

IV. DEFENDANT RETAINING PERSONAL COUNSEL IS IRRELEVANT TO THE ISSUE BEFORE THE COURT AND ENTIRELY PROPER.

Respondent expends significant effort arguing that Appellant's counsel did something improper in assisting Defendant Rafael Docena-Guerrero in obtaining personal counsel. Respondent's arguments are entirely immaterial to the issue before the Court—a complete "red herring." Respondent's arguments also make unsupported factual assertions—assertions that lack any basis in the record and which are false—and implies misconduct by Appellant's and Defendants personal attorneys based on such false factual assertions. In short, given Respondent's inability to provide any argument as to how Section 38-77-160 can be read to permit a UIM insurer to appear more than thirty days after service on the insurer, Respondent regrettably resorts to spurious accusations of collusion by opposing counsel.

First, Respondent's argument as to the propriety of Appellant's counsel assisting Defendant in obtaining personal counsel and the propriety of Defendant being represented by that personal counsel is entirely immaterial to the issue before this Court. The issue before the Court is whether Section 38-77-160 permits a UIM insurer to appear more than thirty days after service. Here, the thirty days in which Respondent could appear under Section 38-77-160 elapsed long before anyone made any effort to obtain personal counsel for Defendant.

Second, Respondent asserts that Appellant's counsel and Mr. Altman are "associated attorneys" on this case, are "represent[ing] both sides to a lawsuit," constitute "Plaintiff's team" who would "represent both the Plaintiff and Defendant at trial," and that Appellant's counsel "selected" Mr. Altman to represent Defendant. (Resp.'s Br. 10, 20, 21.) There is nothing in the record to support these assertions, and the assertions should be disregarded as the misstatements that they are. *See* Rule 210(h); *Vacation Time of Hilton Head Island, Inc. v. Lighthouse Realty, Inc.*, 286 S.C. 261, 270, 332 S.E.2d 781, 786 (Ct. App. 1985).

Finally, Mr. Altman becoming involved in this case was entirely proper. The email Respondent uses as purported proof of some type of collusion notes that Respondent's counsel made conflicting filings as to whether he represented Defendant, the UIM insurer, or both. ." (Resp.'s Mem. Oppn. to Mot. for Recons., Ex. 2 at 1; Resp.'s Mot. Relief from Default 1; Resp.'s Not. of Appear. & Condit. Ans. 1 & 4.) The email then notes that as the result of that confusion, Appellant's counsel suggested Mr. Altman in an effort "to see if [Defendant] can have personal counsel to help us all sort out what roles you and [liability counsel] have at this point." (Resp.'s Mem. Oppn. to Mot. for Recons., Ex. 2 at 1.) Respondent's liability attorney still represented Defendant at that point, and there is no evidence that Respondent's liability attorney had any issue with Mr. Altman speaking with or representing Defendant.

Respondent's UIM counsel solely represents the UIM insurer and does not represent Defendant. Respondent's liability attorney was also hired by Respondent GEICO and was withdrawing from her representation of Defendant. To ensure Defendant had an independent source of legal advice as to who represented him and what obligations if any he had as to the remainder of this suit, Appellant's counsel suggested Mr. Altman. Respondent's liability attorney agreed and signed a substitution of counsel. The alternative was for Mr. Goldberg to contact or advise the defendant directly which would create at least the appearance of improper conduct.

Once Mr. Altman made an appearance, he informed the trial court that he declined to take any position on whether Respondent should be permitted to appear despite failing to comply with Section 38-77-160. If Mr. Altman and Mr. Goldberg were colluding and "trying to prevent the UIM carrier from being able to defend the case" or "represent[ing] both sides to a lawsuit," (Resp.'s Br. 9, 10), one would expect Mr. Altman to have presented arguments supporting Appellant's position that Respondent cannot appear in this action.

The sole fact in the record as to the relationship between Mr. Altman and Appellant's counsel related to this case, which is the entire extent of their relationship related to this case, is that Mr. Altman and Mr. Goldberg are friends, and a friendship between two lawyers is not, and cannot be, a basis for finding that two lawyers should not represent opposing parties. Lawyers are often friends with other lawyers, and lawyers are often friends with judges, yet the applicable rules do not bar friends from opposing one another or appearing in front of one another. *See* Rules 1.7 & 1.8, RPC, Rule 407, SCACR; Canons 2 & 3, CJC, Rule 501, SCACR. Lawyers who are friends are still bound by their ethical duties, and it would be incredible for Respondent to suggest that a lawyer cannot fulfill those ethical duties and zealously represent a client solely because the opposing counsel is a friend.

Respondent fails to provide any explanation, nor could Respondent provide any explanation, as to how this case would be different at this juncture were Defendant not represented by personal counsel. Therefore, the fact that Mr. Altman appeared as Defendant's personal counsel has no bearing on the issue before the Court. The statutory language of Section 38-77-160 either permits or does not permit an exception to the thirty-day requirement.

V. RESPONDENT'S DUE PROCESS ARGUMENT IS BOTH AN ISSUE NOT RAISED TO THE TRIAL COURT AND ERRONEOUS BECAUSE RESPONDENT RECEIVED NOTICE AND AN OPPORTUNITY TO BE HEARD.

Respondent raises for the first time in its appellate brief the argument that not permitting Respondent to appear in this action due to its failure to comply with the thirty-day requirement of Section 38-77-160 deprives Respondent of due process. Respondent did not raise this issue before the trial court, and because the issue would thus be an unraised additional sustaining ground, the Court should decline to consider the issue. *See I'On, LLC v. Town of Mount Pleasant*, 338 S.C. 406, 420–21, 526 S.E.2d 716, 723–24 (2000) (stating that an "appellate court likely would perceive

it as being unfair or unwise to resolve a case on a ground never mentioned by the respondent prior to appeal," that "[i]t is within the appellate court's discretion whether to address any additional sustaining grounds," and that "the appellate court is likely to ignore" a purported additional sustaining ground not raised to the trial court).

Even were the Court to consider Respondent's due process argument, the argument directly contradicts elementary principles of due process law. Respondent argues it would be deprived of due process because it would not be able to appear and defend, however procedural due process requires only that a person receive an *opportunity* to be heard and does not require that a person actually be heard. *See, e.g.*, *Bodie v. Connecticut*, 401 U.S. 371, 378 (1971) ("Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance . . . . What the Constitution does require is an *opportunity* . . . for a hearing . . . ." (emphasis added and internal quotations omitted)); *Cent. Operating Co. v. Utility Workers of Am., AFL-CIO*, 491 F.2d 245, 251 (4th Cir. 1974) ("Default judgments entered for failure, after proper service, to answer within the time allowed do not violate due process."); *Cameron & Barkley Co. v. S.C. Procur. Review Panel*, 317 S.C. 437, 440, 454 S.E.2d 892, 894 (1995) ("Procedural due process requires notice and the *opportunity* to be heard." (emphasis added)); *Webster v. Clanton*, 259 S.C. 387, 391, 192 S.E.2d 214, 216 (1972) ("It is a fundamental doctrine of law that a party whose personal rights are to be affected by a personal judgment must have a day in court, or *opportunity* to be heard, and that without due notice and *opportunity* to be heard a court has no jurisdiction to adjudicate such personal rights." (emphasis added)); *Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) ("Procedural due process

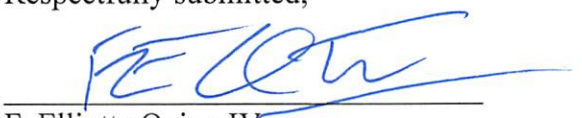
requires notice, the *opportunity* to be heard in a meaningful way, and judicial review." (emphasis added)).

Here, Respondent received notice of the suit and would have been able to participate in the defense, *i.e.*, be heard, if Respondent appeared within thirty days of service as required by Section 38-77-160. Accordingly, Respondent received the opportunity to be heard required by due process, and Respondent's failure to avail itself of the opportunity to be heard cannot create a due process violation. Applying the statutory language of Section 38-77-160 as written to require that a UIM insurer appear within thirty days of service to participate in the defense provides the UIM carrier with an *opportunity* to be heard and comports with due process.

CONCLUSION

Grasping at anything to avoid the clear, plain language of Section 38-77-160, Respondent makes a conclusory assertion as to the appealability of this matter, relies on factual assertions that are both not supported by anything in the record and false, and raises a due process issue controverted by basic due process law. What Respondent does not do is provide any argument as to how Section 38-77-160 can be read as containing any exception permitting a UIM insurer to appear and defend when the insurer fails to appear within thirty days of service. Setting aside Respondent's obfuscation, the issue before the Court is a simple matter of applying the plain language of Section 38-77-160. The statute's language plainly states that a UIM insurer has the right to appear and defend when the UIM insurer does so within thirty days of service, and the statutory language is not susceptible to any reading creating a good cause exception to that requirement. Accordingly, the Court should apply the plain language of Section 38-77-160, reverse the trial court's orders, and hold that Respondent may not appear in this action.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
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Appeal from Berkeley County
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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 December 2, 2020, he caused a copy of the foregoing Initial Reply 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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December 2, 2020

VIA U.S. MAIL AND E-MAIL

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Appellate Case No. 2020-000915

Dear Hon. Clerk Kitchings,

Enclosed please find the Initial Reply Brief of Appellant.

Regards,

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