

**IN THE SUPREME COURT
STATE OF GEORGIA**

Case Number S04C0282

SOUTHERN GUARANTY INSURANCE COMPANY

versus

ROBERT DOWSE and URSULA DOWSE

Appellees' Brief

For Robert and Ursula Dowse, Appellees

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The Dowses also alleged that Cutter, Inc. was negligent in performing subsequent repairs to the Dowses' home. 1R. 118. The negligent subsequent repair attempts contributed to the damages. 1R. 118. Finally, the Dowses alleged that Cutter, Inc., had acted in bad faith and had caused the Dowses unnecessary trouble and expense. 1R. 119.

Cutter, Inc. was insured with Southern Guaranty Insurance Company [SGIC] under a general commercial liability [GCL] policy from January of 1994 until October of 1997. Cutter, Inc. gave timely notice of the claim to SGIC. SGIC responded with a denial letter dated October 11, 2000 to Cutter, Inc. advising that SGIC would not provide a defense or cover any liability of Cutter, Inc. 1R. 206-43. SGIC did not file a declaratory judgment action to determine the coverage issue.

After the denial of coverage and defense, Cutter, Inc. negotiated a settlement agreement with the Dowses. In the settlement agreement, the Dowses fully released Cutter, individually. 1R. 123-28. Cutter, individually, had not been sued and was not a party to the action. Id. The Dowses also agreed not to enforce any judgement against Cutter, Inc. except against its insurance assets. The Dowses retained the right to enforce any judgement against any insurance policy of Cutter, Inc., specifically including the SGIC policy. Id. In consideration for this agreement, Cutter, Inc. agreed to dismiss its Answer and to assign any rights it had against SGIC to the Dowses. 1R. 126.

The settlement agreement between the Dowses and Ulysses Cutter, Sr. individually, and Cutter, Inc. stated the following pertinent part:

Whereas, the Second Party [i.e. the Dowse' s] has and does hereby agree that they will fully release and forever discharge Ulysses Cutter, Sr, individually, from all and any manner of action and actions cause and causes of action

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Whereas, . . . the Second Party has agreed that they will not seek to recover or collect any sums as against Ulysses Cutter, Sr., individually or Ulysses Cutter, Sr. Plaster and All Texture Stucco Co, Inc. . . . except, however the Second Party may seek to recover any funds available to the First Party [i.e. including both Cutter individually and Cutter, Inc.] as indemnity under Southern Guaranty Insurance Policy No. 00CPP13492, or any other available policies of insurance, for the claims of the Second Party in the Lawsuit, it being the express intent of all Parties hereto to enter into an agreement providing the Second Party shall limit their recovery to whatever Second Party may recover under the Southern Guaranty Insurance Company Policy No. 00CPP13492, or any other available policies of insurance, whether as a assignee of the benefits of this Policy or as a judgment creditor of Ulysses Cutter, Sr., Plaster and All Texture Stucco Co., Inc.

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Now Therefore, based on the mutual covenants and promises set forth herein, the Parties hereby further agree as follows:

1. Second Party, , shall only look to and make claim for any additional sums recoverable under Policy No. 00CPP13492 issued by Southern Guaranty Insurance Company for claims . . . against Ulysses Cutter, Sr. and/or Ulysses Cutter, Sr, Plaster and All Texture Stucco Co., Inc

2. Second Party . . . expressly agrees to limit all recovery on any judgement in the Lawsuit or any claim arising from the incident described in the Lawsuit to any amount recoverable against Southern Guaranty. . .

3. If it is determined by a court that Policy No. 00CPP13492 issued by Southern Guaranty Insurance Company or any other policy of insurance, provides no coverage for the claims . . . the Second Party agrees to execute a full and final release in favor of Ulysses Cutter, Sr. and/or Ulysses Cutter Sr., Plaster and All Texture Stucco Co., Inc. for all claims raised in the Lawsuit.

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8. Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc. shall upon the execution of this Agreement, file a dismissal of its answer which it filed in the case known as, Robert Dowse and Ursula Dowse v. C. Richard Dobson Builders, Inc., et al., Chatham County Superior Court Civil Action No. CV99-0302-BA.

1R. 123-128.

The settlement agreement was signed by Ulysses Cutter, individually, and as president of Cutter, Inc. on October 16, 2000.

Cutter, Inc. dismissed its Answer on October 19, 2000 and went into default. 1R. 148. The following factual matters alleged in the numbered paragraphs of the Amended Complaint are admitted:

5. Plaintiffs purchased a home located at 103 Steeplechase Road, Southbridge Subdivision, Savannah, Chatham County, Georgia during November, 1994. The home was constructed by C. Richard Dobson Builders, Inc. An “exterior insulation and finishing system”[EIFS] was used as the exterior finish on the house

6. As a result of the cracking, chipping and splitting of the EIFS on the home owned by Plaintiffs, the foam has become wet and created a moisture problem in the house. The moisture has caused potential wood rot and termite infestation in the house, the extent of which will not be fully known until the EIFS is removed.

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30. Defendant Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc. [Cutter] failed to use reasonable care in the installation and inspection of the EIFS on Plaintiff's home.

31. Defendant Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc. failed to install the EIFS on the Plaintiff's home according to the manufacturer's instructions.

32. As a result of the negligence of Defendant Cutter, moisture has entered the EIFS and caused substantial wood rot to the underlying wooden structure of the Plaintiff's house which requires removal of the EIFS and repair of the wood substrate and wooden framing.

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34. Ulysses Cutter, Sr. Plaster and All Texture Stucco Co., Inc. failed to apply the EIFS in accordance with the manufacturers instructions and failed to satisfy duties and obligations under express and implied warranties that his work would be done in a workmanship like manner.

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37. The Defendants, and each of them have acted in bad faith in the transaction and have caused the Plaintiffs unnecessary expense and trouble.

38. The Plaintiffs have incurred attorney fees and expenses as a result of the bad faith of the Defendants, and each of them. R. 113-19

The above described factual allegations were established as a matter of law. The trial Court entered the default and tried the issue of damages in open court. The trial Court entered a judgment against Cutter, Inc. for \$83,040.29 with interest and costs. 1R. 6.

The Dowses then filed a garnishment to collect the judgment from the SGIC policy. 1R. 4. SGIC answered the garnishment and denied that it had any assets of Cutter, Inc. 1R. 38. The Dowses traversed SGIC's Answer and moved for summary judgement 1R. 55. The trial Court granted summary judgement and dismissed the garnishment. 2R. 10, 12.

The Court of Appeals reversed the trial Court. Dowse v Southern Guaranty Insurance Co., 263 Ga. App. 435, 588 S.E.2d 234 (2003). The Supreme Court granted certiorari on the single issue of whether an insurer is estopped from asserting that a settlement agreement between a plaintiff and an insured relieves the insurer of its obligation under an insurance policy. See Order, (3/1/04). The parties were instructed to only submit briefs on this single issue.

II. Summary of Argument

Georgia law estops an insurer from disputing a good faith settlement between an insured defendant and a plaintiff for the purpose of avoiding coverage. SGIC refused to defend Cutter, Inc., its insured. SGIC neither defended under a reservation of rights nor filed a declaratory judgment action. SGIC must accept the consequences of its choice. Liability and damages have been established as the result of a good faith settlement between its insured,

Cutter, Inc. and the Dowses. The validity of the established facts and the terms of the settlement are beyond dispute.

The majority rule has rejected SGIC's position that a settlement in which a plaintiff retains the right to recover a judgment against an insured defendant's insurance policy precludes coverage based on the "legally obligated to pay" coverage language. In Dowse, the Court of Appeals adopted the majority rule. The majority rule recognizes that a small business owner who has paid his insurance premiums should have the option of preserving his assets with a good faith settlement and so avoid the risk of a ruinous judgement or litigation costs. The only remaining issue is coverage under the policy.

This option removes the risk from the small business owner and places the risk of non-coverage on the plaintiff. The coverage issue can then be litigated by the judgment creditor (ie. plaintiff) against the insurer. Coverage is determined by whether the established facts satisfy the coverage language of the GCL. The fact of a settlement is immaterial to the coverage issue.

Finally, regardless of whether the terms of a settlement can be challenged to dispute coverage, the interpretation of the settlement was decided by the Court of Appeals and was not the issue on which certiorari was granted. Dowse, considers SGIC's arguments disputing coverage based on interpretation of the settlement and policy language. Dowse interprets the settlement language as an agreement to enforce a judgment, not a general release of Cutter, Inc. Dowse interprets the policy language by focusing on the "legally obligated to pay" clause and adopts the majority rule. Therefore, regardless of the outcome of the estoppel issue,

the holding and the rationale of Dowse should remain undisturbed since the interpretation issues are not on appeal.

III. Argument and Citation of Authority

A. An Insurer Is Estopped From Challenging an Insured's Good Faith Settlement When the Insurer Has Denied Its Insured a Defense

Judge Blackburn correctly quoted well established Georgia law when he wrote the following:

[W]hen an insurer denies coverage and absolutely refuses to defend an action against an insured, when it could do so with reservation of its rights as to coverage, the legal consequence of such refusal is that it waives the provisions of the policy against settlement by the insured and becomes bound to pay the amount of any settlement made in good faith plus expenses and attorney's fees. Dowse, 263 Ga. App. at 439 (citing Ga. Southern & F. Ry. Co. v. U.S. Cas. Co., 97 Ga. App. 242, 244, 102 S.E.2d 500, 502 (1958)).

In Ga. Southern, the insurer for the railroad company denied coverage and refused to provide a defense for a claim made against the railroad company. The railroad company then filed a declaratory judgment action against its insurer. The Court held that the insurance company was bound by the railroad's good faith settlement. The insurer may not question the amount of the settlement unless the amount of the settlement is so excessive as to evidence bad faith. Ga. Southern, 97 Ga. App. at 242.

The fact of settlement, by itself, is not a basis for denial of coverage. The insurer is bound by a good faith settlement of the insured. Id. Only a settlement made in bad faith can be contested. Id. In the instant case, no allegations of bad faith were made. Therefore, the fact of settlement is immaterial to the issue of whether the claim is covered by the GCL policy.

SGIC agrees that it is estopped from contesting the underlying facts of negligence. See Petitioner's Brief In Response to Writ of Certiorari [Petitioner's Brief] at p. 3 (citing McCraney v Fire & Cas. Ins. Co. of Connecticut, 182 Ga. App. 895, 357 S.E.2d 327 (1987)). In McCraney, the carrier denied coverage and refused to provide a defense under an automobile liability policy. The plaintiff obtained a judgement against the insured and then filed against the insurer to collect the judgement. Id. Ga. App. at 895. The plaintiff in McCraney was a judgment creditor just as the Dowses are judgment creditors in the instant case.

McCraney describes the choice that the insurer may make in deciding whether to deny coverage and defense. If the insurer decides not to provide a defense, then the insurer waives all opportunity to contest liability. Id. The insurer is estopped from contesting the liability facts. In Dowse, the settlement resulted in the establishment of facts that SGIC cannot dispute.

Furthermore, SGIC agrees that an insurer is estopped from contesting the validity of a settlement absent a showing of fraud or collusion. Petitioner's Brief at 7. SGIC states that it is "not contesting the settlement agreement." Id. Both the fact of and the terms of settlement are immaterial.

Estoppel prevents a third party, the insurer, from disputing the terms of a settlement, including the amount of the settlement. The settlement in the instant case was not for an amount certain, but included terms that would allow the trial court to set damages. The amount

of damages was set by the trial court after an evidentiary hearing. The evidentiary hearing and judgement mitigated any risk of a fraudulent or collusive settlement. Dowse, 263 Ga. App. at 442.

Estoppel is well established Georgia law in this insurance context. Rutledge v. Dixie Auto. Ins. Co., 106 Ga. App. 577, 579, 127 S.E.2d 683, 685 (1962); Aetna Cas. & Sur. Co. v. Empire Fire & Marine Ins. Co., 212 Ga. App. 642, 646, 442 S.E.2d 778, 782 (1994); Residential Developments, Inc. v. Merchants Indem. Co. of New York, 122 Ga. App. 503, 506, 177 S.E.2d 715, 717(1970); State Farm Mut. Auto. Ins. Co. v. Keene, 111 Ga. App. 480, 483, 142 S.E.2d 90, 92 (1965); Motors Ins. Co. v. Auto-Owners Ins. Co., 251 Ga. App. 661, 664, 555 S.E.2d 37, 39 (2001); Atlanta Mill. Co. v. Norris Grain Co., 271 F.2d 453, 455 (5th Cir. 1959); Colonial Oil Industries, Inc. v. Underwriters Subscribing to Policy Numbers TO31504670 and TO31504671, 106 F.3d 960, 965, (11th Cir. 1997); Colonial Oil Industries, Inc. v. Underwriters Subscribing to Policy Nos. TO31504670 and TO31504671, 1995 WL 692691, *12 (S.D. Ga.1995); Colonial Oil Indust., Inc. v. Underwriters Subscribing to Policy Nos. T031504670, T031504671, 1995 WL 495991, *8 (S.D. Ga. 1995); Georgia, S. & F. Ry. Co. v. U.S. Cas. Co., 177 F.Supp. 751, 753 (M.D.Ga. 1959); In re First American Health Care of Georgia, Inc., 288 B.R. 598, 605 (Bankr. S.D. Ga. 2002). See also Liberty Mut. Ins. Co. v. Wheelwright Trucking Co., Inc., 851 So.2d 466, 475 (Ala. 2002); Taylor v. Safeco Ins. Co., 361 So.2d 743, 746 (Fla. App. 1978); Boggs v. Aetna Cas. and Sur. Co., 252 S.E.2d 565, 568, (S.C. 1979); see “Consequences of liability insurer's refusal to assume defense of action against insured upon ground that claim upon which action is based is not within coverage of policy,” 49 A.L.R.2d 694, §10 (1956).

For the last forty years, Georgians have bought insurance contracts with the understanding that the law of estoppel would govern their contractual relationships with insurers.

Insureds have had the right to reach settlements which would protect their assets when insurers deny coverage and defense. Overruling this long-standing precedent would dramatically alter the vested interests all insureds with policies under Georgia law.

In Dowse, the Court relied on established law when Judge Blackburn wrote that SGIC was estopped from asserting that the settlement relieved it of its obligations under the GCL policy. Dowse, 263 Ga. App. at 439. This statement was specific to the parties to the Dowse case and so should not be read too broadly. The fact of settlement was immaterial to the coverage issue. However, Dowse recognized that coverage, as defined by the policy language remained a separate issue. Dowse, 263 Ga. App. at 437-38.

After interpreting the settlement language, Dowse examines SGIC's "legally obligated to pay" argument and rejects that argument in favor of the majority rule. Id. at 439-442. The interpretation of the GCL policy language is a different issue than the estoppel issue cited in the Writ of Certiorari. However, SGIC addresses the policy language issue at length in its brief and so, in an abundance of caution, the Dowses respond below.

B. The "Legally Obligated to Pay" Language of the GCL Policy Does Not Preclude Coverage

The policy states that SGIC has agreed to the following:

We will pay those sums that the insured becomes **legally obligated to pay** as damages because of "bodily injury" or "property damage" to which this

insurance applies. We will have the right and duty to defend any “suit” seeking those damages. We may at our discretion investigate any “occurrence” and settle any claim or “suit” that may result. 1R. 129 at § I.1.a.[emphasis added].

The established facts in Dowse include property damage to the Dowses’ property due to the negligent actions of Cutter, Inc. 1R. 113, 118; O.C.G.A. §9-11-55(a). This negligence caused wood rot and substantial deterioration in the Dowses’ home. Id. These facts establish coverage for property damage.

SGIC’s contends that SGIC is not “legally obligated to pay” because Cutter, individually, was fully released by the settlement. However, Dowse found that Cutter, Inc., the party against which the claim was filed, was not fully released. Dowse, Ga. App. at 437-38. The settlement language expressly reserved its right to enforce any judgment against Cutter, Inc.’s insurer. 1 R. 123, 124. The Dowses only filed a claim against Cutter, Inc.

A settlement which contains an agreement not to enforce a judgment against an insured except to the extent of its insurance coverage is a recognized procedure by which insureds, who have been abandoned by their insurers, can protect themselves from loss of assets and substantial legal fees. Warren v. Instant Loans & Rentals, Inc., 241 Ga. App. 232, 526 S.E.2d 424 (1999); Liberty Mutual Insurance Co. v Wheelwright Trucking Co, Inc., 851 So.2d 466, 475-76, 489-91 (Ala. 2002)(applying Ga. law); J. Harris, “Judicial Approaches To Stipulated Judgements, Assignment of Rights, and Covenants Not to Execute in Insurance Litigation,” 47 Drake L. Rev. 853 (1999)[hereinafter referred to as “Judicial Approaches”]; Am. Physicians Ins. Exch. v Garcia, 876 S.W.2d 842, 871, 51 A.L.R.5th 899 (Tex. 1994); Red Giant Oil Co. v Lawlor, 528

N.W.2d 524, 531-32 (Iowa 1995). Often the insured's insurance policy is the only asset he can use to obtain a settlement. If the plaintiff believes that coverage exists, then the insured can leverage his policy for an agreement by the plaintiff to only execute against the insurance policy.

When an abandoned insured settles his claim based on an agreement not to enforce, the insured's liability does not evaporate. Allowing the coverage to evaporate would reward the insurer for abandoning the insured while leaving the insured without any leverage to protect itself. The insurer would receive a windfall by avoiding coverage that was paid for by the insured. The Courts have recognized this inequity and so have acted to balance the rights of the parties by recognizing the insurer's obligation to pay settled or defaulted claims. See Judicial Approaches, supra.

Agreements not to enforce a judgment may serve as consideration for settlement of a claim by an abandoned insured. Dowse, 263 Ga. App. at 439 (citing Metcalfe v Hartford Accident Co., 176 Neb. 468, 126 N.W.2d 471 (1964); Coblentz v American Surety Co., 416 F.2d 1059 (5th Cir. 1969); Fullerton v United States Cas. Co., 184 Iowa 219, 167 N.W. 700 (1918); Pruyn v Agricultural Ins. Co., 36 Cal. App. 4th 500, 515, 42 Cal. Rptr.2d 295 (1995); Globe Indem. Co. v Blomfield, 115 Ariz. 5, 8, 562 P.2d 1372 (1977); Red Giant Oil Co. v Lawlor, 528 N.W.2d 524, 532-33 (Iowa 1995); Bishop v Crowther, 101 Ill. App.3d 933, 936, 428 N.E.2d 1021 (1981)). Dowse noted that two theories had been used in the adoption of the majority rule which discounted the "legally obligated to pay" language as a basis to avoid coverage.

First, the insured has a right to protect itself from the bad faith

of its insurer. Dowse, 263 Ga.App. at 439. Secondly, an agreement not to enforce a judgment against the insured is not a release but a contract. Therefore, the underlying tort liability remains. Id. at 441.

The Courts have been concerned with balancing the rights of the insured and the carrier. See Judicial Approaches, supra. When an insured is abandoned by his carrier and refuses to provide a defense, then the insured must act reasonably to protect its own interest. Id. at 874. If the insurer is provided with an opportunity to defend its insured and fails to do so, then the equities favor allowing a stipulated or consent judgment to stand as a basis for collection. Id. at 875. The only remaining issue for execution of the judgment is which assets of the insured can be used to satisfy the judgment. Dowse, 263 Ga. App. at 441.

This procedure allows the insurer who denied coverage to dispute coverage with the plaintiff who is seeking the payment. The financial risk created by the coverage denial is thus placed on the insurer. The insurer must then defend its denial and face the consequences of a wrongful denial.

Federal law also follows the majority rule. The 11th Circuit and other federal Courts have held that a corporation's insurance carrier must pay claims although the corporation enjoys bankruptcy protection from its judgment creditors. In re Ink Jet Florida

Systems, Inc, 883 F.2d 970, 975 (11th Cir. 1989); In re Honosky, 6 B.R. 667 (Bankr. D.W.Va. 1980) (Plaintiff could proceed to suit to extent of debtor's insurance coverage); In re McGraw, 18 B.R. 140 (Bankr. D. P. Wis. 1982); In re White, 73 B.R. 983 (Bankr. D. Col 1987). An insurance policy is still an asset that can be used for payment of a judgment creditor, even though a corporation may not be legally obligated to pay its judgment creditors due to bankruptcy discharge and stay protection. Otherwise, the insurer is unjustly enriched by a windfall since the insurer accepted premiums to insure against losses. Ink Jet Florida, 883 F. 2d at 976.

C. Griffith Is Distinguishable

In Griffith, an insured defendant was denied coverage by his insurer. American Cas. Co. of Reading Pennsylvania v. Griffith, 107 Ga. App. 224, 129 S.E.2d 549 (1963). In settlement of the case, the insured defendant gave the plaintiff two promissory notes which the defendant contended were to be paid by his insurance company. The plaintiff then tried to enforce these notes against the insurer. However, the notes were not enforceable instruments because they were statutorily defective. The notes were found to be wholly insufficient to support any recovery by the plaintiff against the insurer. Id. at 227, 129 S.E.2d at 552. The defendant's insurer was not legally obligated to pay the defective notes.

Dowse distinguishes Griffith by finding, "in that case the instrument at issue was not an enforceable contract while the settlement agreement in this case is." Dowse, 263 Ga. App. at

441-42. In Griffith, the parties in litigation did not settle the claim with an agreement to enforce a judgment only against the insured's defendant insurance policy. Instead, the defendant gave the plaintiff two defective promissory notes which the plaintiff accepted. Plaintiff accepted the risk of trying to enforce payment of the claim with the defective promissory notes. The insured's automobile insurance policy language in Griffith never stated that the policy would cover its insured's defective promissory notes. Therefore, no coverage existed to pay the defective promissory notes.

The "legally obligated to pay" policy language in Griffith was triggered by the defective promissory notes. In the instant case, SGIC argues that the settlement agreement itself has triggered similar policy language. Griffith does not provide authority for challenging the actual settlement agreement. The Griffith court emphasized that "settlement... fixed and determined the amount of the defendant insurance carrier's liability." 107 Ga. App at 228, 129 S.E.2d at 552. SGIC remains estopped from disputing the settlement. However, SGIC continues to question whether the claim is covered under the GCL policy language, which raises an issue different from the estoppel issue.

D. Public Policy Considerations Support Dowse's Adoption of the Majority Rule

Judge Blackburn wrote of several policy considerations that supported the Court's adoption of the majority rule. First, the courts disfavor the idea that an agreement not to enforce would automatically release an insurer when the settlement does not intend release. Dowse, 263 Ga. App. at 442 citing Auto-Owners Ins. Co. v St. Paul Fire Ins. Co., 547 So. 148, 152 (Fla.

1989). It is best to carry into effect the clear intentions of the parties when construing a document. Id. citing Paul v Paul, 235 Ga. 382, 384 219 S.E.2d 736 (1975). Secondly, the majority rule favors the availability to injured persons of liability insurance coverage of the insured defendants whose negligence have caused injury or damage. Id. citing Deblon v Beaton, 103 N.J.Super. 345, 351, 247 A.2d 172 (1968). SGIC should not be allowed to refuse to provide the coverage that Cutter, Inc. bought and paid for. Thirdly, the majority rule encourages settlement. Id. citing Williams v St. Paul Cos., 228 Ga. App. 656, 658, 492 S.E.2d 560 (1997).

E. The Law of The Case Establishes the Interpretation of the Settlement and Policy Language

Dowse interpretes both the settlement language and the policy language upon which SGIC bases its argument. The Writ was not granted to review these interpretations. These interpretations have not been appealed. Therefore, the interpretations in Dowse on these issues is the law of this case. Shadix v. Carroll County, 274 Ga. 560, 563, 554 S.E.2d 465, 468 (2001).

The only issue on appeal is that of estoppel. The estoppel issue is a narrow. SGIC has rehashed all of its arguments made in the Court of Appeals. However, the Writ specifically only granted certiorari on the estoppel issue.

The grant of certiorari may have been based on a more expansive view of the estoppel language than supported by the Ga. Southern opinion which is cited in Dowse. However, even if this Court believes that the estoppel statement precludes any challenge by SGIC to coverage, it

is apparent that the Court of Appeals fully considered SGIC's arguments on the coverage issue. Therefore, the estoppel statement in Dowse should be viewed only for the limited principle that the insurer who denies coverage cannot dispute the validity of the terms of a settlement agreed to by its abandoned insured.

SGIC has continued to argue in its brief before this Court that Cutter, Inc. was completely released from all liability by the settlement. SGIC's position that Cutter, Inc. is not "legally obligated to pay" the judgment failed because that argument is dependant on the Dowses executing a complete release of Cutter, Inc. The Court of Appeals has ruled that Cutter, Inc. was not fully released.. This issue is neither part of the Writ nor on appeal.

Furthermore, SGIC continues to argue that the Dowses are barred by O.C.G.A. § 9-13-74 from seeking any recovery based on the judgment. However, O.C.G.A. § 9-13-74 is inapplicable because the statute only refers to agreements "never" to enforce judgments. In this case, the Dowses did not agree to "never" enforce the judgment. The Dowses agreed to enforce any judgment to the extent of available insurance coverage of Cutter, Inc. Dowse, 263 Ga. App. at 437, 588 S.E.2d at 235-36 (citing Bevill v. North Brothers Co., 168 Ga. App. 97, 308 S.E.2d 215 (1983)); see also Revis v. Forsyth County Hospital Authority, 170 Ga. App. 366, 368- 69, 317 S.E.2d 237 (1984) (interpreting O.C.G.A. §9-13-74); Crim v Jones, 204 Ga. App. 289, 291-92, 419 S.E.2d 130 (1992). The Court of Appeals ruled on this issue also, which is neither part of the Writ and nor on appeal. Dowse, 263 Ga. App. at 438.

Conclusion

Robert and Ursula Dowse respectfully request that this Court affirm the Court of Appeals decision and remand this case to the trial court so that the Dowse may proceed with their garnishment.

This the ____ day of April, 2004.

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