STATE OF SOUTH CAROLINA	)	**IN THE COURT OF COMMON PLEAS**
	)	
COUNTY OF SUMTER	)	**THE THIRD JUDICIAL CIRCUIT**
	)	
	)	
Howell D. Thompson and Tara L. Thompson,	)	**Civil Action No.: 2019CP4302375**
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	
	)	**ORDER OF DISMISSAL**
Carlos D. Toney,	)	
	)	
	)	
Defendant.	)	

THIS MATTER COMES BEFORE THE COURT on Motion to Dismiss/Motion for Summary Judgment, filed by UIM carriers Liberty Mutual Insurance Company and Horace Mann Property & Casualty Insurance Company, on October 26, 2021 and October 29, 2021, respectively. The Motion was heard in open court (Webex videoconference) on Thursday, January 6, 2022. Present and arguing for Liberty Mutual Insurance Company was Aaron J. Hayes, Esq. Also present for Liberty Mutual Insurance Company was Richard E. McLawhorn, Jr. Present and arguing for Horace Mann Property & Casualty Insurance Company was Karl S. Brehmer, Esq. Present and arguing for Plaintiffs was John D. Kassel, Esq. Also before the Court are the written submissions of the parties, namely Liberty Mutual's Memorandum in Support of the Motion (filed November 30, 2021), Plaintiffs' Response in Opposition to the Motion (filed December 15, 2021), Liberty Mutual's Reply to Plaintiff's Response (filed December 21, 2021), Plaintiffs' Supplemental Memorandum in Opposition (filed January 27, 2022), and Liberty Mutual's Sur-Reply to Plaintiffs' Opposition (filed February 14, 2022). Having considered the arguments of counsel at the hearing, the written submissions of the parties, and the pleadings on file, the Court hereby GRANTS the Motion. The Court finds and concludes as follows:

FACTS AND PROCEDURAL HISTORY

This case stems from a June 2, 2017 motor vehicle collision at the intersection of 12th Street Extension and the I-77 ramp in Richland County, South Carolina. (*See* Compl., at ¶ 4.) Plaintiff Howell Thompson alleges generally that Defendant Carlos Toney turned left in front of Plaintiff Howell Thompson, failing to yield the right of way, thereby causing the collision and injuries to, *inter alia*, Howell Thompson's left arm. (*See* Compl., at ¶¶ 5, 6, 8.) Plaintiff Tara Thompson, Howell Thompson's wife, alleges loss of consortium. (Compl., at ¶ 7.) Plaintiffs filed suit on December 5, 2019 (Compl., e-filing stamp at right margin.)

On December 18, 2019, the South Carolina Department of Insurance accepted service of the Summons and Complaint upon purported UIM carrier Horace Mann Property & Casualty Insurance Company (alternatively, "Horace Mann"). (*See* Aff. of Service, e-filed December 19, 2019.) On December 19, 2019, the South Carolina Department of Insurance accepted service of the Summons and Complaint upon LMU. (*See* Aff. of Service, e-filed December 20, 2019.)

On January 2, 2020, LMU timely filed an Answer alleging, *inter alia*, defenses based upon improper service and the Statute of Limitations. (LMU Not. of Appearance and Answer, at ¶¶ 22, 34.) On January 7, 2020, Horace Mann timely filed an Answer alleging, *inter alia*, improper service. (Horace Mann Answer, at ¶ 9.) On February 20, 2020, LMU filed a consent Amended Answer alleging, *inter alia*, defenses based upon improper service and the Statute of Limitations. (LMU Am. Answer, at ¶¶ 22, 34.)

Significantly, the Statute of Limitations in this matter expired no later than June 2, 2020. S.C. Code Ann. § 15-3-530. Plaintiffs never served the Summons and Complaint upon Defendant Carlos Toney, a fact which has been admitted. (*See* Pls.' Ans. to LMU Req. to Admit No. 1

(attached as Exhibit A to LMU Reply to Pls.' Resp. in Opp. to Motion (filed December 21, 2021)); *see also* Pls.' Resp. in Opp. to Motion, at p. 2 (filed December 15, 2021).) As noted above, and after a period of discovery between Plaintiffs and the UIM carriers, this Motion was filed in October 2021, based upon Plaintiffs' failure to serve Defendant Carlos Toney.

STANDARD OF REVIEW

Rule 56(c), SCRCP, provides for judgment as a matter of law where "there is no genuine issue as to any material fact for trial." Generally, the "party seeking summary judgment has the initial responsibility of demonstrating the absence of a genuine issue of material fact." *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991). However, "this initial responsibility [of the moving party] may be discharged by pointing out to the trial court that there is an absence of evidence to support the nonmoving party's case." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002) (citing *Baughman v. Am. Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537, 545 (1991)). "The moving party need not 'support its motion with affidavits or other similar materials *negating* the opponent's claim.'" *Baughman*, 306 S.C. at 115, 410 S.E.2d at 545 (1991) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)) (emphasis in original).

The burden of proving personal jurisdiction and compliance with the *Rules* regarding service rests upon a plaintiff. *Moore v. Simpson*, 322 S.C. 518, 522, 473 S.E.2d 64, 66 (Ct. App. 1996) (citations omitted); *see also* Rule 4(g), SCRCP (requiring the party serving process to file proof).

CONCLUSIONS OF LAW

The Court Agrees with the UIM Carriers' Position

The UIM carriers base their Motion upon *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997). They contend that *Louden* requires dismissal of the instant suit, and the Court agrees. The *Louden* facts are straightforward: on May 1, 1992, Louden and Moragne were involved in a car accident. *See id.* at 466, 486 S.E.2d at 525. Louden filed the case on August 22, 1994, and named Moragne as a defendant. *See id.* at 466, 486 S.E.2d at 526. However, Louden failed to serve Moragne, rather choosing to serve only the UIM carrier. *See id.* at 467, 486 S.E.2d at 526. Eventually, Louden served Moragne on January 20, 1996; however, the statute of limitations had run. *See id.* In affirming the trial court's granting of summary judgment in favor of the named defendant (and therefore the UIM carrier), the *Louden* court noted that service on the putative at-fault driver is "fundamental:"

> It is undisputed that Moragne was not served until after the running of the three year statute of limitations. Louden argues that although Moragne is the named defendant, the underinsured motorist carrier is the real party in interest. We find this argument unpersuasive. *The fact that any judgment rendered will not ultimately be collected from the named defendant but from the insurance company does not excuse the fundamental requirements of personal service*.

327 S.C. at 468, 486 S.E.2d at 526 (emphasis added). The *Louden* court's holding concerning the effect of non-service on the putative at-fault driver in a UIM case is clear and unambiguous:

> In the present case, the negligence action is against the at-fault driver and not directly against the insurance company. Service on the at-fault driver is an essential component of the negligence action. Thus, we hold that the named defendant in an action for benefits under a plaintiff's underinsured motorist policy *must* be properly served with the summons and complaint *prior* to the running of the statute of limitations.

327 S.C. at 469, 486 S.E.2d at 527 (emphasis added). In this case, it is undisputed that putative at-fault Defendant Toney has not been served and that the statute of limitations has run. Therefore, the

Court concludes that the facts of this case are on "all fours" with the facts from *Louden*, and thus the *Louden* rule requires dismissal.[1]

The Court Respectfully Disagrees with Plaintiffs' Position

In opposition to this Motion, Plaintiffs advance four arguments. First, Plaintiffs contend that the UIM Carriers have waived their position on non-service by, *inter alia*, allegedly defective pleading, participating in discovery, and filing this Motion after the case had been in suit for a long period of time. Second, Plaintiffs contend that the filing of this Motion violates Rule 12(g) of the *South Carolina Rules of Civil Procedure*. Third, Plaintiffs contend that UIM Carrier Liberty Mutual is equitably estopped from arguing non-service based on an email exchange between counsel. Fourth, Plaintiffs contend that Defendant "voluntarily" appeared at a deposition prior to the expiration of the statute of limitations and therefore equivalent service was procured according to Rule 4(d) of the *Rules*. The Court respectfully disagrees with each of Plaintiffs' arguments. The Court will address generally Plaintiffs' position, and then address specifically each of Plaintiffs' four contentions.

Generally

The Court notes that Plaintiff's Response focuses heavily on Rule 12(b)(5) and personal jurisdiction. However, Plaintiffs' attempt to characterize this Motion as solely a Rule 12(b)(5) inquiry misses the true issue. This Motion is primarily a Rule 56 motion for summary judgment, which is the appropriate vehicle for the Court to rule on a statute of limitations issue of this type. *See McMaster v. Dewitt*, 411 S.C. 138, 143 767 S.E.2d 451, 453 (Ct. App. 2014) (citing *Kreutner v. David*, 320 S.C. 283, 286-87, 465 S.E.2d 88, 90 (1995) ("[s]ummary judgment is appropriate when a plaintiff does not *commence* an action within the applicable statute of limitations.") (emphasis added). Plaintiffs' Answers to Requests to Admit, *supra*, concede that Defendant Toney

[1] The Court notes that this case is even more striking than *Louden*—which involved untimely service—because this is a case of no service upon the named Defendant.

was never served at all, and therefore this action was never commenced as to the sole named Defendant. *See* Rule 3(a), SCRPC ("[a] civil action is commenced when the summons and complaint are filed with the clerk of court if the summons and complaint are served within the statute limitations in any manner prescribed by law. . . or . . . if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing"); *see also* Rule 5(d), SCRPC (providing for administrative dismissal in cases of non-service). Because of the unique nature of the UIM statute, this dispute transcends the traditional Rule 12 analysis engaged in by Plaintiffs.

An analysis of the case upon which *Louden* was based is illustrative of the nature of the problem in the instant UIM case. *See Louden*, 327 S.C. at 468, 486 S.E.2d at 526 (discussing *Williams v. Selective Ins. Co.*, 315 S.C. 532, 446 S.E.2d 402 (1994)). In *Williams*, Williams brought a breach of contract/bad faith suit directly against her UIM carrier, Selective. 315 S.C. at 533, 446 S.E.2d at 403. Williams had settled with the putative at-fault driver's liability carrier, and then filed a "claim" for UIM benefits. *Id.* Selective denied the UIM claim, and the statute of limitations had run as to the putative at-fault driver without Williams filing suit against the at-fault driver. *Id.* The Supreme Court affirmed dismissal of the case, because Williams had violated the UIM statute's requirement that the right of action against the putative at-fault driver be preserved:

> Under [S.C. Code Ann. §38-77-160] summary judgment was properly granted to [Selective] because Williams failed to comply with the requirement that she serve on [Selective] copies of pleadings *in an action* against the at-fault driver. *Further, an action against the at-fault driver can never be brought since the statute of limitations has run on that cause of action*. Since §38-77-160 bars an action for underinsured benefits absent compliance with the requirement that pleadings *in the action* establishing liability be served on the underinsured carrier, Williams cannot maintain her action against [Selective] . . . We note that the intent of §38-77-160 is to protect an insurance carrier's right to contest its liability for underinsured benefits. *An insured must therefore preserve the right of action against an at-fault driver so long as the underinsured carrier has not agreed to the amount and payment of underinsured motorist benefits*.

Id. at 534-35, 446 S.E.2d at 404 (emphasis added); *see also Ex Parte Allstate Ins. Co.*, 339 S.C. 202, 205, 528 S.E.2d 679, 680 (Ct. App. 2000) ("the requirement of service in [§38-77-160] is absolute"). When Rule 3, *Louden*, and *Williams* are taken together, it is clear that the instant action has not been commenced as to the sole named defendant, Carlos Toney. Therefore, there is no way for the Court to attach a valid judgment against Carlos Toney, should a jury so find. Since a UIM carrier's liability for benefits is derived from the liability of the putative at-fault driver on a prescribed statutory scheme for making a UIM claim, Plaintiffs' point-by-point analysis of Rule 12 and related cases is unavailing. Plaintiffs have failed to preserve the right of action against the putative at-fault driver, thereby violating the UIM statute. In other words, the Statute of Limitations has run and there is no longer a right of action against Defendant Toney, and therefore there can be no UIM claim against Liberty Mutual or Horace Mann because no valid judgment could ever attach to Defendant Toney. *See Louden, supra; Williams, supra; see also* S.C. Code Ann. §38-77-160. The *Louden* rule is the law applicable to this case, and Plaintiffs' arguments to the contrary—whether in law or equity—cannot overcome this binding precedent. Summary judgment in favor of the Defendant and the UIM carriers is required.

Specifically

For the record, the Court will adress Plaintiffs' specific arguments in opposition to this Motion, and the Court respectfully disagrees with each.

I. The UIM Carriers have not waived this issue.

Plaintiffs' primary Response argument is that LMU and Horace Mann have waived the right to assert a Rule 12(b) issues with service of process, and by extension, have waived the right to assert failure to serve process within the statute of limitations. Assuming, *arguendo*, that a UIM

carrier could waive an unserved putative at-fault driver's right to service of process,[2] the Court disagrees with Plaintiffs' position.

If there is a service of process defense, the defending party is required to either plead the defense or make a motion, and it is the defendant's option to issue the defense via a pleading or a motion. *See* Rule 12(b), SCRCP. Of course, the defense is waived if not included in the party's first response to the suit, whether that is a pleading or a motion. *See* Rule 12(h)(1), SCRCP. If a party chooses to make a Rule 12 motion at any point, most of the Rule 12 defenses—including Rule 12(b)(5) defenses—must be made within the first Rule 12 motion, or they are waived. *See* Rule 12(g), SCRCP. The Court finds that the UIM carriers have complied with these *Rules*, by filing appropriate Answers and by raising improper service in the first Rule 12 motion, which is the instant motion.

Plaintiffs advance a waiver argument primarily based upon two cases, *Unisun Ins. v. Hawkins* and *Maybank v. BB&T.* As noted above and in as stated in the UIM Carriers' respective Motions, the *Louden* case is entirely on point to the instant dispute. Plaintiffs' reliance on *Unisun* and *Hawkins*—neither of which were cases involving a claim for UIM benefits—is through analogy and argument. If the rules of statutory construction are any guide, the specific rule must prevail over a general rule. *See James v. S.C. Dep't. of Transp.*, 393 S.C. 440, 445, 711 S.E.2d 919, 922 (Ct. App. 2011) (citation omitted) ("[g]enerally, when a general statute and a specific

[2] Under South Carolina law, the UIM carriers are not in privity with named Defendant Toney or his liability carrier, and the UIM carriers have rights separate and distinct from Toney. *See Ex Parte Allstate, supra*, at 206-207, 528 S.E.2d at 681-682 (citing *Broome v. Watts*, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995)). The attorneys for the UIM carriers do not have an attorney-client relationship with Toney. *See generally Crawford v. Henderson*, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003). The UIM carriers had 30 days to answer from the date they were served. S.C. Code Ann. § 38-77-160. Toney, had he ever been served, would have been entitled to answer separately. This begs the question of whether the waiver argument advanced by Plaintiffs could even apply in a UIM context, as against the UIM carriers. Regardless, as the Court holds, the UIM carriers have committed no such waiver. Further, the UIM carriers certainly have not waived their right to rely on the UIM statute, which must be complied with in "absolute" terms by a UIM claimant. *See Ex Parte Allstate, supra*, at 205, 528 S.E.2d at 680; *see also* Not. of App. and Am. Ans. of LMU, at Introduction ("Insurer intends to preserve all rights pursuant to … 38-77-160 et seq. . .").

statute conflict, the specific statute prevails.") Further, the Court holds that *Unisun* and *Maybank* are distinguishable from the instant case.

a) *Unisun* was not a UIM benefits case.

Unisun was a subrogation action by a UM carrier against a named defendant-in-interest, Bruce Hawkins, who waived his right to assert improper service and statute of limitations by inadequate pleading. *See Unisun Ins. Co. v. Hawkins*, 342 S.C. 537, 542-43, 537 S.E.2d 559, 562 (Ct. App. 2000). In the instant UIM case, the UIM carriers' statutory liability for benefits is directly tethered to Plaintiffs preserving the right of action—and actually commencing said action—against Carlos Toney, which Plaintiffs have failed to do. Because it was not a UIM benefits case, there was no analysis of §38-77-160 in *Unisun.*

Further, to the extent the rule from *Unisun* may be fairly summarized as requiring pleading Rule 12(b)(5) and statute of limitations in conjunction with each other in order to preserve the defense of complete non-service, the Court finds that the UIM carriers have done so. The defective pleading from *Unisun* was as follows: "[p]laintiffs have failed to serve Defendant Bruce Hawkins within the three-year statute of limitations." 342 S.C. at 539, 537 S.E.2d at 560. The *Unisun* court issued a disclaimer when holding that this pleading was defective: "[w]e hold the averment that Unisun 'failed to serve Bruce Hawkins within the three-year statute of limitations' is insufficient, *standing alone*, to raise the defense of insufficiency of service of process." 342 S.C. at 542-543, 537 S.E.2d at 562 (emphasis added). Contrary to the *Unisun* defendant's answer, the UIM carriers here have pled with specificity, and their defenses must be read in conjunction and do not "stand alone" like the imprecise pleading from *Unisun*. *See* Rule 8(e)(1), SCRCP ("[e]ach averment of a pleading shall be simple, concise, and direct"); *see also* Rule 8(f), SCRCP ("[a]ll pleadings shall be so construed as to do substantial justice to all parties").

As a final distinction, the Court notes that the *Unisun* plaintiffs at least *attempted* service upon defendant Bruce Hawkins, *see* 342 S.C. at 539, 537 S.E.2d at 560, while Plaintiffs in this case presumably did not even make the attempt for Defendant Toney, *see* Pl.'s Resp. to LMU Mot. to Dismiss and Mot. for Summ. J., at p. 15 ("[p]laintiffs' counsel … took no further action on any of those defenses"). Whatever the means of service (or lack thereof) in *Unisun*, Bruce Hawkins was at least able to avail himself of the opportunity to answer on his own behalf, defective though his answer turned out to be. 342 S.C. at 539, 537 S.E.2d at 560. Carlos Toney has had no such opportunity, and therefore the Court has no ability to attach a valid judgment to the putative at-fault driver in this case, should a jury find liability for damages.[3]

b) *Maybank* is distinguishable on its facts.

The Court finds that *Maybank v. BB&T* does not apply to this case. *Maybank* involved an out-of-state corporate defendant (BB&T Corporation) asserting what was presumably a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, based upon that defendant's contention that it lacked sufficient contacts with the jurisdiction to be subject to suit in said jurisdiction. *See Maybank v. BB&T Corp.*, 416 S.C. 541, 564-66, 787 S.E.2d 498, 510-511 (2016). The Supreme Court affirmed the trial court's denial of the motion and held, *inter alia*, that BB&T waived the

[3] The Court is aware that Plaintiffs claim that this Motion is filed "late." Specifically, the basis for Plaintiffs' argument is the amount of discovery (depositions, document exchange, etc.) conducted by the parties in the months leading up to the filing of this Motion. (*See* Pls.' Resp. in Opp. to LMU Mot. for Summ. J., at pp. 4-6.) In response, and as a matter of law, the Court cannot find that the timing of this Motion is "late" when the timing of this Motion is nearly identical the timing of the successful motion from *Louden*. (*See* LMU Memo. in Supp. of Mot. Dismiss and Mot. for Summ. J., at pp. 4-5.) As an additional sustaining ground for the Court's ruling in this regard, the Court finds that the danger unfair prejudice to *Defendant* should the instant case continue to trial (i.e., his name would be on a verdict form and he would be subject to entry of judgment, all without ever having been served a copy of the Summons and Complaint filed against him) mitigates in favor of this Motion being granted regardless of timing.

defense of personal jurisdiction by implication even though it had properly pled and preserved the defense pursuant to Rule 12(h). *Id.*

Maybank did not establish a bright-line rule, but rather left the matter to the trial court's discretion. *Id.* The basis of the Supreme Court's holding was the Court's perception that BB&T had "gambled" that it could file its motion "on the eve of trial."[4] *Id.* However, *Maybank* involved a direct defendant, not a UIM carrier, and therefore the statutory requirements—that are of fundamental importance to a UIM claim—were not before the *Maybank* court. In sum, *Maybank* involved a defendant "gambling" that a court would agree that it did not have sufficient ties to South Carolina to be subject to suit in this State, which is of course no party's contention in this case. *Maybank* offers no support to Plaintiffs' position.

c) The other cases cited by Plaintiffs in support of waiver do not apply.

Without delving into the specifics of the other cases cited by Plaintiffs in support of their Rule 12 waiver argument, the Court notes that those cases did not involve a UIM benefits claim, and are therefore distinguishable on that basis alone. *Cf. Datskow v. Teledyne, Inc.* 899 F.2d 1298 (2nd Cir. 1990); *Patterson v. Whitlock*, 392 Fed.Appx. 185 (4th Cir. 2010).

II. There is no Rule 12(g) violation by the UIM Carriers.

Plaintiffs' second argument is that the UIM Carriers have violated Rule 12(g) due to Liberty Mutual's filing of a venue transfer motion in March 2020. Of course, Rule 12(g) provides that certain Rule 12(b) defenses are waived if not raised within the movant's first "Rule 12" motion. *See* Rule 12(g), SCRCP. Apparently, Plaintiffs are attempting to cast Liberty Mutual's statutory venue transfer motion from March 24, 2020 as a Rule 12(b)(3) motion to dismiss for improper

[4] For the reasons discussed in the Court's response to Plaintiffs' equitable estoppel argument, *infra*, particularly the discussion of the reason regarding the precise timing of the filing of this Motion and how this Motion came about in the first place, the Court finds that the UIM Carriers did not "gamble" or wait until the "eve of trial" to file this Motion. (*See also* LMU Reply to Pls.' Resp. in Opp. to Mot. for Summ. J., at pp. 16-18.)

venue. Therefore, according to Plaintiffs' logic, one UIM Carrier has already made a "Rule 12" motion prior to the filing of the instant Motion on October 26, 2021, and therefore the UIM Carriers are now barred from further "Rule 12" motions. As noted above, this is primarily a motion for summary judgment. Further, and assuming, *arguendo*, that Rule 12(g) could be chargeable against the UIM Carriers in the context of a Motion of this type (*but see* n.2, *supra* and discussion of *Louden*, *supra*), the Court finds that Plaintiffs' argument in this regard improperly conflates a statutory motion to transfer venue made pursuant to S.C. Code Ann. 15-7-30 *et seq*. with a Rule 12(b)(3) motion to dismiss for improper venue.

Plaintiffs tacitly concede, as they must, that the March 24, 2020 Motion was not a Rule 12(b)(3) motion: "the [March 24, 2020] motion was *essentially* at Rule 12(b)(3) motion." (Pl. Resp. to Mot. to Dismiss and Mot. for Summ. J., at p. 12 (emphasis added).) Along those lines, the Court finds that Liberty Mutual's March 24, 2020 Motion was not based upon Rule 12(b)(3), but rather S.C. Code Ann. 15-7-30 *et seq.* (particularly S.C. Code Ann. 15-7-100) and the supporting case law concerning the convenience of parties and witnesses.[5] (*See* LMU Mot. to Change Venue, filed March 24, 2020, and Memo. in Supp. of Mot. to Change Venue, filed June 17, 2020.) In any event, there can be no Rule 12(g) impediment to the UIM Carrier's current Motion.

III. Equitable estoppel does not operate as a bar to UIM Carrier Liberty Mutual's Motion.

[5] As a matter of law and logic, it is clear that Rule 12(b)(3) motions to dismiss and statutory motions to transfer venue serve different purposes, call for different relief, and are based upon different law. *See Selective Ins. Co. of South Carolina v. Schremmer*, 465 F.Supp.2d 524 (D.S.C. 2006) (discussing a defendant's motion to dismiss for improper venue made pursuant to Rule 12(b)(3), FRCP [the federal equivalent of Rule 12(b)(3) SCRCP] and the defendant's *alternative* motion to transfer venue made pursuant to 28 U.S.C. 1404(a) [the federal equivalent to S.C. Code Ann. 15-7-30 and 15-7-100.]) In other words, a party should file a Rule 12(b)(3) motion if the venue is *unlawful*, and a party should file a motion to transfer venue if the venue is legally *inconvenient*. *See McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1997) (comprehensive discussion of successive venue transfer motions for "convenience of witnesses" and "ends of justice.") On its face, Liberty Mutual's March 24, 2020 Motion falls in the latter category.

At the outset of the Court's discussion of this difficult issue, the Court notes that Plaintiffs' equitable estoppel argument (and UIM carrier Liberty Mutual's position *contra*) rests upon the representations of counsel to each other throughout the course of protracted litigation. The Court appreciates the candor and professionalism of counsel as the parties briefed and argued this issue. However, the outcome is clear: there can be no equitable estoppel as argued by Plaintiffs in this case. Plaintiffs have failed to meet at least three of the six required elements.[6]

While each deficiency would be sufficient to defeat the estoppel argument on its own, the Court nonetheless will address all three. The Court finds: 1) Liberty Mutual's counsel never represented anything false; 2) Plaintiffs cannot show reliance upon the complained-of representation; and 3) the underlying issue regarding lack of service of process was based on information that was within the custody and control of Plaintiffs from the outset.

a) Liberty Mutual's counsel did not issue any false representation.

Plaintiffs argue that Liberty Mutual should be estopped from arguing to the Court that Plaintiffs never served Carlos Toney, based upon a January 16, 2020 email sent from Liberty Mutual's counsel to Plaintiffs' counsel prior to the running of the Statute of Limitations. This email is as follows:

[6] Generally, the elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truths as to the facts in question; and (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of the position in reliance on the conduct of the party being estopped. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 799 S.E.2d 912 (2017)

Subject: thompson v. toney

Richard, thanks for your answer and discovery requests in this UIM case. your answer suggests an improper venue. Where do you contend venue is proper? The answer has defenses for statute of limitations, spoliation and improper service. Are these serious omissions you will be filing a motion upon or more of a boiler plate pleading at this stage of the litigation. Many thanks. jk

John D. Kassel
Kassel McVey, Attorneys at Law

Subject: RE: thompson v. toney

Boiler plate at this stage. Given the recent appellate court ruling in Garrison v. Taget, I'm probably going to have to start pleading every defense available under Title 1 to 63 to be sure I haven't waived anything.

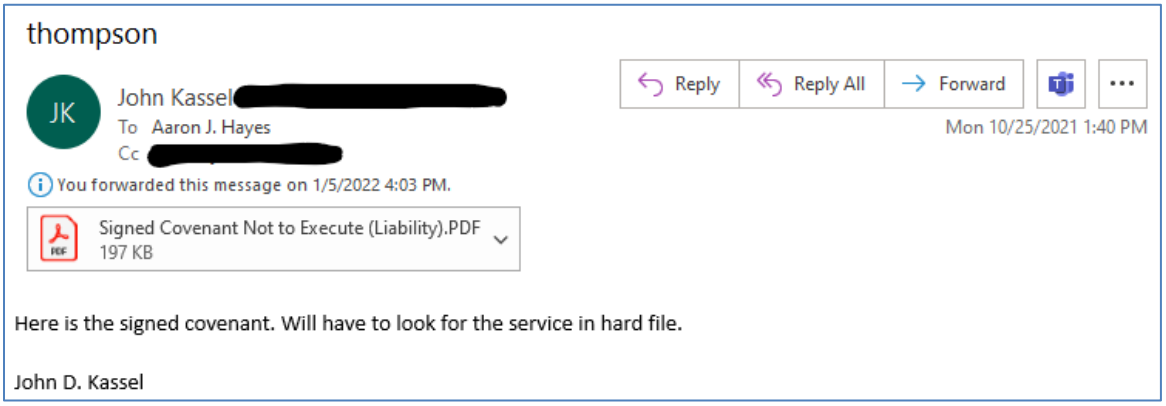
Richard E. McLawhorn, Jr. | *Member*

(found in original form at Ex. A to Pl's Resp. to LMU Mot. to Dismiss and Mot. for Summ. J.) Plaintiffs argue that this email exchange operated as an assertion that there would never be litigation from Liberty Mutual concerning service of process/statute of limitations issues. However, the Court finds that Plaintiffs' argument is built upon an erroneous reading of the unambiguous contents of the email. In the email, Plaintiffs' counsel asks if the statute of limitations and improper service defenses asserted by Liberty are boiler plate "at this stage of the litigation." This question was posed on January 16, 2020, several months prior to the running of the statute of limitations on June 2, 2020. Liberty Mutual's counsel's response—also provided on January 16, 2020, was that Liberty Mutual's counsel considered the statute of limitations and improper service issues to be "boilerplate at this stage," truthfully answering Plaintiffs' counsel's question, but then in the same email Liberty Mutual's counsel expressly stated to Plaintiffs' counsel that he pled as he did "to be sure I haven't waived anything." Liberty Mutual's counsel made no representations about LMU's *future* position with respect to affirmative defenses, and in fact, a fair reading of the email is that Liberty Mutual's counsel intended for there to be no waiver of the defenses itemized in the email by Plaintiffs' counsel. In any event, the Court finds that Liberty

Mutual's counsel did not issue any untrue representations in the complained-of email. It is axiomatic that there can be no estoppel against a party who speaks the truth, and Plaintiffs equitable estoppel claim fails on this element.

b) Plaintiffs fail to demonstrate true reliance on the complained-of representation.

A subsequent email from Plaintiffs' counsel to Liberty Mutual's counsel indicates that Plaintiffs were not in reliance upon any prior representation by Liberty Mutual's counsel regarding the issue of service upon Toney. This email, sent to Liberty Mutual's counsel by Plaintiffs' counsel after an informal request for the Affidavit of Service upon Carlos Toney, is as follows:


thompson

JK John Kassel[redacted]
To Aaron J. Hayes
Cc [redacted]

Reply Reply All Forward ...
Mon 10/25/2021 1:40 PM

You forwarded this message on 1/5/2022 4:03 PM.

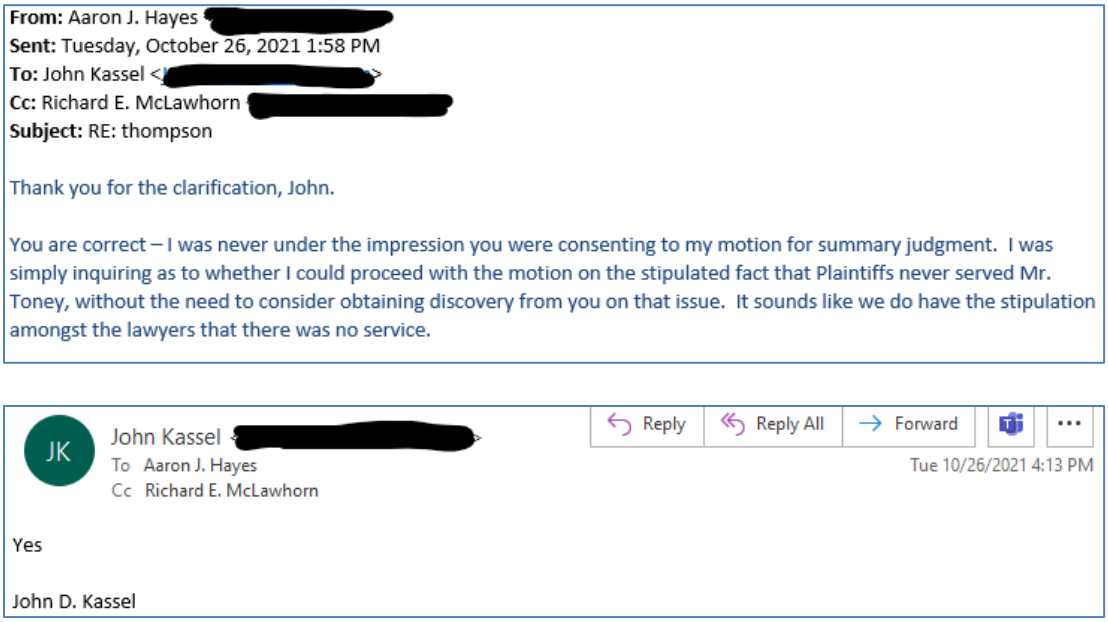
Signed Covenant Not to Execute (Liability).PDF
197 KB

Here is the signed covenant. Will have to look for the service in hard file.

John D. Kassel

(found in original form at Ex. B. to LMU's Reply to Pls.' Resp. in Opp. to Mot. for Summ. J.) In this October 25, 2021 email, sent the day before the filing of the instant motion, counsel for Plaintiffs stated he would "look for the service" [Affidavit of Service on Carlos Toney] in the hard copy file. The Court finds that Plaintiffs' counsel's response to an informal request for the Affidavit of Service does not align with the response of a party who was under the impression that there would be no challenge to service; rather, it aligns with the response of a party who was under the impression that service was readily provable and who was prepared to represent as much to an opposing party. Of course, as is now known, the Affidavit of Service was not produced into the discovery record by Plaintiffs after the informal request, and counsel for Liberty Mutual, operating

with due haste, solicited a factual stipulation on October 26, 2021, to create the good-faith factual basis for the filing of the instant Motion:



From: Aaron J. Hayes [redacted]
Sent: Tuesday, October 26, 2021 1:58 PM
To: John Kassel <[redacted]>
Cc: Richard E. McLawhorn [redacted]
Subject: RE: thompson

Thank you for the clarification, John.

You are correct – I was never under the impression you were consenting to my motion for summary judgment. I was simply inquiring as to whether I could proceed with the motion on the stipulated fact that Plaintiffs never served Mr. Toney, without the need to consider obtaining discovery from you on that issue. It sounds like we do have the stipulation amongst the lawyers that there was no service.

JK John Kassel [redacted]
To Aaron J. Hayes
Cc Richard E. McLawhorn

Reply | Reply All | Forward | ...
Tue 10/26/2021 4:13 PM

Yes

John D. Kassel

(found in original form at Ex. C to LMU's Reply to Pls.' Resp. in Opp. to Mot. for Summ. J.) As a result of this email stipulation, Liberty Mutual filed the instant Motion at 4:40 pm on October 26, 2021, 27 minutes after Plaintiffs' counsel stipulated to no service. (*See* LMU Mot. to Dismiss and Mot. for Summ. J., efiled October 26, 2021 (efiling time-stamp ribbon).) In short, Plaintiffs cannot argue successfully that they were relying on LMU's counsel's representations from a January 16, 2020 email, when Plaintiffs were representing to LMU's counsel as late as October 25, 2021 that they would "have to look" for an Affidavit of Service. Therefore, Plaintiffs' equitable estoppel claim fails on this element.

c) Plaintiffs' Counsel is the One in Possession of the Underlying Information.

Finally, the fact that Plaintiffs never had an Affidavit of Service (or service itself, for that matter) on Carlos D. Toney is information within the custody and control of Plaintiffs. After all, the burden is upon a plaintiff to procure service. *See* Rules 4, 5, SCRCP. The facts of service (or lack thereof) are actually within the purview of the party procuring the service, and it is the party

procuring the service who must swear accordingly. *See* Rule 4(g), SCRCP. Therefore, Plaintiffs' claim of detrimental reliance on Liberty Mutual's position regarding service is *per se* unreasonable, and Plaintiffs' equitable estoppel claim fails on this element.

IV. Plaintiffs' late-stage "voluntary appearance" argument is unavailing.

In Plaintiffs' Supplemental Memorandum in Opposition to this Motion, filed after the hearing, Plaintiffs contend that Carlos D. Toney's giving of a videoconference ("Zoom") deposition in May of 2020 amounts to a "voluntary appearance" as that term is used in Rule 4(d), and therefore according to Plaintiffs the *Louden* issue is moot because "equivalent" service was obtained prior to the expiration of the statute of limitations. The Court disagrees, as Plaintiffs' position effectively would circumvent the UIM statute and *Louden* and *Williams*, *supra*, all of which require timely service upon a putative at-fault driver as a necessary prerequisite to a UIM claim so that the UIM carriers' rights to defend (and right to insist on a valid judgment) are not compromised.

Further, assuming *arguendo* that Rule 4(d)'s "voluntary appearance" provision could apply to the instant case, the Court notes that the record is devoid of any facts that would rise to the level of a finding of "voluntary appearance." The court file for this case reveals no documents filed by Toney nor any notices of appearance by any counsel on behalf of Toney. Further, no party contends that Mr. Toney was present for any matter in this case other than the Zoom deposition referred to by Plaintiffs' counsel in Plaintiffs' Supplemental Memorandum and Exhibit filed on January 27, 2022. Based on the record and the law, the Court declines to hold that Mr. Toney's sitting for a Zoom deposition amounts to a "voluntarily appearance" such that service of the summons and complaint was not required in this case. Mr. Toney's sitting for a brief, videoconference deposition is distinguishable from the South Carolina cases cited by Plaintiffs, most of which involved "voluntary appearances" characterized by robust, continued participation in the case by the party against whom the voluntary

appearance doctrine was being asserted, to include participation at the trial and/or dispositive hearing. *See, e.g., Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) (personal representative participated in *multiple* hearings over *multiple* days); *S.C. Dep't. of Social Svcs. v. Burris*, 297 S.C. 537, 377 S.E.2d 578 (1989) (paternity suit respondent testified *at trial*); *Israel v. Carolina Bar-B-Que*, 292 S.C. 282, 366 S.E.2d 123 (Ct. App. 1987) (trustee defendant testified *at trial*). Further, all of the cases cited by Plaintiffs were litigated *by the actual party* subject to the voluntary appearance doctrine. *Id.* There is no record in this case of any such participation by Toney, and thus Rule 4(d)'s "voluntary appearance" provision cannot be applied to Toney in this case.

CONCLUSION

After careful consideration of all parties' positions, the Court holds that this case falls squarely within the rule from *Louden*, and *Louden* requires that this case be dismissed in spite of any arguments to the contrary. The Motion of Liberty Mutual Insurance Company and Horace Mann Property & Casualty Insurance Company is hereby GRANTED and the above-captioned case is hereby DISMISSED.

AND IT IS SO ORDERED.

_____
R. Kirk Griffin
Circuit Judge, Third Judicial Circuit

Sumter, South Carolina
August ___, 2022

Sumter Common Pleas

Case Caption: Howell D Thompson , plaintiff, et al VS Carlos D Toney

Case Number: 2019CP4302375

Type: Order/Dismissal

So Ordered

s/ R. Kirk Griffin 2768