THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Kirk Griffin, Circuit Court Judge

Civil Action No. 2019-CP-43-02375

Appellate Case No. 2023-000074

Ex Parte: Liberty Mutual Insurance Company and Horace Mann Property and Casualty Insurance Company, Respondents,

In Re:

Howell D. Thompson and Tara L. Thompson,

Appellants,

v.

Carlos D. Toney

Defendant.

APPELLANTS' RETURN TO RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY'S MOTION TO DISMISS

Pursuant to Rule 240(e) of the South Carolina Appellate Court Rules, Appellants Howell D. Thompson and Tara L. Thompson respectfully submit this Return to Respondent Liberty Mutual Insurance Company's Motion to Dismiss.

Liberty once again seeks to hide behind a misrepresentation of South Carolina law and procedural gamesmanship to avoid its contractual obligations. Liberty argues this Court should dismiss this appeal because the notice of appeal was served on the UIM carriers but not Defendant Carlos Toney. However, this argument directly contradicts decades of appellate law and procedure. If the Court were to grant this motion, it would effectively rewrite the law, result in

this Court having issued numerous opinions without jurisdiction, and negatively affect current appeals pending before the Court.

South Carolina law does not require service of the notice of appeal on Defendant Toney because he is not a respondent in this case. A respondent is "the adverse party" in an appeal. Rule 202(a), SCACR. Generally, a named party in the case would be a respondent. However, in the context of an underinsured motorist ("UIM") case, the adverse party is the underinsured motorist carrier, not the named defendant. It is the UIM carriers who filed motions to dismiss the case and obtained the order dismissing the case that is on appeal, not the named defendant. The UIM carriers chose to appear in the case and defend in the name of Defendant Toney, as South Carolina law allows. While the issue of whether Defendant Toney voluntarily appeared and waived service at the circuit court level is one of the issues on appeal, Defendant Toney did not file any pleadings in the case. Appellants have fully resolved their claims with Defendant Toney under a covenant not to execute and this action was initiated solely for the purpose of collecting UIM benefits from Respondents. South Carolina law allows the UIM carriers to stand in the shoes of "Defendant Toney" at a trial of this matter to avoid any prejudice that might result from a jury knowing that an insurance company will be paying any judgment. Thus, Defendant Toney is a fictious party, constructed by the UIM legal fiction, not a respondent in this appeal. Appellants properly served the notice of appeal on the real parties in this case, Respondents.

The Court recognized this fact when it sua sponte corrected the case caption of this appeal to read: *Ex Parte: Liberty Mutual Insurance Company and Horace Mann Property and Casualty Insurance Company,* ***Respondents****, In Re: Howell D. Thompson and Tara L. Thompson, Appellants, v. Carlos D. Toney, Defendant.* The South Carolina Appellate Case Management System also correctly lists the UIM carriers as respondents and does not list Defendant Toney as

a party to this appeal. Liberty's argument that Appellants noted Defendant Toney as a respondent in the notice of appeal is nonsensical. Appellants were required to list the parties of the case as named in the underlying circuit court case. Respondents are not named parties in the case but are defending the case in the name of Defendant Toney.

Requiring service of the notice of appeal on the named defendant in UIM cases would be a deviation from South Carolina law. Section 38-77-160 of the South Carolina Code (emphasis added) states:

> No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the underinsured motorist provision. The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect **its** liability and has thirty days after service of process on it in which to appear. The evidence of service upon the insurer may not be made a part of the record. In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit.

Thus, in order to recover UIM benefits, a plaintiff must initiate an action against the at-fault driver and serve a copy of the pleadings on the UIM carrier. The insurer can then step into the shoes and defend the action in the name of the at-fault driver. The *Louden* case held the initial pleadings must also be properly served on the at-fault driver. *Louden*, 327 S.C. 465, 469, 486 S.E.2d 525, 527 (Ct. App. 1997). However, once the pleadings initiating the case are served on the at-fault driver and the UIM carrier steps into the shoes of the named defendant to defend the action, South Carolina law does not require continued service of every filing on the named defendant. Instead, the filings must be served on the UIM carrier who is defending the action.

Accepting Liberty's argument would rewrite South Carolina law to require that all filings be served on the at-fault driver, not just the initial pleadings, even though the at-fault driver is not

involved in the litigation of the case and is protected from judgment. Even Liberty does not believe this is required. Following Liberty's argument, Liberty, and every other party to a civil action where the UIM carrier has assumed the defense, would have to serve the at-fault driver with copies of its filings, including the motion to dismiss the case filed by Liberty. However, Liberty did not file any proofs of service showing service of pleadings on the at-fault driver. *See* Civil Action No. 2019-CP-43-02375. This is because the UIM statute provides a unique statutory scheme that allows UIM carriers to act as the real adverse party when a settlement has occurred with the at-fault driver. It is undisputed that Liberty, as UIM carrier, entered an appearance and actively participated in the litigation. As to whether the at-fault driver voluntarily appeared and/or waived service in the lower court goes to the merits of the appeal. Should the Court determine, after a review of the record on appeal and briefing, that the at-fault driver voluntarily appeared or waived service, this case is in the same posture as the countless UIM cases previously and presently on appeal.

Appellants properly served the notice of appeal in this case in accordance with the UIM statute, the South Carolina Appellate Court Rules, and the appellate courts' long-standing interpretation of those rules. A review of the many UIM appeals that have been and are before this Court show that Rule 203(b)(1) required Appellants to serve the UIM carriers as respondents, not the named defendant. For example, in *Ex Parte: Travelers Home and Marine Insurance Company*, the UIM carrier appealed an order of the circuit court granting a new trial to the plaintiff on the wrongful death cause of action. 427 S.C. 238, 830 S.E.2d 718 (Ct. App. 2019). **The UIM carrier filed a notice of appeal and served it only on the plaintiff and not the named defendant**. Exhibit A, May 2, 2017 Notice of Appeal, Appellate Case No. 2017-001083. In the caption of the case, the UIM carrier listed themselves as the appellant. *Id.* This court sent a letter

requesting that the UIM carrier clarify its status as the appellant because the UIM carrier was not a named party. Exhibit B, May 8, 2017 Correspondence, Appellate Case No. 2017-001083. The UIM carrier responded:

> The [UIM carrier] is not a named party in the litigation but was served as an underinsured motorist carrier for the plaintiff and subsequently appeared and defended the lawsuit in the name of the defendant pursuant to the rights granted to it under S.C. Code Section 38-77-160. The named defendant was not represented at trial as the Plaintiff had resolved his claim with the defendant and filed the suit only for the purpose of collecting underinsured motorist benefits from [the UIM carrier]. Therefore, although not technically a named party as that is not allowed under Section 38-77-160, [the UIM carrier] appeared and has been defending in the name of the defendant since the case was initially filed and would technically be the appellant, not the named defendant.

Exhibit C, May 25, 2017 Correspondence, Appellate Case No. 2017-001083. The Court agreed with this interpretation and issued a letter correcting the caption of the case to *Ex Parte: The Travelers Home and Marine Insurance Company, Appellant, In Re: William Gresham as Personal Representative of the Estate of John Corey Stringfellow, Respondent, v. Cameron Thomas Stringfellow, Defendant*. Exhibit D, May 31, 2017 Correspondence, Appellate Case No. 2017-001083. The Court's case management system notes the UIM carrier was the appellant and the plaintiff was the Respondent; the named defendant is not listed as a party to the appeal.

Similarly, in *Ex Parte: Progressive Northern Insurance Company*, the plaintiff in a UIM case appealed an order granting a UIM carrier's motion to dismiss. No. 2014-001026, 2016 WL 820920, at *1 (S.C. Ct. App. Mar. 2, 2016). **The appellant served the notice of appeal on the UIM carrier, not on the named defendant**. Exhibit E, May 8, 2014 Notice of Appeal, Appellate Case No. 2014-001026. The caption initially listed the defendant as the respondent, but the UIM carrier requested that the Court correct the caption to list the UIM carrier as the respondent. The UIM carrier noted it was "properly the Respondent." Exhibit F, February 3, 2015 Correspondence, Appellate Case. No. 2014-001026. The Court agreed and issued a letter correcting the caption to

Ex Parte: Progressive Northern Insurance Company. Exhibit G, March 5, 2015 Correspondence, Appellate Case. No. 2014-001026.

More recently, in March 2023, a UIM carrier appealed an order awarding a judgment in favor of the plaintiff. *Ex Parte: USAA Property & Casualty Insurance Company*, Appellate Case No. 2023-000430. **The UIM carrier served the notice of appeal on the plaintiff, not the named defendant.** Exhibit H, March 13, 2023 Notice of Appeal, Appellate Case No. 2023-000430. This Court's initial appeal letter and case management system note the UIM carrier is the appellant. Exhibit I, March 17, 2023 Correspondence, Appellate Case No. 2023-000430. The named defendant is not a party to the appeal.[1] *See* Appellate Case No. 2023-000430.

In a feat of mental gymnastics, Liberty really seeks to have this Court make rulings on the ultimate issues involved in this case without the benefit of full briefing and the record on appeal—whether this action was properly commenced in the circuit court.[2] In the motion, Liberty cites *Louden* almost exclusively. However, whether the circuit court erred in relying on *Louden* to dismiss this case is an issue in this appeal. The Court should ignore Liberty's attempts to argue that the case was not properly commenced against Defendant Toney. For the purposes of this motion to dismiss, the Court must assume service of the underlying action was proper.[3] *See State*

[1] In *Ex Parte USAA*, counsel for the named defendant initially appeared in the action and filed an answer. *See* July 23, 2019 Answer, *Burns v. Branham*, Civil Action No. 2019-CP-40-02528. Counsel for UIM appeared to defend in the name of the defendant pursuant to section 38-77-160. *See* April 16, 2020 Notice of Appearance, *Burns v. Branham*, Civil Action No. 2019-CP-40-02528.

[2] Liberty also misstates the issues involved in this appeal. In footnote 2 of the motion, Liberty states: "If [the circuit court's ruling that Toney did not engage in a voluntary appearance] is correct, then the underlying action was never commenced as to Toney at all and Liberty Mutual should be entitled to prevail on the merits of this appeal." (Mtn. p. 4.) This is not true. Although Defendant Toney's voluntary appearance is one issue, there are other issues involved in this appeal, including whether Liberty could raise service as a defense, that need to be considered by this Court if the Court finds the circuit correctly held Defendant Toney did not voluntarily appear.

[3] Although Liberty makes broad statements about the ultimate merits of the appeal, even Liberty seems to admit that, for the purposes of the motion to dismiss, the Court must assume proper

v. Johnson, 74 S.C. 401, 54 S.E. 601, 603 (1906) ("[T]he merits [of an appeal] cannot be considered upon a mere motion."); *Du Pont v. Du Bos*, 33 S.C. 389, 11 S.E. 1073, 1075 (1890) (explaining the Court should not grant a preliminary motion to dismiss an appeal when a full argument on the merits is necessary). The limited question before the Court in considering Liberty's motion is whether an at-fault driver who has not litigated the case is a proper respondent in a UIM appeal or whether the proper respondent is the UIM carrier who has stepped into the shoes of the named defendant to defend the case pursuant to its rights under South Carolina law. As noted by this Court in numerous other appeals, including *Ex Parte: Travelers Home and Marine Insurance Company*, *Ex Parte: Progressive Northern Insurance Company*, and *Ex Parte: USAA Property & Casualty Insurance Company*, the proper respondent is the UIM carrier and the at-fault driver is not a party to the appeal.

Contrary to Liberty's assertion, Appellants do not "seek to 'have their cake and eat it too.'" (Mtn. p. 5.) Instead, Appellants seek the judicial review they are entitled to under South Carolina law of the circuit court's order foreclosing their ability to recover the contractual benefit of UIM coverage. Liberty relies on flawed procedural gamesmanship in an attempt to avoid its contractual obligations. Appellants properly served the notice of appeal in this case. The Court should deny Liberty's Motion to Dismiss and allow this appeal to proceed.[4]

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service occurred and the only issue before the court is whether Defendant Toney is a respondent that should be served with the notice of appeal. (Mtn. p. 4.) Liberty bases its motion on an assumption that Defendant Toney voluntarily appeared in this action; however, Appellants make numerous arguments in their initial brief which the Court must reach when considering the merits of this appeal, such as whether the insurance carriers appropriately asserted service defenses, whether the carriers waived any service-related issues, etc. To the extent that Liberty argues the Court should assume certain arguments are true while assuming others are false, this is improper and shows that the Court needs to consider the merits of the entire appeal.

[4] Further, Appellants note this Court has allowed an appellant ten days to cure a defect in service where the appellant served the respondents but failed to serve a party who was named but was not

RESPECTFULLY SUBMITTED,

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May 22, 2023

involved in the motions to dismiss giving rise to the order on appeal. *See* Appellate Case No. 2023-000232, February 17, 2023 Deficiency Letter.

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PROOF OF SERVICE

I certify that a true copy of Appellants' Return to Respondent Liberty Mutual Insurance Company's Motion to Dismiss in this case has been served on the following, this 22nd day of May, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447).

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