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**May 30 2023**

**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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

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Appellate Case No. 2023-000074

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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.

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**RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY'S REPLY TO  
APPELLANTS' RETURN TO MOTION TO DISMISS APPEAL FOR LACK OF  
JURISDICTION**

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**INTRODUCTION**

Appellants inaccurately deem this Motion to be “a misrepresentation of South Carolina law and procedural gamesmanship.” (*See Ret.* at 1.) In reality, this Motion is well-founded in the law and the basic requirements of fundamental fairness intrinsic to a well-functioning democracy. Carlos Toney, who gives his name to this case in both the court below and this Court, has never been given a single piece of paper by Appellants informing him that he is being summoned to answer for what is now an appeal to the Court of Appeals. Appellants’ arguments

against this Motion are unavailing, and this Motion to Dismiss for Lack of Jurisdiction must be granted. Respondent Liberty Mutual hereby replies to Appellants' arguments in the order raised in their Return:

### **REPLY ARGUMENTS**

#### **1. Toney is a true "adverse party" and thus a necessary respondent.**

In their first argument, Appellants contend that service of the notice of appeal on Toney is not necessary because "Toney is a fictitious party, constructed by the UIM legal fiction, not a respondent in this appeal." (Ret., at 2.) Appellants conclude this portion of their argument by claiming that "Appellants properly served the notice of appeal on the real parties in this case, Respondents [i.e. the UIM carriers]." (*Id.*) Appellants cite to no authority for either of these quoted portions. In fact, those quoted portions from Appellants' Return are directly contrary to South Carolina law as established by the precedent of this Court:

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. A court may not enter a valid judgment against an individual over whom the court lacks personal jurisdiction.

*Louden v. Moragne*, 327 S.C. 465, 468, 486 S.E.2d 525, 526 (emphasis added). The *Louden* court also explained:

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.

*Id.* at 469, 486 S.E.2d at 527 (emphasis added). *Louden* makes it clear that a court cannot enter a judgment against any individual without jurisdiction, and in the context of a claim in which UIM benefits are sought, the court still must have jurisdiction over the at-fault driver even if that

driver will not be called upon to pay the judgment. Though the *Louden* case was addressing the circuit court's lack of jurisdiction over the at-fault driver, the appellate court rules extend this reasoning to the service of the notice of appeal, which must be served on "all respondents." See Rule 203(b)(1), SCACR. Since the law is clear that Toney is the real, adverse party to Appellants, therefore he qualifies as a "respondent" as that term is defined in Rule 202(a), SCACR. He should have been served with the notice of appeal but was not. This action is "against the at-fault driver and *not* directly against the insurance company" see *Louden, supra* (emphasis added), and therefore this Court must have jurisdiction over Toney for this appeal to proceed. This Court lacks jurisdiction over Toney, and this appeal must be dismissed.

**2. The Clerk of Court's administrative revision of this caption is understandable from a case management perspective but is not controlling as to jurisdiction.**

In their second argument, Appellants contend that the Clerk of Court's administrative revision of the caption of this appeal into the current version somehow operates to alleviate their lack of service of the notice of appeal upon Toney. (*See Ret.*, at 2-3.) While Respondent Liberty Mutual certainly agrees that the Clerk of Court may do what is necessary for the proper administrative cataloguing of an appeal, nevertheless Liberty Mutual points out that Appellants' argument in this regard is really nothing more than a back-door attempt by Appellants to convince this Court to abrogate the jurisdictional rules governing an appeal. The Supreme Court has stated previously that appellate courts cannot extend the time for service of a notice of appeal nor waive the service requirement *in toto*, as Appellants (functionally) ask this Court to do. "The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to 'rescue' the delinquent party by extending *or ignoring* the deadline for service of the notice." *Elam v. S.C. Dep't. of Transp.*, 361 S.C. 9, 14-15 602 S.E.2d 772, 775 (2004) (citing *Mears v.*

*Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985)) (emphasis added); *see also* Rule 263(b), SCACR (“[t]he time prescribed by these Rules for performing any act *except for the time for serving the notice of appeal* under Rules 203 and 243 may be extended or shortened by the appellate court...”). Appellants’ second argument is without merit.

**3. Appellants ignore the import of the Summons and Complaint and the Notice of Appeal. These items are jurisdictional.**

Appellants’ third argument is that in a UIM case, “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 is defending the action.” (Ret. at 3 (citing to no authority for this proposition).) It appears that Appellants are attempting to contend that if a plaintiff obtains service of the summons and complaint upon the at-fault driver, then service of all documents afterwards—to include a notice of appeal—need not be accomplished upon the at-fault driver but can instead be accomplished by service upon a UIM carrier.

Again, this is nothing more than a back-door attempt by Appellants to convince this Court to disregard its own rules a) regarding jurisdiction and b) regarding the proper relationship (or lack thereof) between a UIM carrier and an at-fault driver. Service of a summons and complaint upon an at-fault driver is jurisdictional, *see Loudon, supra*, but so is service of a notice of appeal upon a respondent, *see Elam, supra*. Other documents in the case—while important—do not rise to this level. The law is clear that the jurisdictional documents in a case involving a UIM carrier must be served on the at-fault driver to establish jurisdiction, because a matter of law a UIM carrier and an at-fault driver *are not in privity with each other and do not have an attorney-client relationship*. *See Ex Parte Allstate Ins. Co.*, 339 S.C. 202, 207, 528 S.E.2d 679,

681-682 (“Allstate, as [plaintiff’s] UIM carrier, had rights separate and distinct from those of [defendant]... not only, then, was Allstate [the UIM carrier] never a party to the suit, it was not in privity with [defendant]”) (internal quotation marks omitted); *Crawford v. Henderson*, 356 S.C. 389, 398, 589 S.E.2d 204, 209 (Ct. App. 2003) (holding that there is no attorney-client relationship between the named defendant and a UIM carrier). Taken together, the foregoing rules clearly establish that a jurisdictional document must be served directly on an at-fault driver, not just the UIM carrier. Appellants’ contention otherwise defies law and logic.

**4. The case examples cited by Appellants do not address the issues raised in this Motion.**

In their fourth argument, Appellants cite three case examples, apparently taken from documents available on C-Track Public Access. None of these cases reach the issue raised in this Motion and all three cases are distinguishable.<sup>1</sup> The first and third cases cited by Appellants are *Ex Parte Travelers Home & Marine Ins. Co.*, 427 S.C. 238, 803 S.E.2d 718 (Ct. App. 2019) and *Ex Parte USAA Prop. & Cas. Ins. Co.*, Appellate Case No. 2023-000430. Both *Ex Parte Travelers* and *Ex Parte USAA* were appeals taken by a UIM carrier against the underlying plaintiffs, and thus offer Appellants no help in their opposition to this Motion.

The second case cited by Appellants, *Ex Parte Progressive Northern Ins. Co.*, 2016 WL 820920, is instructive not in Appellants’ favor, but in favor of Respondents’ position.<sup>2</sup> In *Ex Parte Progressive*, the underlying plaintiff took an appeal against a UIM carrier who had procured dismissal, and there is no indication that anyone raised the issue of whether the at-fault driver had been served with the notice of appeal. Compare Final Br. of Appellant, Appellate

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<sup>1</sup> One of the cases—*Ex Parte Progressive*—is unpublished and therefore should not have been cited by Appellants. See Rule 268(d)(2), SCACR. Because it was raised, Respondents must distinguish *Ex Parte Progressive*, as is done *infra*. One of the other cases raised by Appellants—*Ex Parte USAA*—is younger than the instant case and has produced no rulings, unpublished or otherwise.

<sup>2</sup> *But see* n.1, *supra*.

Case No. 2014-001026 (filed April 20, 2015) *with* Final Br. of Respondent, Appellate Case No. 2014-001026 (filed April 20, 2015). Perhaps no one raised the issue because the underlying at-fault driver was in default for failure to appear, had lost the motion to set aside default, and opted not to appeal. *See* Final Br. of Respondent, Appellate Case No. 2014-001026, *supra*, at 13-14. Not surprisingly, the UIM carrier then prevailed in its appeal because the summons and complaint had not been served upon the UIM carrier until after the default had been entered. *See* 2016 WL 820920 at \*1 (quoting *Ex Parte Allstate*, 339 S.C. 202, 205, 528 S.E.2d 679, 681 (Ct. App. 2000)) (“[t]o allow service on a UIM carrier *after that action has been tried* would defeat the purpose of granting the UIM carrier the right to appear and defend”) (internal quotation marks omitted) (emphasis added); *see also* Final Br. of Respondent, Appellate Case No. 2014-001026, *supra*, at 1-2. Appellants’ citation to a UIM case—wherein the UIM carrier prevailed on appeal—is no support to their opposition to this Motion.

**5. This Motion is made on procedural grounds, not the merits of the appeal.**

Finally, Appellants contend that “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 . . .” (Ret. at 6.) Appellants are incorrect. Liberty’s position on this Motion is simple: if Toney was served with process below—as Appellants contend in their Initial Brief—then he should have been served with process in this Court, as he would be the necessary respondent. This is a separate question from the merits of this appeal which concern, *inter alia*, whether Toney was served at all in the court below. If Appellants truly believe that Toney was served below, then they should not have ignored the requirement that he be served with the notice of appeal to this Court.

**CONCLUSION**

For the reasons stated in Respondent Liberty Mutual's Motion to Dismiss and this Reply, the Motion must be granted as the appellate courts lack jurisdiction over Toney, a necessary respondent.

Respectfully submitted,

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**PROOF OF SERVICE**

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I certify that a true copy of the foregoing Respondent Liberty Mutual Insurance Company's Reply to Appellants' Return to Motion to Dismiss Appeal for Lack of Jurisdiction in this case has been served on the following, this 30<sup>th</sup> 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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Respectfully submitted,

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