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SC Court of Appeals

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

RESPONDENT HORACE MANN PROPERTY AND CASUALTY INSURANCE COMPANY'S INITIAL BRIEF

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ATTORNEYS FOR RESPONDENT
HORACE MANN PROPERTY AND
CASUALTY INSURANCE COMPANY

Columbia, South Carolina
June 19, 2023

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STATEMENT OF THE CASE AND FACTS

On December 5, 2019, Plaintiff-Appellants Howell D. Thompson and his wife, Tara L. Thompson, (hereinafter "Appellants") brought this action alleging negligence and loss of consortium against Defendant Carlos D. Toney, seeking recovery from Appellants' underinsured motorist ("UIM") insurance carriers for damages sustained from a motor vehicle accident. In Appellants' initial action against Defendant Toney, Appellants settled their claims against the Defendant and his liability carrier, State Farm, on September 9, 2019. (Ex. H to Mot. to Alter/Amend.) As a result, Appellants executed a Covenant Not to Execute to preserve their claims for recovery from their own UIM coverage.

In the present action on appeal, Appellants served the Summons and Complaint on Respondent Liberty Mutual Insurance Company (hereinafter "Liberty Mutual") on December 19, 2019, and on Respondent Horace Mann Casualty and Property Insurance Company (hereinafter "Horace Mann", and, together with Liberty Mutual, "Respondents") on December 18, 2019, pursuant to S.C. Code Ann. §§ 38-5-70 and 38-77-160. (Certs. of Service.) By December 20, 2019,

Appellants filed letters from the South Carolina Department of Insurance, accepting service on behalf of both the Respondents. (*Id.*) However, Appellants did not, at any point, personally serve Defendant Toney with the Complaint and, therefore, did not file a proof of service showing service on Toney. (Pls.' Ans. To Liberty Mutual Req. to Admit No.1.)

On January 2, 2020, Liberty Mutual timely filed an Answer alleging, *inter alia,* defenses based upon improper service and the Statute of Limitations. (Liberty Mutual 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, Liberty Mutual filed a consent Amended Answer alleging, *inter alia,* defenses based upon improper service and the Statute of Limitations. (Liberty Mutual Am. Answer, at ¶¶ 22, 34.) By June 2, 2020, Appellants failed to serve the Summons and Complaint on Defendant Carlos Toney before the Statute of Limitations in this matter expired, which Appellants have admitted. (Pls.' Ans. To Liberty Mutual Req. to Admit No. 1); *see also* (Pls.' Resp. in Opp'n to Motion, at p. 2 (filed December 15, 2021).)

As a result, Liberty Mutual filed a Motion to Dismiss or, in the alternative, Motion for Summary Judgment on October 26, 2021, alleging Appellants' failure to serve the Complaint on Toney within the Statute of Limitations. (Mot. to Dismiss.) Three days later, Horace Mann filed a Motion to Dismiss for Failure to Obtain Service of Process, whereupon Appellants submitted their Memoranda in Opposition to these motions on December 15, 2021, and January 27, 2022. (Mot. to Dismiss); *see also* (Pls.' Mems. in Opp'n.)

This case proceeded to a hearing before the Hon. R. Kirk Griffin on January 6, 2022. At the hearing, Respondents made motions for dismissal and/or summary judgment as to Appellant's failure of service on the Defendant Toney within the Statute of Limitations. The circuit court subsequently construed the motion as a Motion for Summary Judgment under Rule 56 of the South

Carolina Rules of Civil Procedure and granted the motion in favor of the Respondents. The circuit court specifically found that the action had not been commence against Toney, a valid judgment could not attach against Toney, and Toney would be prejudiced by allowing the case to move forward. (Aug. Order, at 7, 10.) The circuit court further noted that the Respondents, as UIM carriers, did not waive service because "the timing of [their motions were] nearly identical to the timing of the successful motion in *Louden.*" (*Id.,* at 10.) Therefore, the Respondents participation in litigating this case, without more, did not rise to such a degree as to constitute a waiver of service. *Id.* Finally, the circuit court held Toney's appearance at his deposition did not amount to a voluntary appearance in the case because it would "circumvent the UIM statute, *Louden* and *Williams*[,] 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 the right to insist on a valid judgment) are not compromised." (*Id.*, at 17-18.)

Upon entry of judgment in favor of Respondents, Appellants filed a motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (Mot. to Alter/Amend.) The court held that the motion did not necessitate any oral argument from the parties and summarily denied Appellants' motion on December 21, 2022. (Dec. Order.) Appellants filed a Notice of Appeal on January 19, 2022. (Notice of Appeal.)

STANDARD OF REVIEW

When reviewing the dismissal of an action, an appellate court must apply the same standard of review as the trial court. *Cap. City Ins. Co. v. BP Staff, Inc.,* 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). For actions dismissed through a Motion for Summary Judgment, appellate courts apply the same standard prescribed to the trial court under Rule 56(c) of the South Carolina Rules of Civil Procedure, which states that "summary judgment is proper when there is no genuine

issue as to any material fact and the moving party is entitled to judgment as a matter of law." *USAA Prop. & Cas. Ins. Co. v. Clegg,* 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). The evidence presented to the trial court and all reasonable inferences that may be drawn therefrom must be viewed in the light most favorable to the non-moving party in determining the existence of any triable issues of fact. *Guinan v. Tenet Healthsystems of Hilton Head, Inc.,* 383 S.C. 48, 677 S.E.2d 32, 35 (Ct. App. 2009).

ARGUMENT

I. Because the Appellants failed to serve the at-fault driver with the Summons and Complaint within the Statute of Limitations, the circuit court did not err in dismissing the case.

Under *Louden,* this Court specifically held 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." *Louden,* 327 S.C. at 469, 486 S.E.2d at 527. Here, the Appellants voluntarily admitted that they did not personally serve Defendant Toney with the Summons and Complaint upon filing nor at any point after, thereby directly conflicting with the findings of this Court in *Louden.* As an alternative, Appellants base their arguments solely on the premise that Defendant Toney "voluntarily appeared" at a deposition on May 15, 2020, which Appellants argue is the equivalent of service of process (i.e., "voluntary appearance," as used in Rule 4(d) of the South Carolina Rules of Civil Procedure) within the Statute of Limitations.[1]

[1] Appellants cite to Rule 3 of the South Carolina Rules of Civil Procedure to provide further clarification as to when they allege the Statute of Limitations expired in this action; however, the date of expiration for the Statute of Limitations on this particular issue is irrelevant, for multiple reasons. First, Appellants argue that the date of expiration was September 30, 2020, as opposed to June 2, 2020, therefore they "served" Defendant Toney within the Statute of Limitations. The Appellants allege service was completed by Defendant Toney's appearance at his deposition on May 15, 2020; therefore, the disputed date of expiration does not carry any determinative value on this issue. Further, the Appellants have never personally served Defendant Toney with the Summons and Complaint; therefore, either date of expiration would still bar the Appellants' claims against Toney under the Statute.

However, the "voluntary appearance" doctrine is not a bright-line rule that can be applied mechanically, but rather must be determined on a case-by-case basis. See *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP,* 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) ("[n]o specific act constitutes an appearance...courts decided on a case-by-case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction.") (citations omitted). Appellants relied upon several cases in support of Appellants' position; however, Appellants failed to recognize that their position effectively circumvents South Carolina law requiring timely service upon a putative at-fault driver as an essential prerequisite to a UIM claim. (Aug. Order, at 17.) In the cases cited by Appellants, a "voluntary appearance" revolved around a robust, extensive participation in the respective case by the party against whom the doctrine was being asserted, including participation in 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 the cases cited by Appellants involved parties who engaged in the presentation of *their own argument* on the issue of whether a voluntary appearance occurred. In *New Hampshire Ins. Co. v. Bey Corp.,* this Court held that even a party's appearance at a hearing to set aside default was not a voluntary appearance as contemplated by Rule 4(d), thereby demonstrating that the mere presence of a named party at *one* hearing or similar proceeding is insufficient to grant a finding of a voluntary appearance. *New Hampshire Ins. Co. v. Bey Corp.,* 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993). Here, Defendant Toney never filed any documents on his own behalf nor any notices of appearance by any counsel on his behalf. The only presence Defendant Toney has ever had in

this action was his sitting for a brief, videoconference deposition. While Appellants argue that Defendant Toney "voluntarily appeared" for his deposition, this presence by Toney does not rise to the level of participation of other parties, as cited by Appellants. Therefore, Defendant Toney has not actively participated in this case, and thus Rule 4(d) of the South Carolina Rules of Civil Procedure's "voluntary appearance" provision is not applicable to Toney.

II. Because this case falls squarely within the rule of *Louden,* the circuit court did not err in relying on *Louden* to dismiss the case.

In the August Order granting Summary Judgment for Respondents, the circuit court found that, factually, *Louden* was "entirely on point to the instant dispute" and utilized this case as a *partial* support in rendering its decision. While Appellants construe their arguments based on waiver and estoppel against *Louden,* the circuit court did not make any such findings as they relate to the *Louden* case but rather use other legal support to rebut those claims.[2] The circuit court noted that *Louden* provides a clear indication "...that service on the putative at-fault driver is 'fundamental,'" and that this case is *factually* on "all fours" with *Louden.*[3] (Aug. Order, at 4.)

Notwithstanding those indications made by the circuit court, Appellants argue that the absence of waiver and estoppel issues in the *Louden* case make that case "*entirely* separate and distinct" from the present action. (Appellants' Init. Br., at 16.) The Appellants state:

> *Louden* is not dispositive in this matter because [it] did not consider or rule on the numerous foundational issues involved in the instant case, including whether lack of service was raised with specificity, whether the insurance carriers waived the service defense by participating in robust litigation for nearly two years, whether the insurance carriers waived the service defense by failing to timely raise it in a Rule 12(b) motion, whether Liberty Mutual waived the service defense by filing a venue motion and failing to raise the service defense, or whether an insurance

[2] These points are discussed in subsection III below.
[3] *See Aug. Order,* at 4 for factual comparisons made by the circuit court between the *Louden* case and the present action.

> carrier was estopped from raising the service defense after assuring Plaintiffs its defense was merely boiler plate.

(Appellants' Init. Br., at p. 15.) The mere absence of these issues from *Louden* do not make the *Louden* case entirely separate and distinct, and the circuit court ensured that these issues were addressed with great specificity in addition to the rule from *Louden.* (*See, e.g.,* Aug. Order, at 9.) In *Louden*, Louden and Moragne were involved in a car accident on May 1, 1992. See *Louden*, 327 S.C. at 466, 486 S.E.2d at 525. Louden filed the case on August 22, 1994, and named Moragne as a defendant. *Id,* at 466, 486 S.E.2d at 526. However, Louden failed to serve Moragne and rather chose to serve only the UIM carrier. *Id,* at 467, 486 S.E.2d at 526. Eventually, Louden served Moragne on January 20, 1996; however, the Statute of Limitations had run at that point. *Id.* Here, Appellants filed suit against the named Defendant, Carlos Toney, and subsequently served Appellants' UIM carriers, Liberty Mutual and Horace Mann. However, Appellants failed to ever serve process on the named Defendant Toney. In this case, the Statute of Limitations expired no later than June 2, 2020.[4] As such, the circuit court properly concluded that the *Louden* case and the present action were factually similar and even gave the Appellants a generous nod in noting such comparisons, as Louden, unlike Appellants, at least attempted to serve process on the named Defendant.

Appellants misconstrue the findings of the circuit court in relation to its findings on waiver and estoppel. Appellants argue that the circuit court "erred in construing the *Louden* case to hold that waiver and estoppel cannot apply in the UIM context where these issues were never raised to or ruled upon by this Court in *Louden* or even present in *Louden.*" (Appellants' Init. Br., at 17.)

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[4] See *Mem. In Supp. Of UIM Carrier Liberty Mut.'s Mot. to Dismiss/Motion to Summ. J.,* at 4 for a side-by-side timeline of the factual similarities between the present action and *Louden.*

However, this argument by Appellants misstates the circuit court, as the court provided "[Defendant] Toney, had he ever been served, would have been entitled to answer separately. This begs the question of *whether* the waiver argument advanced by [Appellants] could even apply in a UIM context, as against the UIM carriers." (Aug. Order, at 8 n.2.) The circuit court did not reference or cite to *Louden* in making this determination. Further, the circuit court did not construe *Louden* as Appellants argue, rather it merely alludes to the fact that there *may* be some circumstance in the UIM context in which waiver and estoppel issues might arise; however, any such circumstance is not present here.

III. Because the Respondents properly raised service-related issues in their Answers and provided Appellants with sufficient notice of the service-related issues, the circuit court did not err in finding Respondents did not waive these issues.

In this case, Respondents made their defenses of lack of service of process on Defendant Toney abundantly clear to Appellants within the Statute of Limitations. Respondents (1) sufficiently asserted their defenses in their respective Answers; (2) raised service-related issues pursuant to the South Carolina Rules of Civil Procedure; and (3) asserted all defenses in a reasonable and timely manner to Appellants before continuing through the litigation process. Accordingly, Respondent Horace Mann respectfully requests this Court find Respondents have not waived any service-related defenses, affirm the circuit court's orders, and dismiss this case with prejudice.

A. Respondents sufficiently asserted service-related defenses in their respective Answers.

The circuit court, after disclosing a detailed record of its findings, properly concluded that Respondents sufficiently raised service-related defenses in their Answers such that Appellants

would be on notice of these defenses and the defenses would be not barred by waiver. Under the South Carolina Rules of Civil Procedure, Rule 8(e)(1), "[e]ach averment of a pleading shall be simple, concise, and direct." *See* Rule 8(e)(1), SCRCP. Further, Rule 8(f) provides that pleadings must be construed in order to provide substantial justice to *all* parties. *See* Rule 8(f), SCRCP. Here, Respondent Horace Mann provided the following in its Answer to Appellants' Complaint:

> Defendant, by and through *the underinsured motorist carrier,* Horace Mann Property and Casualty Insurance Company ("Defendant"), hereby answers the Complaint of Plaintiff herein as follows:
>
> ...
>
> **FOR A THIRD DEFENSE**
> **(Process of Service)**
>
> 9. Defendant would show, upon information and belief, Plaintiff has failed to obtain Service of Process against this Defendant and for that reason, Plaintiff's Complaint should be dismissed with prejudice.

(Horace Mann Answer, at ¶ 9.) As noted by the circuit court, Respondent Horace Mann complied with the South Carolina Rules of Civil Procedure by providing a simple, concise, and direct response in its initial pleading, such that Appellants were placed on notice of their deficiency in filing the present action. (Aug. Order, at 9.)

In response to this finding, Appellants argue Respondent Horace Mann's Process of Service Defense was inadequate to identify whether "this Defendant" referred to Defendant Carlos Toney or Respondent Horace Mann. (Appellants' Init. Br., at 22.) To support its contention, Appellants cited to the *Unisun* case, which illustrates a party waiving a defense by failing to plead it with specificity. (*Id,* at 23.) Under *Unisun*, this Court held that the defense that the plaintiff failed to serve the Defendant within the statute of limitations was "insufficient, standing alone, to raise the defense of insufficiency of service of process." *Unisun Ins. v. Hawkins,* 342 S.C. 537, 542-43, 537 S.E.2d 559, 562 (Ct. App. 2000). Here, the circuit court ruled that the UIM carriers have "pled

with specificity, and their defenses must be read in conjunction and do not 'stand alone' like the imprecise pleading from *Unisun*." (Aug. Order, at 9.) In Respondent Horace Mann's Answer, Horace Mann not only referenced Defendant Toney in paragraph 9 but also in its fourth defense for punitive damages in paragraph 10. Specifically, paragraph 10 provides "[d]efendant would show, upon information and belief, that the Plaintiff's claims for punitive damages...violates the double jeopardy clause in that Defendant could be subjected to *multiple* awards of punitive damages for the same set of facts." (Horace Mann Answer, at ¶ 10.) When this defense is read in conjunction with paragraph 9 of Horace Mann's Answer, as instructed by the circuit court, it is readily apparent that Respondent Horace Mann used "Defendant" in reference to Carlos Toney. Carlos Toney had already defended himself in the third-party liability action brought by Appellants, whereas Respondent Horace Mann was not involved until the present UIM action was filed; therefore, Respondent Horace Mann's reference to "Defendant" could not be misconstrued as referencing any other party other than Carlos Toney. This is precisely the point the circuit court referenced, where Respondent Horace Mann's defenses, namely Process of Service and Punitive Damages, should be read in *conjunction* to support a precise pleading that maintains the law outlined in Rules 8(e)(1) and 8(f). *See* Rule 8(e)(1), (f), SCRCP. Therefore, Respondent Horace Mann has sufficiently and specifically raised its service-related defense in its Answer.

B. Respondents raised service-related issues pursuant to the South Carolina Rules of Civil Procedure.

Respondents did not waive any service-related defenses by failing to timely file Rule 12(b) Motions in this action, as a Rule 12(b) motion is one of two possible avenues for raising this type of issue. Under Rule 12(b), "every defense, in law or fact, to a cause of action in any pleading...shall be asserted in the responsive pleading thereto if one is required, except for that

the following defenses *may at the option of the pleader* be made by motion: ... (5) insufficiency of service of process." *See* Rule 12(b), SCRCP.[5] Here, Appellants argue that "South Carolina courts have determined issues of service *must* be raised in a Rule 12(b)(5) motion." (Appellants Init. Br., at 27.) This is a clear misstatement of law. The law provided Respondent with the option to either plead the defense in Respondent's initial response or to make a motion for insufficient service of process. *See* Rule 12(b), SCRCP. Appellants are twisting the language of Rule 12(b)(5) and misconstruing what was required of Respondents by the South Carolina Rules of Civil Procedure. Instead of acknowledging the clear statement of law encompassed by [the Rules], Appellants plead innocence, stating that Appellants would have been able to cure the improper service defect had Respondents raised the issue by filing a Rule 12(b) motion. (Appellants Initial Brief at 28.) Despite this argument by Appellants, the circuit court found 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." (Aug. Order, at 8.)

Furthermore, the circuit court, citing to *McMaster v. Dewitt,* held that Respondent Horace Mann's Motion to Dismiss was "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." (Aug. Order, at 5.) Under *McMaster*, this Court held that summary judgment is appropriate where a plaintiff fails to commence an action within the applicable statute of limitations. *McMaster v. Dewitt,* 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014). Here, Appellants argue that the issue in *McMaster* was appropriate for summary judgment, because "(1) [the issue] was timely raised at the beginning on the litigation to put the plaintiff on notice and (2) there were no intervening

[5] The circuit court further reinforced this point in stating that, "[i]f 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." Aug. Order at 8.

actions that could have been taken at any point in the proceedings to remedy the statute of limitations deficiency." (Appellants' Initial Brief, at 26.) While Respondents do not dispute the Appellants' first point of the effect of the *McMaster* case, the second point regarding remedial measures misconstrues the finding of this Court. As argued by Appellants, the second point would show that a case is only ripe for summary judgment under *McMaster* where *either party* could have intervened to remedy the issue. However, as noted above, the summary judgment is appropriate under *McMaster,* where the *plaintiff* fails to commence the action. *McMaster,* 411 S.C. at 143, 767 S.E.2d at 453. Therefore, there is not a duty on the defendant to commence the action against itself where the defendant UIM carrier has timely raised the issue at the beginning of litigation. Like *McMaster,* Respondent Horace Mann initially raised the defense of Service of Process in its Answer to Appellants and filed its Motion to Dismiss with the court due to the Appellants' failure to commence the action against Defendant Toney. (Horace Mann Answer, at ¶ 9; Horace Mann Mot. to Dismiss.)

However, should the Court find this argument to be unpersuasive, Respondents would respectfully direct the Court's attention to the opportunity and inaction of Appellants. Here, Appellants filed their Complaint on December 5, 2019, to which Respondent Liberty Mutual responded with its Answer on January 2, 2020. (Complaint; Liberty Mutual Answer.) In Respondent Liberty Mutual's Answer, it pled in its fourteenth defense Improper Service, to which Appellants' counsel responded via email to Liberty Mutual's counsel on January 16, 2020, requesting clarification of the Improper Service defense.[6] *See* Jan. 16, 2020, email between counsel, cited extensively by all parties and located in the record at Ex. A to Pls.' Resp. to Liberty

[6] See Liberty Mutual Notice of Appearance and Answer, at ¶ 34 for verbatim defense set forth by Respondent Liberty Mutual.

Mutual Mot. To Dismiss and Mot. For Summ. J. Therefore, Appellants were on notice of a service-related issue being raised on January 2, 2020, which it confirmed exactly two weeks later. From January 16, 2020, through June 2, 2020, Appellants made no attempt to effect service on the putative at-fault driver, Defendant Toney, in this action.[7] If, however, the Court is convinced by Appellants' argument that the Statute of Limitations in this case did not expire until September 30, 2020, Respondent Horace Mann would respectfully show that Appellants never attempted to effect service in this time period either. As such, Appellants had approximately between five to eight months to make an intervening, remedial act to ensure that this action was commenced against Defendant Toney through service of process yet failed to do so at any point.

C. Respondents' participation in litigation for two years prior to filing its motion to dismiss did not constitute a waiver of any service-related defenses.

The circuit court properly concluded that Respondents did not waive any service-related defenses by participating in discovery in this case for approximately two years without filing a Rule 12(b) motion. In *Louden,* this Court affirmed an order granting summary judgment after the case progressed through litigation for twenty-two months. *Louden,* 327 S.C. at 466-67, 486 S.E.2d at 525-26. Here, the circuit court found that the timing of this case was nearly identical to that in *Louden*, and, as a result, the Court could not find that the timing of Respondents' Motion was "late" such that it would constitute a waiver of service-related defenses by Respondents. (Aug. Order at 10 n.3.) *See* Liberty Mutual Mot. in Supp. of Summ. J. for detailed timeline comparison.

In response to this finding by the circuit court, Appellants argue that *Maybank v. BB&T Corp.* is controlling on this issue. In *Maybank,* the court ruled that a party who "continues to

[7] June 2, 2020, was the date of expiration for the Statute of Limitations, as argued by Respondent Liberty Mutual.

participate in litigation after challenging personal jurisdiction in their initial responsive pleading to the court" waives the defense. *Maybank,* 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016). However, *Maybank* does not apply to this case. (Aug. Order, at 10.) In *Maybank,* an out-of-state corporate defendant (BB&T Corporation) made a motion to dismiss for lack of personal jurisdiction, based on the defendant's contentions that it lacked sufficient contacts with the jurisdiction such that it did not avail itself of protection from suit. *Maybank,* 416 S.C. at 564-66, 787 S.E.2d at 510-11. *Maybank,* however, does not establish a bright-line rule for courts to follow in this scenario. *Id.* The circuit court in this case correctly found that *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 met before the *Maybank* court." (Aug. Order, at 11.) As such, this Court is not bound to the *Maybank* decision, as it offers no support for the Appellants' contentions. Appellants are intentionally conflating the UIM carriers (who have filed motions and participated in discovery) with Defendant Toney (who is not properly before the Court). *See Ex Parte Allstate,* 339 S.C. 202, 207, 528 S.E.2d 679, 681-82 (Ct. App. 2000) (noting that a UIM carrier is not in privity with the at-fault defendant driver). The UIM carriers' participation in this case should have been anticipated prior to filing their respective Motions for Dismissal.

Further, Respondents are not guilty of laches by filing their respective Motions, as Respondents raised service-related issues in the outset of this suit before proceeding through almost two years of litigation. In *Byars v. Cherokee Cnty.,* the court defined laches as:

> [T]he neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable and unexplained length of time and in circumstances which afforded opportunity for diligence.

Byars, 237 S.C. 548, 559, 118 S.E.2d 324, 330 (1961). Here, Respondents, like the carrier in *Louden,* immediately began investigating whether Defendant Toney was ever served and timely raised service-related issues in their respective Answers, pursuant to Rule 12(b) as discussed above. (Horace Mann Answer, at ¶ 9.) Further, Respondent Liberty Mutual kept its service-related defense in its Amended Answer. (Liberty Mutual Am. Answer, at ¶ 34.) Outside of formal pleadings, Appellants were also placed on notice that Respondent Liberty Mutual would not be waiving any defenses in an email exchange between the parties' respective counsel, all of which transpired *before* the statute of limitations ran. *See* Jan. 16, 2020, email between counsel, cited extensively by all parties and located in the record at Ex. A to Pls.' Resp. to Liberty Mutual Mot. To Dismiss and Mot. For Summ. J. Therefore, Respondents provided Appellants with more than sufficient notice within the *first month* of this action pending by way of the processes prescribed by the South Carolina Rules of Civil Procedure and are not guilty of laches as alleged by Appellants.

D. The circuit court did not err in relying on prejudice to Defendant Toney in granting Respondents' motions.

Appellants contend that the circuit court erred factoring the possible prejudice to the absent Defendant, Carlos Toney, into its Order. Here, Appellants seeks to attach a judgment to Defendant Toney without serving process on him under the guise that Toney is protected entirely by a Covenant Not to Execute. However, a Covenant Not to Execute Judgment is not the same as a Covenant Not to Enter Judgment. (*See* Motion, at Ex. H ¶ 2 (Covenant Not to Execute) (providing for entry of judgment and withholding satisfaction in certain circumstances).) Furthermore, the Covenant Not to Execute agreed to Toney the following:

> The Covenantors and the Covenantors' attorney, if represented, expressly agree to keep...Carlos Demetius [sic] Toney abreast of developments in their attempts to collect additional liability coverage and/or underinsured motorist benefits, including *specific notice as to the date of the trial,* the amount of verdict, status of the underinsured motorist claim and whether a settlement of the underinsured motorist benefits has been obtained.

Id., at ¶ 8 (emphasis added). Here, Appellants have failed to afford Toney notice of the action via service of process.[8] As stated in *Louden,* "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." *Louden,* 327 S.C. at 468, 486 S.E.2d at 526. Appellants failure to afford Toney of this basic rights prescribed in the Covenant Not to Execute Judgment should serve as a bar to disallow them from placing his name on a verdict form and entering judgment against him. While Appellants argue in the alternative that dismissing this action would be prejudicial to them, Appellants' alleged prejudice was created by their own volition, and, as such, the circuit court's findings should be affirmed as a matter of course.

IV. Because Appellants failed to serve a Notice of Appeal on Defendant Toney, Appellants failed to timely perfect their appeal and the South Carolina Court of Appeals does not have appellate jurisdiction.

As provided by South Carolina Appellate Court Rule 203(b)(1), "[a] notice of appeal *must* be served on *all* respondents within thirty (30) days after receipt of written notice of entry of the order or judgment." Rule 203(b)(1), SCACR; *see The Friends of McLeod, Inc. v. City of Charleston,* 376 S.C. 610, 658 S.E.2d 544, 546 (Ct. App. 2008). Furthermore, "the requirement of service of a 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

[8] Appellants allege that Defendant Toney was on notice of this action based on his "voluntary appearance" at his deposition, which Respondent Horace Mann addressed in section one of its argument herein.

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 (2004). Where the appellate court lacks jurisdiction to consider the appeal, the court must dismiss the appeal. *Charpentier v. S.C. Dep't of Emp't & Newberry Cnty. Council of Aging, Inc.* (2022), 2022 WL 19264581 (citing *Southbridge Props., Inc. v. Jones,* 292 S.C. 198, 198-99, 355 S.E.2d 535, 535 (1987) (applying the appellate court rules and dismissing for failure to serve a notice of intent to appeal in a timely manner). Here, Appellants filed and served their Notice of Appeal on January 19, 2023. However, Appellants only served counsel for Respondents Liberty Mutual and Horace Mann, thereby omitting service on the named Defendant Carlos Toney and/or any representative of Defendant Toney. (*See* Proof of Service attached to Appellants' Notice of Appeal.)

The fact that Respondents Liberty Mutual and Horace Mann, as putative UIM carriers, were served with the Notice of Appeal does not operate to excuse this omission. As stated in *Louden,* "[t]he 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." *Louden,* 327 S.C. at 468, 486 S.E.2d at 526. The law is clear that even though the judgment might be collected ultimately from the UIM carrier(s), the case is still a traditional plaintiff-versus-defendant lawsuit that requires jurisdiction over the named defendant to render a valid judgment. *Id.* Thus, Carlos Toney is the true defendant in the court below and, as such, is the adverse party to Appellants before this Court, making him a "respondent" as that term is defined in the *South Carolina Appellate Court Rules. See* Rule 202(a), SCACR; *see also* S.C. Code Ann. § 18-6-120 (stating same).

Furthermore, Appellants argue in their Initial Brief that Defendant Toney was properly joined to this action due to a "voluntary appearance" at his deposition, as discussed previously.

(Appellants' Initial Brief, at 12.) Should this Court find the Appellants' argument convincing, Defendant Toney would have been joined as a party in the action upon his appearance at his deposition on May 15, 2020. Therefore, it is inexcusable that Appellants did not serve Defendant Toney with the Notice of Appeal to this Court, pursuant to Rule 203(b)(1) of the *Appellate Court Rules.*

As a result, Appellants failure to procure service of the Notice of Appeal upon Carlos Toney is fatal to this action, as Appellants did not perfect a timely appeal. Defendant Toney is the party against whom this action is filed, and Appellants have failed to summon him to neither the circuit court nor this Court. Therefore, this Court lacks jurisdiction over this action, and the appeal should be dismissed.

CONCLUSION

For the reasons stated herein, Respondent Horace Mann respectfully requests this Court affirm the Circuit Court's August 28, 2022, and December 21, 2022, orders granting summary judgment in this case in favor of Respondents.

[Signature Page to Follow]

RESPECTFULLY SUBMITTED,

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Columbia, South Carolina
June 19, 2023

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
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SC Court of Appeals

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

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.

PROOF OF SERVICE

I certify that a true copy of Respondent Horace Mann Property and Casualty Insurance Company's Initial Brief in this case has been served on the following, this 19th day of June 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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