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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

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 LIBERTY MUTUAL INSURANCE COMPANY'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE AND FACTS 1

STANDARD OF REVIEW 4

ARGUMENT 5

I. No voluntary appearance occurred by Defendant Toney, therefore the circuit court properly dismissed the case where the Appellant failed to serve the at-fault driver within the statute of limitations, thereby failing to commence the action 5

II. This case falls squarely within the rule from *Louden*, and therefore the circuit court did not err in relying on *Louden* in dismissing this case. 12

III. Respondents properly and timely raised service-related issues in their Answer and Motions, and therefore the circuit court appropriately found that Respondents did not waive these issues. 16

A. Respondent Liberty Mutual adequately asserted service-related defenses in its respective Answer 16

B. Respondents properly raised service-related motions in compliance with the *South Carolina Rules of Civil Procedure* 21

C. Respondents timely filed their motion to dismiss based upon these service-related issues 25

D. The circuit court was correct to consider—as an additional sustaining ground—the potential prejudice to Defendant Toney 26

IV. The circuit court properly refused to estop Liberty Mutual from raising service issues in its Motion to Dismiss 27

A. Liberty Mutual's counsel did not issue any false representation 28

B. Appellants failed to demonstrate true reliance on the complained-of representation .30

C. Appellants' counsel was the one in possession of the underlying information 31

V. Because Appellants failed to serve a Notice of Appeal on Defendant Toney, Appellants failed to timely perfect their appeal and the South Carolina appellate courts do not have

jurisdiction over this appeal 32

CONCLUSION 34

TABLE OF AUTHORITIES

CASES

Baughman v. Am. Tel. & Tel. Co.,
306 S.C. 101, 410 S.E.2d 537 (1991) 5

Broome v. Watts,
319 S.C. 337, 461 S.E.2d 46 (1995) 16

Cap. City Ins. Co. v. BP Staff, Inc.,
382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). 5

Celotex Corp. v. Catrett,
477 U.S. 317 (1986) 5

Cobb v. Benjamin,
325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997) 17

Connelly v. Main Street Amer. Group,
439 S.C. 81, 886 S.E.2d 196 (2023) 3, 11

Crawford v. Henderson,
356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003) 16, 17, 34

David v. McLeod Reg'l Med. Ctr.,
367 S.C. 242, 626 S.E.2d 1 (2006) 5

Elam v. S.C. Dep't. of Transp.,
361 S.C. 9, 602 S.E.2d 772, (2004) 33

Ex Parte Allstate Ins. Co.,
339 S.C. 202, 528 S.E.2d 679 (Ct. App. 2000) 16, 17, 22

Ex parte Cannon,
385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) 7, 8, 9, 10

Hedgepath v. Amer. Tel. & Tel. Co.,
348 S.C. 340, 559 S.E.2d 327 (Ct. App. 2001) 32

Israel v. Carolina Bar-B-Que,
292 S.C. 282, 366 S.E.2d 123 (Ct. App. 1987) 7, 8, 10

Kreutner v. David,
320 S.C. 283, 465 S.E.2d 88 (1995) 4

Lanham v. Blue Cross & Blue Shield of S.C., Inc.,
349 S.C. 356, 563 S.E.2d 331 (2002)....................5

Louden v. Moragne,
327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997)....................*passim*

Maybank v. BB&T Corp.,
416 S.C. 541, 787 S.E.2d 498 (2016)....................24, 25

McKissick v. J.F. Cleckley & Co.,
325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1997)....................24

McMaster v. Dewitt,
411 S.C. 138, 767 S.E.2d 451 (Ct. App. 2014)....................4, 5

Mears v. Mears,
287 S.C. 168, 337 S.E.2d 206 (1985)....................33

Montgomery v. CSX Transp., Inc.,
376 S.C. 37, 656 S.E.2d 20 (2008) 5

Moore v. Simpson,
322 S.C. 518, 473 S.E.2d 64 (Ct. App. 1996) 5

New Hampshire Ins. Co. v. Bey Corp.,
312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993) 7, 8

Poch v. Bayshore Concrete Products/South Carolina, Inc.,
386 S.C. 13, 686 S.E.2d 689 (Ct. App. 2009)....................9, 26

Rodarte v. Univ. of S.C.,
419 S.C. 592, 799 S.E.2d 912 (2017)....................28

S.C. Dept. of Social Svcs. v. Burris,
297 S.C. 537, 377 S.E.2d 578 (1989).................... 6, 7, 8, 10

Selective Ins. Co. of S.C. v. Schremmer,
465 F.Supp.2d 524 (D.S.C. 2006)....................24

Southbridge Prop., Inc. v. Jones,
292 S.C. 198, 355 S.E.2d 535 (1987)....................33

Southern Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth.,
311 S.C. 29, 426 S.E.2d 748 (1993) 32

Stearns Bank Nat. Ass'n v. Glenwood Falls, LP,
373 S.C. 331, 644 S.E.2d 793 (Ct. App. 2007)....................6

Unisun Ins. Co. v. Hawkins,
342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000) 16, 17, 18, 21

Williams v. Selective Ins. Co.,
315 S.C. 532, 446 S.E.2d 402 (1994).................... 10, 22, 23

STATUTES

28 U.S.C. § 1404(a) 24

S.C. Code Ann. § 15-3-530 2

S.C. Code Ann. § 15-7-30 24

S.C. Code Ann. § 15-7-100 24

S.C. Code Ann. § 18-1-120 33

S.C. Code Ann. § 38-77-150....................11

S.C. Code Ann. § 38-77-160....................*passim*

S.C. Code Ann. § 62-3-202(a) 7

S.C. Code Ann. § 62-3-602 7

RULES

Rule 3, SCRCP 22

Rule 3(a), SCRCP 6

Rule 3(a)(2), SCRCP....................6

Rule 4, SCRCP 31

Rule 4(d), SCRCP....................6, 7, 9

Rule 4(g), SCRCP.................... 5, 15, 23, 31

Rule 5, SCRCP 31

Rule 8(e)(1), SCRCP....................21

Rule 8(f), SCRCP....................21

Rule 12, SCRCP....................3, 14, 21, 22, 23, 24

Rule 12(b), SCRCP....................10, 16, 17, 21, 22, 23, 26

Rule 12(b)(2), SCRCP....................24

Rule 12(b)(3), FRCP....................24

Rule 12(b)(3), SCRCP....................24

Rule 12(b)(5), SCRCP....................17, 23, 24

Rule 12(d), SCRCP....................26

Rule 12(g), SCRCP....................14, 24

Rule 12(h), SCRCP....................25

Rule 12(h)(1), SCRCP....................24

Rule 36(b), SCRCP....................11

Rule 56, SCRCP....................3, 4, 21, 26

Rule 56(c), SCRCP....................4

Rule 202(a), SCACR....................33

Rule 203(b)(1), SCACR....................33

Rule 208(b)(6), SCACR....................34

Rule 220(c), SCACR....................34

Rule 262, SCACR....................33

RESPONDENT LIBERTY MUTUAL'S STATEMENT OF ISSUES ON APPEAL

1. Did the circuit court properly dismiss this case where the Appellant failed to serve the at-fault driver with the Summons and Complaint prior to the expiration of the statute of limitations, thereby failing to commence this action against the at-fault driver?

2. Did the circuit court properly rely on the controlling precedent found in *Louden v. Moragne* when it dismissed this case?

3. Did the circuit court properly find that Respondent Liberty Mutual did not waive service-related issues at any time prior, where there is no basis to assert waiver against Liberty Mutual?

4. Did the circuit court properly refuse to estop Liberty Mutual from raising service-related issues, where there is no basis to assert estoppel against Liberty Mutual?

5. Does this Court have appellate jurisdiction over this matter, when Appellants have failed to serve the Notice of Appeal upon Defendant Toney, a necessary respondent?

STATEMENT OF THE CASE AND FACTS

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. (R. pp. ___, *Compl.* ¶ 4.) Appellant Howell Thompson alleges that Defendant Carlos D. Toney (alternatively, "Toney") turned left in front of him, failing to yield the right of way, thereby causing the collision and injuries to, *inter alia*, Howell Thompson's left arm. (*See* R. pp. ___, *id.* ¶¶ 5, 6, 8.) Appellant Tara Thompson, Howell Thompson's wife, alleges loss of consortium. (R. pp. ___, *id.* ¶ 7.) Appellants filed suit in the Court of Common Pleas for Sumter County on December 5, 2019. (R. pp. ___, *id.*, e-filing stamp at right margin.)

On December 18, 2019, the South Carolina Department of Insurance accepted service of the Summons and Complaint upon UIM carrier Horace Mann Property & Casualty Insurance Company (alternatively, "Horace Mann"). (*See* R. pp. ___, Aff. of Service, Horace Mann.) On December 19, 2019, the South Carolina Department of Insurance accepted service of the

Summons and Complaint upon UIM carrier Liberty Mutual Insurance Company (alternatively, "Liberty Mutual"). (*See* R. pp. ___, Aff. of Service, Liberty Mutual.)

On January 2, 2020, Liberty Mutual timely filed an Answer alleging, *inter alia*, defenses based upon improper service and the statute of limitations. (R. pp. ___, Liberty Mutual Not. of Appearance and Answer ¶¶ 22, 34.) On January 7, 2020, Horace Mann timely filed an Answer alleging, *inter alia*, improper service. (R. pp. ___, Horace Mann Answer ¶ 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. (R. pp. ___, Liberty Mutual Am. Answer ¶¶ 22, 34.) The statute of limitations in this matter expired no later than June 2, 2020. *See* S.C. Code Ann. § 15-3-530.

During the discovery phase of this case, it was revealed that Appellants never served the Summons and Complaint upon the sole named defendant, Toney. In an email between counsel, Appellants' counsel stipulated that there was no service upon Toney. (R. pp. ___, October 26, 2021 email exchange, Hayes to Kassel, attached as Ex. C to Liberty Mutual's Reply to Pls.' Resp. to Mot. to Dismiss/Mot. Summ. J.) Further, in Appellants' December 16, 2021 response to Liberty Mutual's Request to Admit No. 1, Appellants explicitly stated that service was not procured upon Toney: "Admit that Plaintiffs never served the Summons and Complaint in the above-reference[d] [*sic*] matter upon Defendant Carlos D. Toney . . . Response: Plaintiffs' Admit." (R. pp. ___, Pls.' Resp. to Liberty Mutual Req. to Admit No. 1, attached as Ex. A to Liberty Mutual's Reply to Pls.' Resp. to Mot. to Dismiss/Mot. Summ. J.)

On October 26, 2021, Liberty Mutual filed a Motion to Dismiss/Motion for Summary Judgment based upon Appellants' failure to serve Toney, arguing that dismissal was required due to the rule from this Court's decision in *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct.

App. 1997).[1] (R. pp. ___, Liberty Mutual's Mot. to Dismiss/Mot. Summ. J.) Horace Mann filed a nearly identical motion three days later on October 29, 2021. (R. pp. ___, Horace Mann's Mot. to Dismiss.) After extensive briefing and a hearing on January 6, 2022, the underlying action was dismissed by the circuit court via written order filed on August 29, 2022 (the "August 2022 Order"). (R. pp. ___, August 29, 2022 Order of Dismissal.) The motion was granted due to, *inter alia*, the circuit court's application of the long-established rule from *Louden.* (R. pp. ___, *id.* at 4-5 ("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").) The circuit court analyzed the motion under both the Rule 12, SCRCP standard and the Rule 56, SCRCP standard, and reached the same conclusion. (*See, e.g.,* R. pp. ___; *id.* at 5-8.) The circuit court held that the action had not been commenced as to Toney, a valid judgment could not attach to Toney, and that Toney would be prejudiced if the case moved forward. (R. pp. ___, *id.* at 7, 10 n. 3.) The circuit court also rejected any arguments that the UIM carriers had waived service-related defenses, R. pp. ___, *id.* at 7-12, or that UIM carrier Liberty Mutual should be estopped to assert service-related defenses, R. pp. ___, *id.* at 12-17. Finally, the circuit court considered, and rejected, Appellants' late-stage argument that Toney's appearance at a brief Zoom deposition in May of 2020 amounted to an equivalent to service of process via "voluntary appearance." (R. pp. ___; *id.* at 17-18.)

On September 7, 2022, Appellants filed a motion to reconsider the order of dismissal. (R. pp. ___, Pls.' Mot. Reconsider Order of Dismissal.) Liberty Mutual opposed the motion to reconsider on its merits, and issued numerous objections to new arguments raised by Appellants

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[1] As discussed at length herein, *Louden* holds that a "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," otherwise the case must be dismissed. 327 S.C. at 469, 487 S.E.2d at 527.

in the motion to reconsider.[2] (R. pp. ___; Liberty Mutual's Mem. of Law in Opp. to Pls.' Mot. Reconsider.) Appellants' motion to reconsider the order of dismissal was denied via written order on December 21, 2022 (the "December 2022 Order"). (R. pp. ___, Dec. 21, 2022 Order Denying Mot. to Reconsider.)

On January 19, 2023, Appellants filed and served the instant Notice of Appeal upon the Respondent UIM carriers. (R. pp. ___; Not. Appeal.) On May 11, 2023, Respondent Liberty Mutual filed a motion to dismiss this appeal for want of appellate jurisdiction, based upon Appellants' failure to serve the Notice of Appeal upon Toney (R. pp. ___; Mot. to Dismiss Appeal.) After written submissions from both parties, on June 16, 2023 this Court entered an order denying the motion to dismiss but granting leave for the issue of appellate jurisdiction to be included in the Briefs. (R. pp. ___; Order Denying Mot. to Dismiss Appeal.)

STANDARD OF REVIEW

In reviewing the grant of a motion for summary judgment, appellate courts apply the same standard as the trial court under Rule 56(c), SCRCP. *Connelly v. Main Street America Group*, 439 S.C. 81, 88, 886 S.E.2d 196, 200 (2023). A Rule 56 motion for summary judgment is the appropriate vehicle for the circuit court to rule on a statute of limitations issue. *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). Summary judgment is proper when there is no genuine issue as to any

[2] Liberty Mutual's list of objections to certain of Appellants' arguments, all of which were improperly presented by Appellants for the first time at the motion to reconsider stage, appears at R. pp. ___. (Liberty Mutual's Mem. of Law in Opp. to Mot. Reconsider, at 3-5.) Liberty Mutual maintains these objections but, in the alternative and out of an abundance of caution, argues against the merits of certain of these items because they are raised in Appellants' Brief.

material fact and the moving party is entitled to judgment as a matter of law." *Id.* (quoting *Montgomery v. CSX Transp., Inc.*, 376 S.C. 37, 47, 656 S.E.2d 20, 25 (2008). 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). A court considering summary judgment neither makes factual determinations nor considers the merits of competing testimony; however, summary judgment is appropriate when a properly supported motion sets forth facts that remain undisputed or are contested in a deficient manner. *David v. McLeod Reg'l Med. Ctr.*, 367 S.C. 242, 250, 626 S.E.2d 1, 5 (2006).

When reviewing a dismissal, "[the] appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). Notably, 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).

ARGUMENT

I. No voluntary appearance occurred by Defendant Toney. Therefore, the circuit court properly dismissed the case where the Appellants failed to serve the at-

fault driver within the statute of limitations, thereby failing to commence the action.

Appellants attempt to argue against the circuit court's dismissal of the case for lack of service upon Toney by claiming that Toney's appearance at a Zoom deposition in May 2020 was a "voluntary appearance" under Rule 4(d), SCRCP. (Apps.' Brief, at 11.) Therefore, Appellants assert that Toney's attendance at deposition was equivalent to personal service of the summons and complaint prior to the expiration of the statute of limitations, and thus they commenced their action against Toney within the required timeframe.[3] (*Id.* at 11-15.) However, Appellants' argument misses the mark because they misconstrue both the facts of this case and South Carolina case law surrounding the voluntary appearance doctrine. Specifically, 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). As will be explained below, the circuit court was correct to conclude that no voluntary appearance occurred and thus the action was never commenced as to the sole defendant, Toney. Appellants' argument that they somehow obtained substitute "service" on Toney is without merit.

In support of Appellants' position concerning their voluntary appearance argument, Appellants rely upon *S.C. Dept. of Social Svcs. v. Burris*, 297 S.C. 537, 377 S.E.2d 578 (1989)

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[3] Appellants assert that they had 120 days from the expiration of the statute of limitations on June 2, 2020—i.e. until September 30, 2020—to accomplish service. (*See* Apps.' Brief, at 11 (citing Rule 3(a), SCRCP).) For the record, Liberty Mutual notes that this analysis is incorrect. The 120-day grace period for service outside of the statute of limitations is calculated from *the date of filing*, not the date of the expiration of the statute of limitations. *See* Rule 3(a)(2), SCRCP. Since this case was filed in December of 2019 but the statute of limitations did not run until June 2, 2020, the 120-day grace period does not apply.

(hereinafter, "*Burris*"), *Israel v. Carolina Bar-B-Que*, 292 S.C. 282, 366 S.E.2d 123 (Ct. App. 1987), and *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009). (*See* Apps.' Brief, at 12.) Tellingly, Appellants do not substantively analyze the facts of these cases, which all indicate that a voluntary appearance is found only when there is robust, protracted participation in the case by the unserved party. In *Burris*, while not expressly stated in the opinion, it is clear that the paternity suit respondent "voluntarily appeared" by testifying *at the trial* and therefore had no right to complain about non-service of the petition that led to the trial. 297 S.C. at 540, 377 S.E.2d at 579-80. In *Israel*, a property trustee was sued originally in his capacity as trustee for an incorrect trust, but the complaint was later amended *mid-trial* to reflect correctly his trustee status over the relevant trust. 292 S.C. at 285-87, 356 S.E.2d at 125-127. The trustee had no right to complain of lack of service of a summons reflecting the correct trustee capacity, because the trustee continued to defend the suit after the amendment of the complaint and could not claim "surprise," based on his own admissions to the court. *Id.* Finally, in *Ex Parte Cannon*, an estate's personal representative and trustee of a related trust had no right to complain of lack of service of a summons, where two statutes provide that a person in such a position is *subject to the jurisdiction of the court as a matter of law*. 385 S.C. at 658, 685 S.E.2d at 822 (citing S.C. Code Ann. §§ 62-3-602 (personal representatives) and 62-3-202(a) (trustees)). Further, the PR/trustee and his counsel participated *in multiple hearings over multiple days*, *id.* at 659, 585 S.E.2d at 823, including the hearing that generated the order on appeal. Each one of these cases is distinguishable from this one, in which the party subject to the voluntary appearance argument, i.e. Toney, only sat for a brief Zoom deposition and did nothing else.

Moreover, Appellants' Brief ignores a key case on point regarding voluntary appearances. In *New Hampshire Ins. Co. v. Bey Corp.*, 312 S.C. 47, 435 S.E.2d 377 (Ct. App.

1993), a mortgagor's appearance at a foreclosure hearing, including the mortgagor's introduction of evidence, was limited to attempting to set aside a default and was *not* a Rule 4(d) voluntary appearance. 312 S.C. at 49-50, 435 S.E.2d at 378. Therefore, the mortgagor was entitled to argue defects with service of process. *Id.* In short, *New Hampshire Ins. Co.* stands for the proposition that even participation at a hearing does not necessarily give rise to a finding of voluntarily appearance, nor preclude a party from litigating service issues. In this case, all Toney did was sit for a brief Zoom deposition, which is certainly less significant participation than attending a hearing at a courthouse. Liberty Mutual submits that the instant case is much more analogous to *New Hampshire Ins. Co.* than to *Burris*, *Israel*, or *Ex Parte Cannon.*

Also, Appellants' position ignores the simple fact that in each and every voluntary appearance cases discussed above, the party against whom the voluntary appearance doctrine was asserted was present in the action—whether in person or through counsel—such that the party was at least on notice that the voluntary appearance doctrine was being asserted against them. In other words, the "voluntary" parties in the above-listed cases engaged in the presentation of *their own argument* as to whether they had voluntarily appeared. In this case, Toney is not even on notice that Appellants are arguing he has voluntarily appeared and thus should be subject to entry of judgment. For this reason alone, Appellants' voluntary appearance argument against Respondent Liberty Mutual should be dismissed, as it amounts to legal sleight-of-hand. In an apparent effort to bootstrap this flawed argument, Appellants issue several bold, unfounded comments about Toney's state of mind in their Brief. For instance, Appellants claim that "[i]t is clear from his voluntary appearance at the deposition that Defendant Toney was on notice of this action and his role as a defendant in same and did not intend to contest service." (Apps.' Brief, at 13.) Appellants also claim that "Defendant Toney had appropriate notice of this

case and every opportunity to retain his own counsel and appear in this action; however he chose not to do so." (*Id.*, at 14.) In reality, none of those conclusions are "clear," but rather are unsupported assertions placed into their Brief by Appellants.

Appellants' factual support for the argument that Defendant Toney voluntarily appeared is the deposition transcript attached as an exhibit to a Supplemental Memorandum submitted to the circuit court after the original hearing on this motion. (R. pp. ___; Exhibit to Pls.' Supp. Memo. in Opp. to Mot. to Dismiss/Mot. Summ. J.) On its face, this transcript falls well short of a finding of voluntary appearance. *Cf. Ex Parte Cannon*, 385 S.C. at 659-660, 685 S.E.2d at 823 ("Cannon clearly had notice of *all* proceedings . . . [b]y appearing and arguing the merits of the action *multiple* times, we find Cannon consented to the circuit court's personal jurisdiction . . .") (emphasis added). Even a cursory review of this transcript reveals no evidence to support Appellants' Brief's characterization of this deposition. Appellants' claim that Toney "was told there was a lawsuit pending." (Apps.' Brief, at 13.) While it may be technically true that the word "lawsuit" was used during a deposition question, nowhere in the transcript is Toney advised that the lawsuit is pending *against him*. (R. pp. ___; Dep. of Toney, at p. 4. ll. 3-9.) Appellants argue that the notice of deposition, containing a "case caption," was sent to Toney. (Apps.' Brief, at 12.) Appellants neglect to mention that the notice of deposition was not made an exhibit to the deposition and thus there is no proof Toney ever saw it. Nor was the notice presented to the circuit court until after the August 2022 Order was issued and Appellants decided to file a motion to reconsider. (R. pp. ___; Ex. D to Pls.' Mot. Reconsider.) Therefore, the notice of deposition is one of the many items not properly before this Court in this appeal. *See Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) ("[a] party cannot use a motion to reconsider, alter or amend a judgment to

present an issue that could have been raised prior to the judgment but was not.") (citation omitted). Appellants claim that neither Toney nor UIM counsel raised objections to service at the deposition (Apps.' Brief, at 12, 13), however they ignore the fact that the two UIM carriers had interposed three Answers protesting lack of service of process prior to the deposition. (R. pp. ___, ___, ___ ; Ans. of Liberty Mutual, Ans. of Horace Mann, Am. Ans of Liberty Mutual.) In reality, the deposition transcript speaks for itself. The deposition was taken via Zoom at the beginning of a pandemic, and lasted approximately one hour. (R. pp. ___; Dep. Transcript of Toney, at cover page and last page.) Nothing about this transcript rises to the level of the robust, continuing participation in the case as occurred in *Burris*, *Israel*, and *Ex Parte Cannon*, all of which involved defendants who came *to the trial and/or dispositive hearing* of their own cases.

Finally, Appellants simply brush aside the circuit court's additional finding that their voluntary appearance argument against Toney "effectively would circumvent the UIM statute and *Louden* and *Williams* [*v. Selective Ins. Co.*, *infra*] . . . 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." (August 2022 Order, at 17.) Appellants are wrong to disagree with the circuit court's holding in this regard. Appellants' argument is tantamount to stating that Toney's appearance at a short deposition means that the UIM carriers are forever barred from raising the issue of the total lack of service of process upon Toney. Appellants would claim that they merely need to demonstrate Toney's fault, and damages flowing therefrom, in order to recover UIM benefits. But a UIM insurer's right to defend is of paramount importance, and Appellants cannot dispense with it at

will. As the South Carolina Supreme Court has recently held in a UM case:[4] "we reject the lower courts' interpretation of the UM statute as requiring a plaintiff to show only fault and resulting damages. Such a reading automatically negates any defenses the at-fault driver could present, *such as the statute of limitations*, comparative negligence, or statutory immunity." *Connelly v. Main Street Amer. Group*, 439 S.C. 81, 92, 886 S.E.2d 196, 202 (2023) (emphasis added).

Clearly, the circuit court was well within its discretion to find that the deposition did not amount to a voluntary appearance by Toney. Therefore, the remainder of the merits of this appeal are easily dealt with by Appellants' own admissions. In the opening paragraph of Appellants' Argument, Appellants concede that no personal service was procured upon named Defendant Carlos D. Toney: "Appellants admit they did not personally serve Defendant Toney with the Summons and Complaint . . ." (Apps.' Brief, at p. 11.) Further, on at least three occasions during the discovery phase of the underlying litigation, Appellants stated explicitly that they did not serve Defendant Carlos D. Toney.[5] (*See* R. pp. ___, Ex. A to Liberty Mutual Reply to Pls.' Resp. in Opp. to Mot. Dismiss/Mot. Summ. J. (Pls. Resp. to Liberty Mutual Req. to Admit No. 1); R. pp. ___, Ex. C to Liberty Mutual's Reply to Pls.' Resp. in Opp. to Mot. Dismiss/Mot. Summ. J. (October 26, 2021 email exchange, Hayes to Kassel); R. pp. ___, Pls.' Resp. to Mot. Dismiss and Mot. Summ. J., at 2.) This repeated stipulation by Appellants ends

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[4] In the operative portions relevant to this appeal, the UM statute, S.C. Code Ann. § 38-77-150, is substantively identical to the UIM statute.

[5] Liberty Mutual notes that Appellants' Answer to Request to Admit—admitting that "[Appellants] never served the Summons and Complaint in the above-reference [*sic*] matter upon Defendant Carlos D. Toney"—renders this issue "conclusively established." *See* Rule 36(b), SCRCP. Therefore, Appellants should be precluded from arguing service via voluntary appearance.

the analysis, leaving no doubt that the circuit court was correct to dismiss this case pursuant to *Louden*, as discussed further in Section II, *infra*.

II. This case falls squarely within the rule in *Louden*, and therefore, the circuit court did not err in relying on *Louden* in dismissing this case.

In the circuit court's order granting summary judgment for Respondents, it found that *Louden* was "entirely on point to the instant dispute" and utilized that case as primary support in rendering its decision. (R. pp. ___; August 2022 Order, at 4-5.) 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*. (*Id.*) In their Brief, Appellants claim that "[t]he circuit court erred in relying on *Louden* to dismiss this case." (Apps.' Brief, at 15.) Appellants assert that the circuit court "discounted all other applicable and controlling authority simply because the cases did not specifically concern underinsured motorist coverage." (*Id.*) Contrary to Appellants' arguments, the circuit court was correct to conclude that the instant case is identical to *Louden*. When a plaintiff brings an action for his own underinsured motorist policy benefits, the plaintiff must properly serve the insurer. *See* S.C. Code Ann. § 38-77-160. Additionally, the plaintiff must serve the summons and complaint on the named defendant within the statute of limitations or the case is over. *See Louden*, 327 S.C. at 469, 486 S.E.2d at 527. In affirming the trial court's grant of summary judgment to the named defendant (and UIM carrier), the *Louden* court stated:

> 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*.

Louden, 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).

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.* As noted above, the trial court dismissed the *Louden* action upon the UIM carrier's motion, and this Court affirmed. *Id.* Here, as in *Louden*, Appellants filed suit against putative at-fault driver Toney and subsequently served their UIM carriers, Liberty Mutual and Horace Mann. However—as is uncontested—Appellants failed to serve the summons and complaint on Toney. It is difficult to imagine a more on-point case than *Louden*.

Notwithstanding the circuit court's decision, Appellants argue that the absence of discussion of waiver and estoppel issues in *Louden* makes *Louden* distinguishable from the present action. (*See* Apps.' Brief, at 15.) Appellants boldly 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 carrier was estopped from raising the service defense after assuring Appellants its defense was merely boiler plate.

(*Id.*) Regardless of whether the *Louden* court expressly considered issues similar to Appellants' above-quoted itemized list, the circuit court in this case certainly did so with great specificity in its August 2022 Order, as each of these items is discussed in *addition* to the rule from *Louden*. (*See*, *e.g.*, R. pp. ___, ___, ___, ___; August 2022 Order at p. 9 (holding that the UIM carriers pled with specificity); *id.* at p. 10 n. 3 (holding that UIM carriers did not waive defenses by participating in discovery); *id.* at pp. 11-12 (holding that the UIM carriers made the appropriate Rule 12 motion at an appropriate time, and therefore there is no Rule 12(g) waiver or waiver due to a preexisting statutory venue transfer motion); *id.* at pp. 12-17 (holding that UIM carriers are not equitably estopped to assert defense of non-service/statute of limitations).) Appellants are incorrect to argue as if the Court relied upon *Louden* to the exclusion of all other considerations.

Further, Appellants contort the *Louden* opinion and case record into an argument that *Louden* somehow supports their position in this appeal. (Apps.' Brief, at 17). Liberty Mutual notes that the *Louden* court record supports the UIM carriers' position in this matter. For instance, the *Louden* court apparently discounted a statute of limitations defense waiver argument by Louden, in which Louden asserted there was no statute of limitations problem because the presence of a signed release[6] in favor of the at-fault driver meant that the statute of limitations defense was "waived" by Morange. 327 S.C. 467, 486 S.E.2d at 526. The *Louden* court found that Moragne had not waived the statute of limitations defense because only the

[6] The *Louden* court referred to this document as a "release," however because said document appears to have attempted to preserve the right of action against Moragne, perhaps it was actually a covenant not to execute. *See* 327 S.C. 467, 486 S.E.2d at 526 ("the clear language of the release indicates that Louden merely preserved her right to pursue a tort action against Morange to establish her entitlement to underinsured motorist benefits.").

plaintiff Louden was a signatory on the release, *see id.*, which is an identical situation to the Covenant Not to Execute signed only by the Appellants in this case. (R. pp. ___; Ex. H to Pls.' Mot. Reconsider.) Appellants also cite the *Louden* UIM counsel's handling of the service issue, which involved UIM counsel placing the service defense into the answer and sending a letter to the clerk of court requesting proofs of service. (Apps." Brief, at 17-18.) Appellants ignore the fact that in this case, Appellants received *three* Answers from two separate UIM carriers pleading improper service and an email from Liberty Mutual's counsel stating that no defenses were being waived, all of which transpired *before* the statute of limitations ran and *before* Toney's deposition. (*See* R. pp. ___, ___, ___; Ans. of Liberty Mutual, Ans. of Horace Mann, Am. Ans. of Liberty Mutual; *see also* R. pp. ___; Ex. A to Pls.' Resp. to Liberty Mutual Mot. to Dismiss and Mot. for Summ. J.) Appellants also ignore the fact that not all affidavits of service are filed with the clerk in a timely fashion,[7] and so counsel for Liberty Mutual made a verbal request to Appellants' counsel for an Affidavit of Service, which is not substantively different from what the UIM counsel in *Louden* did to investigate service. (*See* R. pp. ___; Ex. B to Liberty Mutual's Reply to Pls.' Resp. in Opp. to Mot. to Dismiss, filed Dec. 21, 2021.) Finally, Appellants ignore the fact that the timing of the motion in this case is nearly identical to the timing of the successful motion in *Louden*, as detailed with specificity in the chart prepared by Liberty Mutual for the court below. (R. pp. ___; Liberty Mutual's Mem. in Supp. of Mot. to Dismiss/Mot. for Summ. J., at 4-5.) Nothing in the *Louden* decision or record supports Appellants' position in these issues on appeal.

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[7] *See* Rule 4(g), SCRCP ("[f]ailure to make proof of service does not affect the validity of service"). Liberty Mutual simply was acting prudently when it made a verbal request for an affidavit of service from Appellants' counsel, in the event the affidavit of service had been procured but not filed.

In any event, the circuit court was correct to rely on *Louden*, because *Louden* definitively answers the question posed in this case. Further, the circuit court gave the Appellants and full and fair consideration of all other issues raised by them in opposition to the motion to dismiss/motion for summary judgment. Appellants simply do not like the result reached by the circuit court.

III. Respondents properly and timely raised service-related issues in their Answer and Motions, and therefore the circuit court appropriately found that Respondents did not waive these issues.

Appellants argue that the circuit court was incorrect to hold that Liberty Mutual (A) sufficiently asserted their service-related defenses in their respective Answers; (B) properly and timely raised service-related issues in compliance with the *South Carolina Rules of Civil Procedure*; and (C) timely filed its motion to dismiss based upon these service-related issues, even though litigation had been ongoing for an extended period. (Apps.' Brief, at 21-32.) Appellants also contend that the circuit court was wrong to consider potential prejudice to Toney as an additional sustaining ground for its ruling. (*Id.* at 32-34.) Appellants' arguments are incorrect.

A. Liberty Mutual sufficiently asserted service-related defenses in its Answers.

The circuit court, after itemizing a detailed record of its findings, properly concluded that Respondent Liberty Mutual sufficiently pled service-related defenses in its Answers. (R. pp. ___; August 2022 Order, at 7-11.) In an attempt to defeat this finding, Appellants rely on the *Unisun* case, which illustrates a party waiving a defense by failing to plead with specificity.[8]

[8] Liberty Mutual, as the UIM carrier, is not in privity with named Defendant Toney or his liability carrier, and Liberty Mutual has 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 undersigned, as attorney for Liberty Mutual, does 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). Liberty Mutual had 30 days to answer from the date it was served.

(Apps.' Brief at 23 (citing *Unisun Ins. Co. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000).) *Unisun* is inapplicable to the instant discussion. *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* 342 S.C. at 542-43, 537 S.E.2d at 562. In the instant UIM case, Liberty Mutual's statutory liability for benefits is directly tethered to Appellants' preserving the right of action—and actually commencing said action—against Carlos Toney, which Appellants have failed to do. Because it was not a UIM 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, Liberty Mutual notes that it has 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. Crucially, this court in *Unisun* 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

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S.C. Code Ann. § 38-77-160. Toney, had he ever been served, would have been entitled to answer separately, with his liability carrier providing a defense even if a covenant not to execute had been procured. *Crawford*, at 400-01, 589 S.E.2d at 210 (quoting *Cobb v. Benjamin*, 325 S.C. 573, 584, 482 S.E.2d 589, 594 (Ct. App. 1997) (noting putative at-fault driver's liability carrier still has duty to defend even if limits are paid)). This begs the question of whether certain of Appellants' arguments, such as waiver, can even apply in a UIM context. I.e., is it even possible for a UIM carrier waive the putative at-fault driver's right to service of process? The question itself, combined with the above-listed authorities, supplies the negative answer. Regardless, Liberty Mutual has committed no such waiver. Further, in its own defense, Liberty Mutual has never waived *its* 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. Per the UIM statute, a UIM carrier must be served with pleadings "in the action" establishing liability against the at-fault driver, *see* S.C. Code Ann. §38-77-160, and in this case, no action was ever commenced as to Toney.

However, and in the alternative, Liberty Mutual will spend the remainder of this Brief addressing Appellants' Rule 12, waiver, and estoppel arguments.

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, Liberty Mutual has issued two Answers that plead its defenses with specificity, and these defenses must be read in conjunction and do not "stand alone" like the imprecise pleading from *Unisun*. Embedded below are the relevant portions of Liberty Mutual's Answers, which are precise, lawful, and in accord with the rule from *Unisun*:

> The undersigned, as attorney for Liberty Mutual Insurance Company ("Insurer"), notifies the Court, the parties, and their attorneys that he appears on behalf of Insurer as an insurance carrier alleged to provide uninsured motorist coverage to one or more parties to this lawsuit. By making this appearance, Insurer specifically reserves and does not waive any rights pursuant to its policy of insurance, including but not limited to, the applicability of uninsured motorist coverage to this lawsuit and the amounts of uninsured coverage provided as part of the policy. Insurer intends to preserve all rights pursuant to S.C. Code Ann. § 38-77-150, et seq, as amended.

(R. pp. ___; Liberty Mutual Not. of Appearance and Answer, filed Jan. 2, 2020, at Introduction.)

> **FOR A TENTH DEFENSE**
> **(Statute of Limitations)**
>
> 21. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.
>
> 22. Insurer would show that this action is barred by the applicable Statute of Limitations.

(R. pp. ___; *id.*, at ¶¶ 21-22.)

FOR A FOURTEENTH DEFENSE
(Improper Service)

33. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

34. Insurer would show that Plaintiff's claims are barred because Insurer and Defendant have not been served in accordance with the South Carolina Rules of Civil Procedure.

(R. pp. ___; *id.*, at ¶¶ 33-34.)

The undersigned, as attorney for Liberty Mutual Insurance Company ("Insurer"), notifies the Court, the parties, and their attorneys that he appears on behalf of Insurer as an insurance carrier alleged to provide underinsured motorist coverage to one or more parties to this lawsuit. By making this appearance, Insurer specifically reserves and does not waive any rights pursuant to its policy of insurance, including but not limited to, the applicability of underinsured motorist coverage to this lawsuit and the amounts of underinsured coverage provided as part of the policy. Insurer intends to preserve all rights pursuant to S.C. Code Ann. § 38-77-150; 38-77-160 et seq, as amended.

(R. pp. ___; Am. Ans., filed Feb. 20, 2020, at Introduction.)

FOR A TENTH DEFENSE
(Statute of Limitations)

21. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

22. Insurer would show that this action is barred by the applicable Statute of Limitations.

(R. pp. ___; *id.*, at ¶¶ 21-22.)

FOR A FOURTEENTH DEFENSE
(Improper Service)

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33. The allegations contained in the preceding paragraphs, not inconsistent herewith, are hereby realleged as if set forth herein verbatim.

34. Insurer would show that Plaintiff's claims are barred because Insurer and Defendant have not been served in accordance with the South Carolina Rules of Civil Procedure.

(R. pp. ___; *id.*, at ¶¶ 33-34.)

It is abundantly clear that Liberty Mutual has always maintained—with specificity—insufficient service of process, statute of limitations, and §38-77-160.[9] As required by the *Rules,* Liberty Mutual has always placed Appellants on notice that Liberty Mutual takes the position that the UIM statute must be complied with, Appellants must actually serve Toney, and Appellants must do so within the statute of limitations. Liberty Mutual knows of no other proper construction of the phrase "Defendant [has] not been served" from its Answers, which is embedded within a paragraph entitled "Improper Service." Further, both Answers expressly call

[9] Appellants fault Liberty Mutual for including a reference to § 38-77-160 in its Amended Answer, which was filed by consent upon Liberty Mutual's counsel's statement to Appellants' counsel that the Amended Answer was being filed to assert three changes, one of which was correcting "UM" to "UIM." Appellants argue that Liberty Mutual was somehow playing games by surreptitiously putting § 38-77-160 into the Amended Answer. (*See* Apps.' Brief, at 37-38 (citing R. pp. ___, Ex. B to Mot. Reconsider).) This argument is ludicrous. § 38-77-160 is the UIM statute, and Appellants knew that the primary reason for the Amended Answer was to clarify that is a UIM case, not a UM case. (R. pp. ___, Ex. B to Mot. Reconsider.)

upon the statute of limitations and the UM/UIM statutes. Liberty Mutual has complied with the rule from *Unisun*, and there is no just way to read Liberty Mutual's pleadings in any other manner. *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, Liberty Mutual 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 Appellants in this case presumably did not even make the attempt for Defendant Toney (*See* R. pp. ___; Pl.'s Resp. to Liberty Mutual 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. Toney has had no such opportunity. Appellants seek to be rewarded for not even making the attempt to comply with the law.

B. Respondents properly raised service-related motions in compliance with the *South Carolina Rules of Civil Procedure.*

Appellants contend that "the circuit court erred in construing Respondents' motions as [Rule 56] motions for summary judgment . . . instead of [Rule 12(b)] motions to dismiss . . . [h]ad the circuit court appropriately construed the motions under Rule 12(b), it would have been clear that the motions were untimely." (Apps.' Brief, at 25.) Appellants miss the mark. The circuit court painstakingly and thoroughly analyzed this case under the Rule 12 standard *and* the Rule 56 standard to reach the same conclusion: this case must be dismissed. (*See* R. pp. ___; August 2022 Order, at 3-7 (analyzing the case through the lens of a motion for summary judgment); R. pp. ___; *id.*, at 7-12 (in the alternative, analyzing the case through the lens of a

Rule 12 motion).) If Appellants wanted the circuit court to analyze the case as a Rule 12 issue, the circuit court certainly did so, just not to Appellants' liking.

However, Liberty Mutual notes that Appellants' attempt to characterize this appeal as solely a Rule 12(b) inquiry is an attempt to distract from the real issue. Because of the unique nature of the UIM statute, this dispute transcends the Rule 12 analysis engaged in by Appellants. 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 adjudicated after the commencement of an action, Appellants' point-by-point analysis of Rule 12 and related cases is unavailing. Appellants 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 Toney, and therefore there can be no UIM claim against Liberty Mutual or Horace Mann because no valid judgment could ever attach to 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 was required in the court below and should be affirmed by this Court.

The summary judgment issue aside, Appellant's primary argument in this section appears to be that Liberty Mutual and Horace Mann have waived the right to assert a Rule 12(b)(5) issue with service of process, and by extension, have waived the right to assert the defense statute of limitations. Assuming, *arguendo*, that a UIM carrier could waive an unserved putative at-fault driver's right to service of process or right to defend based on the statute of limitations,[10] the circuit court disagreed with Appellant's position. The circuit court analyzed this issue correctly. 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

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[10] *But see* n. 8, *supra.*

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 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 underlying motion.[11]

Appellant attempts to rely on *Maybank v. BB&T*, but the circuit court correctly held that *Maybank* is "wholly inapplicable" 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 defense

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[11] Appellants make reference to a motion to transfer venue made by Liberty Mutual early on in the litigation, attempting to argue that Liberty Mutual's venue transfer motion operated as a Rule 12(g) waiver of right to assert a later Rule 12(b)(5) motion. (*See* Apps.' Brief, at 40-42.) In other words, Appellants are misconstruing Liberty Mutual's statutory venue transfer motion, R. pp. ___, as a Rule 12(b)(3) motion to dismiss for improper venue, thus asking this Court to hold that Liberty Mutual was barred by Rule 12(g) from making the subsequent Rule 12(b)(5) motion that gives rise to this appeal. However, the law is clear that a statutory venue transfer motion and a Rule 12 motion to change venue are two distinct motions. *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.]) Simply stated, 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 venue transfer motion falls in the latter category. Therefore, Liberty Mutual was under no Rule 12(g) impediment when it filed the underlying motion to dismiss/motion for summary judgment on October 26, 2021.

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." *Id.* As noted elsewhere herein, the underlying motion was not an "eve of trial motion," or a "gamble." Further, *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 Appellant's position.

C. Respondents timely filed their motion to dismiss based upon these service-related issues.

Contrary to Appellants' position stated throughout their Brief, Liberty Mutual would point out to the court that the underlying Motion to Dismiss/Motion for Summary Judgment was not filed on "the eve of trial." Liberty Mutual filed its Motion to Dismiss and Motion for Summary Judgment on October 26, 2021, R. pp. ____, and filed its initial Memorandum in Support on November 30, 2021, R. pp. ___. Liberty Mutual had no way of knowing when a trial roster would be published. Indeed, Liberty Mutual filed its Motion and initial memorandum with all haste after the email exchange of October 26, 2021, R. pp. ___, expressly to *prevent* the underlying Motion being called an "eve of trial" motion.

As detailed via chart in Liberty Mutual's November 30, 2021 Memorandum in Support of Motion to Dismiss and Motion for Summary Judgment, the timeline of the filings in this case is nearly identical to the timeline of the filings in *Louden*. (*See* R. pp. ___; Liberty Mutual Memo.

in Supp. of Mot. Dismiss and Mot. for Summ. J., at pp. 4-5.) Appellants cannot complain that the timing of Liberty Mutual's Motion to Dismiss was "late" when the timing of that Motion was nearly identical to the timing of the *successful* motion from *Louden*.

Appellants claim in multiple places in their Brief that Liberty Mutual waived the statute of limitations/services issues because there was a significant discovery activity in the underlying case prior to Respondents filing the Motion to Dismiss/Motion for Summary Judgment. (*See, e.g.*, Apps.' Brief, at 29-32.) This argument is flawed. It is axiomatic that many cases have significant discovery conducted prior to the filing of a successful dispositive motion. In fact, one might say that is one of the purposes of discovery under the *Rules*, which provide for dispositive motions at each stage of a case even up to the time of trial. *See*, *e.g.*, Rule 12(d), SCRCP (providing for the deferral of a hearing on a Rule 12(b) motion or Rule 56 motion *until the time of trial*). Moreover, Appellants argue that Liberty Mutual waived its right to contest jurisdictional issues by availing itself of the circuit court's jurisdiction by sending discovery requests and filing motions. Again, Appellants are conflating the UIM carriers, who appeared in the action below after service upon them, with Toney, who was never served and thus never subject to the circuit court's jurisdiction. Lastly on this subject, Appellants advance a late-asserted laches argument. (Apps.' Brief, at 32.) Appellants raised laches for the first time at the motion to reconsider stage, and therefore it is untimely asserted and not a proper argument for this appeal. *See Poch*, *supra*. *See also* n. 2, *supra*.

D. The circuit court was correct to consider—as an additional sustaining ground—the potential prejudice to Defendant Toney.

Appellants assign error to the circuit court for analyzing the possible prejudice to the absent Defendant, Carlos Toney. (Apps.' Brief, at 32-34.) However, the court was correct to consider the prejudice to Toney as an additional sustaining ground for its August 2022 Order of

Dismissal, especially since Appellants seek to attach a judgment to Toney without notice. Even though there is a Covenant Not to Execute Judgment in this case, that is not the same thing as a Covenant Not to Enter Judgment. (R. pp. ___; Ex. H to Pls.' Mot. Reconsider, at ¶ 2 (Covenant Not to Execute) (providing for entry of judgment and withholding of satisfaction in certain circumstances).) Further, the Covenant Not to Execute may well have been violated by Appellants, as they failed to keep Toney abreast of the legal case even as it was approaching trial:

> 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.

(R. pp. ___; *id*., at ¶ 8 (emphasis added).) Toney was promised notice of the trial date by the Appellants in the Covenant, and the *Rules of Civil Procedure* afford every party litigant the fundamental right to be on notice of an action via service of process. Appellants did not afford Toney these basic rights, and now they wish to put his name on a verdict form and enter a judgment against him, contrary to the *Louden* rule: "[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 (emphasis added). In light of the foregoing, Appellants' claim that "Defendant Toney knew of this action and the possibility of his name appearing on a verdict form," Apps.' Brief, at 33, rings hollow. Appellants' opposing claim of prejudice—the alleged prejudice to themselves for having their case dismissed prior to trial—is of their own making.

IV. The circuit court properly refused to estop Liberty Mutual from raising service issues in its Motion to Dismiss.

Appellants claim that Liberty Mutual should be estopped to assert the service issue in this case. (Apps.' Brief, at 34-39.) However, as the circuit court stated, "the outcome is clear: there can be no equitable estoppel as argued by Appellants in this case." (R. pp.___; August 2022 Order, at 13.) The circuit court was correct to conclude that Appellants have failed to meet at least three of the six required elements.[12] (*Id.*) While each deficiency would be sufficient to defeat the estoppel argument on its own, the circuit court addressed all three. The court found: (A) Liberty Mutual's counsel never represented anything false; (B) Appellants cannot show reliance upon the complained-of representation; and (C) the underlying issue regarding lack of service of process was based on information that was within the custody and control of Appellants from the outset. (R. pp. ___; August 2022 Order, at 13.) The circuit court's findings are correct and supported by all the evidence in the record.

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

Appellants argue that Liberty Mutual should be estopped from arguing to the Court that Appellants never served Carlos Toney, based upon a January 16, 2020 email sent from Liberty Mutual's counsel to Appellants' counsel prior to the running of the Statute of Limitations. (*See* Apps.' Brief, at 35-37.) This email exchange stated:

> [Appellants' counsel to Liberty Mutual's counsel]: Richard, thanks for your answer and discovery requests in this UIM case. your [*sic*] 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

[12] 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).

> 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
>
> [Liberty Mutual's counsel to Appellants' counsel]: Boiler plate at this stage. Given the recent appellate court ruling in Garrison v. Taget [*sic*], 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.

(R. pp. ___; Ex. A to Pl's Resp. to Liberty Mutual Mot. to Dismiss and Mot. for Summ. J.) Appellants 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. (*See* Apps.' Brief, at 37.) The circuit court was correct to find that Appellants' argument is built upon an erroneous reading of the unambiguous contents of the email. (R. pp.___; August 2022 Order, at 14.) In the email, Appellants' 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 Appellants' counsel's question, but then in the same email Liberty Mutual's counsel expressly stated to Appellants' counsel that he pled as he did "to be sure I haven't waived anything." Liberty Mutual's counsel made no representations about Liberty Mutual'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 Appellants' counsel. In any event, Liberty Mutual 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, as the circuit court concluded, Appellants' equitable estoppel claim must fail on this element.

B. Appellants failed to demonstrate true reliance on the complained-of representation.

As the circuit court found, a subsequent email from Appellants' counsel to Liberty Mutual's counsel indicates that Appellants were not in reliance upon any prior representation by Liberty Mutual's counsel regarding the issue of service upon Toney. (R. pp. ___; August 2022 Order, at 15-16.) This email, sent to Liberty Mutual's counsel by Appellants' counsel after an informal verbal request for a copy of the Affidavit of Service upon Carlos Toney, states in pertinent part: "[w]ill have to look for service in the hard file." (R. pp. ___; Ex. B. to Liberty Mutual'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 motion giving rise to this appeal, counsel for Appellants stated he would "look for the service" [i.e. Affidavit of Service on Carlos Toney] in the hard copy file. The circuit court found that Appellants' 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. (R. pp. ___; August 2022 Order, at 15.) Of course, as is now known, the Affidavit of Service was not produced into the discovery record by Appellants 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 Motion giving rise to this appeal. (R. pp. ___; Ex. C to Liberty Mutual's Reply to Pls.' Resp. in Opp. to Mot. for Summ. J.) As a result of this email stipulation, Liberty Mutual filed the underlying Motion at 4:40 pm on October 26, 2021, 27 minutes after Appellants' counsel stipulated no service. (R. pp. ___; Liberty Mutual Mot. to Dismiss and Mot. for Summ. J. (efiling time-stamp ribbon).) In short, Appellants cannot argue successfully that they were relying on Liberty

Mutual's counsel's representations from a January 16, 2020 email, when Appellants were representing to Liberty Mutual's counsel as late as October 25, 2021 that they would "have to look" for an Affidavit of Service in their file. Therefore, the circuit court was correct to conclude that Appellants' equitable estoppel claim fails on the reliance element.

C. Appellants' Counsel is the One in Possession of the Underlying Information.

Finally, the fact that Appellants never had an Affidavit of Service (or service itself, for that matter) on Carlos D. Toney is information within the custody and control of Appellants. 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, Appellants' claim of lack of knowledge regarding service issues is *per se* unreasonable, and Appellants' equitable estoppel claim fails on this element.

Liberty Mutual would be remiss if it did not address for the record how Liberty Mutual, not Appellants, is the party who has been misled on the issue of service. Throughout their Brief, Appellants repeatedly accuse Liberty Mutual of "gamesmanship" and the like. (*See, e.g.*, Apps' Brief, at 4 n. 5, 20, 28, 29.) However, it is Appellants themselves who dismantle this argument. In at least two places in their Brief, Appellants cite to Liberty Mutual's Answers to Plaintiffs' Interrogatories, served upon Plaintiffs on August 21, 2020.[13] (*See* Apps.' Brief, at 31, 38 (citing R. pp. ___; Ex. F to Mot. Reconsider).) In the general objection provided in these Answers to Interrogatories, the undersigned noted that Liberty Mutual does not represent Toney, "who has been served with this lawsuit and can respond on his own." (R. pp. ___; Ex. F to Mot. Reconsider.) As is now known, Toney had not been served at the time that Interrogatory Answer

[13] Served upon Appellants by Liberty Mutual *after* the statute of limitations had run. *See* n. 2, *supra*.

was issued in August of 2020, and by implication Appellants must have already known this fact because they were the ones who had the duty to serve Toney in the first place and file an affidavit accordingly. Appellants, upon receiving this erroneous Interrogatory Answer, said nothing. Appellants knew Liberty Mutual did not have key information in its possession, and yet they said nothing. Later, when pressed by Liberty Mutual for an Affidavit of Service, Appellants continued to obfuscate, claiming in October of 2021 that they would "look for" one. (R. pp. ___; Ex. B to Reply to Pls.' Resp. In Opp. to Mot. for Summ. J.) If anyone should be estopped in this case, it is Appellants, not the Respondent UIM carriers. "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *Hedgepath v. Amer. Tel. & Tel. Co.*, 348 S.C. 340, 361, 559 S.E.2d 327, 339 (Ct. App. 2001) (quoting *Southern Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993)).

V. 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.

Carlos Toney is a necessary party to this case—both in the court below and before this Court—and should have been served with the Notice of Appeal. Appellants cannot contend otherwise. In their Initial Brief, filed in this Court on March 23, 2023, Appellants contend that the circuit court erred in dismissing the underlying action because, *inter alia*, they claim service was procured upon Toney via an alleged voluntary appearance. (Apps.' Initial Brief, at 11-15.) According to Appellants' reasoning, if Toney voluntarily appeared in the circuit court, then the action was commenced as to Toney and never should have been dismissed. (*Id.* at 15.) In fact, Appellants assert that a finding of voluntary appearance is so important, it would dispose of this entire appeal. (*Id.* at 15 n.7.)

Assuming for the sake of argument that Appellants' argument about voluntary appearance in the circuit court is correct,[14] then Toney would have been joined as a party in the action below and therefore it is inexcusable that Appellants did not serve Toney with the Notice of Appeal to this Court. The notice of appeal must be served on "all respondents" pursuant to Rule 203(b)(1), SCACR, otherwise the appellate court lacks jurisdiction. *See Elam v. S.C. Dep't. of Transp.*, 361 S.C. 9, 14-15, 602 S.E.2d 772, 775 (2004) ("[t]he 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 ignoring or extending the deadline for service of the notice."). Untimely—and by extension, nonexistent—service of a notice of appeal results in dismissal of the appeal. *See Southbridge Prop., Inc. v. Jones*, 292 S.C. 198, 199, 355 S.E.2d 535, 535 (1987) (citing *Mears v. Mears,* 287 S.C. 168, 337 S.E.2d 206 (1985)). As discussed further, Toney is the true defendant in the court below. Thus, he is the adverse party to Appellants before this Court, making him a "respondent" as that term is defined in the *Appellate Court Rules*. *See* Rule 202(a), SCACR; *see also* S.C. Code Ann. § 18-1-120 (stating same). All respondents to an appeal must be served via one of the methods prescribed in Rule 262, SCACR, and none of those methods were used upon Toney in this appeal.

The fact that Liberty Mutual, a putative UIM carrier, has been served with the Notice of Appeal does not operate to excuse this deficiency. In a UIM case, the law is clear that even though the judgment might be collected ultimately from the UIM carrier, the case is still a traditional plaintiff-versus-defendant lawsuit that requires jurisdiction over the named defendant to render a valid judgment. *Louden*, 327 S.C. at 468, 486 S.E.2d at 526. The *Louden* court also

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[14] As noted above, Respondent Liberty Mutual agrees with the circuit court's conclusion that Toney did not voluntarily appear in the court below. *See* Argument, Section I, *supra*.

explained that, in spite of the presence of a UIM carrier in the suit, "the negligence action *is against the at-fault driver*." *Id.* at 469, 486 S.E.2d at 527 (emphasis added). The law is also clear that service of the Notice of Appeal upon Liberty Mutual's counsel cannot count as service of the Notice of Appeal upon Toney, as counsel for Liberty Mutual is not in privity with Toney. *See 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). Appellants seek to "have their cake and eat it too," by arguing that Toney was "served" in the court below but then ignoring the requirement that he be served in this Court. Appellants' failure to procure service of the Notice of Appeal upon Carlos Toney is fatal to this appeal because this Court is without jurisdiction over Toney.[15]

CONCLUSION

For the reasons stated herein, or for any other reason appearing in the Record on Appeal (*see* Rule 220(c), SCACR) or the Brief of Respondent Horace Mann,[16] Respondent Liberty Mutual respectfully requests that this Court affirm the circuit court's Orders of August 28, 2022, and December 21, 2022. In the alternative, Respondent Liberty Mutual respectfully requests that this appeal be dismissed for want of appellate jurisdiction.

Signature block on following page.

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[15] In further support of Respondent Liberty Mutual's position regarding lack of appellate jurisdiction due to lack of service of the Notice of Appeal, Liberty Mutual hereby incorporates by reference its original Motion to Dismiss this Appeal (filed May 11, 2023) and its Reply to Appellants' Return to Motion to Dismiss this Appeal (filed May 30, 2023).

[16] To the extent applicable to Liberty Mutual's position, and to the extent not already argued herein, Liberty Mutual adopts by reference the arguments in Sections I, II, III, and IV of Horace Mann's Brief. *See* Rule 208(b)(6), SCACR.

Respectfully submitted,

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Columbia, South Carolina

July 27, 2023

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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

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 Liberty Mutual Insurance Company's Initial Brief in this case has been served on the following, this 27th day of July 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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July 27, 2023