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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.

**RECORD ON APPEAL
VOLUME I**

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and	)	C/A No.: 2019-CP-43-02375
Tara L. Thompson,	)	
	)	
Plaintiffs,	)	
	)	Order
v.	)	
	)	
Carlos D. Toney,	)	
	)	
Defendant.	)	

INTRODUCTION

This matter comes before the Court upon motion of Defendant Carlos D. Toney to change venue from Sumter County to Lexington County based upon the convenience of witnesses and the “ends of justice”. A hearing was held with counsel for the parties present. The issue has been thoroughly briefed and is now ripe for decision. For the reasons cited below, Defendant’s motion is denied.

FACTS

On June 2, 2017, Plaintiff Howell Thompson and Defendant Carlos Toney were involved in a motor vehicle wreck in Lexington County. Thompson, a Lexington County resident, alleged Toney, a Sumter County resident, turned his motor vehicle left in front of Thompson’s vehicle, causing a significant impact. Thompson claimed injuries as a result of the wreck. Thompson saw numerous treating physicians who either live in or have offices in Richland and Lexington counties. Thompson brought suit in Sumter County. Toney moved to change venue to Lexington County for the convenience of the witnesses and to promote the ends of justice.

ROA 001

LAW

A civil action against a resident individual may be brought and tried in the county in which the ...(1) defendant resides at the time the cause of action arose. South Carolina Code §15-7-30(c). Nonetheless, a party may move to change venue for the convenience of the witnesses and to promote the ends of justice. South Carolina Code §15-7-100. A party moving for a change of venue has the burden of showing the convenience of witnesses will be promoted as well as the “ends of justice”. *Garrett v. Packet motor Express.Co.*, 263 S.C. 463, 210 S.E.2d 912 (1975). In deciding the motion, the trial judge must resolve questions of fact. *Shelton v. Southern Kraft Corp.*, 195 S.C. 81, 10 S.E.2d 341 (1940). The showing must be based on “competent evidence”, not mere “beliefs, opinions, and conclusions of the witnesses”. *Mixson v. Agricultural Helicopters, Inc.*, 260 S.C. 532, 197 S.E.2d 663 (1973). Neither the trial court nor the appellate court can consider the convenience of any witness when the materiality of the witness’s testimony has not been shown. *McKissick v. JF Cleckley and Company*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996). Although distance alone is not determinative, there is a presumption it is more convenient to travel a lesser rather than a greater distance. *Arledge v. Colonial Oil Indus. Inc.*, 272 S.C. 88, 249 S.E.2d 740 (1978). But the distance of travel, without further explanation, is of no probative significance. *Garrett v. Packet Motor Express Co.*, 263 S.C. 463, 210 S.E. 912 (1975). Once such a showing of inconvenience and promotion of justice has been made, the burden shifts to the party opposing the motion to overcome at least one of the two requirements. *Mixson v. Agricultural Helicopters*, supra. It is within the trial judge’s discretion to determine whether to grant a motion to change venue based on the convenience of witnesses and the ends of justice. *Varnadoe v. Hicks*, 264 S.C. 216, 213 S.E.2d 736 (1975).

A. Defendant Toney Failed to Meet His Burden of Proof

Given Defendant Toney's residence, this case was properly brought in Sumter County. Toney has the burden of proof to demonstrate the basis for a change of venue. Typically, a party proves the necessity for a change of venue based upon the convenience of witnesses and promotion of the ends of justice by reliance on sworn evidence. Toney failed to provide the Court with a single affidavit demonstrating the materiality of any witness he claimed would be inconvenienced by trial in Sumter County. Moreover, Toney made no showing that any witness would suffer an identifiable hardship unless venue was changed. No affidavit was produced addressing how the ends of justice would be promoted by moving the case out of Sumter County. Essentially, Toney argued mileage, that Lexington County was closer to various witnesses rather than Sumter County. But without a showing of materiality of the witness, the Court never reaches the issue of inconvenience. *McKissick v. JF Cleckley and Company*, supra.

Toney relies on exhibits he provided to the Court which included a copy of Plaintiffs' interrogatory responses listing the names and addresses of various witnesses, including medical witnesses; excerpts of Thompson's deposition wherein he acknowledged the majority of his medical care was delivered in Lexington and Richland counties and not Sumter County; and a web site print out of the Cayce Police Department, presumably identifying Sergeant Bryan Schumpert, the investigating officer of this motor vehicle wreck. None of these exhibits is sworn evidence. None of these exhibits speak to the materiality of any witness, the hardship any witness might endure with a trial in Sumter County, nor how the ends of justice would be promoted by a change of venue to Lexington County.

Finally, Toney urges that the ends of justice are served when the credibility of witnesses is judged by a jury of the same vicinage. *Utsey v. Charleston, S & N.R. Co.*, 38 S.C. 399, 17 S.E. 141 (1893). This argument applies with equal force to leaving the case in Sumter County as it does to moving it to Lexington County. There will be benefit in having a Sumter County jury evaluate the credibility of the Defendant, a Sumter County resident, in this case that may well involve conflicting accounts of how the wreck occurred.

Toney has failed to carry his burden of proof in demonstrating the need to change venue for the convenience of witnesses and to promote the ends of justice. For these reasons Defendant's motion to change venue to Lexington County is denied.

AND IT IS SO ORDERED.



Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Other

So Ordered

S/George M. McFaddin, Jr., #2759

Electronically signed on 2020-07-24 09:29:01 page 5 of 5

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION NO: 2019-CP-430-2375

Howell D. Thompson and
Tara L. Thompson

Plaintiffs,

vs.

CONSENT SCHEDULING ORDER

Carlos D. Toney,

Defendant.

Pursuant to Rule 16 of South Carolina Rules of Civil Procedure, the following Scheduling Order is established in this case based upon the consent of the parties:

1. The parties will mediate this case by March 31, 2021; and
2. This case is subject to being called for trial on or after May 1, 2021.

AND IT IS SO ORDERED.

The Honorable Kristi F. Curtis
Chief Administrative Judge

September ____, 2020
Columbia, South Carolina

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Attorney for UIM Carrier



Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Scheduling Order

So Ordered

s/ Kristi F. Curtis, Circuit Court Judge, No. 2762

Electronically signed on 2020-09-21 11:10:59 page 3 of 3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION NO. 2019-CP-43-02375

Howell D. Thompson and
Tara L. Thompson,

Plaintiffs,

vs.

SECOND CONSENT SCHEDULING ORDER

Carlos D. Toney,

Defendant.

Pursuant to Rule 16 of South Carolina Rules of Civil Procedure, the following Scheduling Order is established in this case based upon the consent of the parties:

1. The parties will mediate this case by June 1, 2021; and
2. This case is subject to being called for trial on or after August 1, 2021.

AND IT IS SO ORDERED.

George M. McFaddin, Jr.
Chief Administrative Judge

March ____, 2021
Sumter, South Carolina

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Attorney for UIM Carrier

March 3, 2021



Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Scheduling Order

So Ordered

S/George M. McFaddin, Jr., #2759

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION NO: 2019-CP-43-02375

Howell D. Thompson and
Tara L. Thompson

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

**THIRD PROPOSED
SCHEDULING ORDER**

Pursuant to Rule 16 of South Carolina Rules of Civil Procedure, the following Scheduling Order is established in this case based upon the consent of the parties:

1. The parties will mediate this case by October 1, 2021; and
2. This case is subject to being called for trial on or after November 1, 2021.

AND IT IS SO ORDERED.

George M. McFaddin, Jr.
Chief Administrative Judge

May 26, 2021
Columbia, South Carolina

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Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Other

So Ordered

S/George M. McFaddin, Jr., #2759

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ROA 014

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and Tara	)	C/A No.: <u>2019-CP-43-02375</u>
L. Thompson,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
Carlos D. Toney,	)	ORDER GRANTING
	)	MOTION FOR PROTECTION
	)	FROM COURT APPEARANCE
Defendant.	)	

Before the Court is a Motion for Protection from Court Appearance by John D. Kassel, counsel for Plaintiffs in the above-entitled action. Counsel requests protection from court appearance from August 17, 2021 through August 28, 2021 based on a preplanned family vacation out of state. Because there are no compelling scheduling conflicts that will affect this case, Counsel's Motion is GRANTED.

AND IT IS SO ORDERED.

[Signature appears on the following page.]

ROA 015



Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Protection from Court Appearance

So Ordered

S/George M. McFaddin, Jr., #2759

Electronically signed on 2021-07-15 09:27:28 page 2 of 2

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	Third Judicial Circuit
	)	
Howell D. Thompson and Tara L. Thompson,	)	Docket No.: 2019-CP-43-02375
	)	
Plaintiffs,	)	ORDER
	)	
vs.	)	
	)	
Carlos D. Toney,	)	
	)	
Defendant.	)	

This matter came before the Court upon motion by counsel for Plaintiff seeking an order of protection regarding the deposition of Dr. Misrad Mujadzic, set for July 23, 2021. The basis for the motion was alleged prejudice to Plaintiff if forced to participate in the Mujadzic deposition without a detailed understanding of the opinions of Defendant's recently named expert, Dr. David DuPuy. Plaintiff sought either a detailed and supplemented discovery response or in the alternative, a change in the schedule to take Dr. DuPuy's deposition first and then Dr. Mujadzic subsequently.

A hearing was held before the Court on July 14, 2021 with counsel for all parties present. Argument was presented in full. The goal of the litigation process is a search for the truth. That aim will be promoted by first allowing Plaintiff the deposition of Dr. DePuy where the doctor can articulate his opinions on the cause of Plaintiff's non healing forearm fracture. Thereafter, in a subsequent deposition, Dr. Mujadzic can respond to the DePuy testimony. The result will be a robust discussion of the claims and defenses which will greatly aid the jury in making its factual determinations.

Pursuant to Rule 26(c) and (d), SCRCPP, this Court, in matters relating to a deposition, for good cause shown, may make any order which justice requires, or for the convenience of the parties, including the timing of discovery. Here, switching the timing of the doctors' deposition will lead to a full airing of the arguments and benefit the jury in its search for the truth. No prejudice will be visited upon the Defendant from this change.

THEREFORE IT IS ORDERED that the parties proceed first with the deposition of Dr. DuPuy and then follow with the deposition of Dr. Mujadzic. The parties shall coordinate on the timing of these depositions. Further, Plaintiff's request that Defendant supplement its expert disclosure for Dr. DuPuy is denied.

AND IT IS SO ORDERED.

The Honorable George M. McFaddin, Jr.
Chief Administrative Judge
Third Judicial Circuit

This ____ day of July, 2021

Sumter, South Carolina



Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Protection from Discovery

So Ordered

S/George M. McFaddin, Jr., #2759

Electronically signed on 2021-07-22 16:16:13 page 3 of 3

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

CIVIL ACTION NO: 2019-CP-43-02375

Howell D. Thompson and
Tara L. Thompson

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

**FOURTH PROPOSED
SCHEDULING ORDER**

Pursuant to Rule 16 of South Carolina Rules of Civil Procedure, the following Scheduling Order is established in this case based upon the consent of the parties:

1. The parties will mediate this case by November 1, 2021; and
2. This case is subject to being called for trial on or after January 10, 2022.

AND IT IS SO ORDERED.

George M. McFaddin, Jr.
Chief Administrative Judge

September_____, 2021
Columbia, South Carolina

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Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Scheduling Order

So Ordered

S/George M. McFaddin, Jr., #2759

Electronically signed on 2021-09-15 11:54:57 page 3 of 3

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

THIS MATTER COMES BEFORE THE COURT on the defense Motion for Continuance from the January 10, 2022 trial roster. The Motion is made by Aaron J. Hayes, Esq. (counsel for UIM carrier Liberty Mutual Insurance Company) and James D. Floyd, Esq. (counsel for UIM carrier Horace Mann Property & Casualty Insurance Company).

Counsel avers that the defense expert witness, David N. DuPuy, MD, is unavailable to testify during the week of January 10. Counsel has also advised the undersigned that there is a pending Motion to Dismiss/Motion for Summary Judgment, which the Chief Administrative Judge has agreed to hear in the near future.

Therefore, for good cause shown and in the interests of justice, this matter is CONTINUED from the January 10, 2022 trial roster.

AND IT IS SO ORDERED.

Presiding Judge
Third Judicial Circuit

Sumter, South Carolina
January __, 2022

ROA 023



Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Continuance

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2022-01-06 10:52:30 page 2 of 2

ELECTRONICALLY FILED - 2022 Jan 06 3:04 PM - SUMTER - COMMON PLEAS - CASE#2019CP4302375

ROA 024

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

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

FACTS AND PROCEDURAL HISTORY

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

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

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

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

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

STANDARD OF REVIEW

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

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

CONCLUSIONS OF LAW

The Court Agrees with the UIM Carriers’ Position

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

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

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

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

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

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

The Court Respectfully Disagrees with Plaintiffs’ Position

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

Generally

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

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

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

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

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

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

Specifically

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

I. The UIM Carriers have not waived this issue.

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

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

If there is a service of process defense, the defending party is required to either plead the defense or make a motion, and it is the defendant's option to issue the defense via a pleading or a motion. *See* Rule 12(b), SCRCF. Of course, the defense is waived if not included in the party's first response to the suit, whether that is a pleading or a motion. *See* Rule 12(h)(1), SCRCF. 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), SCRCF. The Court finds that the UIM carriers have complied with these *Rules*, by filing appropriate Answers and by raising improper service in the first Rule 12 motion, which is the instant motion.

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

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

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

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

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

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

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

b) *Maybank* is distinguishable on its facts.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subject: thompson v. toney

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

John D. Kassel
Kassel McVey, Attorneys at Law

Subject: RE: thompson v. toney

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

| Richard E. McLawhorn, Jr. | Member

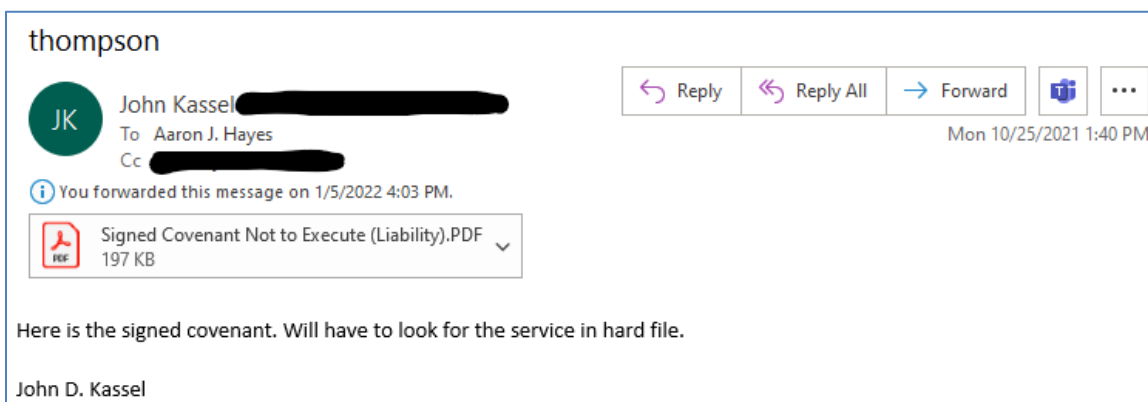
(found in original form at Ex. A to Pl's Resp. to LMU Mot. to Dismiss and Mot. for Summ. J.)

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

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

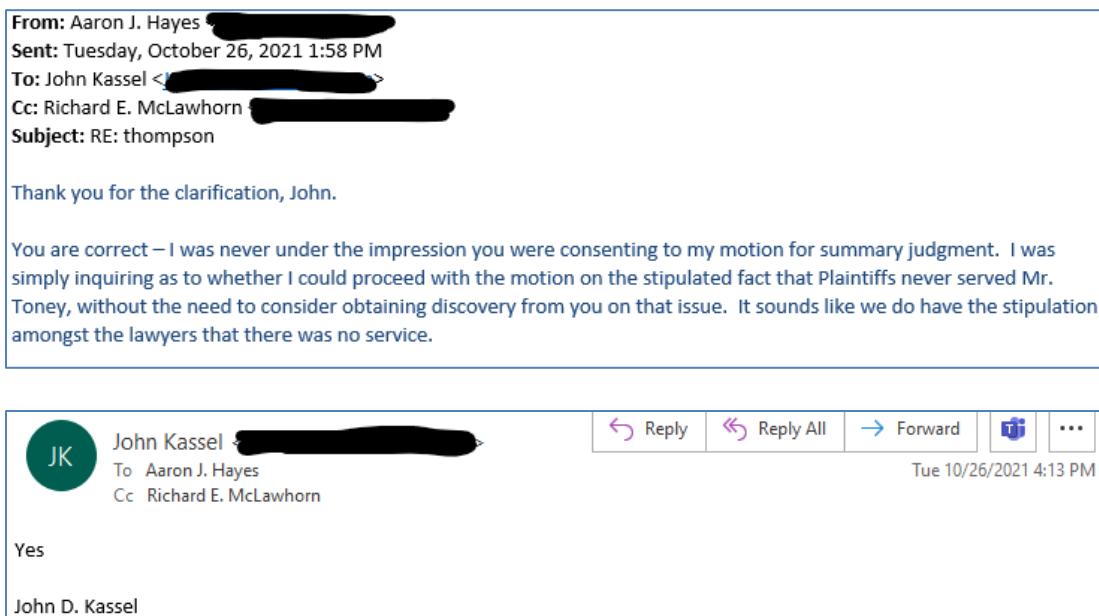
b) Plaintiffs fail to demonstrate true reliance on the complained-of representation.

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



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

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



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

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

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

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

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

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

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

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

CONCLUSION

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

AND IT IS SO ORDERED.

R. Kirk Griffin
Circuit Judge, Third Judicial Circuit

Sumter, South Carolina
August __, 2022



Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Dismissal

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2022-08-26 15:57:51 page 19 of 19

STATE OF SOUTH CAROLINA)
) IN THE COURT OF COMMON PLEAS
 COUNTY OF SUMTER) THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.
 Thompson

Plaintiffs,

v.

Carlos D. Toney,

Defendants

ORDER
 C/A NO. 2019-CP-43-02375

This matter is before the Court pursuant to Rule 59 (e) SCRCPP. The Defendants' seek an Order of this Court amending or altering its Order of August 26, 2022.

Pursuant to Rule 59 (f) SCRCPP, this Court determines that the motion to alter or amend may be decided on briefs filed by the parties and without oral argument.

Having duly considered the motion to alter or amend of the Defendants, this Court has determined that its original Order dated August 26, 2022, is fully supported by the law and the evidence and is hereby ratified and reconfirmed. The motion to alter or amend the earlier Order is therefore DENIED.

AND IT IS SO ORDERED.

Sumter, South Carolina

December 20, 2022

 R. Kirk Griffin
 Judge, Third Judicial Circuit

ROA 044



Sumter Common Pleas

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

Case Number: 2019CP4302375

Type: Order/Other

So Ordered

s/ R. Kirk Griffin 2768

Electronically signed on 2022-12-20 17:32:00 page 2 of 2

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
 Howell D. Thompson and	)	C/A No.: 2019-CP-43-_____
Tara L. Thompson,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	SUMMONS
	)	(Jury Trial Demanded)
Carlos D. Toney,	)	
	)	
Defendant.	)	

TO: THE DEFENDANT ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

s/John D. Kassel
 John D. Kassel (SC Bar No. 03286)
Jkassel@kassellaw.com
 Theile B. McVey (SC Bar No. 16682)
Tmcvey@kassellaw.com
 Jamie R. Rutkoski (SC Bar No. 103270)
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KASSEL McVEY ATTORNEYS AT LAW
 1330 Laurel Street
 Post Office Box 1476
 Columbia, South Carolina 29202
 803-256-4242
 803-256-1952 (fax)

Attorneys for Plaintiffs

December 5, 2019

Columbia, South Carolina

ROA 046

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and	)	C/A No.: 2019-CP-43-_____
Tara L. Thompson,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	COMPLAINT
	)	(Jury Trial Demanded)
Carlos D. Toney,	)	
	)	
Defendant.	)	

TO: THE DEFENDANT ABOVE-NAMED:

The Plaintiffs would respectfully show:

1. That Plaintiff Howell D. Thompson is a citizen and resident of Lexington, South Carolina.
2. That Plaintiff Tara L. Thompson is a citizen and resident of Lexington, South Carolina and the wife of Howell D. Thompson.
3. That Defendant Carlos D. Toney is a citizen and resident of Sumter County, South Carolina.
4. That on or about June 2, 2017, Howell D. Thompson was traveling north in a vehicle on the 12th Street Extension in Cayce, South Carolina. The vehicle was a 2016 Ford pick up truck, owned by F&ME Consultants, with VIN 1FMJU1HT1GEF54685.
5. At the time and place described above, Carlos D. Toney was operating his motor vehicle southbound on 12th Street Extension when he attempted to turn left onto the entrance ramp for I-77. Mr. Toney disregarded northbound traffic, plowed through the intersection, and collided with Mr. Thompson's vehicle.

ROA 047

6. As a result of this collision, Mr. Thompson suffered injuries to his body including but not limited to injuries to his right hand, and right wrist, left arm. As a result of the physical trauma of the collision, Mr. Thompson has undergone three surgeries to his left arm and has participated in intensive physical therapy. Further, Mr. Thompson has incurred medical, hospital, and doctors bills and will suffer such damages in the future. Mr. Thompson has endured and will in the future endure great physical pain, suffering, mental anguish, emotional distress, loss of enjoyment of life, disfigurement and impairment of health and bodily efficiency. Lastly, Mr. Thompson has suffered and will in the future suffer lost income.

7. As a result of the injuries and damages suffered by Howell Thompson, Tara L. Thompson lost the comfort, companionship, and consortium of her husband; the services provided by her husband, and other marital obligations.

8. Defendant Carlos D. Toney was negligent, careless, reckless, grossly negligent, willful and wanton at the time and place above mentioned in the following particulars:

- a. In failing to maintain the proper look out;
- b. In failing to maintain proper control of his vehicle;
- c. In failing to apply his brakes or to maintain the same;
- d. In failing to take evasive action to avoid the accident;
- e. In failing to yield the right of way;
- f. In failing to exercise degree of care which a reasonable prudent person would have exercised under the same circumstances;
- g. In driving too fast for conditions;
- h. In colliding with the Plaintiff's vehicle;
- i. In turning his vehicle left directly in front of Plaintiff

9. All of which combined and concurred as a direct and proximate cause of the injuries and damages suffered by the Plaintiffs herein.

WHEREFORE, the Plaintiffs pray for judgement against Defendants in a sum sufficient to adequately compensate them for their actual damages, for such punitive damages as a jury may reasonably award, for the cost of this action, and for such other and further relief as this court may deem just and proper.

Respectfully submitted,

s/John D. Kassel

John D. Kassel (SC Bar No. 03286)

Jkassel@kassellaw.com

Theile B. McVey (SC Bar No. 16682)

Tmcvey@kassellaw.com

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803-256-4242

803-256-1952 (fax)

Attorneys for Plaintiffs

December 5, 2019

Columbia, South Carolina

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and
Tara L. Thompson,

Plaintiffs,

v.

Carlos D. Toney,

Defendant.

) Civil Action No.: 2019CP4302375

) NOTICE OF APPEARANCE OF UM
CARRIER AND ANSWER
(Jury Trial Demanded)

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.

FOR A FIRST DEFENSE

1. Insurer denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. Lacks sufficient knowledge and information to form a belief as to Paragraphs 1, 2 and 3, and, therefore, denies the same and demands strict proof thereof.
3. Lacks sufficient information to form a belief as to paragraphs 4 and 5 and, therefore, denies the same and demands strict proof thereof.

4. Denies the allegations of Paragraphs 6, 7, 8, and 9, and, the unnumbered paragraph beginning with WHEREFORE.

FOR A SECOND DEFENSE
(Failure to State a Claim)

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

6. Insurer would show that the Plaintiff's Complaint fails to state a claim upon which relief can be granted, and, therefore should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Comparative Negligence)

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

8. Insurer would show that such injuries or losses that Plaintiff sustained, if any, was due to and caused by the sole negligence, gross negligence, willfulness, wantonness, carelessness and recklessness of the Plaintiff, combining, concurring and contributing with the negligence, if any, on the part of the Defendant, to such a degree that Plaintiff's recovery is barred by the doctrine of comparative negligence in South Carolina.

FOR A FOURTH DEFENSE
(Intervening and Superseding Negligence)

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

10. Insurer would show that such injuries or losses that Plaintiff sustained, if any, as alleged in Plaintiff's Complaint, was not due to or caused by any negligence on the part of the Defendant, but was rather due to and caused by the contributing, concurring, intervening or

superseding fault, breach of warranty or act or omission of a third party, over which Insurer had no control.

FOR A FIFTH DEFENSE
(Sudden Emergency)

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

12. Even assuming Defendant was negligent in any respect, which is expressly denied, Insurer would show that the Plaintiff's injuries or losses were the result of and reaction to a sudden emergency over which Defendant had no control and, therefore, Plaintiff's action is barred.

FOR A SIXTH DEFENSE
(Assumption of Known Risk)

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

14. Insurer would show that the Plaintiff knew of the probable risk of injury or harm resulting from Plaintiff's actions, and therefore, Insurer would plead the doctrine of assumption of a known risk as a complete bar to this action.

FOR A SEVENTH DEFENSE
(Unavoidable Accident)

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

16. Insurer would show that such injuries or losses that the Plaintiff sustained, if any, as alleged in Plaintiff's Complaint, was not due to or caused by the negligence on the part of the Defendant, but was rather due to and caused by an unavoidable accident, thereby barring any claim whatsoever.

FOR AN EIGHTH DEFENSE

(Waiver and Estoppel)

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

18. Insurer would show that Plaintiff's Complaint is barred by the doctrine of waiver and estoppel.

FOR A NINTH DEFENSE
(Improper Venue)

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

20. Insurer pleads the defense of improper venue in the County of Sumter, State of South Carolina.

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.

FOR AN ELEVENTH DEFENSE
(Spoliation)

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

24. The Defendants would show that Plaintiff's Complaint is barred by the doctrine of spoliation.

FOR A TWELFTH DEFENSE
(Reservation and Non-waiver)

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

26. Insurer reserves the right to assert and does not waive any additional further defenses which may be revealed by additional information that may be acquired in discovery or otherwise.

FOR A THIRTEENTH DEFENSE
(Punitive Damages)

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

28. Insurer alleges that the Plaintiff's claim for punitive damages violates both the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of any meaningful standard and is inconsistent with due process guarantees.

29. Insurer alleges that the Plaintiff's claim for punitive damages violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the South Carolina Constitution because, even if it could be argued the standard governing the imposition of punitive damages exists, the standard would be void due to vagueness.

30. Insurer alleges that the Plaintiff's claim for punitive damages violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendant.

31. Insurer alleges that the Plaintiff's claim of punitive damages violates the doctrine of separation of powers and Article I, Section 3 of the South Carolina Constitution because punitive

damages are a creation of the Judicial Branch of government which invades the province of the Legislative Branch of government.

32. Insurer would show, upon information and belief, that the Plaintiff's claim for punitive Damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that Insurer could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because Insurer can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills the Defendants' exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed; the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

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.

FOR A FIFTEENTH DEFENSE
(Bifurcation of Punitive Damages)

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

36. Defendant requests trial bifurcation on the issues of actual damages and punitive damages pursuant to S.C. Code Ann. § 15-32-520. Further, Defendant pleads all defenses, limitations, and other privileges codified at S.C. Code Ann. § 15-32-520 and § 15-32-530.

WHEREFORE, having fully answered, Insurer prays that the Plaintiff's Complaint be dismissed with costs, for attorneys' fees and such other and further relief this Court deems just and proper.

Insurer demands a jury trial.

(Signature Page Following)

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

/s/ Richard E. McLawhorn, Jr.

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**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY, PURPORTED UM
CARRIER**

Columbia, South Carolina

January 2, 2020

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No. 2019-CP-43-02375

Howell D. Thompson and Tara L.
Thompson,

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

**ANSWER OF HORACE MANN PROPERTY
AND CASUALTY INSURANCE COMPANY,
THE UNDERINSURED MOTORIST
CARRIER
(Jury Trial Demanded)**

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 FIRST DEFENSE
(General Denial)

1. Each and every paragraph of Plaintiff's Complaint not hereinafter specifically admitted, qualified, or explained is denied.
2. Paragraphs 1 and 2 are admitted.
3. Paragraph 3 is denied.
4. Paragraph 4 is admitted.
5. As to paragraph 5, Defendant admits that a motor vehicle accident occurred but lacks sufficient knowledge to form an opinion as to the allegations of paragraph 5 and therefore denies the same and demands strict proof thereof.

ROA 058

6. As to paragraph 6 and 7, Defendant lacks sufficient knowledge to form an opinion as to the allegations of paragraph 6 and 7 and therefore denies the same and demands strict proof thereof.

7. Paragraphs 8 and 9 are denied.

FOR A SECOND DEFENSE
(Improper Venue)

8. Defendant would show, upon information and belief, the appropriate venue would be the Lexington County Court of Common Pleas.

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.

FOR A FORTH DEFENSE
(Punitive Damages)

10. Defendant would show, upon information and belief, that the Plaintiff's claim for punitive damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that Defendant could be subjected to multiple awards of punitive damages for the same set of facts, the self-incrimination clause is being violated because Defendant can be compelled to give testimony against itself in a penalty situation such as punitive damages, the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature, Plaintiff's claim for punitive damages violates Defendant's right to access to the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive

damages chills Defendant's exercise of that right, Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed, and Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards and, therefore, Plaintiff's claim for punitive damages should be dismissed.

WHEREFORE, having fully answered the Complaint of the Plaintiff, Defendant prays the Complaint be dismissed with prejudice, for the costs of this action, and for such other and further relief as the Court deems just and proper.

BROWN & BREHMER

By: **s/ Karl S. Brehmer**
Karl S. Brehmer (SC Bar # 12849)
1720 Main Street, Suite 201
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Columbia, South Carolina 29202
(803) 771-6600
ksb@brownandbrehmer.com
*Attorneys for Horace Mann Property and
Casualty Insurance Company, the
underinsured motorist carrier*

January 7, 2020

ROA 060

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and) Civil Action No.: 2019CP4302375
Tara L. Thompson,)
)
Plaintiffs,)
)
v.) FIRST AMENDED NOTICE OF
) APPEARANCE OF UIM CARRIER AND
) ANSWER
Carlos D. Toney,) (Jury Trial Demanded)
)
)
)
Defendant.)

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.

FOR A FIRST DEFENSE

1. Insurer denies each and every allegation of the Complaint not hereinafter specifically admitted.
2. Lacks sufficient knowledge and information to form a belief as to Paragraphs 1, 2 and 3, and, therefore, denies the same and demands strict proof thereof.

3. Lacks sufficient information to form a belief as to paragraphs 4 and 5 and, therefore, denies the same and demands strict proof thereof.

4. Denies the allegations of Paragraphs 6, 7, 8, and 9, and, the unnumbered paragraph beginning with WHEREFORE.

FOR A SECOND DEFENSE
(Failure to State a Claim)

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

6. Insurer would show that the Plaintiff's Complaint fails to state a claim upon which relief can be granted, and, therefore should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A THIRD DEFENSE
(Comparative Negligence)

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

8. Insurer would show that such injuries or losses that Plaintiff sustained, if any, was due to and caused by the sole negligence, gross negligence, willfulness, wantonness, carelessness and recklessness of the Plaintiff, combining, concurring and contributing with the negligence, if any, on the part of the Defendant, to such a degree that Plaintiff's recovery is barred by the doctrine of comparative negligence in South Carolina.

FOR A FOURTH DEFENSE
(Intervening and Superseding Negligence)

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

10. Insurer would show that such injuries or losses that Plaintiff sustained, if any, as alleged in Plaintiff's Complaint, was not due to or caused by any negligence on the part of the Defendant, but was rather due to and caused by the contributing, concurring, intervening or superseding fault, breach of warranty or act or omission of a third party, over which Insurer had no control.

FOR A FIFTH DEFENSE
(Sudden Emergency)

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

12. Even assuming Defendant was negligent in any respect, which is expressly denied, Insurer would show that the Plaintiff's injuries or losses were the result of and reaction to a sudden emergency over which Defendant had no control and, therefore, Plaintiff's action is barred.

FOR A SIXTH DEFENSE
(Assumption of Known Risk)

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

14. Insurer would show that the Plaintiff knew of the probable risk of injury or harm resulting from Plaintiff's actions, and therefore, Insurer would plead the doctrine of assumption of a known risk as a complete bar to this action.

FOR A SEVENTH DEFENSE
(Unavoidable Accident)

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

16. Insurer would show that such injuries or losses that the Plaintiff sustained, if any, as alleged in Plaintiff's Complaint, was not due to or caused by the negligence on the part of the

Defendant, but was rather due to and caused by an unavoidable accident, thereby barring any claim whatsoever.

FOR AN EIGHTH DEFENSE
(Waiver and Estoppel)

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

18. Insurer would show that Plaintiff's Complaint is barred by the doctrine of waiver and estoppel.

FOR A NINTH DEFENSE
(Improper Venue)

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

20. Insurer pleads the defense of improper venue in the County of Sumter, State of South Carolina.

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.

FOR AN ELEVENTH DEFENSE
(Spoliation)

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

24. The Defendants would show that Plaintiff's Complaint is barred by the doctrine of spoliation.

FOR A TWELFTH DEFENSE
(Reservation and Non-waiver)

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

26. Insurer reserves the right to assert and does not waive any additional further defenses which may be revealed by additional information that may be acquired in discovery or otherwise.

FOR A THIRTEENTH DEFENSE
(Punitive Damages)

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

28. Insurer alleges that the Plaintiff's claim for punitive damages violates both the Fourteenth Amendment to the United States Constitution and Article I, Section 3 of the South Carolina Constitution in that the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of any meaningful standard and is inconsistent with due process guarantees.

29. Insurer alleges that the Plaintiff's claim for punitive damages violates the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, Section 3 of the South Carolina Constitution because, even if it could be argued the standard governing the imposition of punitive damages exists, the standard would be void due to vagueness.

30. Insurer alleges that the Plaintiff's claim for punitive damages violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and Article I,

Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the Defendant.

31. Insurer alleges that the Plaintiff's claim of punitive damages violates the doctrine of separation of powers and Article I, Section 3 of the South Carolina Constitution because punitive damages are a creation of the Judicial Branch of government which invades the province of the Legislative Branch of government.

32. Insurer would show, upon information and belief, that the Plaintiff's claim for punitive Damages violates the Fifth, Sixth, Seventh, Eighth and Fourteenth Amendments to the Constitution of the United States of America in that it violates the double jeopardy clause in that Insurer could be subjected to multiple awards of punitive damages for the same set of facts; the self-incrimination clause is being violated because Insurer can be compelled to give testimony against itself in a penalty situation such as punitive damages; the assessment of punitive damages by a burden of proof less than beyond a reasonable doubt is violative of the Sixth and Fourteenth Amendments in that punitive damages are a fine or penalty and are, therefore, quasi-criminal in nature; Plaintiff's claim for punitive damages violates Defendant's right to access the courts as guaranteed by the Seventh and Fourteenth Amendments because the threat of an award of punitive damages chills the Defendants' exercise of that right; the Plaintiff's claim for punitive damages violates the Eighth Amendment's guarantee that excessive fines shall not be imposed; the Plaintiff's claim for punitive damages violates both the due process and equal protection clauses of the Fourteenth Amendment in that the standard for awarding either punitive damages is unduly vague and, therefore, violates both procedural and substantive due process safeguards; therefore, the Plaintiff's claim for punitive damages should be dismissed.

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.

FOR A FIFTEENTH DEFENSE
(Bifurcation of Punitive Damages)

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

36. Defendant requests trial bifurcation on the issues of actual damages and punitive damages pursuant to S.C. Code Ann. § 15-32-520. Further, Defendant pleads all defenses, limitations, and other privileges codified at S.C. Code Ann. § 15-32-520 and § 15-32-530.

FOR A SIXTEENTH DEFENSE
(Set-Off)

37. Defendant asserts that any amount Plaintiff is entitled to recover in the present action case be offset by any amount paid by Plaintiff's employer's worker's compensation carrier under S.C. Code Ann. § 38-77-220 et seq. and associated case law. *See Williamson v. U.S. Fire Ins. Co.*, 314 S.C. 215, 442 S.E.2d 587 (1994).

WHEREFORE, having fully answered, Insurer prays that the Plaintiff's Complaint be dismissed with costs, for attorneys' fees and such other and further relief this Court deems just and proper.

Insurer demands a jury trial.

(Signature Page Following)

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

/s/ Richard E. McLawhorn, Jr.

Mark S. Barrow, Esquire, SC Bar No.: 7821

Richard E. McLawhorn, Jr., Esquire, SC Bar No.:
100179

1515 Lady Street

Post Office Box 12129

Columbia, South Carolina 29211

Telephone: (803) 256-2233

Fax: (803) 256-9177

msb@swblaw.com

rem@swblaw.com

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY, PURPORTED UIM
CARRIER**

Columbia, South Carolina

February 20, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and Tara L. Thompson	)	Civil Action No.: 2019CP4302375
	)	
	)	
Plaintiff,	)	
	)	
v.	)	LIBERTY MUTUAL
	)	INSURANCE COMPANY'S
Carlos D. Toney	)	MOTION TO CHANGE VENUE
	)	
	)	
Defendant.	)	

TO: JOHN D. KASSEL, ESQUIRE, THEILE B. McVEY ESQUIRE, AND JAMIE RUTKOSKI, ESQUIRE, ATTORNEYS FOR THE PLAINTIFF AND TO THE PLAINTIFF ABOVE-NAMED:

YOU WILL PLEASE TAKE NOTICE the undersigned, as attorney for Liberty Mutual Insurance Company, purported UM carrier, will move before the Presiding Judge of the Sumter Court of Common Pleas, at the Sumter County Courthouse, on the tenth (10th) day after service hereof, or as soon thereafter as counsel may be heard, for an Order transferring venue in the above-referenced case from Sumter County to Lexington County on the grounds that the convenience of the witnesses and the ends of justice will be promoted by changing the venue.

This Motion is made pursuant to South Carolina Code §15-7-30 and will be supported by a memorandum of law.

(Signature Page Following)

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

/s/ Richard E. McLawhorn, Jr._____

Mark S. Barrow

Richard E. McLawhorn, Jr.

Sweeny, Wingate & Barrow, P.A.

Post Office Box 12129

Columbia, SC 29211

(803) 256-2233

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY, PURPORTED UM
CARRIER**

Columbia, South Carolina

March 24, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and	)	C/A No.: 2019-CP-43-02375
Tara L. Thompson,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Plaintiff's Response to Defendant's Motion to
	)	Transfer Venue
Carlos D. Toney,	)	
	)	
Defendant.	)	

TO: RICHARD McLAWHORN, ESQ., COUNSEL FOR DEFENDANT:

Plaintiff, by and through undersigned counsel, will respectfully show that Defendant's Motion to Change Venue should be denied.

Section 15-7-30(C) of the South Carolina Code provides venue is proper when a case is filed in the county in which the:

- (1) defendant resides at the time the cause of action arose; or
- (2) most substantial part of the alleged act or omission giving rise to the cause of action occurred.

The defendant in this case resides in Sumter County, and resided in Sumter County at the time the cause of action arose. This case was filed in Sumter County. Thus, venue is proper. Despite Plaintiff filing this case in a proper venue, Defendant has requested the Court change the venue in this case, apparently based on an inadequate argument of convenience.

Defense counsel sent an email on March 20, 2020 (*see*, Exhibit A). Defense counsel listed the following facts to support his request to transfer venue:

- 1) the offices of the medical providers in this case are in Lexington, Richland, and Charleston County,
- 2) the accident occurred in Lexington County,
- 3) and Defendant works in Columbia.

ROA 071

The South Carolina Supreme Court has made clear:

“[i]n order to prevail on a motion for a change of venue, the moving party must make a prima facie showing that both the convenience of witnesses and the ends of justice will be promoted by the change and upon such showing having been made, the burden shifts to the party resisting the motion to overcome it as to at least one of these requirements. We have also held that the promotion of the ends of justice is served by having a jury of the vicinage pass upon the credibility of witnesses.”

Cleland v. Atlantic Coast Line R.R. Co., 245 S.C. 478, citing *Harper v. Newark Ins. Co.*, 244 S.C. 282, 136 S.E. (2d) 711; *Skinner v. Santoro*, 245 S.C. 35, 138 S.E. (2d) 645; *Oswald v. Oswald*, 245 S.C. 44, 138 S.E. (2d) 639.

Defendant will not be able to show Lexington County is more convenient for the witnesses in this case. First, the fact that the accident occurred in Lexington County has no bearing on Defendant’s motion to change venue for convenience. Second, Defendant lives in Sumter County. He works in Richland County. The assertion that Lexington County would be most convenient for him is unfounded.

Third, plaintiff’s medical providers are stretched across the state between the counties of Lexington, Richland, and Charleston. Regardless of their location, Plaintiff would use video deposition testimony at trial, and the deposition would likely take place in their office. The location of the medical providers does not support an argument of convenience.

Lastly, Plaintiff is not inconvenienced by litigating this case in Sumter County courts. Thus, Defendant has failed to make a prima facie case that changing venues would be more convenient for the witnesses in this case and has not met the standard to support this Court changing venues.

Defendant will also fail to make a prima facie case for the other prong of the *Cleland* test. Defendant will not be able to show “the ends of justice will be promoted” by changing the venue from Sumter to Lexington County. There is no evidence this request to change venue is based on the promotion of justice. Instead, it is merely an attempt at forum shopping.

Section 15-7-50 of the South Carolina Code also allows the parties to consent to venue. In an email to defense counsel on March 10, 2020 (*see*, Exhibit A), plaintiff's counsel offered to consent to file and try this case in Richland County. If defense counsel's desire to change venue was truly based on an argument of convenience, Richland County proves to be more convenient than Lexington County based on defense counsel's own arguments.

Based on the foregoing, Plaintiff respectfully requests the Court deny Defendant's Motion to Change Venue to Lexington County.

Respectfully submitted,

s/Jamie R. Rutkoski
John D. Kassel (SC Bar No. 03286)
Jkassel@kassellaw.com
Theile B. McVey (SC Bar No. 16682)
Tmcvey@kassellaw.com
Jamie R. Rutkoski (SC Bar No. 103270)
Jrutkoski@kassellaw.com
KASSEL McVEY ATTORNEYS AT LAW
1330 Laurel Street
Post Office Box 1476
Columbia, South Carolina 29202
803-256-4242
803-256-1952 (fax)
Attorneys for Plaintiffs

March 26, 2020

Columbia, South Carolina

ROA 073

Stephanie Fanning

From: John Kassel
Sent: Tuesday, March 10, 2020 5:21 PM
To: 'Richard E. McLawhorn'; Jamie Rutkoski
Cc: anh@brownandbrehmer.com; Stephanie Fanning; Esther Oliver; Danielle Jolly; ksb@brownandbrehmer.com
Subject: RE: Thompson vs Toney Change of Venue

Thanks for the email Richard. I believe mr. toney lives in sumter county. I suspect that any treating physician we call will be by video. The Thompson's are fine going to Sumter county. So I would prefer Sumter. The code section 15-7-50 allows for the parties to consent to another venue. It appears your primary concern is travel distance. Perhaps you might consider Richland County. Let me know. thanks. Jk

John D. Kassel
 Kassel McVey, Attorneys at Law
 P.O. Box 1476
 1330 Laurel Street
 Columbia, South Carolina 29202
 803.256.4242 office
 803.360.2521 cell
 www.kassellaw.com

From: Richard E. McLawhorn <rem@swblaw.com>
Sent: Tuesday, March 10, 2020 5:07 PM
To: John Kassel <JKassel@kassellaw.com>; Jamie Rutkoski <jrutkoski@kassellaw.com>
Cc: anh@brownandbrehmer.com; Stephanie Fanning <SFanning@kassellaw.com>; Esther Oliver <MEO@swblaw.com>; Danielle Jolly <DFJ@swblaw.com>; ksb@brownandbrehmer.com
Subject: Thompson vs Toney Change of Venue

John, Jamie:

In reviewing the discovery responses, I noticed that nearly every one of the medical providers in this case are located in Lexington or Richland County. The Thompsons live in Lexington County. The accident occurred in Lexington County. Mr. Toney works in Columbia.

Lexington County is closer for nearly every single witness in this case, save the one provider listed in Charleston. I'd like to ask for your consent to a motion to move venue in this case from Sumter to Lexington County.

If I do not hear back from you in the next 10 days, I will assume that you have not consented and will file a motion to change venue.

Richard E. McLawhorn, Jr. | *Member*
 Sweeny, Wingate & Barrow, P.A.





1515 Lady St. (29201)
PO Box 12129
Columbia, SC 29211

T ■ 803-256-2233
D ■ 803-217-3357
F ■ 803-256-9177
[Web](#) | [Bio](#) | [Email](#)

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L. Thompson,) Civil Action No.: 2019CP4302375
))

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**MEMORANDUM OF LAW IN
SUPPORT OF LIBERTY MUTUAL
INSURANCE COMPANY'S
MOTION TO CHANGE VENUE**

NATURE OF THE CASE

This is an action that arose out of an automobile accident that occurred on June 2, 2017 in Lexington County in which a vehicle driven by Defendant Carlos D. Toney ("Toney") allegedly turned left into the path of oncoming traffic which resulted in a collision with Plaintiff Howell D. Thompson ("Thompson"). (Compl. ¶ 4-5). On December 5, 2019, Plaintiffs filed their complaint in the Sumter County Court of Common Pleas against Defendant Carlos D. Toney.

FACTS BEARING ON THE MOTION

The accident occurred at the intersection of 12th Street Extension and I-77 in Cayce, South Carolina which is in Lexington County, South Carolina, and is 13.9 miles from the Lexington County Courthouse. Including the Plaintiffs and the Defendant, Thompson identified 15 witnesses to the accident. 13 of the 15 identified witnesses are geographically closer to the Lexington County Courthouse than they are to the Sumter County Courthouse as indicated by the following figures:

1. Plaintiffs Howell D. Thompson and Tara L. Thompson live 18.6 miles from the Lexington County Courthouse. They live 74.9 miles from the Sumter County Courthouse. Both of them have been named as witnesses and their testimony is important as they are seeking damages. In the event of trial, the witnesses would have to travel an extra 112.6 miles round trip to testify in Sumter County.
2. Sergeant B. Schumpert is named as a witness. He is listed on the Cayce Department of Public Safety website as a Patrol Supervisor. He responded to the scene and his account at trial would be an eye witness account to the aftermath of the crash. Cayce Department of Public Safety is 11.5 miles from the Lexington County Courthouse. It is 48.4 miles from the Sumter County Courthouse. In the event of trial, the witness would have to travel an extra 73.8 miles round trip to testify in Sumter County.
3. Dr. Thomas Hall is a physician at Lexington Medical Center, located at 2720 Sunset Boulevard, West Columbia, S.C. Dr. Hall treated the Plaintiff and can testify to injuries the Plaintiff may have allegedly suffered from the accident. The Dr. Hall's address is 8.7 miles away from the Lexington County Courthouse. His address is 52.6 miles from the Sumter County Courthouse. In the event of trial, the witness would have to travel an extra 87.8 miles round trip to testify in Sumter County.
4. Ms. Elizabeth Way's contact address is 1910 Blanding St., Columbia S.C. She treated the Plaintiff and is expected to testify regarding his injuries. Ms. Way's place of business is 15.2 miles from the Lexington County Courthouse. Her place of business is 43.5 miles from the Sumter County Courthouse. In the event of trial, the witness would travel an extra 56.6 miles round trip to testify in Sumter County.

5. Dr. William Fravel, another of the Plaintiff's physicians who treated him post-accident, works 12.6 miles from the Lexington County Courthouse. He works 72.8 miles from the Sumter County Courthouse. In the event of trial, this witness would have to travel an extra 120.4 miles round trip to testify in Sumter County.
6. Dr. William Westerkam and Dr. Scott Boyd are both physicians who can testify to the alleged injuries sustained by the Plaintiffs. They are 15 miles from the Lexington County Courthouse. They are 53 miles from the Sumter County Courthouse. In the event of trial, these witnesses would have to travel an extra 76 miles round trip to testify in Sumter County.
7. Dr. Jessamyn Bartley and Dr. David Fulton are located 21.4 miles from the Lexington County Courthouse. They are 52.6 miles from the Sumter County Courthouse. In the event of trial, these witnesses, who have knowledge about the Plaintiff's care, would have to travel an extra 62.4 miles round trip to testify in Sumter County.
8. Dr. David Kingerly and Dr. James MacIntosh are located 8.8 miles from the Lexington County Courthouse. They are 53 miles from the Sumter County Courthouse. In the event of a trial, these witnesses, who have knowledge about the Plaintiff's care, would have to travel an extra 88.4 miles round trip to testify in Sumter County.
9. Dr. Gary Lourie, who was involved in the care of the Plaintiff, is located 211 miles from the Lexington County Courthouse. He is 279 miles from the Sumter County Courthouse. In the event of a trial, this witness would have to travel an extra 136 miles to testify in Sumter County.

Of the two witnesses whose contact address is not physically closer to Sumter County than to Lexington County, one of them is the Defendant, who commutes from Sumter to work in the Columbia Metropolitan Area. The other witness is a doctor whose care of the Plaintiff is responsible for only 1.4% (\$1,781.28) of the damages associated with known medical bills (\$123,438.79), indicating that the vast majority of witnesses related to the vast majority of care for the Plaintiff are located in or near Lexington County.

If this case is tried in Sumter County, therefore, the above-named witnesses and parties would be required to travel a total of 831.8 extra miles round trip, than if trial were held in Lexington County – and that is just based on the witnesses known to date.

1. TRIAL OF THIS MATTER SHOULD BE TRANSFERRED TO LEXINGTON COUNTY BECAUSE IT WOULD BE MORE CONVENIENT FOR THE VAST MAJORITY OF WITNESSES

The party seeking a change of venue is responsible in the first instance to make a prima facie showing that the convenience of the witnesses would be served by changing the venue. *Patterson v. Charleston & W.C. Ry. Co.*, 190 S.C. 66, 1 S.E.2d, 920, 923 (1939). There is a presumption that it is more convenient to travel a lesser distance rather than a greater distance. *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 339, 479 S.E.2d 67, 73 (Ct. App. 1996). Moreover, common sense demands the conclusion that it is more expensive to travel a greater distance, particular because of increased fuel costs.

This computer-calculated distances cited *supra* and associated travel times make plain that it would be more convenient – and less expensive – for the vast majority of the witnesses to travel to Lexington than to Sumter.

2. TRIAL OF THIS MATTER SHOULD BE TRANSFERRED TO LEXINGTON COUNTY BECAUSE THE ENDS OF JUSTICE WOULD BE PROMOTED IF THIS CASE WERE TRANSFERRED.

A showing of convenience to the witnesses constitutes a prima facie showing that the ends of justice would be promoted by a change in venue. *Beard v. Billups Petroleum Co.*, 228 S.C. 481, 90 S.E.2d 1956. Moreover, the ends of justice are served when the credibility of witnesses is judged by a jury of the same vicinage. *Utsey v. Charleston, S & N.R. Co.*, 38 S.C. 399, 17 S.E. 141, 143 (1893); *See also, Smith v. Atlantic Coast Line R. Co.*, 218 S.C. 481, 486, 63 S.E.2d 311, 313 (1951), *McKissick*, 325 S.C. at 335, 479 S.E.2d at 71 (Ct. App. 1996).

In this case, a prima facie showing has been made that Lexington County is more convenient for the witnesses than Sumter County. Furthermore, it is appropriate to have the trial held in a county from which nine out of 15 witnesses are located (in addition to the three other witnesses who are located just over the Congaree River in Richland County). Finally, it is common sense public policy that the people from where the accident occurred have an interest in dispensing justice regarding alleged negligence in their county.

CONCLUSION

This is a Lexington County case. The accident occurred in Lexington County. The Cayce Department of Public Service responded to the accident. The Plaintiff sought the vast majority of his medical care in Lexington County. Both of the plaintiffs are Lexington County residents. The Lexington County Courthouse is closer for 13 of the 15 witnesses so far named, and only further away for two witnesses. As such, venue is more appropriate in Lexington County. The ends of justice and the convenience to the witnesses would both be promoted if this case were transferred to Lexington County.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

/s/ Richard E. McLawhorn, Jr.

Mark S. Barrow

Richard E. McLawhorn, Jr.

Sweeny, Wingate & Barrow, P.A.

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Columbia, SC 29211

(803) 256-2233

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY**

Columbia, South Carolina

June 17, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and Tara L. Thompson,	)	Civil Action No.: 2019CP4302375
	)	
Plaintiff,	)	
	)	
v.	)	SUPPLEMENTAL MEMORANDUM OF
	)	LAW IN SUPPORT OF LIBERTY MUTUAL
Carlos D. Toney,	)	INSURANCE COMPANY'S MOTION TO
	)	CHANGE VENUE
	)	
Defendant.	)	

IN FURTHER SUPPORT of Liberty Mutual Insurance Company's Motion to Change Venue, Liberty Mutual Insurance Company (hereinafter "LMU") respectfully submits the following Exhibits as a Supplement to its previously filed Memorandum of Law in Support of the Motion to Change Venue. Said Exhibits are:

- Plaintiff Howell Thompson's Answers to Defendant Liberty Mutual's Interrogatories. Excerpts attached hereto as **Exhibit A**.
- Deposition Transcript of Plaintiff Howell Thompson. Excerpts attached hereto as **Exhibit B**.
- Cayce Department of Public Safety online personnel listing, accessed July 6, 2020. Screenshot attached hereto as **Exhibit C**.

Signature Block on Following Page.

ROA 082

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

s/Aaron J. Hayes

Mark S. Barrow

Richard E. McLawhorn, Jr.

Aaron J. Hayes

Sweeny, Wingate & Barrow, P.A.

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Columbia, SC 29211

(803) 256-2233

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY**

Columbia, South Carolina

July 8, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) FOR THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and) C/A No.: 2019-CP-43-02375
Tara L. Thompson,)

Plaintiffs,)

v.)

Carlos D. Toney,)

Defendant.)

PLAINTIFF HOWELL THOMPSON'S
ANSWERS TO DEFENDANT'S
LIBERTY MUTUAL
INTERROGATORIES

TO: RICHARD E. MCLAWHORN, JR., ESQUIRE ATTORNEY FOR DEFENDANT
LIBERTY MUTUAL INSURANCE COMPANY:

1. Give the names, addresses and telephone numbers of persons known to the Plaintiff or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

ANSWER:

The Plaintiffs and Counsel are not in possession of any written or recorded statements.

Howell D. Thompson

[REDACTED]

Howell D. Thompson is the Plaintiff in this action. Mr. Thompson is expected to testify about the facts and circumstances surrounding the motor vehicle wreck which caused his injuries. Mr. Thompson is expected to testify regarding the nature and extent of his injuries, his pain and suffering, mental anguish, loss of enjoyment of life, permanent injury, and medical bills.

Tara L. Thompson

[REDACTED]

Tara L. Thompson is the Plaintiff in this action. Ms. Thompson is expected to testify about the facts and circumstances surrounding the motor vehicle wreck which injured her husband Howell Thompson. She is expected to testify about the nature and extent

ROA 084

of his injuries, his pain and suffering, mental anguish, loss of enjoyment of life, permanent injury, and medical bills. She is also expected to testify about her loss of consortium.

Carlos D. Toney



Carlos D. Toney is the Defendant in this action. Carlos D. Toney is expected to testify about the facts and circumstances surrounding the motor vehicle wreck he caused on June 02, 2017.

B. Schumpert
South Carolina Highway Patrol State Trooper

It is expected that Officer B. Schumpert will testify regarding his/her investigation of the motor vehicle wreck involving Howell D. Thompson

Lexington Medical Center
Thomas Hall, MD
2720 Sunset Boulevard
West Columbia, SC 29169
803-791-2000

Dr. Hall treated Mr. Thompson following the motor vehicle wreck. It is expected that he will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations.

Midlands Orthopaedics
Elizabeth Way, OTR/L, CHT
1910 Blanding Street
Columbia, SC 29201
803-256-4107

Ms. Way treated Mr. Thompson following the motor vehicle wreck. It is expected that she will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations.

Lexington Family Practice
William Fravel, MD
1846 Dutch Fork Road
Irmo, SC 29063
803-781-5200

Dr. Fravel treated Mr. Thompson following the motor vehicle wreck. It is expected that he will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations

**Lexington Brain & Spine
William Westerkam, MD
222 E. Medical Lane Ste., 200
West Columbia, SC 296169
803-935-8410**

Dr. Westerkam treated Mr. Thompson following the motor vehicle wreck. It is expected that he will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations

**Pain Specialists of Charleston
David Strickler, MD
2695 Elms Plantation Blvd.
Charleston, SC 29406
843-818-1181**

Dr. Strickler treated Mr. Thompson following the motor vehicle wreck. It is expected that he will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations

**Palmetto Health Orthopedics
Jessamyn Bartley, MD
101 Business Park Boulevard, Floor 2
Columbia, SC 29203
803-296-9250**

Dr. Bartley treated Mr. Thompson following the motor vehicle wreck. It is expected that she will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations

**Lexington Orthopaedics
David Kingerly, MD
146 North Hospital Drive
West Columbia, SC 29169**

Dr. Kingerly treated Mr. Thompson following the motor vehicle wreck. It is expected that he will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations.

**Palmetto Health Orthopedics
David Fulton, MD
101 Business Park Boulevard, Floor 2
Columbia, SC 29203
803-296-9250**

Dr. Fulton treated Mr. Thompson following the motor vehicle wreck. It is expected that he will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations

**Lexington Brain & Spine
Scott Boyd, MD
222 E. Medical Lane Ste., 200
West Columbia, SC 296169
803-935-8410**

Dr. Boyd treated Mr. Thompson following the motor vehicle wreck. It is expected that he will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations

**The Hand & Upper Extremity Center of Georgia, PC
Gary Lourie, MD
Northside Hospital Doctors Building
980 Johnson Ferry Road, NE Ste 1020
Atlanta, GA 30342
404-255-0226**

Dr. Lourie treated Mr. Thompson following the motor vehicle wreck. It is expected that he will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations.

**Lexington Orthopaedics
James MacIntosh, MD
146 North Hospital Drive
West Columbia, SC 29169**

Dr. MacIntosh treated Mr. Thompson following the motor vehicle wreck. It is expected that he will testify regarding the nature of his injuries, the medical treatment, and the extent of permanent injury and limitations.



1226 Pickens Street
Columbia, South Carolina 29201
info@garberreporting.com
Telephone: (803) 256-4500 | Fax (803) 256-1999

HOWELL D. THOMPSON

May 05, 2020

Howell D. Thompson and Tara L. Thompson

VS

Carlos D. Toney

2019-CP-43-02375

REPORTER: Patricia Bachand

ROA 088

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF SUMTER) C/A NO.: 2019-CP-43-02375

3
4 Howell D. Thompson and)
5 Tara L. Thompson,)
6 Plaintiffs,) VIDEO CONFERENCE DEPOSITION
7 vs.) OF
8 Carlos D. Toney,) HOWELL D. THOMPSON
9 Defendant.)

10 _____)
11
12 Video conference deposition on oral examination of
13 HOWELL D. THOMPSON, reported by Patricia G. Bachand, Court
14 Reporter and Notary Public in and for the State of South
15 Carolina; pursuant to Rule 30 of the South Carolina Rules
16 of Civil Procedure; said video conference deposition was
17 taken on Tuesday, the 5th day of May 2020, scheduled for
18 ten o'clock a.m. and commencing at the hour of 10:10 a.m.
19
20
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24
25

APPEARANCES:

REPRESENTING THE PLAINTIFFS (VIA VIDEO CONFERENCE):

JOHN D. KASSEL, ESQ.

Kassel McVey

1330 Laurel Street

Columbia, South Carolina 29201

(jkassel@kassellaw.com)

REPRESENTING LIBERTY MUTUAL (VIA VIDEO CONFERENCE):

RICHARD E. MCLAWHORN, JR., ESQ.

Sweeny, Wingate & Barrow, PA

1515 Lady Street

Columbia, South Carolina 29201

(rem@swblaw.com)

REPRESENTING THE UIM CARRIER (VIA VIDEO CONFERENCE):

JAMES FLOYD, ESQ.

Brown & Brehmer Law Firm

1720 Main Street, Suite 201

Columbia, South Carolina 29202

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* * * * *

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(None proffered.)

* * * * *

Court Reporter's Legend:

dashes [--]	Intentional or purposeful interruption
...	Indicates trailing off
[ph]	Denotes phonetically written
[sic]	Written as said

1 This video conference deposition is taken in
2 accordance with the South Carolina Rules of Civil
3 Procedure.

4 It is agreed and stipulated by the deponent and
5 respective counsel that the reading and signing of the
6 video conference deposition by the deponent is expressly
7 waived.

8 WHEREUPON:

9 HOWELL D. THOMPSON, being duly sworn and
10 cautioned to speak the truth, the whole truth and nothing
11 but the truth, testifies as follows:

12 DIRECT EXAMINATION BY MR. MCLAWHORN:

13 Q. Mr. Thompson, my name is Richard McLawhorn. I
14 represent Liberty Mutual Insurance Company in a lawsuit
15 that's pending in Sumter County, South Carolina. First
16 off, have you ever given a deposition like this before?

17 A. No, sir.

18 Q. Okay. So I'm going to go over some of the rules
19 very quickly with you. First, the court reporter is taking
20 down everything that you and I say, so it's important that
21 you provide an audible response to my questions. You and I
22 are looking at the video, we can see each other and nod our
23 head and that sort of thing, but the court reporter can't
24 take that down very well, okay?

25 A. Okay.

1 Q. If I ask you a question that calls for a yes or a
2 no, please answer with a yes or a no instead of an uh-huh
3 or an uh-uh. 'Cause, again, if we were to go back and read
4 it later, we wouldn't be able to tell what the answer was,
5 all right?

6 A. Yes, sir.

7 Q. If I ask you a question and you don't understand
8 it, let me know and I will ask it in a different way. But
9 if I ask you a question and you answer it, I'm going to
10 assume that you understood it; is that fair?

11 A. Yes, sir.

12 Q. If you need to take a break at any time, let me
13 know. The only thing I would ask is that you answer the
14 last question that I asked you before we go on a break,
15 okay?

16 A. Okay.

17 Q. All right. Could you state your full name?

18 A. Howell Dewitt Thompson, Jr.

19 Q. What's your date of birth?

20 A. [REDACTED]

21 Q. What's your current address?

22 A. [REDACTED]
[REDACTED]

24 Q. And how long have you lived there?

25 A. Twenty-one years.

1 bills that I've paid for through, you know, Lexington
2 Family Practice, trying to get some answers, since I didn't
3 seem to be getting those elsewhere. I wouldn't say that
4 was a lot, but there are some.

5 Q. So there's some that you've had to pay yourself?

6 A. Yes, sir.

7 Q. Have you been told by your -- by F&ME's comp
8 carrier, that they are not going to pay for any treatments
9 in the future?

10 A. I have not been told that. No, sir.

11 Q. Were any of the providers that you sought
12 treatment from located in Sumter County?

13 A. No, sir.

14 Q. Is it safe to say that the majority of the
15 medical providers you sought treatment from were in
16 Lexington County?

17 A. Lexington and Richland. Yes, sir.

18 Q. I saw in the record that you had complained about
19 some difficulty sleeping --

20 A. Yes.

21 Q. -- after the accident?

22 A. Yes.

23 Q. Is that resolved?

24 A. You know, I would say kind of like the migraines,
25 it has gotten better. But it's -- you know, I still have -



Public Safety

Mission and Vision

The mission of the Cayce Department of Public Safety is to provide its citizens and visitors with professional services through forming constant partnerships within the community while striving to maintain integrity, compassion, and impartiality.

Vision Statement

HONOR - PRIDE - LOYALTY - INTEGRITY

The Cayce Department of Public Safety is committed in providing professional law enforcement services to its community members by using advanced technologies in the apprehension of criminals that interfere in the daily lives of its citizens. Through community oriented policing concepts and partnerships, the police department and its citizens will be united as one in protecting the core values of life by reducing fear, crime, and personal barriers.

Learn More...

Public Safety Staff

Administration	
Name	Contact
Chief Byron Snellgrove, Director	803-550-9531 email
Pattie Rabon, Admin Coordinator/ Assistant to the Director	803-550-9531 email
Deputy Chief JJ Jones, Assistant Director	803-550-9538 email
Major Jimmy Gleaton, Police Services	803-550-9512 email
Captain Brian Lorick, Assistant Chief of Fire Services	803-550-9514 email
Lieutenant Paul Dufault, Police Administration	803-550-9521 email
Lieutenant Scott Hall, Battalion Chief of Fire Services	803-550-9514 email
Lieutenant Stephan Wilcox Team 2 Commander	803-550-9539 email
Lieutenant David Hoffman, Team 1 Commander	803-550-9539 email
Lieutenant Matt McMillan, Support Services	803-550-9539 email
Patrol	
Name	Email
Sergeant Bryan Schumpert, Supervisor	803-550-9548 email
Sergeant Brent Baker, Supervisor	803-550-9548 email

Name	Email
Sergeant Trevor Hall, Supervisor	803-550-9548 email
Sergeant Eddie Powell, Supervisor	803-550-9548 email
Corporal John Maynard, Assistant Supervisor	803-550-9548 email
Corporal Mandy Fournier, Assistant Supervisor	803-550-9548 email
Corporal Ronald Gibson, Assistant Supervisor	803-550-9548 email
Corporal Terrin Reel, Assistant Supervisor	803-550-9548 email

Traffic Division

Name	Email
PSO Roy Barr	email
MPSO Brandon Turner	email
Officer Robert Garman	email

Public Safety K9 Division

Officer	K9	Breed
MPSO Hayden Clark	K9 Kimber	Belgian Malinois
MPSO Kimberly Paparella	K9 Rocco	Belgian/ German Shepherd
MPSO Wilson Lewis	K9 Molly	Labrador Retriever
PSO Anthony Branham	K9 Louisa	Belgian/ German Shepherd

Training / Special Operations

Name	Contact Info
Sergeant Evan Antley / Training	803-550-9536 email
Sergeant Austol Youmans / Narcotics	803-794-0456 email
Jacob Harlow “Emergency Management Coordinator”	803-794-0456 email

✂ Criminal Investigations Division

The Criminal Investigations Division (C.I.D.) of the Cayce Department of Public Safety is responsible for investigating criminal offenses that occur within the city limits of Cayce. The unit is comprised of a Sergeant, Corporal, and five (5) investigators. Each investigator receives continuous advanced training in various investigative specialties, such as crime scene processing, interview and interrogation techniques, juvenile crimes, homicide/death investigation, narcotics, financial crimes, computer crimes, domestic violence/abuse, and child abuse. Many investigators are members of national or international professional associations for various investigative specialties.

Cases are referred to this division from incident reports submitted by the Patrol Division, directly from citizens and businesses, and other law enforcement or regulatory agencies. For the 2016 calendar year, the division investigated 1,463 criminal cases.

This division works closely with other local law enforcement agencies, as well as state and federal agencies such as the SC State Law Enforcement Division (SLED), the United States Secret Service (USSS), and the Bureau of Alcohol, Tobacco, Firearms, and Explosives (BATFE). Investigators routinely meet with representatives from these other agencies to exchange information and current intelligence regarding crime trends, patterns, and suspects. Investigators also

maintain a close working relationship with the 11th and 5th Judicial Circuit Solicitor’s Offices. These offices are responsible for the prosecution of offenses in the Court of General Sessions.

Criminal Investigations Staff	
Name	Contact Info
Lieutenant Jason Merrill, Investigations Supervisor	803-550-9553 email
Sergeant Cal Thomas, Assistant Investigations Supervisor	803-550-9533 email
Paul Sanguiliano, Investigator	803-550-9540 email
Doug Bramlett, Investigator	803-550-9509 email
Donta Stewart, Investigator	803-550-9537 email
William Dougall, Investigator	803-550-9535 email
Findlay Wihlidal, Investigator	803-550-9501 email
Sergeant Edward Pereira, Crime Scene/ Evidence	803-550-9558 email
Rebecca Barnett, Victim’s Advocate	803-550-9540 email

📌 Animal Services

Officer Leigh Summers is Cayce's Animal Service Officer. Animal Services rescues injured or abused animals, control potentially dangerous animals roaming at-large, and bring lost pets to a shelter where their owners can reclaim them.

Leash Law

In Cayce, animals must be kept either on a leash or in a secure enclosure. Animals running loose will be picked up and impounded by Cayce Animal Services Officers. In addition, anyone walking or owning an animal is required to clean up animal waste deposited by a pet on public property and on the private property of others.

Adoptions

Adoptions are available at Lexington County Animal Services through their adoption program, with many dogs and cats awaiting new homes. We invite anyone interested in a new animal to visit their shelter or view the animals they have for adoption on their site.

Spay or Neuter Your Pet

Every day in the United States, thousands of puppies and kittens are born because of the irresponsible breeding of pets. Some 4 to 6 million animals are destroyed every year because there are not enough homes for them. Being a responsible owner means choosing spay or neuter surgery. Spaying and neutering helps pets live longer, healthier lives. Spaying or neutering will not make your pet fat and lazy, it will not lessen a dog's natural instinct to protect home and family, and it is not better to let a female animal have one litter before being spayed. These are just myths and excuses.

It doesn't matter if your pet is a purebred—so is at least one of every four animals brought to shelters. There are too many animals, period. Even if you find homes for all the animals in your pet's litter, that means fewer homes for unwanted animals in shelters that are already desperate for good, loving homes.

📌 Community Outreach Policing

The Community Outreach Policing Services Team is a group of specialized and highly trained officers. It is their mission, using community oriented policing methods, to solve law enforcement problems that arise in the various communities of Cayce. However, the C.O.P.S. program is far more than a mere extension of law enforcement.

It is also the mission of the C.O.P.S. program to develop long term solutions for problems. This would include things as simple as sharing and gathering information with the communities, conducting home and business security surveys, developing strategies for ridding areas of drug dealers and other criminals along with enhancing overall community safety.

The Community Outreach Policing Services Team seeks to form partnerships with various business, church, charity and civic groups throughout Cayce. The focus of the Community Outreach Policing Services Unit is bolster our excellent relationships with these various groups to focus on crime prevention, citizen education, community involvement, and meeting the needs of people in distress along with improving the quality of life for our citizens.

Name	Email
Sergeant James Richardson	email
Corporal Joshua Addy	email

Name	Email
Officer Eddie West	email

✂ Fire Department

The Cayce Fire Department is actually an integrated division within the Cayce Department of Public Safety. The "Fire Division" is comprised of the Assistant Fire Chief, Battalion Chief, Captain, and a Fire Marshal. Three shifts are assigned for twenty-four hour city coverage. Forty-nine Public Safety Officers support the Fire Divisions emergency operations.

The Blue Sign Program

Time is the enemy. The blue sign program helps emergency personnel quickly and easily identify your house when responding to emergencies

All emergency responders know that it is important to locate emergencies as soon as possible. However, many residents have failed to clearly mark their residence, which severely hinders responders’ efforts to give aid. The Cayce Fire Department participates in the Interstate Blue Address Sign Program to help EMS, Fire and Police locate your residence quicker during an emergency.

Whether you participate in the Blue Sign Program or not, PLEASE, clearly mark your residence with the correct address.

Blue Sign prices as follows:

- Blue Sign (metal plate w/ numbers only) \$15.00
- Blue Sign attached to a treated 2”x4” \$18.00
- Blue Sign attached to a treated 2”x4” (INSTALLED) * \$20.00
- Blue Sign attached to a treated 4”x4” post \$20.00
- Blue Sign attached to a treated 4”x4” (INSTALLED) * \$25.00

* Please note that installation usually requires a 24-48 hour wait period for Palmetto Utility Protection services to mark the proposed installation area for all utility lines which may be present.

Smoke Detector Information

Smoke Detector Basic Rules

- Install at least one smoke detector on each floor of your house.
- Test it once a month. Just push the button.
- Clean it periodically. Dust may collect on the detector.
- Change the battery at least once a year, preferably twice a year at the daylight savings time transitions.

Installation

- Smoke alarms are normally installed on the ceiling or high on a wall with the top of the alarm no closer than 4 inches or farther than 12 inches from the ceiling. Alarms should be no closer than 3 feet from air vents or returns that may prevent the smoke from reaching the alarm. Also, avoid placing detectors near doorways.
- Avoid placing detectors in kitchens or bathrooms to prevent excessive false activation by normal smoke from cooking or steam from showers. This will also reduce the temptation to remove detector batteries due to the alarm activation causing a nuisance. An estimated 20% of U.S. homes have smoke alarms present with dead or missing batteries.
- Place at least one detector on each floor near sleeping areas. In a one story house with sleeping areas on both ends of the house, two detectors should be installed.
- The ultimate test for smoke alarms is their ability to wake you when you are asleep. You may need to install additional alarms or specialized alarms. There are alarms that allow a parent to record their voice to assist in waking children, i.e., “Johnny, wake up there is a fire”. There are also detectors for the hearing impaired that use bright, flashing lights or vibrating signals.

Smoke detectors typically have a 10-year life span and should be replaced periodically.

✂ Fire Marshal

[View the Fire Marshal page for more information.](#)

For emergencies, dial 911

For non-emergencies, call 803.794.0456





Explore & Learn More

-  [Animal Services](#)
-  [Fire Marshal Information](#)
-  [Sex Offender Registry](#)



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[Freedom of Information Act \(FOIA\) requests](#)

Site Design by [18 Street Design](#)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
 Howell D. Thompson and	)	 C/A No.: 2019-CP-43-02375
Tara L. Thompson,	)	
	)	
Plaintiffs,	)	
	)	PLAINTIFFS' OPPOSITION TO
v.	)	DEFENDANT'S MOTION TO CHANGE
	)	VENUE TO LEXINGTON COUNTY
Carlos D. Toney,	)	
	)	
Defendant.	)	

INTRODUCTION

This matter comes before the Court upon Defendant Carlos D. Toney's motion to change venue from Sumter County to Lexington County based upon the convenience of witnesses and the "ends of justice". The Court should deny the motion. Defendant has failed to sustain his burden of proving 1) the materiality of any witness claimed to be inconvenienced; 2) failing to substantiate any argument of inconvenience with affidavit or deposition testimony; 3) failing to demonstrate how a change of venue would promote the ends of justice; 4) and failing to demonstrate why Richland County would not be a more convenient venue than Lexington County if a change of venue was ordered by the Court. This memorandum supplements a previous one filed by Plaintiffs on March 26, 2020. Attached to this memorandum are signed affidavits of Mr. Howell Thompson, Mrs. Tara Thompson, and counsel for Plaintiffs, John Kassel, Esq.

FACTS

Defendant Toney turned his motor vehicle left in front of Plaintiff Thompson's vehicle on June 2, 2017, causing a massive wreck. The wreck occurred in Lexington County. Toney is a resident of Sumter County who works in Columbia. Pursuant to South Carolina Code §15-7-30(c)

a civil action against a resident individual may be brought and tried in the county in which the (1) defendant resides at the time the cause of action arose; or (2) most substantial part of the alleged act or omission giving rise to the cause of action occurred. Plaintiffs filed this action in Sumter County. The case is properly pending in Sumter County.

According to the attached affidavit supplied by Plaintiff Howell Thompson, he sustained non-healing fractures of his left forearm in the wreck, as well as neck injuries and a concussive syndrome producing headaches. He has undergone three surgeries without successful healing. He is anticipating at least one more surgery.

According to the affidavit of counsel, all four of Mr. Thompson's main treating orthopaedic witnesses have connections to Richland County. Dr. Kingery lives in Richland County. Drs. Fulton and McFadden have offices in Richland County. Dr. Mujadzic, who is planning a fourth surgery has his office in Richland County.

Mr. Thompson has seen Dr. David Stickler, a neurologist in Charleston, for headaches and concussive syndrome a number of times. He has also seen Dr. Gary Lourie, an orthopaedic in Atlanta for a second opinion.

Pursuant the affidavit of counsel, a number of other physicians played a lesser role in the care and treatment of Mr. Thompson. The Plaintiff has seen his family doctor, Dr. Fravel of Lexington, a number of times. However, Dr. Fravel was not the main treating physician of Mr. Thompson for the injuries he sustained in the motor vehicle wreck. Dr. Fravel relied instead on the previously seen orthopaedists and the neurologist. Mr. Thompson saw Dr. Hall of Lexington, the emergency room physician. He saw Dr. Hall one time following the wreck on June 2, 2017. As an emergency Room physician, Dr. Hall had a very limited role in treating Mr. Thompson's injuries which continue to

limit him to the present time. Mr. Thompson saw Dr. Westerkam of Lexington, a rehabilitation physician. He saw Dr. Westerkam one time on July 6, 2017. Dr. Weserkam also played a limited role in Mr. Thompson's care as opposed to other physicians who saw the patient more often. Mr. Thompson saw Dr. Scott Boyd, a neurosurgeon in Lexington. He saw Dr. Boyd one time on December 4, 2107 for neck complaints. Dr. Boyd felt the condition was not surgical and would improve with time. Similarly, Dr. Boyd's role was limited. Finally, Mr. Thompson saw Dr. James C. McIntosh, an orthopaedist in Lexington and partner of Dr. Kingery. Mr. Thompson saw Dr. McIntosh three times between September and November 2017. Dr. McIntosh provided no surgery but recommended further surgery similar to the recommendation of Dr. Lourie.

LAW

A party moving for a change of venue has the burden of showing the convenience of witnesses will be promoted as well as the "ends of justice". *Garrett v. Packet motor Express.Co.*, 263 S.C. 463, 210 S.E.2d 912 (1975). In deciding the motion, the trial judge must resolve questions of fact. *Shelton v. Southern Kraft Corp.*, 195 S.C. 81, 10 S.E.2d 341 (1940). The showing must be based on "competent evidence", not mere "beliefs, opinions, and conclusions of the witnesses". *Mixson v. Agricultural Helicopters, Inc.*, 260 S.C. 532, 197 S.E.2d 663 (1973). Neither the trial court nor the appellate court can consider the convenience of any witness when the materiality of the witness's testimony has not been shown. *McKissick v. JF Cleckley and Company*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996). Although distance alone is not determinative, there is a presumption it is more convenient to travel a lesser rather than a greater distance. *Arledge v. Colonial Oil Indus. Inc.*, 272 S.C. 88, 249 S.E.2d 740 (1978). But the distance of travel, without further explanation, is of no probative significance. *Garrett v. Packet Motor Express Co.*, 263 S.C. 463, 210 S.E. 912

(1975). Once such a showing of inconvenience and promotion of justice has been made, the burden shifts to the party opposing the motion to overcome at least one of the two requirements. *Mixson v. Agricultural Helicopters*, supra. It is within the trial judge's discretion to determine whether to grant a motion to change venue based on the convenience of witnesses and the ends of justice. *Varnadoe v. Hicks*, 264 S.C. 216, 213 S.E.2d 736 (1975).

A. Defendant Has Failed to Prove the Materiality of any Witness Alleged to be Inconvenienced

Typically, a party proves the necessity for a change of venue based upon the convenience of witnesses by reliance on affidavits and/or deposition testimony. Such written sources document the materiality of the witness, i.e., what specific factual testimony they can offer at trial, as well as specific hardships encountered unless the venue is changed. For example in *McKissick v. JF Cleckley and Company*, supra, the plaintiff submitted 10 affidavits supporting the need to change venue for the convenience of witnesses and the ends of justice. The case involved an motor vehicle wreck involving an ambulance traveling on a roadway with a significant drop off or low shoulder. McKissick's lawyers submitted an affidavit summarizing the testimony of various witnesses for the court and in doing so laid out their materiality. It was not enough to simply identify someone as an eye witness to the wreck. Rather, the affidavit described what each witness would testify to, including for example, the speed of the ambulance before the crash. The *McKissick* court refused to consider two affidavits where the materiality of the witnesses was not explained. See *Guardian Fidelity Corp v. United States Fidelity & Guaranty Co.*, 266 S.C. 595, 225 S.E.2d 655 (1976)(affirming denial of transfer of venue when affidavits submitted by moving party did not state what the particular witnesses named would testify to or that the testimony was material to the moving party's case).

Further, the affidavits had to identify particular hardships suffered by the witness to support the motion. McKissick, the plaintiff, was injured when the ambulance she was riding in overturned due to the drop off. In her affidavit she described her significant medical needs, the extensive medical equipment located in her house that she relied upon daily, and the difficulties she would experience attending trial in Orangeburg, located distantly from her house. Other affidavits submitted by plaintiffs described specific identifiable problems faced by material witnesses if they had to participate in a trial in a distant venue: missed work, travel after dark, travel after working long hours on a shift.

Likewise, the Defendant Cleckley submitted 13 affidavits from witnesses whose materiality was demonstrated by showing they would testify about the quality of the contractors' work on the roadway, as well as the convenience for them testifying at trial in the current venue. As a result of the thorough presentation of affidavits, the Court had a basis upon which to rule on the convenience of the witnesses and the promotion of the ends of justice.

Similarly in *Garrett v. Packet motor Express.Co.*, 263 S.C. 463, 210 S.E.2d 912 (1975) 10 affidavits were submitted to the trial court regarding the defendant's motion to change venue for the convenience of witnesses and the promotion of the ends of justice. The materiality of 5 eye witnesses, whom purportedly saw the motor vehicle wreck in question, was in doubt since the affidavits "did not say from what vantage point, whether they viewed the accident or can throw any real light on the cause of the collision". 263 S.C. at 466, 210 S.E.2d at 913. The affidavit from Defendant's driver stated only that he was the driver of the truck and did not reveal any facts to which he could testify. The affidavit from the defense lawyer stated he had talked to all of the witnesses, suggested they were important to the defense, but failed to state

what the witnesses would testify to if called. Three affidavits were from doctors all of whom the plaintiff-respondent's attorney indicated would probably not have to appear in person at trial in any event. *Id.* In denying the motion to change venue, the court stated

Here we do not have a single affidavit which states any concrete facts as to what the witness would testify. The affidavits state, without any explanation, that they were a witness and that it would be inconvenient to travel to Walterboro. An analysis of these statements reveals nothing more than their conclusions. The distance of travel, without further explanation, is of no probative significance in determining the issue of convenience. 263 S.C. at 467, 210 S.E.2d 913 (emphasis in original).

In the instant case, Toney attempts to argue the convenience of the witnesses to support a transfer of venue from Sumter to Lexington without presenting the Court with any affidavits or deposition testimony. Therefore, he cannot demonstrate the materiality of a single witness to the Court. Of the 10 medical witnesses discussed in his memorandum, Defendant fails to give any factual basis for their expected testimony. He gives the Court no basis to determine the relative importance of each witness's testimony or what supportive fact the Defendant would expect to elicit from each. *Garrett v. Packet Motor Express*, 269 S.C.463, 210 S.E.2d 912 (1975)(no abuse in denying motion to change venue where affidavits failed to state what witnesses would testify to if called). Instead all that is mentioned are general conclusion that the witness will discuss the care and treatment of the Plaintiff. Neither the trial court nor the appellate court can consider the convenience of any witness when the materiality of his or her testimony has not been shown. *McKissick v. JF Cleckley and Company*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996).

Since both Mr. Thompson and Mr. Toney have been deposed, it is conceded their respective testimony is of course material to the way the wreck occurred. However, the same cannot be said for the Investigating officer, Sergeant Shumpert of the Cayce Police Department.

No information was supplied through affidavit or otherwise regarding his expected testimony and what he might be able to say about how the wreck occurred.

Despite failing to reveal witness materiality, Toney spends his efforts cataloging the mileage of each witness to the Lexington County courthouse vs. the Sumter County courthouse. Certainly Lexington is closer than Sumter. But the distance of travel, without further explanation, is of no probative significance in determining the issue of convenience. *Garrett v. Packet motor Express.Co.*, 263 S.C. 463, 210 S.E.2d 912 (1975). What is missing is any articulated hardship by a single witness regarding travel offered by the Defendant. By contrast, in Mr. Thompson's affidavit and Mrs. Thompson's affidavit, both demonstrate their willingness to travel to Sumter for trial.

Further, focusing on mileage in this case misses the point. From the attached affidavit, counsel for Plaintiffs intends to present medical testimony by video deposition for use at trial pursuant to Rule 30(i) SCRPC. Defense counsel will of course be provided a prior discovery deposition. There will likely be no driving by healthcare witnesses to the trial of this case where ever venue is decided. This methodology has been used historically to present medical testimony not only due to distances involved but time schedules of physicians. To utilize a video deposition at trial, of course, eliminates any inconvenience for the medical witness that would arise from attending trial in a home county or otherwise. See *Garrett v. Packet motor Express.Co.*, 263 S.C. 463, 210 S.E.2d 912 (1975) (in denying motion to change venue court noted plaintiff's attorney indicated three physicians of plaintiff would probably not have to appear in person at trial in any event).

B. DEFENDANT TONEY HAS MADE NO SHOWING REGARDING THE ENDS OF JUSTICE

In addition to showing the materiality of witnesses and their inconvenience, a party moving for a change in venue must also show how such a transfer would promote the ends of justice. *Garrett v. Packet motor Express.Co.*, 263 S.C. 463, 210 S.E.2d 912 (1975). In *Garrett*, the motion to change venue was denied where none of the affidavits offered referred to the ends of justice being promoted. Here, Toney has presented no affidavits at all, let alone ones providing facts showing promotion of the ends of justice.

Although both requirements must be met, a showing of the convenience of the witnesses can, depending on the facts of the case, bear on the issue of promotion of justice. *McKissick v. JF Cleckley and Company*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1996). The ends of justice are promoted by having a jury from the same area as the witnesses evaluate witness credibility. *Holden v. Beach*, 228 S.C. 234, 89 SE.2d 433 (1955). Here, a Sumter jury could evaluate the credibility of Sumter resident Toney who may give a different version of how the wreck occurred than Mr. Howell. Moreover, the court in *McKissick* found transfer of the case to Allendale County promoted the ends of justice where the plaintiff provided evidence demonstrating difficult medical challenges facing McKissick and the witness Barbara Smith in attending trial in a distant venue. McKissick was in need of extensive medical equipment for her daily needs which was located in her home, two blocks from the Allendale County courthouse. Smith was in a wheelchair and had all her necessary medical equipment in her home, also located close to the Allendale County Courthouse. The court stated, “Here, the difficult medical challenges facing McKissick and Barbara Smith are a prime example of a convenience issue bearing on the ends of justice”. 325 S.C. at 340, 479 S.E.2d at 74. Again, there has been no showing by affidavit or deposition by Toney of the ends of justice being promoted. Toney has

alleged no facts that the distances to the Sumter County Courthouse would present some particular hardship on a material witness.

C. If the Court Were to Consider a Change in Venue, Richland County would be the Correct Choice

Despite use of video depositions for use at trial, if the Court were to consider mileage as an important factor in deciding this venue question, then Richland County would be the logical choice. All of Mr. Thompson's main treating physicians (or soon to be treating physician) have connections in Richland County. Dr. Kingery lives in Richland County. Dr. Fulton has offices in Richland County. Dr. McFadden has offices in Richland County and Dr. Mujadzic has offices in Richland County. Other medical witnesses who have a Lexington address and who saw Mr. Howell played a minor role in his treatment.

CONCLUSION

Mr. Howell Thompson stated in his affidavit he was prepared to come to Sumter for the trial of his case. Mrs. Tara Thompson stated in her affidavit she was prepared to come to Sumter for the trial of her case. Mr. Carlos Toney lives in Sumter. The case is properly filed in Sumter. Plaintiff will bring key medical witnesses to trial by video deposition. Defendant has failed to meet his burden of proof by showing the materiality of any witness he claims will be inconvenienced. Further Defendant has failed in showing any witness has expressed any hardship attending a trial in Sumter. Defendant has failed in showing any hardship such as to promote the ends of justice by moving the case. Lastly, even if this court were to consider a transfer of venue, Richland County would have connection to the main medical witnesses than

Lexington. For these reasons, Plaintiffs respectfully request the Defendant's motion to change venue be denied.

s/ John Kassel

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Attorneys for Plaintiff

July 8, 2020

Columbia, South Carolina

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	Docket No.: 2019-CP-430-2375
	)	
Howell D. Thompson and Tara L. Thompson,	)	
	)	
Plaintiffs,	)	AFFIDAVIT
	)	OF
vs.	)	HOWELL D. THOMPSON
	)	
Carlos D. Toney,	)	
	)	
Defendant.	)	
	)	

-
1. I, Howell D. Thompson, am a Plaintiff in the above captioned action. I live in Chapin, South Carolina, County of Lexington.
 2. I was injured in a motor vehicle wreck on June 2, 2017 in Lexington County when Carlos D. Toney, from Sumter County, turned his vehicle left in front of me. I sustained a complex fracture of my left forearm which despite 3 surgeries has not healed. So far, I have been seen by five orthopaedic physicians. Most of these physicians are in the Lexington-Columbia area. I have been informed that I am in need of further surgery. Because of the difficulty of the anticipated procedure, it will need to be performed by a specialist. I have been informed that an appropriate specialist is in Columbia or at Duke Medical Center in Raleigh, North Carolina. I am in the process of trying to get this surgery scheduled.
 3. Of the five orthopaedic physicians, I have seen Dr. David Fulton, of Palmetto Health USC Medical Group, the most frequently and fairly recently. Palmetto Health USC Medical group has offices in Lexington, Columbia, and Sumter. I have seen Dr.

Fulton in both the Lexington and Columbia offices. Dr. Fulton performed two of the surgeries I have had. I was last seen by Dr. Fulton on April 17, 2019.

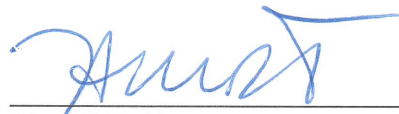
4. The first surgery I had was performed by Dr. David Kingerly in Lexington, South Carolina immediately following the June 2, 2017 wreck. The last appointment I had with Dr. Kingerly was August 29, 2017.
5. I saw Dr. Kingerly's partner, Dr. James McIntosh. Dr. McIntosh evaluated my arm but never performed any procedures. The last appointment I had with Dr. McIntosh was November 15, 2017.
6. I was referred to Dr. Gary Lourie, an orthopedist in Atlanta, Georgia. I saw Dr. Lourie one time on October 18, 2019. He recommended further work up of my arm to determine if infection was inhibiting healing of the bone.
7. I have recently seen Dr. Earl McFadden with Palmetto Health USC Medical Group. Dr. McFadden recommended that I consider a specialized procedure called a open reduction fixation with segmental iliac bone graft with a free vascularized fibular bone graft. Because of its specialized nature, Dr. McFadden recommended the procedure be done at Duke Medical Center in Raleigh, North Carolina. Subsequently, I have come to learn of an orthopaedic surgeon in Columbia, South Carolina, who might be skilled to perform this particular surgery.
8. In addition to the orthopaedic physicians listed above, I have seen other health care providers following the motor vehicle wreck. I understand that the my medical records reveal that I was seen in the Emergency Department at Lexington Medical Center on June 2, 2017, following the wreck, by the ED physician, Dr. Thomas Hall.

I have not seen him since. I saw Elizabeth Way, an occupational therapist, who provided treatment to my left arm. Dr. William Fravel is my family doctor. I would typically see him for treatment of colds and flu. Following the wreck he treated me for headaches and referred me to other physicians, including referral to a neurosurgeon. I saw Dr. William Westerkam, a rehabilitation physician one time on July 6, 2017. He assessed me for headaches and did nerve studies on my arms. I saw Dr. Scott Boyd, a neurosurgeon, one time for neck pain on December 4, 2017. He referred me to pain management for my neck. I have been seen and treated by Dr. David Stickler, a neurologist in Charleston, South Carolina, for headaches and post concussive syndrome.

9. I am currently employed as a construction services manager for the engineering firm called F&ME. As part of my job, I travel by vehicle to various counties throughout the state of South Carolina. Given the travel I do for work, as well as the travel I have done seeing physicians, I am quite prepared to attend the trial of this case in Sumter, South Carolina. Once the trial is scheduled, I will block off the time necessary to fully participate. Therefore, trial in Sumter will not inconvenience me.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.¹

¹Supreme Court Order 2020-04-01(16)(“If a statute, court rule or other provision of law requires an affidavit to be filed in an action, the requirement of an affidavit may be satisfied by a signed certification of the maker...” with language as stated above.)



Howell D. Thompson

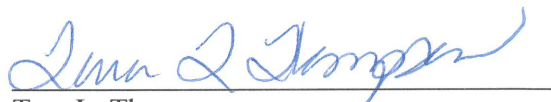
June 23, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	Docket No.: 2019-CP-430-2375
	)	
Howell D. Thompson and Tara L. Thompson,	)	
	)	
Plaintiffs,	)	AFFIDAVIT
	)	OF
vs.	)	TARA L. THOMPSON
	)	
Carlos D. Toney,	)	
	)	
Defendant.	)	
	)	

-
1. I, Tara L. Thompson, am a Plaintiff in the above captioned action and wife of Howell D. Thompson. We live together in Chapin, South Carolina, County of Lexington. I work as a reading coach for Chapin Elementary School
 2. My husband Howell, D. Thompson, was injured in a motor vehicle wreck on June 2, 2017.
 3. I understand that the litigation arising out of this wreck has been filed in Sumter County and that the trial of this case may take place in Sumter, South Carolina. I plan to attend the trial with my husband. I will be happy to travel to Sumter for the trial.
- I will not be inconvenienced by trial in Sumter.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.¹

¹Supreme Court Order 2020-04-01(16) ("If a statute, court rule or other provision of law requires an affidavit to be filed in an action, the requirement of an affidavit may be satisfied by a signed certification of the maker..." with language as stated above.)


Tara L. Thompson

June 23, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	Docket No.: 2019-CP-430-2375
	)	
Howell D. Thompson and Tara L. Thompson,	)	
	)	
Plaintiffs,	)	AFFIDAVIT
	)	OF
vs.	)	JOHN D. KASSEL, ESQ
	)	
Carlos D. Toney,	)	
	)	
Defendant.	)	
	)	

-
1. I, John D. Kassel, am a member of the South Carolina Bar, and the counsel of record for the plaintiffs in this action.
 2. Following the June 2, 2017 motor vehicle wreck in which Howell D. Thompson was injured, I filed a Summons and Complaint on December 5, 2019. The South Carolina Traffic Collision Report Form listed Mr. Carlos D. Toney as a resident of Sumter County. Pursuant to South Carolina Code §15-7-30© a civil action against a resident individual may be brought and tried in the county in which the (1) defendant resides at the time the cause of action arose; or (2) most substantial part of the alleged act or omission giving rise to the cause of action occurred. Pursuant to the statute, I filed this action in Sumter County.
 3. Medical witnesses will no doubt be important to the trial of this case.
 4. Of the 11 medical witnesses so far identified by plaintiffs in answer to interrogatory responses, perhaps six will likely be important to the case. They

include the following:

5. Dr. David Kingery. Dr. Kingery is an orthopaedic surgeon with an office in Lexington, South Carolina. He lives in Richland County in Columbia. Following the motor vehicle wreck, Dr. Kingery evaluated and provided treatment to Mr. Thompson. He will testify that Mr. Thompson suffered from a comminuted fracture of two bones in the left forearm, including a fracture of the midshaft radius and ulna with significant displacement and foreshortening. Mr. Thompson also had a fracture of his right little finger that was treated with bracing. Dr. Kingery performed surgery on June 4, 2017 including a open reduction internal fixation, with a six hole compression plate and intra medullary rod. Dr. Kingery or his staff saw Mr. Thompson in follow up in the office on June 9, 2017, June 15, 2017, July 10, 2017, July 31, 2017 and August 29, 2017. Due to continued pain, numbness and weakness, Dr. Kingery referred Mr. Thompson to his partner, Dr. McIntosh. At that point, Dr. Kingery had no further direct care with Mr. Thompson. This case involves the complication with bone healing sustained by Mr. Thompson. The bone healing problem was not addressed by Dr. Kingery. Other physicians have played a more prominent role in evaluating and treating Mr. Thompson's ongoing orthopaedic complications.
6. Dr. James C. McIntosh. Dr. Kingery referred Mr. Thompson to his partner, Dr. McIntosh. Dr. McIntosh has his office in Lexington, South Carolina. Dr. McIntosh saw Mr. Thompson in his office on September 25, 2017, October 16, 2017, November 15, 2017. Dr. McIntosh recommended further surgery to attempt to

alleviate Mr. Thompson's symptoms but did not perform any procedures. His direct care of Mr. Thompson ended in November 2017. The bulk of Mr. Thompson's care was performed by other health care providers. Drs. Kingery and McIntosh treated Mr. Thompson for 5 months.

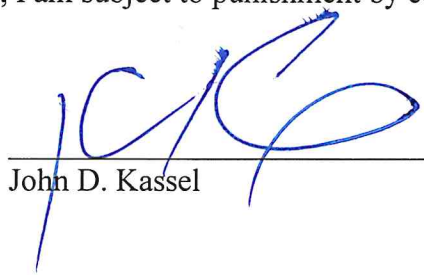
7. Dr. David Fulton. Dr. Fulton is an orthopaedic surgeon with Prisma Health with offices in both Lexington and Columbia. Dr. Fulton saw Mr. Thompson approximately 16 times from November 29, 2017 until April 17, 2019, an 18 month period. He performed two additional surgeries on Mr. Thompson's left forearm. The first was to remove the hardware installed by Dr. Kingery. Dr. Fulton then installed new plates and a bone graft. This was done in an attempt to get the forearm bones to finally heal. Despite the second surgery and use of a bone graft, a third surgery by Dr. Fulton was required to redo the compression plate for fixation on the ulna.
8. Dr. Gary Lourie. Dr. Lourie is an orthopaedic surgeon in Atlanta, Georgia. He saw and evaluated Mr. Thompson one time for a second opinion. Dr. Lourie was concerned about an occult infection, metabolic abnormalities and inflammatory processes. He recommended a strategy to evaluate all these factors to determine if they existed and whether they inhibited healing. He recommended removal of the hardware again, and depending on the findings, he raised the possibility of another procedure to be done including a vascularized bone graft.
9. Dr. Earl McFadden. Dr. McFadden is an orthopaedic surgeon with Prisma Health, with offices in Lexington and Columbia. He evaluated Mr. Thompson one time on

May 5, 2020. Dr. McFadden found the injury to be a complex problem. He agreed with Dr. Lourie with need for an extensive metabolic work up and evaluation for infection. He also recommended further surgery that might include a free vascularized bone graft. Dr. McFadden stated that such a surgery would need to be done at a center where this specialized surgery could benefit from a team approach.

10. Dr. Mirsad M. Mujadzic. Mr. Thompson has recently learned that Dr. Mirsad M. Mujadzic, a plastic surgeon with offices in Columbia, South Carolina, and who is employed by Palmetto Health-USC, will do the planned next surgery. Dr. Mujadzic will likely provide important testimony as he will address whether Mr. Howell will undergo a fourth surgery, the nature of the fourth surgery, and whether the fourth surgery, if done, was successful in healing the bone in Mr. Howells forearm and relieving his pain.
11. From an orthopaedic point of view the most significant witnesses for Mr. Thompson will be Dr. Kingery (Lexington & Columbia), Dr. Fulton (Lexington & Columbia), Dr. McFadden (Lexington and Columbia), Dr. Lourie (Atlanta) and Dr. Mujadzic (Columbia).
12. Dr. David Stickler. Dr. Stickler is a neurologist with an office in Charleston, South Carolina. He treated Mr. Howell for headaches and concussive syndrome as a result of the wreck. In addition he conducted EMG and nerve conduction studies on the left arm, finding abnormalities. He saw Mr. Thompson on multiple visits between July 18, 2017 and November 7, 2018.

13. Drs. Boyd, Fravel, Hall, and Westerkam are lesser important witnesses as any testimony they may have to offer will likely be provided by the physicians listed in paragraph 12 above.
14. It is anticipated that testimony from medical witnesses will be procured by the plaintiffs through the use of video depositions to be published at trial. Since 1994, SCRCF 30(I) has allowed the use of video evidence depositions of health care providers to be used at trial notwithstanding the 100 mile limit of Rule 32(a)(3). In my experience the majority of treating physician testimony is presented through video deposition. Under the Rule, Defendant is of course entitled to a discovery deposition before the video deposition. To date, Defendant has not requested depositions of any health care providers.
15. I sent an email to counsel for Defendant on March 10, 2020, previously identified as Exhibit A. The email asked if travel distance was the main concern, then perhaps defense counsel might consider Richland County as a suggested venue. I received no response.

I certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment by contempt.¹



John D. Kassel

¹Supreme Court Order 2020-04-01(16)(“If a statute, court rule or other provision of law requires an affidavit to be filed in an action, the requirement of an affidavit may be satisfied by a signed certification of the maker...” with language as stated above.)

July 8, 2020

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
	)	
Howell D. Thompson and	)	C/A No.: 2019-CP-43-02375
Tara L. Thompson	)	
	)	
Plaintiff,	)	
	)	CONSENT MOTION TO EXTEND
v.	)	SCHEDULING ORDER
	)	
Carlos D. Toney,	)	
	)	
Defendant	)	

A status conference was held before the Court on May 26, 2021 to discuss scheduling in this matter. The parties were in agreement on establishing new dates for mediation and trial. The new dates are as follows:

- 1) This case shall be mediated on or before October 1, 2021.
- 2) This case shall be called for trial not before November 1, 2021.

WE SO MOVE:

WE SO CONSENT:

s/John Kassel
 John D. Kassel, Esquire, Bar #03286
 Kassel McVey, Attorneys at Law
 Post Office Box 1476
 Columbia, SC 29202
 Phone: 803-256-4242
 Fax: 803-256-1952

Attorney for Plaintiffs

s/Aaron Hayes
 Aaron Hayes, Esquire
 Sweeny Wingate & Barrow, PA
 1515 Lady Street
 Columbia, SC 29211
 Phone: 803-256-2233
 Fax: 803-256-9177

*Attorney for Liberty Mutual
 UIM Carrier*

WE SO CONSENT:

s/Karl Brehmer
Karl S. Brehmer, Esquire
Brown & Brehmer
Post Office Box 7966
Columbia, SC 29202
Phone: 803- 771-6600
Fax: 803- 252-1620

Attorney for Horace Mann Insurance

UIM Carrier

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	FOR THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and Tara L. Thompson,	)	C/A No.: 2019-CP-43-02375
	)	
Plaintiffs,	)	
	)	
v.	)	MOTION FOR ORDER OF PROTECTION
	)	FROM COURT APPEARANCE
	)	
Carlos D. Toney,	)	
	)	
Defendants.	)	

The undersigned John D. Kassel, counsel for Plaintiffs in the above-entitled action, respectfully requests protection from this Honorable Court from court appearance from August 17, 2021 through August 28, 2021. I have a preplanned family vacation out of state. Further, I am unaware of any compelling scheduling conflicts that will affect this case.

Respectfully submitted,

s/John D. Kassel
 John D. Kassel (SC Bar 3286)
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 Theile B. McVey (16682)
tmcvey@kasselalw.com
 Jamie Rutkoski (103270)
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 KASSEL McVEY ATTORNEYS AT LAW
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 803-256-4242
 803-256-1952 (Facsimile)
 Other email: emoultire@kassellaw.com

July 14, 2021

Columbia, South Carolina.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
	)	
Howell D. Thompson and	)	C/A No.: 2019-CP-43-02375
Tara L. Thompson	)	
	)	
Plaintiff,	)	
	)	CONSENT MOTION TO EXTEND
v.	)	SCHEDULING ORDER
	)	
Carlos D. Toney,	)	
	)	
Defendant	)	

This matter comes before the Court upon consent of the parties for an entry of a consent Scheduling Order. The parties have been engaged in discovery including depositions of the plaintiffs, defendants, witnesses and medical providers. Given Covid 19 delays and further necessary discovery, additional time is necessary to complete the discovery process. The parties agree to the following new dates:

- 1) This case shall be mediated on or before November 1, 2021.
- 2) This case is subject to being called for trial on or after January 10, 2022.

WE SO MOVE:

s/John Kassel
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 Kassel McVey, Attorneys at Law
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 Fax: 803-256-1952

Attorney for Plaintiffs

WE SO CONSENT:

s/Aaron Hayes
 Aaron Hayes, Esquire
 Sweeny Wingate & Barrow, PA
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 Columbia, SC 29211
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 Fax: 803-256-9177

*Attorney for Liberty Mutual
 UIM Carrier*

WE SO CONSENT:

s/Karl Brehmer

Karl S. Brehmer, Esquire

Brown & Brehmer

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Phone: 803- 771-6600

Fax: 803- 252-1620

Attorney for Horace Mann Insurance

UIM Carrier

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and Tara L. Thompson,	)	Civil Action No. 2019CP4302375
	)	
Plaintiffs,	)	
	)	
v.	)	MOTION TO DISMISS OR, IN THE
	)	ALTERNATIVE, MOTION FOR SUMMARY
Carlos D. Toney,	)	JUDGMENT
	)	
Defendant.	)	

TO: JOHN D. KASSEL, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS, AND TO THE PLAINTIFFS ABOVE-NAMED:

PLEASE TAKE NOTICE THAT, the undersigned attorney for UIM Carrier Liberty Mutual Insurance Company will move before the presiding judge of the Sumter County Court of Common Pleas on the tenth (10th) day after service thereof, or as soon thereafter as counsel may be heard, for an Order granting dismissal, judgment on the pleadings, or, in the alternative, summary judgment, in accordance with Rules 5(d), 8(c), 12(b)(5), 12(b)(6), 12(c), 56 and/or any other applicable rule of the South Carolina Rules of Civil Procedure.

As grounds for said motion, Liberty Mutual has become informed and now believes that Plaintiffs never served the Summons and Complaint in the above-captioned case upon Defendant Carlos D. Toney at all, or in the alternative did not serve the Summons and Complaint upon Defendant Carlos D. Toney within the applicable Statute of Limitations. Pursuant to Louden v. Moragne, 327 S.C. 465 (Ct. App. 1997), this matter must be dismissed and/or judgment entered in favor of Defendant and the UIM Carrier.

This motion may be supported a memorandum of law that may include deposition transcripts, affidavits, and other evidentiary material which discovery has revealed or will reveal in this matter. This motion may be further supplemented by the arguments of counsel at the hearing.

Respectfully submitted,

SWEENY, WINGATE & BARROW, P.A.

s/ Aaron J. Hayes

Mark S. Barrow

Richard E. McLawhorn, Jr.

Aaron J. Hayes

Sweeny, Wingate & Barrow, P.A.

Post Office Box 12129

Columbia, SC 29211

(803) 256-2233

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY, AS UIM CARRIER**

Columbia, South Carolina

October 26, 2021

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No. 2019-CP-43-02375

Howell D. Thompson and Tara L.
Thompson,

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

**MOTION TO DISMISS FOR FAILURE TO
OBTAIN SERVICE OF PROCESS**

**TO: JOHN D. KASSEL, ESQUIRE, ATTORNEY FOR THE PLAINTIFFS, AND TO THE
PLAINTIFFS ABOVE-NAMED:**

PLEASE TAKE NOTICE THAT, the undersigned attorneys for UIM Carrier Horace Mann Insurance Company, will move before a presiding judge for the Sumter Court of Common Pleas on the tenth (10th) day after service thereof, or as soon thereafter as may be heard, for an Order granting dismissal, judgment on the pleadings, or summary judgment in accordance with Rules 5(d), 12(b)(5), 12(b)(6), 12(c), and/or 56 of the South Carolina Rules of Civil Procedure.

As grounds for said motion, Horace Mann contends that Plaintiffs never served the Summons and Complaint in the above-captioned case upon Defendant Carlos D. Toney, or in the alternative did not serve the Summons and Complaint upon Defendant Carlos D. Toney within the applicable Statute of Limitations. Pursuant to Louden v. Moragne, 327 S.C. 465 (Ct. App. 1997), this matter must be dismissed and/or judgment entered in favor of Defendant and the UIM Carriers.

This motion may be supported a memorandum of law that may include deposition transcripts, affidavits, and other evidentiary material which discovery has revealed in this matter. This motion may be further supplemented by the arguments of counsel at the hearing.

BROWN & BREHMER

By: s/ Karl S. Brehmer
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(803) 771-6600
ksb@brownandbrehmer.com
*Attorneys for Horace Mann Insurance
Company, a underinsured motorist carrier.*

October 29, 2021

ROA 130

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
	)	
	)	
Howell D. Thompson and Tara L. Thompson,	)	Civil Action No. 2019CP4302375
	)	
	)	
Plaintiffs,	)	
	)	MEMORANDUM IN SUPPORT OF UIM
v.	)	CARRIER LIBERTY MUTUAL'S MOTION
	)	TO DISMISS OR, IN THE ALTERNATIVE,
Carlos D. Toney,	)	MOTION FOR SUMMARY JUDGMENT
	)	
Defendant.	)	

CONTROLLING LAW

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.

Louden v. Moragne, 327 S.C. 465, 469, 486 S.E.2d 525, 527 (Ct. App. 1997) (emphasis added).

STATEMENT OF THE CASE

In this auto wreck case brought by Plaintiffs Howell and Tara Thompson against Defendant Carlos D. Toney, Plaintiffs failed to serve the Summons and Complaint upon Defendant Toney. Therefore, Plaintiffs' claims must be dismissed and/or summary judgment entered, according to the black-letter law of South Carolina. *See Louden, supra*. This Memorandum is submitted in support of the Motion to Dismiss/Motion for Summary Judgment filed by UIM carrier Liberty Mutual Insurance Company (alternatively, "LMU") on October 26, 2021.

FACTS AND PROCEDURAL HISTORY

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

On December 18, 2019, the South Carolina Department of Insurance accepted service of the Summons and Complaint upon purported UIM carrier Horace Mann Property & Casualty Insurance Company (alternatively, "Horace Mann"). (See Aff. of Service, e-filed December 19, 2019.) On December 19, 2019, the South Carolina Department of Insurance accepted service of the Summons and Complaint upon LMU. (See Aff. of Service, e-filed December 20, 2019.) There is no Affidavit of Service in the Court's file alleging service upon named Defendant Carlos D. Toney. (See electronic court record for Civil Action No. 2019CP4302375.)

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

The Statute of Limitations in this matter expired no later than June 2, 2020. S.C. Code Ann. § 15-3-530. To date, Plaintiffs have not served Defendant Carlos D. Toney.¹

STANDARD OF REVIEW AND BURDEN OF PROOF

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

The burden of proving personal jurisdiction and compliance with the *Rules* regarding service rests upon a plaintiff. *Moore v. Simpson*, 322 S.C. 518, 522, 473 S.E.2d 64, 66 (Ct. App. 1996) (citations omitted); *see also* Rule 4(g), SCRCP (requiring the party serving process to file proof). Therefore, LMU has discharged its burden on this Motion by pointing out to the court the *absence* of proof of service upon Defendant Carlos D. Toney.

ARGUMENT: 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

¹ In the event Plaintiffs attempt (or procure) untimely service as a purported remedial measure, same would be ineffective. *See Loudon, supra*, at 467, 486 S.E. at 526 (service upon named defendant approximately 7 months after expiration of statute of limitations had no effect on outcome).

plaintiff must serve the summons and complaint on the named defendant. *See Louden*, 327 S.C. 465, 469, 486 S.E.2d 525, 527. In affirming the trial court's granting of summary judgment to the named defendant (and UIM carrier), the *Louden* court held:

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 486, 486 S.E.2d at 526 (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.*

Here, Plaintiffs filed suit against named defendant Carlos Toney, and subsequently served their UIM carriers, LMU and Horace Mann. However—as is uncontested—Plaintiffs failed to serve the summons and complaint on the named Defendant Toney. In this case, the statute of limitations ran no later than June 2, 2020. LMU concludes this Memorandum with a side-by-side comparison of the timeline in *Louden* and the timeline in this case, to illustrate the striking similarities:

<i>Louden</i> [facts taken from 327 S.C. 466-67, 486 S.E.2d 525-26]	The instant case
Collision: May 1, 1992	Collision: June 2, 2017

Suit filed: August 22, 1994 [approximately 27 months after collision] Service upon UIM carrier: on/about August 25, 1994 Expiration of Statute of Limitations: No later than May 1, 1995 Service upon named defendant: January 20, 1996 [approximately 44 months after collision] Summary judgment (dismissal) granted: June 1996 [approximately 22 months after filing of suit]	Suit filed: December 5, 2019 [approximately 30 months after the collision] Service upon UIM carriers: Mid-December 2019 Expiration of Statute of Limitations: No later than June 2, 2020 Service upon named defendant: Not attempted [Nov. 2021 marks approximately 54 months since the collision] Summary judgment (dismissal) motion filed: October 26, 2021 [less than 23 months after filing of suit]

CONCLUSION

The instant case is on “all fours” with *Louden*, and therefore the law compels that this case be dismissed and judgment entered in favor of Defendant Carlos D. Toney, and by extension the purported UIM carriers.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

s/ Aaron J. Hayes

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**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY (UIM CARRIER)**

Columbia, South Carolina
November 30, 2021

STATE OF SOUTH CAROLINA	)	
	)	IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER	)	
	)	Docket No.: 2019-CP-43-02375
Howell D. Thompson and Tara L. Thompson,	)	
	)	
	)	PLAINTIFFS' RESPONSE TO LIBERTY
Plaintiffs,	)	MUTUAL AND HORACE MANN'S MOTION
	)	TO DISMISS OR MOTION FOR SUMMARY
vs.	)	JUDGMENT
	)	
Carlos D. Toney,	)	
	)	
Defendant.	)	

TO: AARON HAYES, ESQUIRE ATTORNEY FOR DEFENDANT LIBERTY MUTUAL INSURANCE COMPANY; KARL BREHMER, ATTORNEY FOR HORACE MANN CASUALTY AND PROPERTY INSURANCE COMPANY

I. INTRODUCTION

This underinsured motorist case comes before the Court upon motions by Liberty Mutual Insurance Company and Horace Mann Casualty and Property Insurance Company (the "Underinsured Carriers") to dismiss or for summary judgment based on insufficient service of the Summon and Complaint within the applicable statute of limitations upon the at-fault driver. These motions lack merit and must be denied for three reasons: 1) waiver of these defenses by the Underinsured Carriers; 2) violation of Rule 12(g) by the Underinsured Carriers and 3) equitable estoppel by Liberty Mutual. The Underinsured Carriers waived these defenses by failing to timely file Rule 12(b) motions to dismiss; failing to state with specificity the nature of any defects in service; by engaging in robust discovery and litigation for nearly two years without raising any complaint about service; by failing to file Rule 12b motions when they raised venue challenges. Liberty Mutual should be estopped from raising these defenses because of previous representations

by its counsel that there were no serious omission with service or the statute of limitations. By waiting for nearly two years of litigation to raise these defenses demonstrates that the Underinsured carriers had detailed notice of the claims against the adverse driver, Carlos Toney. At no time can the Underinsured Carriers legitimately claim undue prejudice from any defects with service. If timely raised by the Underinsured Carriers, any defects in service could have easily been cured within the statute of limitations. The Underinsured Carriers should not have their nearly two year delay in raising defenses be rewarded with a dismissal of a seriously injured plaintiff cause of action

II. FACTS

This case arises out of a motor vehicle wreck which occurred in Lexington County on June 2, 2017. Carlos Toney, a Sumter County resident, disregarded a traffic control device and turned in front of a vehicle being operated by the Plaintiff Howell Thompson. The impact was extensive. Mr. Thompson sustained multiple injuries including a forearm fracture that took nearly four years to heal and required four surgical procedures. The wreck has left him with a permanent injury limiting his use of his left arm.

Mr. Thompson's claims against Mr. Toney and his carrier, State Farm, were settled on a covenant not to executed September 9, 2019. Thereafter, a Summons and Complaint was filed against Mr. Toney in Sumter County on December 5, 2019. The Summons and Complaint was served on both Underinsured Carriers by December 19, 2019, pursuant to South Carolina Code §38-5-70 and §38-77-160. The Summons and Complaint was not served personally on Mr. Toney.

The Underinsured Carriers timely answered the Complaint in January 2020. In its initial answer dated January 2, 2020, Liberty Mutual Insurance Company raised several affirmative defenses including statute of limitations (paragraph 21-22) and improper service (paragraph 33-34).

Liberty Mutual pled improper service as follows:

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. (Liberty Mutual Answer, 1-2-20, paragraph 33-34)

Similarly, Horace Mann pled insufficient service in its paragraph 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.

Further, after receipt of Liberty Mutual Insurance Company's answer raising the affirmative defense of statute of limitations and service of process, counsel for Plaintiffs sent an email to counsel for Liberty Mutual on January 16, 2020, well within the statute of limitations, stating the following:

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

Richard McLawhorn, counsel for Liberty Mutual responded the same day as follows:

Boiler plate at this stage. Given the recent appellate court ruling in Garrison v. Target, 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. (See exhibit A, attached).

Importantly, neither of the Underinsured Carriers timely filed a motion to dismiss for lack of service under Rules 5(d), 8(c), 12(b)(2), 12(b)(4), 12(b)(5), 12(b)(6), 12(c), 56 or any other applicable rule of the South Carolina Rules of Civil Procedure. Liberty Mutual requested and received consent to file an amended answer¹. Liberty Mutual filed essentially a Rule 12(b)(3) venue

¹By email dated February 19 2020, counsel for Liberty Mutual Insurance Company sought agreement from plaintiffs' counsel to file an amended answer to change the wording "uninsured" to "underinsured". Plaintiffs' counsel agreed. The amended answer, filed February 20, 2020 contained the same identical defense for statute of limitations (paragraph 21-22) and

motion on March 24, 2020. But it failed to file at the same time any other Rule 12(b) motion, including a Rule 12(b)(2) motion for lack of personal jurisdiction, a Rule 12(b)(4) motion for insufficiency of process; or a Rule 12(b)(5) motion for insufficiency of service of process. As will be seen, filing other Rule 12(b) motions contemporaneously with its venue motion was required under Rule 12(g).

Instead of filing a timely motion to dismiss after receiving the summons and complaint, the Underinsured Carriers instead chose to engaged in robust discovery and litigation for nearly two years, from January 2020 to October 2021. The following time line demonstrates the active engagement in discovery by the Underinsured Carriers:

1-2-20	Liberty Mutual answers the complaint
1-2-20	Liberty Mutual sends interrogatories and request to produce to both plaintiffs
1-7-20	Horace Mann answers the complaint
1-8-20	Horace Mann sends interrogatories and request to produce to plaintiff
1-16-20	John Kassel, Esq. asks in an email to Richard mcLawhorn, Esq., whether there are any serious omissions with service or statute of limitations that will be followed with a motion, or is the defenses in answer just “boiler plate. The response is just boiler plate.
2-20-20	Liberty Mutual files amended answer reiterating same defenses
3-5-20	Horace Mann sends responses to plaintiffs’ discovery
3-10-20	Liberty Mutual subpoenas Thompson medical records from Lexington Radiology, Lexington Medical Center, Midlands Orthopaedics, Pain Specialists of Charleston, Palmetto Health Orthopaedics, Palmetto Imaging, Eye Center, Lexington Brain & Spine, Lexington County EMS, Lexington

improper service (paragraph 33-34). The amended answer also contained a new defense for Set Off in paragraph 37.

Family Practice, Lexington Orthopaedics

3-24-20 Liberty Mutual files motion for change of venue

5-5-20 Liberty Mutual/Horace Mann take deposition of Howell Thompson

5-5-20 Liberty Mutual/Horace Mann take deposition of Tara Thompson

5-15-20 Liberty Mutual/Horace Mann participates in deposition of Carlos Toney

5-24-20 Liberty Mutual subpoenas Thompson medical records from Prisma Health Plastic Surgery

6-15-20 Liberty Mutual subpoenas Thompson cell phone records from Verizon

8-7-20 Liberty Mutual/Horace Mann take deposition of Officer Bryan Shumpert

7-22-20 Liberty Mutual participates in change of venue motion hearing

8-17-20 Liberty Mutual/Horace Mann take discovery deposition of Dr. Earl McFadden

8-20-20 Liberty Mutual sends responses to plaintiffs' discovery

9-2-20 Liberty Mutual/Horace Mann takes deposition of Dr. David Strickler

9-14-20 Liberty Mutual/Horace Mann participate in 2nd deposition of Earl McFadden

9-21-20 Liberty Mutual/Horace Mann participate in drafting and presenting Scheduling Order signed by the Court

10-7-20 Liberty Mutual/Horace Mann take deposition of Dr. David Fulton

10-6-20 Liberty Mutual responds to plaintiffs' request to admit

10-14-20 Horace Mann responds to plaintiffs' request to admit

10-28-20 Liberty Mutual/Horace Mann take continuation deposition of Dr. David Fulton

11-30-20 Liberty Mutual/Horace Mann take continuation deposition of Howell Thompson

12-7-20 Liberty Mutual/Horace Mann participate in deposition of Lori Campbell

3-4-21	Liberty Mutual/Horace Mann participate in drafting and presenting Scheduling Order signed by the Court
3-17-21	Liberty Mutual counsel seeks order of protection
5-26-21	Liberty Mutual/Horace Mann participate in status conference with the Court
6-1-21	Liberty Mutual/Horace Mann participate in drafting and presenting Scheduling Order signed by the Court
7-1-21	Liberty Mutual identifies Dr. David DuPuy as an orthopaedic expert
7-14-21	Liberty Mutual/Horace Mann participate in motions hearing before the Court
8-9-21	Liberty Mutual/Horace Mann participates in deposition of Dr. David DuPuy
8-23-21	Liberty Mutual subpoenas records from Lindsay Moore, MSPAS
9-10-21	Liberty Mutual/Horace Mann participate in deposition of Dr. Mirsad Mujadzic
9-15-21	Liberty Mutual/Horace Mann participate in drafting and presenting Scheduling Order signed by the Court
10-25-21	Liberty Mutual/Horace Mann participate in mediation
10-26-21	Liberty Mutual files motion to dismiss/summary judgment
10-29-21	Horace Mann files motion to dismiss/summary judgment

As can be seen by the above time line, the Underinsured Carriers have engaged in robust discovery over nearly a two year period, including exchanging discovery, subpoenaing records, participating in 13 depositions, filing motions, participating in hearings and a mediation. The Underinsured Carriers took these actions instead of filing a motion to dismiss for lack of service upon receipt of the Summons and Complaint in December 2019. .

II. LAW

A. Scope of Review

A trial court has discretion when deciding to grant a motion for insufficient service of process under Rule 12(b)(5). See *Anik v. House. Auth*, 396 Fed. Appx 15, 2010 U.S. App. Lexis 19276 (4th Cir) citing *Shao v. Link Cargo (Taiwan) Ltd*, 986 F.2d 700 (4th Cir. 1993)(We review for abuse of discretion a district court's grant of a motion to dismiss for insufficient service of process under Federal Rule Civil Procedure 12(b)(5)). A court has the discretion to dismiss a case under Rule 12(b)(5) for insufficient service of process, *Blandford v. Will Haynie and John J. Tecklenburg*, 2021 U.S. Dist. Lexis 198775(D.S.C. Oct 14, 2021).

B. The Underinsured Carriers waived any arguments regarding insufficient service of process and personal jurisdiction

Service of the summons brings the defendant within the court's jurisdiction and gives the court the power to render a personal judgment against the person served. *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997). A court may not enter a valid judgment against an individual over whom the court lacks personal jurisdiction. *Id.* Service of process is a jurisdictional requirement. *Pardazi v. Cullman Med. Ctr.*, 896 F.2d 1313 (11th Cir. 1990). While service of process establishes personal jurisdiction, it must be recognized that personal jurisdiction can be waived. *Ex parte Cannon*, 385 S.C. 643, 685 S.E.2d 813 (Ct. App. 2009)(Unlike subject matter jurisdiction, personal jurisdiction may be waived); *Maybank v. BB&T*, 416 S.C. 541, 787 S.E.2d 498 (Sup. Ct. 2016)(“...we find BB&T Corporation waived any possible personal jurisdiction defense, and it was well within the trial court's discretion to find BB&T Corporation waived its personal jurisdiction defense”). 416 S.C. at 566, 787 S.E.2d at 511.

A defendant may raise insufficiency of process and thus the defense of lack of personal jurisdiction by way of a Rule 12(b)(5) motion. A Rule 12(b)(5) motion is the proper vehicle for challenging the of delivery of the summons and complaint. *Unisun Ins. v. Hawkins*, 342 S.C. 537,

537 S.E.2d 559 (Ct. App. 2000)(footnote 3). A 12(b)(5) motion “...shall be made before pleading if a further pleading is permitted”. Rule 12(b). The challenge to personal jurisdiction must be timely. See *Maybank v. BB&T*, 416 S.C. 541, 787 S.E.2d 498 (Sup. Ct. 2016)(looking to federal case law in interpreting the rules of civil procedure and finding that a delay in challenging personal jurisdiction by motion to dismiss may result in waiver, even where the defense was asserted in a timely answer).

Rule 12(h)(1) discusses waiver of the defenses of insufficiency of service and lack of personal jurisdiction. The Rule states:

A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, insufficiency of service of process, or that another action is pending between the same parties for the same claim is waived (A) if omitted from a motion in the circumstances described in subdivision (g) or (B) if it is neither made by motion under this rule nor included in a responsive pleading or in an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

It is uncontested that the Underinsured Carriers failed to file any Rule 12(b) motion to dismiss for lack of personal jurisdiction or deficient service of process on Defendant Carlos Toney in December 2019 when the Underinsured Carriers were served with the Summons and Complaint. They did not file their motion to dismiss/motion for summary judgment until October 2021, nearly two years later. In *Unisun Ins. v. Hawkins*, supra, the court reversed summary judgment after finding waiver of service of process because the defendant failed to file a Rule 12(b)(5) motion. Citing *Garner v. Houck*, 312 S.C. 481, 435 S.E.2 847 (1993) the *Unisun* Court held, “our supreme court held that a party who fails to properly raise the defense of insufficient service of process under Rule 12 waives any issues or defenses regarding service, including a statute of limitations defense.” 342 S.C. at 541, 537 S.E.2d at 561. (emphasis added). By failing to file a timely Rule 12(b) motion the Underinsured Carriers have waived their defenses of deficient service. The *Unisun* court, once

finding waiver of the service of process defense, made quick work of finding waiver of the statute of limitations defense. “Because Bruce failed to challenge the service of process properly, he has also waived his statute of limitations defense under Garner. Accordingly, we reverse the trial court’s grant of summary judgment to Bruce and remand the case for trial”. 342 S.C. at 543, 537 S.E.2d at 562.

Even if a defendant attempts to raise challenges to service and personal jurisdiction in his answer, the court may find waiver if the defenses are not pled with specificity. In *Unisun Ins. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000) the Court again looked to federal courts to assess the issue of the requisite specificity in pleading a defense under Rule 12(b)(5).

Federal courts addressing this issue have held that objections to the sufficiency of service of process must be specific and must point out in what manner the plaintiff has failed to satisfy the rule relating to the service provisions. (Citing numerous federal court decisions). 342 S.C. at 542, 537 S.E.2d at 562.

In *Unisun*, the plaintiffs attempted to serve Bruce Hawkins at a house where he no longer lived and thus never achieved personal service. Hawkins filed an answer with the following averment: “Plaintiffs have failed to serve defendant Bruce Hawkins within the three year statute of limitations”. The trial court granted summary judgment for Hawkins on defective service and the expiration of the statute of limitations. The Court of Appeals reversed, finding waiver. The Court stated:

We hold the averment that Unisun “failed to serve Bruce Hawkins within the three-year statute of limitations” is insufficient, standing alone, to raise the defense of insufficiency of service of process. Here, Bruce failed to identify that he was moving to challenge service of process pursuant to Rule 12 and failed to specify any defects in the service of process. Having failed to allege process with even a minimal amount of specificity in his responsive pleading, Bruce may not now bootstrap the defense to his statute of limitations argument, a separate affirmative defense likewise subject to waiver. *Unisun*, 342 S.C. at 542, 537 S.E.2d at 562.

A delayed, untimely motion alleging insufficient service will not be saved from a waiver

analysis simply by inserting a defense in an answer. This notion was expressed by the South Carolina in *Maybank v. BB&T Corp*, 416 S.C. 541, 787 S.E.2d 498 (Sup. Ct. 2016). There, the Court looked to federal guidance on the subject and stated with approval, “A number of federal courts have determined a delay in challenging personal jurisdiction by motion to dismiss may result in waiver, even where the defense was asserted in a timely answer.” 416 S.C. at 565, 787 S.E.2d at 510. A boiler plate pleaded defense in an answer, robust engagement for a prolonged time in litigation, and delay in filing a Rule 12(b) motion is a prescription for waiver issued by our courts.

Here, Liberty Mutual failed to state with any specificity any defects in service in its answer. Liberty Mutual simply stated in paragraph 33-34 of its initial answer as well as identical language in its amended answer, “Improper Service. 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”. (Liberty Mutual Answer, filed 1-2-20, paragraphs 33-34; Liberty Mutual Amended Answer, filed 2-20-20, paragraphs 33-34). Liberty Mutual failed to be specific and specify in what manner Mr. Thompson failed to comply with the service rule. See *Patterson v. Whitlock*, 392 Fed. Appx 185, 2010 U.S. app. LEXIS 17626 (4th Cir. 2010) finding waiver where the defendants failed to preserve the defense of incomplete service by not asserting it with some specificity and simply attacking the sufficiency of process in “barebones fashion”. Similarly, Horace Mann has failed to plead a defense with specificity and failed to identify it was moving to dismiss under Rule 12.

Furthermore, the Underinsured Carriers waived defenses by engaging in robust litigation for nearly two years without ever raising lack of service even when they were before the Court on another Rule 12 motion. Conduct in actively participating in litigation can support waiver of a

personal jurisdiction defense or insufficient service. In *Maybank v. BB& T*, 414 S.C. 541, 787 SE.2d 498 (Sup. Ct. 2016), Maybank argued BB&T waived its right to assert a personal jurisdiction defense because it failed to timely contest personal jurisdiction in a motion to dismiss and instead, actively participated in litigation. The trial court agreed finding waiver. The Supreme Court affirmed even though the bank timely answered the complaint and raised a defense of lack of personal jurisdiction. In finding waiver, the Court noted BB&T's conduct in participating in litigation for some 2 ½ years, included removing the case to federal court, filing an amended answer, filing a corporate disclosure form, opposing remand, opposing a motion for attorneys' fees, and submitting its own discovery responses. A month before trial, BB&T reasserted its defense on personal jurisdiction in its answer. In affirming the finding of waiver the Court held

In our opinion, BB&T Corporation gambled that it could argue personal jurisdiction on the eve of trial after actively participating in litigation over the course of two and a half years. After considering the circumstances of this case, we find BB&T Corporation waived any possible personal jurisdiction defense, and it was well within the trial courts's discretion to find BB&T Corporation waived its personal jurisdiction defense. *Maybank* 414 S.C. at 566, 787 S.E.2d at 511.

A similar result was reached in *Datskow v. Teledyne, Inc.*, 899 F.2d 1298 (Ct. App. 2nd 1990) where the court found waiver based on participation in litigation. There, the defendant answered the complaint alleging lack of personal jurisdiction, lack of proper service, the statute of limitations and suit against the wrong defendant. Four months later the defendant filed a motion to dismiss for lack of personal jurisdiction, lack of service and the statute of limitations. The trial court dismissed the action. The Court of Appeals reversed finding waiver. The Court stated

Nevertheless, under all the circumstances, we conclude that defendant's conduct bars it from complaining about the defective form of service. Defendant attended the conference with the magistrate and participated in scheduling discovery and motion practice. Nothing was said about defective service of process. As we hold, *infra*, the

limitations period on the wrongful death claims had not yet run at the time of this conference, and it would have been simple for plaintiffs to have made personal service on the defendant if the point had been mentioned. 898 F.2d at 1303.

Here, the Underinsured Carriers participated in robust litigation and discovery for nearly two years without raising any issue with service or personal jurisdiction. Like the defendant in *Datskow*, the Underinsured Carriers participated in motion practice without ever raising the defense. The Underinsured Carriers participated in exchanging discovery, subpoenaing medical records, participating in 13 depositions, filing a venue motion, participating in a motion hearing and in a mediation. Such conduct and level of participation in litigation that supported waiver in *Maybank* and *Datskow* should support a finding of waiver here. With this case now on the trial roster for January, 2022, less than a month from now, it appears the Underinsured Carriers have gambled that they could argue personal jurisdiction on the eve of trial after actively participating in litigation over the course of nearly two years. *Maybank* 414 S.C. at 566, 787 S.E.2d at 511.

C. The Underinsured Carriers are precluded from bringing any Rule 12(b) motions now because they failed to comply with Rule 12(g)

The Underinsured Carriers each pled improper venue in their respective answers. (Answer and Amended Answer of Liberty Mutual, paragraphs 19-20; Answer of Horace Mann, paragraph 8). As noted above, Liberty Mutual filed a motion March 24, 2020 seeking to change venue. The motion was essentially a Rule 12(b)(3) motion. See *Breland v. Love Cherverlot Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (Sup. Ct. 2000, footnote 1)(Although the Defendants asserted improper venue in their answer, the analysis of this issue is identical to a Rule 12(b)(3), SCRCP motion). However, despite filing what was essentially a Rule 12(b)(3) motion on venue, the Underinsured Carriers failed to bring at the same time a Rule 12(b)(2) motion on personal jurisdiction, a Rule 12(b)(4) motion on insufficiency of process, or a Rule 12(b)(5) insufficiency of service of process motion.

Under Rule 12(g) the Underinsured Carriers were required to bring any Rule 12 defense motion they had when they raised their venue challenge. Having failed to do so, they are precluded from doing so now. Rule 12(g) states

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the ground there stated.

Rule 12(h)(2) pertains to causes not at issue here. Rule 12(g) required the Underinsured Carriers to bring any Rule 12(b)(2), Rule 12(b)(4) or Rule 12(b)(5) motions when they brought their Rule 12(b)(3) venue motion. See *Glenn v. School Dist.*, 294 S.C. 530, 366 S.E.2d 47 (Ct. App. 1988)(interpreting Rule 12(g) as precluding a party, who brings a motion under Rule 12 from later bringing other Rule 12 motion he could have brought). The Underinsured Carriers advocated a Rule 12(b)(3) motion to change venue without even mentioning any issue with service or jurisdiction. If they had, back in March of 2020, there was time to correct any deficiencies in service before the running of the statute of limitations in June 2020. The Underinsured Carriers should not be rewarded for their delay and violation of Rule 12(g) with a dismissal of a meritorious claim.

Reframing the Underinsured Carriers' motion to dismiss as one for summary judgment under Rule 56 should allow avoidance of the sanction the Rules of Civil Procedure intended to maintain. The purpose of allowing certain 12(b) defenses to be raised by motion, even before a responsive pleading, is to deal with issues, for example, personal jurisdictional issues, before expending time money and judicial resources reaching the merits of the case. "The failure to assert improper service for over two years until the summary judgment motions in 1991 waives any issue regarding the service". *Garner v. Houck*, 312 S.C. 481, 487, 435 S.E.2d 847, 850 (Supt. Ct. 1993). Defenses should be promptly asserted to eliminate harmful delay and waste of judicial resources. *Trustees of*

Cent. Laborers' Welfare Fund v. Lowery, 924 F.2d 731 (7th Cir. 1991). Moreover, courts have recognized the desirability in raising issues early, for example like service of process, when defects could be cured. *Datskow v. Teledyne, Inc.*, 899 F.2d 1298 (Ct. App. 2nd 1990)(finding it would have been simple for plaintiffs to have made personal service on the defendant if the point had been mentioned by defendants).

The Underinsured Carriers reliance on *Louden v. Morange*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) while understandable, is misplaced. Waiver was not argued in *Louden*. Loudon never argued a failure by Morange to file a timely Rule 12 motion, or that Morange had engaged in robust discovery and litigation for nearly two years despite sitting on a defect in service, or a failure by Morange to plead a lack of service defense with specificity, or the failure to file Rule 12(b) motions when a venue motion was argued, or equitable estoppel. Perhaps these arguments were not available to Loudon when the insurance company, State Farm, responded with a defense of lack of personal jurisdiction. Instead, Loudon argued the release with the at fault driver created a new right in contract for underinsured motorist coverage and overcame the statute of limitations. That is not our argument. Loudon also argued she served the real party in interest, her underinsured carrier. Again, that is not our argument. We argued waiver and estoppel.

D. Liberty Mutual Insurance Company should be estopped from seeking a motion to dismiss or summary judgment on service of process because it issued a representation that there were no problems with service

As recounted above, after receipt of the answer in January 2020, counsel for Plaintiffs specifically requested confirmation from counsel for Liberty Mutual whether there were any serious omissions with service of the complaint that would be followed with a motion. The answer was no.

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

pleading at this stage of the litigation. (Email January 16, 2020 from John Kassel, Esquire to Richard McLawhorn, Jr., Esquire, Exhibit A).

Richard McLawhorn, counsel for Liberty Mutual responded the same day as follows:

Boiler plate at this stage. Given the recent appellate court ruling in *Garrison v. Target*, 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.

Defense counsel was making reference to *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020) that was issued on January 15, 2020, shortly after answers in this case were filed. The case found waiver of limits on punitive damages for failure to plead South Carolina Code §15-32-530 as a defense. The case did not address personal jurisdiction, service of process, statute of limitations or venue. A reasonable reading of defense counsel's response to a direct, focused inquiry on whether there were serious omissions regarding statute of limitations and service, was a "belt and suspenders" reaction to the *Garrison* opinion, and not the presence of any deficient facts from which to base a motion to dismiss upon. Plaintiffs' counsel relied upon the representation and took no further action on any of those defenses. However, counsel's reassurance proved to be untrue. Liberty Mutual should be equitably estopped from raising these defenses now.

The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel. 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 (Sup. Ct. 2017). Where a defendant leads a plaintiff to believe that service is adequate and that no such defense will be interposed, courts have not hesitated to conclude that the defense is waived. *Trustees of Cent. Laborers Welfare Fund v. Lowery*, 924 F.2d 731, 733 (7th Cir. 1991). Equitable estoppel may arise even though there was no intention on the part of the party estopped to relinquish or change any existing right. *Janasik v. Fairway Oaks Vilas Horizontal Property Regime*, 307 S.C. 339, 415 S.E.2d 384 (Sup.Ct. 1992).

The elements of estoppel are met here. For the Underinsured Carriers, the estopped party:

(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;

Defense counsel's email reasonably suggested no serious defense on statute of limitations or service of process would be prosecuted by filing a motion. Indeed, no such defense was raised for nearly two years, thereby reinforcing the belief in the truth of this statement. The statement was false. There was no intent to deceive but proving such scienter is not a necessary element. Here, it was enough that the representation was calculated to convey the impression that the facts were otherwise than those which the party subsequently attempted to assert. The fact that defense counsel ultimately did raise a challenge to venue, but only venue, again, tended to suggest defendant was not seeking to contest the statute of limitations of service of process.

(2) the intention that such conduct shall be acted upon by the other party;

As an officer of the court and a fellow counsel involved in litigation in our bar, there would necessarily be the expectation of reliance on representations made and delivered in response to specific questions.

(3) actual or constructive knowledge of the real facts;

Defense counsel knew or should have known that his trial strategy would include a motion

to dismiss. The decision was in his discretion. Any problems with service on the at fault driver were knowable to defense counsel at the beginning of this litigation.

For Plaintiffs, the party bringing estoppel:

(1) lack of knowledge, and the means of knowledge, of the truths as to the facts in question;

While Plaintiffs' counsel knew or should have known about the state of the service on the at fault driver, Plaintiffs' counsel did not have knowledge nor could he have knowledge that defense counsel would not honor the representation in the email and bring a subsequent motion to dismiss.

(2) reliance upon the conduct of the party estopped;

Plaintiff's counsel specifically asked if there was a problem with the statute of limitations and service and whether a motion would be filed. Plaintiff's counsel relied on the response from the defense lawyer in the case.

(3) a prejudicial change of the position in reliance on the conduct of the party being estopped;

As a result of defense counsel's representation, Plaintiffs' counsel took no further action on the alleged defenses of jurisdiction, service or statute of limitations. If instead, Defense counsel had indicated a problem with service, there was time before the running of the statute of limitations for Plaintiffs' counsel to rectify any problems with service of the summons and complaint. Plaintiff's counsel relied to his detriment on representations by defense counsel.

In addition to finding waiver of the defenses raised in the late motion to dismiss, this Court should also find Liberty Mutual is estopped from asserting them now.

III. CONCLUSION

For the reasons put forth above, this Court should deny the motion to dismiss or motion for

summary judgment filed by Liberty and Horace Mann. Liberty Mutual Insurance Company waived the defenses of personal jurisdiction, insufficiency of process, insufficiency of service of process, and the resulting statute of limitations defense by failing to file timely Rule 12(b)(2), (4) and (5) motions under Rule (h)(1) and *Unisun Ins. v. Hawkins*, supra. Liberty Mutual waived these defenses by failing to plead with specificity these defenses in its answers. It further waived these defenses by failing to raise the defenses when it filed its motion for change of venue, in violation of Rule 12(g). It further waived these defenses when instead of prosecuting these defenses it engaged in robust discovery for nearly two years. Finally Liberty Mutual Insurance Company should be estopped from asserting these defenses now because of its false misrepresentation to Plaintiffs' counsel.

Horace Mann waived the defenses of personal jurisdiction, insufficiency of process, insufficiency of service of process, and the resulting statute of limitations defense by failing to file timely Rule 12(b)(2), (4) and (5) motions under Rule (h)(1) and *Unisun Ins. v. Hawkins*, supra. Horace Mann waived these defenses by failing to plead with specificity these defenses in its answers. It further waived these defenses by failing to prosecute these defenses when it participated in the motion for change of venue, in violation of Rule 12(g). It further waived these defenses when instead of prosecuting these defenses it engaged in robust discovery for nearly two years.

Given their nearly two year conduct litigating this case, neither of the Underinsured Carriers can show any undue prejudice by denying their motions. They have had notice of Plaintiffs' claims and the time to respond to them. This case should be set for trial.

Respectfully submitted,

s/ John D. Kassel

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December 15, 2021

Columbia, South Carolina.

John Kassel

From: John Kassel
Sent: Thursday, January 16, 2020 11:57 AM
To: 'Richard E. McLawhorn'
Cc: Stephanie Fanning
Subject: RE: thompson v. toney

Well just the affirmative ones. That was good money for a needle stick. And interesting that constructive notice could be the basis for recklessness or a conscious disregard...jk

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From: Richard E. McLawhorn <rem@swblaw.com>
Sent: Thursday, January 16, 2020 9:35 AM
To: John Kassel <JKassel@kassellaw.com>
Cc: Stephanie Fanning <SFanning@kassellaw.com>
Subject: RE: thompson v. toney

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



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From: John Kassel <JKassel@kassellaw.com>
Sent: Thursday, January 16, 2020 9:32 AM

To: Richard E. McLawhorn <rem@swblaw.com>
Cc: Stephanie Fanning <SFanning@kassellaw.com>
Subject: thompson v. toney

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

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and Tara L. Thompson	)	Civil Action No. 2019CP4302375
	)	
Plaintiff,	)	
	)	
v.	)	LIBERTY MUTUAL INSURANCE
	)	COMPANY'S REPLY TO PLAINTIFF'S
Carlos D. Toney	)	RESPONSE TO MOTION TO DISMISS AND
	)	MOTION FOR SUMMARY JUDGMENT
	)	
Defendant.	)	

TO: JOHN D. KASSEL, ESQ., THEILE MCVEY, ESQ., AND JAMIE RUTKOWSKI, ESQ., ATTORNEYS FOR PLAINTIFFS, AND TO THE PLAINTIFFS ABOVE-NAMED:

Liberty Mutual Insurance Company ("LMU") hereby submits the following Reply to Plaintiff's Response to LMU's Motion to Dismiss or Motion for Summary Judgment. By way of Reply to Plaintiff's Response, and in further support of LMU's Motion to Dismiss/Motion for Summary Judgment, LMU argues as follows:

I. Plaintiffs' Response Concedes No Service Upon Defendant Toney, Thereby Ending the Need for Further Analysis.

On page 2 of Plaintiffs' Response, Plaintiffs' factual recitation concedes that no service was procured upon named Defendant Carlos D. Toney: "[t]he Summons and Complaint was not served personally on Mr. Toney." (Pl. Resp. to Mot. Dismiss and Mot. Summ. J., at p. 2.) Pursuant to the black-letter law of South Carolina, this case must be dismissed upon LMU's Motion. *Louden v. Moragne*, 327 S.C. 465, 469, 486 S.E.2d 525, 527 (Ct. App. 1997) (dismissing a UIM case at summary judgment, for late service on the named defendant and expressly holding "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.”) By Plaintiffs’ own admission, this case is even more striking than *Louden*—which involved untimely service—because this is a case of *no service whatsoever* upon the sole Defendant:

REQUEST TO ADMIT

1. Admit that Plaintiffs never served the Summons and Complaint in the above-reference matter upon Defendant Carlos D. Toney.

RESPONSE: Plaintiffs’ Admit

(Pls.’ Resp. to LMU Req. to Admit No. 1, embedded above and also attached hereto as **Exhibit A.**) There is nothing further to say. However, because Plaintiffs have advanced additional Response arguments, LMU would be remiss if it did not issue a Reply to each argument.

II. A Motion for Summary Judgment is the Appropriate Vehicle to Raise a Statute of Limitations Problem of this Magnitude.

Plaintiff’s Response focuses heavily on Rule 12(b)(5) and personal jurisdiction, which LMU will address in Section III, *infra*. However, Plaintiffs’ attempt to characterize this Motion as solely a Rule 12(b)(5) issue misses the magnitude of the real problem. The simple fact is that this is primarily a Rule 56 motion for summary judgment, which is the appropriate vehicle for the Court to rule on a statute of limitations issue of this type. *See McMaster v. Dewitt*, 411 S.C. 138, 143 767 S.E.2d 451, 453 (Ct. App. 2014) (citing *Kreutner v. David*, 320 S.C. 283, 286-87, 465 S.E.2d 88, 90 (1995) (“[s]ummary judgment is appropriate when a plaintiff does not *commence* an action within the applicable statute of limitations.”) (emphasis added)). Plaintiffs’ Answers to Requests to Admit, *supra*, remove all doubt: Defendant Toney was never served at all, and therefore this action was never commenced as to the sole named Defendant. *Cf.* Rule 3(a), SCRPC (“[a] civil action is commenced when the summons and complaint are filed with

the clerk of court if the summons and complaint are served within the statute limitations in any manner prescribed by law. . . or . . . if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.”) Because of the unique nature of the UIM statute, this dispute transcends a traditional Rule 12 motion.

An analysis of the case upon which *Louden* was based is illustrative of the magnitude of the problem in a 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 even been “commenced” as to the sole named defendant, Carlos Toney. Since a UIM carrier’s liability for benefits is derived from the liability of the putative at-fault driver on a prescribed statutory scheme, Plaintiffs’ Response’s attempt to do a point-by-point analysis of Rule 12, *Unisun*, *Maybank*, etc. (see Section III, *infra*) misses the real issue. There is not even a valid, commenced action in which Plaintiffs can even assert alleged Rule 12 pleading deficiencies against LMU, the UIM carrier. The defect in this case rises above legal disputes concerning Rule 12 waiver. The defect in this case is fatal. Plaintiffs have failed to preserve right of action and/or commence said action against the putative at-fault driver, thereby violating the UIM statute.¹ There can be no case against Toney, and there can be no UIM claim against LMU (or Horace Mann). See *Louden*, *supra*; *Williams*, *supra*; see also S.C. Code Ann. §38-77-160. Summary judgment in favor of the Defendant and LMU is required.

III. In the Alternative, LMU Avers that Plaintiffs Three Stated Response Arguments are Unavailing.

a. LMU Has Not Waived Its Rule 12(b) and Statute of Limitations Defenses.

Plaintiffs’ primary Response argument is that LMU and Horace Mann have waived the right to assert a Rule 12(b) issues with service of process, and by extension, have waived the right to assert failure to serve process within the statute of limitations. Plaintiffs are incorrect. 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), SCRC. Of course, the defense is waived if not included in the party’s first

¹ For the sake of argument, LMU poses the hypothetical scenario of Defendant Toney being served today with the Summons and Complaint. Defendant Toney would demand (and receive) summary dismissal of the suit, because there is no longer any right of action against Toney. Of course, the UIM claim would be over as well, because if there is no right of action against Toney, there would be no right of action against the UIM carrier. Late service of suit is clearly less egregious than no service of suit, and late service would clearly result in dismissal, so it is completely incongruous for Plaintiffs in this case to argue that this case should survive when Plaintiffs admit they *never* served Toney. Such an absurd result is the precise reason for the holdings of *Louden* and *Williams*.

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.

LMU has scrupulously complied with these *Rules*, by filing two Answers asserting improper service/statute of limitations and by raising improper service in its first Rule 12 motion, which is of course the instant motion. LMU answered on January 2, 2020 and alleged, *inter alia*, improper service and statute of limitations. (*See* LMU Not. of Appearance and Answer, at ¶¶ 22, 34.) On February 20, 2020, LMU filed an Amended Answer alleging same. (*See* LMU Not. of Appearance and Am. Answer, at 22, 34.) Of course, the instant Motion, filed on October 26, 2021, is LMU’s first and only Rule 12 Motion in this case. LMU has pled these defenses *twice* and asserted them via motion. Therefore, LMU has complied with the *Rules of Civil Procedure* with respect to pleading and preserving a Rule 12(b) issues and statute of limitations issues.

In spite of LMU’s adherence to the *Rules*, Plaintiffs advance a waiver argument primarily based upon two cases, *Unisun Ins. v. Hawkins* and *Maybank v. BB&T*. As noted above and in LMU’s initial Memorandum in support of this Motion, the *Louden* case is entirely on point to the instant dispute. Plaintiffs’ reliance on *Unisun* and *Hawkins*—neither of which were cases involving a claim for UIM benefits—is through analogy and argument. If the rules of statutory construction are any guide, the specific rule must prevail over a general rule. *See James v. S.C. Dep’t. of Transp.*, 393 S.C. 440, 445, 711 S.E.2d 919, 922 (Ct. App. 2011) (citation omitted) (“[g]enerally, when a general statute and a specific statute conflict, the specific statute prevails.”) Further, *Unisun* and *Maybank* are distinguishable from the instant case.

i. Plaintiff’s reliance on *Unisun* is misplaced.

Unisun was a subrogation action by a UM carrier against a named defendant-in-interest, Bruce Hawkins, who waived his right to assert improper service and statute of limitations by inadequate pleading. *See Unisun Ins. Co. v. Hawkins*, 342 S.C. 537, 542-43, 537 S.E.2d 559, 562 (Ct. App. 2000). In the instant UIM case, LMU's statutory liability for benefits is directly tethered to Plaintiffs preserving the right of action—and actually commencing said action—against Carlos Toney, which Plaintiffs have failed to do. *See* Section II, *supra*. 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, LMU 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, the *Unisun* court issued a disclaimer when holding that this pleading was defective: “[w]e hold the averment that Unisun ‘failed to serve Bruce Hawkins within the three-year statute of limitations’ is insufficient, *standing alone*, to raise the defense of insufficiency of service of process.” 342 S.C. at 542-543, 537 S.E.2d at 562 (emphasis added). Contrary to the *Unisun* defendant's answer, LMU 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 LMU'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.**

(LMU Not. of Appearance and Answer, filed Jan. 2, 2020, at Introduction (emphasis added).)

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.

(*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.

(*Id.*, at ¶¶ 33-34 (emphasis added).)

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.

(LMU Not. of Appearance and Am. Ans., filed Feb. 20, 2020, at Introduction (emphasis added).)

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.

(*Id.*, at ¶¶ 21-22.)

FOR A FOURTEENTH DEFENSE
(Improper Service)

6

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.

(*Id.*, at ¶¶ 33-34 (emphasis added).)

It is abundantly clear that LMU has always maintained—with specificity—insufficient service of process, statute of limitations, and §38-77-160. As required by the *Rules*, LMU has always placed Plaintiffs on notice that LMU takes the position that the UIM statute must be complied with, Plaintiffs must actually serve Toney, and Plaintiffs must do so within the statute of limitations. LMU 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 upon the statute of limitations and the UM/UIM statute. LMU has complied with the rule from *Unisun*, and there is no just way to read LMU’s pleadings in any other manner. See Rule 8(e)(1), SCRCPP (“[e]ach averment of a pleading shall be simple, concise, and direct”); see also Rule 8(f), SCRCPP (“[a]ll pleadings shall be so construed as to do substantial justice to all parties”).

As a final distinction, LMU notes that the *Unisun* plaintiffs at least *attempted* service upon defendant Bruce Hawkins, see 342 S.C. at 539, 537 S.E.2d at 560, while Plaintiffs in this case presumably did not even make the attempt for Defendant Toney, see Pl.’s Resp. to LMU Mot. to Dismiss and Mot. for Summ. J., at p. 15 (“[p]laintiffs’ counsel ... took no further action on any of those defenses”). Whatever the means of service (or lack thereof) in *Unisun*, Bruce Hawkins was at least able to avail himself of the opportunity to answer on his own behalf, defective though his answer turned out to be. 342 S.C. at 539, 537 S.E.2d at 560. Carlos Toney

has had no such opportunity.² Plaintiffs seek to be rewarded for not even making the attempt to comply with the law.

ii. Plaintiff's reliance on *Maybank* is misplaced.

Maybank v. BB&T is wholly inapplicable. *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 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 herein, the instant Motion is not an "eve of trial motion," or a "gamble." *See* Section V, *infra* (noting this is not an "eve of trial" motion; Section III.c.ii-iii, *infra* (noting that it is LMU, not Plaintiffs, who has been misled on the issue of service, therefore LMU is not "gambling"). Further, *Maybank* involved a

² LMU, as the UIM carrier, is not in privity with named Defendant Toney or his liability carrier, and LMU 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 LMU, 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). LMU had 30 days to answer from the date it was served. 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 401, 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 the waiver argument advanced by Plaintiffs even applies in a UIM context: 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, LMU has committed no such waiver. Further, in its own defense, LMU 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.

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. *See* Section II, *supra* (discussion of S.C. Code Ann. §38-77-160, *Louden*, and *Williams*). In sum, *Maybank* involved a defendant “gambling” that a court would agree that it did not have sufficient ties to South Carolina to be subject to suit in this State, which is of course no party’s contention in this case. *Maybank* offers no support to Plaintiffs’ position.

b. LMU Has Not Violated Rule 12(g).

Plaintiffs’ additional argument that LMU has violated Rule 12(g) is inaccurate. Of course, Rule 12(g) provides that certain Rule 12(b) defenses are waived if not raised within the movant’s first Rule 12 motion. *See* Rule 12(g), SCRCPP. Apparently, Plaintiffs are attempting to cast LMU’s statutory venue transfer motion from March 24, 2020 as a Rule 12(b)(3) motion to dismiss for improper venue. Therefore, according to Plaintiffs’ logic, LMU has already made a Rule 12 motion prior to the filing of the instant Motion on October 26, 2021. However, Plaintiffs tacitly concede, as they must, that LMU’s March 24, 2020 Motion was not a Rule 12(b)(3) motion: “the [March 24, 2020] motion was *essentially* at Rule 12(b)(3) motion.” (Pl. Resp. to Mot. to Dismiss and Mot. for Summ. J., at p. 12 (emphasis added).)

Plaintiffs’ unilateral attempt to expand the scope of Rule 12(g) is of course unavailing. However, and for the sake of argument, LMU again notes that the instant Motion is LMU’s first and only Rule 12 motion. Plaintiffs have improperly conflated a statutory motion to transfer venue made pursuant to S.C. Code Ann. 15-7-30 *et seq.* with a Rule 12(b)(3) motion to dismiss for improper venue. LMU’s March 24, 2020 Motion was not based upon Rule 12(b)(3), but rather S.C. Code Ann. 15-7-30 *et seq.* (particularly S.C. Code Ann. 15-7-100) and the supporting case law concerning the convenience of parties and witnesses. (*See* LMU Mot. to Change

Venue, filed March 24, 2020, and Memo. in Supp. of Mot. to Change Venue, filed June 17, 2020.) As a matter of law and logic, it is clear that Rule 12(b)(3) motions to dismiss and statutory motions to transfer venue serve different purposes, call for different relief, and are based upon different law. *See Selective Ins. Co. of South Carolina v. Schremmer*, 465 F.Supp.2d 524 (D.S.C. 2006) (discussing a defendant's motion to dismiss for improper venue made pursuant to Rule 12(b)(3), FRCP [the federal equivalent of Rule 12(b)(3) SCRCF] and the defendant's *alternative* motion to transfer venue made pursuant to 28 U.S.C. 1404(a) [the federal equivalent to S.C. Code Ann. 15-7-30 and 15-7-100.]) In other words, a party should file a Rule 12(b)(3) motion if the venue is *unlawful*, and a party should file a motion to transfer venue if the venue is legally *inconvenient*. *See McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (Ct. App. 1997) (comprehensive discussion of successive venue transfer motions for "convenience of witnesses" and "ends of justice.") On its face, LMU's March 24, 2020 Motion falls in the latter category, and therefore there is no Rule 12(g) impediment to LMU's current Rule 12 Motion.

c. LMU Is Not "Equitably Estopped" from Pointing Out Non-service to the Court; Rather, the Equities Between the Parties Favor LMU on this Issue.

Plaintiffs' counsel's estoppel argument asserted against LMU fails as a matter of law because LMU's counsel never said anything false, because Plaintiffs' counsel never relied upon LMU's counsel's statements at all, and because the underlying dispute concerns information that was within the custody and control of Plaintiffs' counsel all along.

i. **All of LMU's representations to Plaintiffs' counsel were true.**

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

Subject: thompson v. toney

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

John D. Kassel
Kassel McVey, Attorneys at Law

Subject: RE: thompson v. toney

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

| Richard E. McLawhorn, Jr. | Member

(Ex. A to Pl's Resp. to LMU Mot. to Dismiss and Mot. for Summ. J. (embedded above and not attached hereto for the sake of efficiency).) Plaintiffs' argument is built upon a misreading the content of the email. In the email, Plaintiffs' counsel asks if the statute of limitations and improper service defenses asserted by LMU 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. Plaintiffs' counsel's own words concede that the litigation was at a particular "stage," implying there would be "stages" to follow. The LMU's counsel's response—also provided on January 16, 2020, was that LMU's counsel considered the statute of limitations and improper service issues to be "boilerplate at this stage," truthfully answering Plaintiffs' counsel's question, but then LMU's counsel expressly stated to Plaintiffs' counsel that the defenses were being asserted so that they would *not* be waived. LMU's counsel made no representations about LMU's *future* position with respect to affirmative defenses, because at the

time of the representation, *the statute of limitations had not run*. It is axiomatic that there can be no estoppel against a party who speaks the truth.³

As discussed above, LMU filed an Amended Answer *after* the January 16, 2020 email, again asserting defenses of statute of limitations and improper service. (*See* Am. Ans. of LMU, efiled Feb. 20, 2020.) Between February 20, 2020 and June 2, 2020, Plaintiffs had over 3 months to serve Carlos Toney and they did not do so. By the time the statute of limitations ran, Plaintiffs had received *three* Answers (2 from LMU and 1 from fellow UIM Carrier Horace Mann) expressly pleading statute of limitations, improper service, and reliance upon §38-77-160 (LMU) and improper service (Horace Mann).

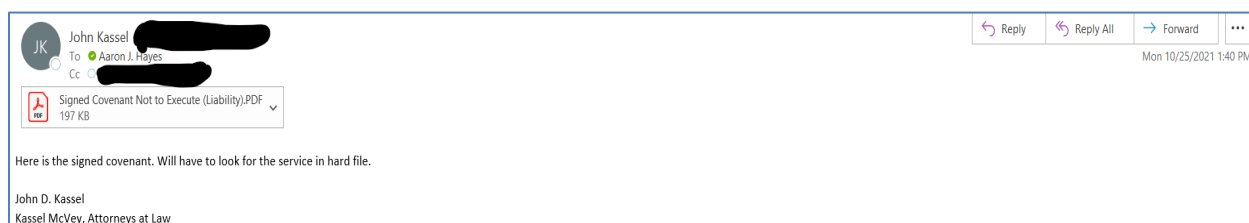
ii. Plaintiffs’ counsel did not rely on LMU’s counsel’s January 16, 2020 email.

If the emails between counsel are to be of import, counsel for LMU is constrained to point out to the Court that Plaintiffs’ counsel issued an email to LMU’s counsel that indicates that Plaintiffs’ counsel was in no way relying upon any prior representation by LMU’s counsel regarding the issue of service upon Toney. For context, LMU notes that the Public Index to this case has two affidavits of service on file, (unintentionally) misleadingly titled “Certificate of Service – Certified Mail on Carola D To” [sic]:

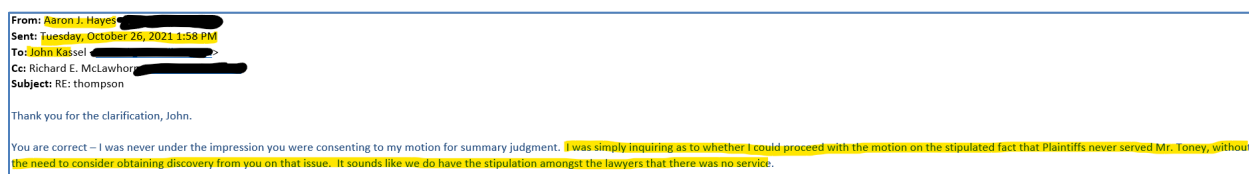
Thompson, Howell D	Service/Certificate Of Service...	Filing		12/20/2019-16:12		
Thompson, Howell D	Service/Certificate Of Service Certified Mail on Carola D To	Filing		12/20/2019-16:12		
Thompson, Howell D	NEF(12-19-2019 03:23:05 PM) Service/Certificate Of Servi...	Filing		12/19/2019-15:38		
Thompson, Howell D	Service/Certificate Of Service Certified Mail on Carola D To	Filing		12/19/2019-15:23		
Thompson, Howell D	Summons & Complaint	Filing		12/05/2019-10:15		

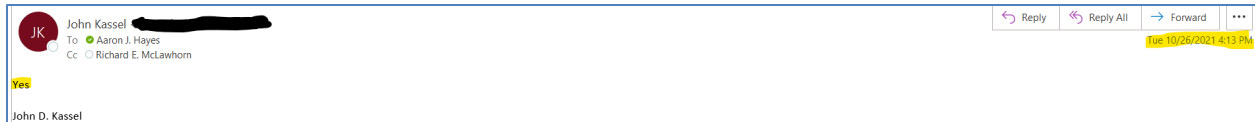
³ Further, any equitable argument must fail, since Plaintiffs had a legal option to address their concerns with LMU’s Answers. *See Nutt Corp. v. Howell Road, LLC*, 396 S.C. 323, 327, 721 S.E.2d 447, 449 (Ct. App. 2011) (citing *EllisDon Constr., Inc. v. Clemson Univ.*, 391 S.C. 552, 555, 707 S.E.2d 399, 401 (2011)) (“equity is generally only available when a party is without an adequate remedy at law.”) Because Plaintiffs were entitled to serve a Reply to LMU’s Answer asserting affirmative defenses, *see* Rule 8(c), SCRCF, Plaintiffs were entitled to file a motion for more definite statement to address their contention that LMU’s Answer was “boilerplate,” *see* Rule 12(e), SCRCF. Plaintiffs did not do so. Indeed, as applied to this Motion as a whole, Plaintiffs failure to file a Rule 12(e) motion may operate as a bar to Plaintiffs’ newly made *Unisun* argument (i.e. that LMU’s defenses were not sufficiently pled).

In or around October 24, 2021 and/or October 25, 2021, counsel for LMU confirmed that these two Affidavits of Service are actually for the two UIM carriers, not “Carola D To” [i.e., Carlos D. Toney]. On the morning of October 25, 2021, LMU’s counsel informally requested that Plaintiff’s counsel provide any covenant not to execute procured by the liability carrier for Carlos Toney, as well as the Affidavit of Service upon Carlos Toney. Plaintiffs’ counsel responded as follows:



(October 25, 2021 Email, Kassel to Hayes, embedded above and attached hereto as **Exhibit B**.) Plaintiffs’ counsel stated he would “look for the service” [Affidavit of Service] in the hard copy file. What is noteworthy is that Plaintiffs’ counsel’s response to a request for the Affidavit of Service does not align with the response of a person under the impression that there would be no challenge to service; rather, it aligns with the response of a person who was under the impression that service was readily provable and who was prepared to represent as much to the undersigned. Plaintiffs’ counsel stated was “looking for it” and, from LMU’s perspective, an Affidavit of Service may very well have been presented shortly thereafter, which would have precluded the filing of the instant Motion. However, the next day, October 26, 2021, it became clear to LMU’s counsel that likely there had been no service, and a stipulation was requested at 1:58 pm (and received at 4:13 pm) so that the instant Motion could be filed with all haste:





(October 26, 2021 email exchange, Hayes to Kassel, embedded above and attached hereto as **Exhibit C.**) LMU filed the instant Motion at 4:40 pm on October 26, 2021, 27 minutes after Plaintiffs’ counsel stipulated to no service. (*See* LMU Mot. to Dismiss and Mot. for Summ. J., efiled October 26, 2021 (efiling time-stamp ribbon).) In order to file the Motion in good faith, LMU had to confirm that no service was obtained, and that fact was not confirmed in writing until October 26, 2021. Clearly, Plaintiffs cannot argue in good faith that they were relying on LMU’s counsel’s representations from January 16, 2020, when Plaintiffs’ counsel was representing to LMU’s counsel as late as October 25, 2021 that they were “looking” for an Affidavit of Service.

iii. Plaintiffs’ Counsel is the One in Possession of the Underlying Information.

The fact that Plaintiffs never had an Affidavit of Service for Carlos D. Toney is information within the custody and control of Plaintiffs’ counsel. After all, the burden is upon a plaintiff to procure and prove service. *See* Rules 4, 5, SCRCP. Therefore, Plaintiffs’ counsel claim of detrimental reliance on LMU is *per se* unreasonable. 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. If there is any party who has been misled on the issue of service, it is LMU, not Plaintiffs. After all, LMU is not in privity with Defendant Toney. *See* n. 2, *supra*.

IV. Plaintiffs Supplemental Argument Concerning Alleged “Lack of Prejudice” to LMU Misses the Point of the *Louden* Holding, Which Focuses on a More Fundamental Concept: Validity of the Court’s Judgment.

Plaintiffs' Response claims that LMU suffers no prejudice because of the lack of service upon Defendant Carlos D. Toney, ostensibly because Plaintiffs, LMU, and Horace Mann have conducted discovery. Plaintiffs' Response ignores the fact that *Louden* focuses upon the "fundamental requirement" of personal service, which, *inter alia*, paves the way for a "valid judgment." See *Louden*, 327 S.C. at 468, 486 S.E.2d at 526. In this case, something deeply "fundamental" about this lawsuit is wrong: Carlos Toney has never been served with a copy of the lawsuit filed against him. Carlos Toney has never been placed on valid notice that he could be summoned to appear in court and sit in the defendant's chair. Carlos Toney has never been placed on valid notice that Plaintiffs intend to call witnesses to a public courtroom to testify against him. Carlos Toney has never been placed on valid notice that his name might appear on a verdict form. Carlos Toney has never been placed on valid notice that he might have a judgment entered against him and reported against his credit. Therefore, if a jury were to return a verdict for Plaintiffs, this Court would be unable to enter a valid judgment, because whom would the judgment be entered against? If this were a criminal case, would the Court be able to pronounce sentence on a defendant who had never been served with an arrest warrant or indictment, even if the police had done an extended investigation? The two rhetorical questions above and the analogy to a criminal case illustrate the extreme nature of the fundamental problem with this suit: there is no defendant present in this case. In fact, there is no case at all. This fundamental problem was identified in *Louden*, and binding guidance was issued to the trial courts of this state accordingly. See also Section II, *supra*.

Further, and to the extent that a prejudice analysis is requested by the Court, LMU would note that LMU has a statutory right to insist upon a valid action against the putative at-fault driver, as described in *Williams*, *supra*, and that right has been violated by Plaintiffs. LMU

would also note that, for the reasons stated above, Toney is subject to prejudice due to lack of notice of an action bearing his name.

V. This Motion was Not Filed on the “Eve of Trial.”

Contrary to Plaintiff’s position, LMU would point out to the court that this Motion was not filed on “the eve of trial.” LMU filed this Motion on October 26, 2021 and filed its initial memorandum in support on November 30, 2021. The trial roster on which this case currently appears was not published until December 13, 2021, and of course LMU had no way of knowing when a trial roster would be published. Indeed, LMU filed its Motion and initial memorandum with all haste after the email exchange of October 26, 2021, expressly to *prevent* this Motion being called an “eve of trial” motion.

As detailed via chart in LMU’s November 30, 2021 Memorandum in Support of this Motion, the timeline of the filings in this case is nearly identical to the timeline of the filings in *Louden*. (See LMU Memo. in Supp. of Mot. Dismiss and Mot. for Summ. J., at pp. 4-5.) Plaintiffs cannot complain that the timing of this Motion is “late” when the timing of this Motion is nearly identical the timing of the *successful* motion from *Louden*.

VI. In the Alternative, this Case is Subject to Administrative Dismissal Pursuant to Rule 5(d), Regardless of Rules 12 and 56.

Perhaps in recognition of the potential differences between late service and no service at all, the Legislature has codified the consequences of no service whatsoever: “[u]pon failure to serve the summons and complaint, the action may be dismissed by the court on the court’s own initiative or upon application by any party.” Rule 5(d), SCRCP. Plaintiffs have admitted that this is a case of no service. (See Ex. A.) LMU asserts that the Court can and should look to Rule 5(d) alone, and analysis of Rules 12, 56, and associated case law is not necessary. This matter must be dismissed pursuant to Rule 5(d).

CONCLUSION

Plaintiff's arguments in Response to LMU's Motion to Dismiss/Motion for Summary Judgment cannot overcome the longstanding rule from *Louden* and the fundamental problem of a UIM claimant's failure to preserve the right of action against the putative at-fault driver. LMU's Motion must be granted, and this case must be dismissed and judgment entered in favor of Toney and LMU.

LMU reserves the right to further supplement its position with further argument at the hearing of this Motion.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

s/ Aaron J. Hayes
Mark S. Barrow
Richard E. McLawhorn, Jr.
Aaron J. Hayes
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia, SC 29211
(803) 256-2233

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY**

Columbia, South Carolina

December 21, 2021

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Howell D. Thompson and Tara L.
Thompson,

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

IN THE COURT OF COMMON PLEAS

Civil Action No. 2019-CP-43-02375

**PLAINTIFF'S RESPONSE TO
DEFENDANT LIBERTY MUTUAL
INSURANCE REQUEST TO ADMIT****EXHIBIT****A**

tabbies

TO: AARON HAYES, ESQUIRE AND RICHARD E. MCLAWHORN, JR., ESQUIRE
ATTORNEYS FOR DEFENDANT LIBERTY MUTUAL INSURANCE COMPANY:REQUEST TO ADMIT

1. Admit that Plaintiffs never served the Summons and Complaint in the above-reference matter upon Defendant Carlos D. Toney.

RESPONSE: Plaintiffs' Admit

KASSEL McVEY ATTORNEYS AT LAW

John D. Kassel (SC Bar No. 03286)

jkassel@kassellaw.com

Therile B. McVey (SC Bar No. 16682)

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Jamie R. Rutkoski (SC Bar No. 103270)

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1330 Laurel Street

Post Office Box 1476

Columbia, South Carolina 29202

803-256-4242

803-256-1952 (fax)

Attorneys for Plaintiff

December 16, 2021
Columbia, South Carolina

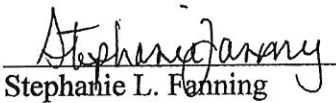
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
	)	
Howell D. Thompson and Tara L. Thompson,	)	Civil Action No.: 2019-CP-43-02375
	)	
Plaintiffs,	)	
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
Carlos D. Toney,	)	
	)	
Defendant.	)	

I, Stephanie L. Fanning, Paralegal, an employee of Kassel McVey Attorneys at Law, counsel for Plaintiffs in the above-entitled matter, do hereby certify that on the 16th day of December 2021, I caused the attached Plaintiffs' Response to Defendant Liberty Mutual's Request to Admit to be served upon counsel for Defendants by depositing a true and correct copy in the United States Mail and addressed as follows:

Wingate & Barrow, P.A
Attn: Richard McLawhorn, Esquire
1515 Lady Street
Columbia, South Carolina 29201

Wingate & Barrow, P.A
Attn: Aaron Hayes, Esquire
1515 Lady Street
Columbia, South Carolina 29201

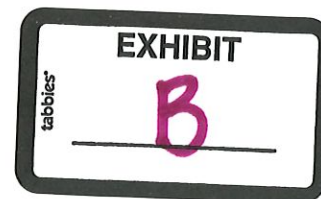
Brown and Brehmer
Attn: Karl Brehmer, Esquire
1720 Main Street, Ste. 201
Columbia, SC 29201


Stephanie L. Fanning

December 16 2021
Columbia, South Carolina.

Aaron J. Hayes

From: John Kassel <JKassel@kassellaw.com>
Sent: Monday, October 25, 2021 1:40 PM
To: Aaron J. Hayes
Cc: bmccoy@hnblaw.com
Subject: thompson
Attachments: Signed Covenant Not to Execute (Liability).PDF

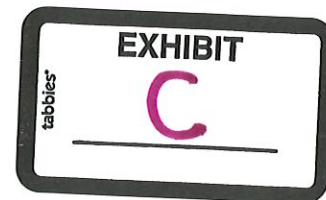


Here is the signed covenant. Will have to look for the service in hard file.

John D. Kassel
Kassel McVey, Attorneys at Law
P.O. Box 1476
Columbia, South Carolina 29202
803.256.4242
803.256.1952 fax
803.360.2521 cell
www.kassellaw.com

Aaron J. Hayes

From: John Kassel <JKassel@kassellaw.com>
Sent: Tuesday, October 26, 2021 4:13 PM
To: Aaron J. Hayes
Cc: Richard E. McLawhorn
Subject: RE: thompson



Yes

John D. Kassel
 Kassel McVey, Attorneys at Law
 P.O. Box 1476
 Columbia, South Carolina 29202
 803.256.4242
 803.256.1952 fax
 803.360.2521 cell
 www.kassellaw.com

From: Aaron J. Hayes <AJH@swblaw.com>
Sent: Tuesday, October 26, 2021 1:58 PM
To: John Kassel <JKassel@kassellaw.com>
Cc: Richard E. McLawhorn <rem@swblaw.com>
Subject: RE: thompson

Thank you for the clarification, John.

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

You also brought up my willingness to stipulate to an email that originated with my firm. If you are referring to the January 16, 2020 email between yourself and Richard McLawhorn, regarding a question you had about affirmative defenses, we will stipulate that email is authentic.

I understand your counter-position based on Maybank v. BB&T.

Does this email accurately recount where we are?



Aaron J. Hayes | *Of Counsel*
 Sweeny, Wingate & Barrow, P.A.
 Cell: (803) 517-4338
 Office: (803) 256-2233

From: John Kassel <JKassel@kassellaw.com>
Sent: Tuesday, October 26, 2021 1:40 PM
To: Aaron J. Hayes <AJH@swblaw.com>
Subject: thompson

Aaron following our phone conversation, just to be clear, I am not consenting to your filing a motion. In fact, I think you have waived the issue. See Maybank v. BB&T. If you do file a motion, I will press the waiver issue. Thanks.

John D. Kassel
Kassel McVey, Attorneys at Law
P.O. Box 1476
Columbia, South Carolina 29202
803.256.4242
803.256.1952 fax
803.360.2521 cell
<https://link.edgепilot.com/s/4df277a0/nkwcwAYMCkuFIF3Gp8pQrg?u=http://www.kassellaw.com/>

Links contained in this email have been replaced. If you click on a link in the email above, the link will be analyzed for known threats. If a known threat is found, you will not be able to proceed to the destination. If suspicious content is detected, you will see a warning.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and Tara L. Thompson,	)	Civil Action No. 2019CP4302375
	)	
Plaintiffs,	)	
	)	
v.	)	MOTION FOR CONTINUANCE
	)	(January 10, 2022 Trial Roster)
Carlos D. Toney,	)	
	)	
Defendant.	)	

TO: JOHN D. KASSEL, ESQUIRE, THEILE B. MCVEY, ESQUIRE, AND JAMIE R. RUTKOSKI, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS, AND TO THE PLAINTIFFS ABOVE-NAMED:

YOU WILL PLEASE TAKE NOTICE that the undersigned, as attorneys for UIM carriers Liberty Mutual Insurance Company and Horace Mann Property & Casualty Insurance Company, respectively, hereby respectfully petition the Court for a continuance from the January 10, 2022 trial roster. The grounds for this Motion are as follows:

- 1) A primary witness for the Defense, David N. DuPuy, M.D. (expert), is not available to testify at trial during the week of January 10; and, alternatively,
- 2) The Defense has a pending Motion to Dismiss/Motion for Summary Judgment based upon a significant legal issue in this case. Upon information and belief, Chief Administrative Judge has agreed to hear the Motion to Dismiss/Motion for Summary Judgment as soon as this week. In any event, the undersigned felt it advisable to notify the Presiding Judge of the pending status of the Motion to Dismiss/Motion for Summary Judgment in advance of the

Court's January 4, 2022 (5:00 pm) deadline for continuance motions related to the January 10, 2022 trial roster.

The undersigned have discussed this matter with counsel for Plaintiffs, and counsel indicated that he could not consent to this Motion for Continuance at this time.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

s/ Aaron J. Hayes

Mark S. Barrow, SC Bar No. 7821

Richard E. McLawhorn, Jr., SC Bar No. 100179

Aaron J. Hayes, SC Bar No. 100114

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(803) 256-2233

**ATTORNEYS FOR UIM CARRIER LIBERTY
MUTUAL INSURANCE COMPANY**

BROWN AND BREHMER

s/ James D. Floyd

Karl S. Brehmer

James D. Floyd

1720 Main Street, Suite 201

PO Box 7966

Columbia, South Carolina 29202

(803) 771-6600

**ATTORNEYS FOR UIM CARRIER HORACE
MANN PROPERTY & CASUALTY
INSURANCE COMPANY**

Columbia, South Carolina

January 4, 2022

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
Howell D. Thompson and Tara L. Thompson,	)	Civil Action No.: 2019CP4302375
	)	
Plaintiff,	)	
	)	
v.	)	PLAINTIFFS' SUPPLEMENTAL
	)	MEMORANDUM IN OPPOSITION TO UIM
Carlos D. Toney,	)	CARRIERS' MOTIONS TO DISMISS OR FOR
	)	SUMMARY JUDGMENT
Defendant.	)	
	)	

Before addressing any of the parties' arguments regarding waiver, estoppel, or the holding in *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997), the Court must first address whether this action was commenced against Defendant Carlos D. Toney within the statute of limitations. If so, the remaining issues become moot.¹

An action is commenced by the filing of a Summons and Complaint and service of same upon the named Defendant within the statute of limitations of 120 days thereafter. Rule 3(a), SCRCF. Because the subject motor vehicle collision occurred on June 2, 2017 and a three-year statute of limitations applies to Plaintiffs' claims, that means these events had to have occurred before September 30, 2020 (120 days after June 2, 2020).

Here, Plaintiffs filed the Summons and Complaint on December 5, 2019, long before that date. Thus, the remaining question is whether Plaintiffs achieved service on Defendant Carlos D. Toney before the deadline.

Of course, one method of personal service on an individual is "by delivering a copy of the summons and complaint to him personally or by leaving copies thereof at his dwelling house or

¹ Plaintiffs incorporate by reference and do not abandon their previous arguments in opposition to the motions.

usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy to an agent authorized by appointment or by law to receive service of process.” Rule 4(d)(1), SCRCF. While Plaintiffs admittedly did not do so in this case, that is not the only mechanism by which they could achieve personal service. Rather, “[v]oluntary appearance by defendant is equivalent to personal service.” Rule 4(d), SCRCF. Therefore, if Defendant Carlos D. Toney made a voluntary appearance in this action before September 30, 2020, the law would regard him as having been personally served and the action commenced within the statute of limitations.

On multiple occasions, South Carolina appellate courts have concluded that a party has made a voluntary appearance based on his conduct.²

For example, in *S.C. Dept. of Social Services v. Burris*, 297 S.C. 537, 377 S.E.2d 578 (1989), the Supreme Court held that, by testifying at a hearing, the defendant made a voluntary appearance as contemplated by Rule 4(d) and, therefore, “[h]is contention that this lack of service [failure to serve pleadings on him] deprived the Family Court of personal jurisdiction is without merit.”

Similarly, the Court of Appeals held that a defendant had made a voluntary appearance when he participated in the defense of a case, including testifying, without raising any defense of lack of service. *Israel v. Carolina Bar-B-Que*, 292 S.C. 282, 366 S.E.2d 123 (Ct. App. 1987). The court noted that the defendant certainly could not have been surprised by the plaintiff’s claims.

More recently, in *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009), the Court of Appeals again found that a defendant had made a voluntary appearance by, among other things, making himself available for testimony at a hearing without objection. The court reasoned:

² Rule 4(d), SCRCF, was preceded by S.C. CODE ANN. § 15-9-70 (1976), which contained identical language. Therefore, some older decisions cite the statute rather than the Rule of Civil Procedure but apply the same rule of law.

“Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance.” *Stearns Bank Nat’l Ass’n v. Glenwood Falls, LP*, 373 S.C. 331, 337, 644 S.E.2d 793, 796 (Ct. App. 2007). “Voluntary appearance by [a] defendant is equivalent to personal service....” Rule 4(d), SCRPC. “A defendant may waive any complaints he may have regarding personal jurisdiction by failing to object to the lack of personal jurisdiction and by appearing to defend his case.” *State v. Dudley*, 354 S.C. 514, 542, 581 S.E.2d 171, 186 (Ct. App. 2003); *see Cheraw Motor Sales Co. v. Rainwater*, 125 S.C. 509, 513 119 S.E. 237, 239 (1923) (“The defendant filed his answer and tried his case on the affidavit in attachment, and thereby waived his right to his motion [to dismiss the proceedings because there was no summons and complaint served].”).

...

Cannon clearly had notice of all proceedings and waived any defects that might have occurred. *See Stickland v. Consol. Energy Prods. Co.*, 274 S.C. 554, 555, 265 S.E.2d 682, 683 (1980) (“A general appearance constitutes a voluntary submission to the jurisdiction of the court and waives any defects and irregularities in the service of process.”); *H.S. Chisholm, Inc. v. Klinger*, 229 S.C. 8, 16, 91 S.E.2d 538, 542 (1956) (“[T]he appellants had actual notice of the issuance and contents of the rule [to show cause, which was improperly filed] by the personal service of it upon them, and in response to it they appeared by counsel.”). Cannon never raised the issue of improper service of process and, consequently, never objected to personal jurisdiction of the circuit court. *See Bakala*, 352 S.C. at 629, 576 S.E.2d at 165 (finding husband never raised the issue of improper service of rule to show cause in constructive contempt case and, therefore, waived his objection to personal jurisdiction). By appearing and arguing the merits of the action multiple times before the circuit court, we find Cannon consented to the circuit court’s personal jurisdiction and waived any defense of lack of personal jurisdiction.

In *Petty v. Weyerhaeuser*, 272 S.C. 282, 251 S.E.2d 735 (1979), the Supreme Court held that a defendant’s attorney’s letter to the plaintiff’s attorney stating it was “an informal notice of appearance” was “as a matter of law, a general appearance.”

While not a South Carolina case, *International Controls Corp. v. Vesco*, 490 F.2d 1334 (2d Cir. 1974), is also instructive. There, the court noted the district judge’s ruling that, by having its attorney attend a deposition and by submitting testimony via affidavit, a defendant had made a voluntary appearance sufficient to confer personal jurisdiction over the defendant.

In short, where a defendant who has not been served nevertheless provides testimony or otherwise participates in the defense of an action without objecting to lack of service or personal jurisdiction, the law will regard him as having been personally served for purposes of Rule 4.

It is undisputed that Defendant Carlos D. Toney participated in the defense of this action by voluntarily – and without subpoena – appearing for and testifying at his deposition on May 15, 2020. (*See* attached copy of deposition transcript). He did not enter a special appearance, raise any defense inadequate service, or object to the Court’s exercise of personal jurisdiction over him. Thus, he made a voluntary appearance as of that time, well before the deadline imposed by Rule 3(a), SCRCP.

This fact alone is sufficient to deny the UIM carriers’ motions without further inquiry into other arguments or issues. However, even if the Court were inclined to do so, it should deny the motions for the reasons previously articulated by Plaintiffs.

Respectfully submitted,

/s/ John D. Kassel
John D. Kassel
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KASSEL McVEY
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(803) 256-4242

January 27, 2022

Attorneys for Plaintiffs

1 STATE OF SOUTH CAROLINA

COURT OF COMMON PLEAS

2 COUNTY OF SUMTER

3
4 HOWELL D. THOMPSON and TARA L.
THOMPSON,

5 Plaintiffs,

6 vs.

CASE NO. 2019-CP-43-02375

7 CARLOS D. TONEY,

8 Defendant.

9

10

11 V I D E O
12 D E P O S I T I O N

13

WITNESS: CARLOS D. TONEY

14

DATE: Friday, May 15, 2020

15

TIME: 10:06 a.m.

16

LOCATION: Sweeny Wingate & Barrow, P.A.
1515 Lady Street
Columbia, South Carolina 29201

17

TAKEN BY: Attorneys for Plaintiffs

18

REPORTED BY: CAROLL ANNE BOUTAHAR
Certified Verbatim Reporter
(Appearing by videoconference)

19

20

21

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1 APPEARANCES:

2 ATTORNEYS FOR THE PLAINTIFFS:

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6 jkassel@kassellaw.com
(Appearing by videoconference)
7

8 ATTORNEYS FOR THE DEFENDANT:

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12 cgd@swblaw.com

13 ATTORNEYS FOR THE UIM CARRIER:

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803.771.6600
17 jdf@brownandbrehmer.com
(Appearing by videoconference)

18 ALSO PRESENT:

19 BRUCE BALMER, CIRM, CLVS, CCVS
20 Videographer
21 (Appearing by videoconference)

22 (INDEX AT REAR OF TRANSCRIPT)

1 MR. KASSEL: So we're on the record,
2 Mr. Toney. This is a deposition of you in a case
3 involving Howie Thompson. I'm an attorney in Columbia.
4 I represent Mr. Thompson.

5 We're doing this by Zoom, given the COVID-19
6 crisis. And because of that, the rules have been
7 changed a bit so that the court reporter is not actually
8 physically in the room with you but is at a distant
9 location and that all of us are at distant locations,
10 other than you and your lawyer. I appreciate you being
11 here.

12 And this video is also being recorded by
13 CompuScripts. All right. I'm going to begin.

14 Bruce, is that what you need?

15 THE VIDEOGRAPHER: Yes. And I'll do my intro,
16 and then Carroll will swear Mr. Toney in.

17 MR. KASSEL: All right. Thank you.

18 THE VIDEOGRAPHER: We are going on the video
19 record at 10:07:32. This is media unit one of the video
20 deposition of Carlos D. Toney.

21 Will the court reporter please swear in the
22 witness.

23 (Witness sworn.)

24 CARLOS D. TONEY, being duly sworn,
25 testified as follows:

1 EXAMINATION

2 BY MR. KASSEL:

3 Q. Good morning, Mr. Toney. As I said, I'm John
4 Kassel. I represent the Thompsons in this lawsuit.
5 This is a deposition. I'm going to ask you some
6 questions.

7 If you don't understand my questions, will you
8 let me know?

9 A. Yes, sir.

10 Q. If you need to take a break for any reason,
11 will you tell us?

12 A. Yes, sir.

13 Q. I may ask a question that Mr. Doolittle may
14 object to. You may hear something to the effect,
15 Objection, or, Objection to the form of the question.

16 Do you understand that, despite the objection,
17 you're still obligated to respond to the question?

18 A. Yes, sir.

19 Q. Okay.

20 Will you promise me, sir, that your answers
21 will be with words as opposed to uh-huhs?

22 A. Yes, sir.

23 Q. Okay. Because we are making a record of all
24 of this. Okay. Thank you.

25 Would you start and give us your full name.

1 A. Carlos D. Toney.

2 Q. And what is your address, Mr. Toney?

3 A. 373 Lower Lee School Road, Mayesville, South
4 Carolina 29104.

5 Q. And how long have you lived in Mayesville?

6 A. Pretty much all my life. I moved -- I was
7 living in Sumter County. Then I moved back here.

8 Q. Moved back here to Mayesville.

9 A. Yes, sir.

10 Q. Okay.

11 And Mayesville is in Sumter County, isn't it?

12 A. Yes, sir.

13 Q. And is that where you were born and raised, in
14 Sumter County?

15 A. Yes, sir.

16 Q. And who lives with you at that address?

17 A. I live alone.

18 Q. Are you married?

19 A. No, sir.

20 Q. Ever been?

21 A. Yes, sir. I have -- I was married. I'm
22 divorced.

23 Q. Okay.

24 Children?

25 A. Yes, sir.

1 Q. How old are your children?

2 A. I have a 12-year-old right now, sir.

3 Q. And what is your -- okay.

4 And does the 12-year-old live with you?

5 A. No, she don't, sir.

6 Q. Okay.

7 And what is the name of your ex?

8 A. Patrice Small.

9 Q. Small was her maiden name?

10 A. Yes, Patrice Small Toney.

11 Q. Okay.

12 And does she still live in Sumter County?

13 A. Yes, sir.

14 Q. And do you have relatives in Sumter County?

15 A. Yes, I do, sir.

16 Q. And can you tell me who your relatives are by
17 blood or marriage that go by names other than Toney?

18 A. I have a great deal of family, sir. I could
19 give you a couple names but -- I know some but -- you
20 know, nicknames, but I can't really give a --

21 Q. How about last names that you know?

22 A. Grooms, McGees. I have others in Sumter
23 that's Toney. That's what I can come up with.

24 Q. Okay.

25 And what immediate family do you have in

1 Sumter? Are your folks alive?
2 A. Yes. My mother's still alive.
3 Q. And what is her name?
4 A. Carolyn Anthony.
5 Q. And her last name?
6 A. Anthony, A-N-T-H --
7 Q. Anthony.
8 A. Yes.
9 Q. Okay.
10 And where did she work?
11 A. She drives for RTA.
12 Q. All right.
13 And what kind of education do you have,
14 Mr. Toney?
15 A. I have a high school education.
16 Q. Where did you go?
17 A. Mount Pleasant High School.
18 Q. And is that in Sumter County?
19 A. No, it's not. It's in Lee County.
20 Q. Lee County.
21 And what year did you graduate?
22 A. 1990.
23 Q. And what's your date of birth?
24 A. XX/XX/72.
25 Q. And are you employed today?

- 1 A. Yes, I am.
- 2 Q. And where are you employed?
- 3 A. G&P Trucking.
- 4 Q. And what is your job?
- 5 A. I'm a driver, sir.
- 6 Q. And it's G&P trucking.
- 7 A. Yes.
- 8 Q. Okay.
- 9 And tell me about your job. When did you
- 10 start?
- 11 A. I can't actually tell you the date, but I've
- 12 been working with the company, like, over 13 years.
- 13 Q. And during that 13-year period, have you
- 14 always been a driver?
- 15 A. Yes, sir.
- 16 Q. And what kind of vehicles do you to drive?
- 17 A. 18 wheelers somehow.
- 18 Q. And do you have a CDL?
- 19 A. Yes, I do.
- 20 Q. And tell me about the driving that you do.
- 21 Is it full-time?
- 22 A. Yes.
- 23 Q. And are you still doing that?
- 24 A. Yes, sir.
- 25 Q. And what kind of routes do you drive?

1 A. Long distance.

2 Q. And so where do you typically go?

3 A. I was mainly going to, like, Texas, Louisiana,
4 and stuff.

5 Q. And at the time of the wreck I want to talk
6 you about, which was in June 2017, is that what you were
7 doing?

8 A. Yes, sir.

9 Q. And what kind of trailer were you pulling?

10 A. No, sir. I wasn't driving no big -- I was
11 driving my personal vehicle.

12 Q. I understand.

13 But at the time of the wreck, you were driving
14 a red vehicle, a red truck.

15 A. Yes.

16 Q. But in June 2017, when you were doing the
17 long-distance hauling, what kind of trailers were you
18 pulling?

19 A. Fifty-three-foot trailers.

20 Q. And what were you hauling?

21 A. I can't answer that at this time, sir. I
22 can't remember what it was.

23 Q. Okay.

24 Do you have any criminal record?

25 A. No, I don't, sir.

1 Q. Have you ever been sued before?

2 A. No, sir.

3 Q. Have you ever brought a lawsuit before?

4 A. I don't understand the question as brought.

5 Q. Okay.

6 Have you ever been involved in a motor vehicle
7 wreck other than the one I'm going to talk to you about?

8 A. Yes, I have, sir.

9 Q. How many wrecks have you been involved in?

10 A. I -- it may have been -- it may have been
11 three, sir.

12 Q. Okay.

13 Counting the wreck that I'm talking to you
14 about or in addition to that wreck?

15 A. Yes, sir.

16 Q. Which?

17 Are you counting the wreck that we're talking
18 about today?

19 A. Yes, sir. Yes, sir.

20 Q. Can you tell me about the other two, starting
21 with the first one?

22 A. I can't remember what happened at the other
23 two, sir.

24 Q. Were you driving professionally or were you
25 driving your private vehicle?

1 A. One was professional and the other ones were
2 personal vehicles.

3 Q. Let's talk about the one where you were
4 driving professionally.

5 You were driving an 18-wheeler.

6 A. Yes, sir.

7 Q. And what year did that happen?

8 A. I can't remember which year, sir.

9 Q. Approximately?

10 A. It may have been 2013, sir. Yeah.

11 Q. And where did it happen?

12 A. This was in Pennsylvania, sir.

13 Q. And how did the wreck happen?

14 A. It was -- the road -- it was snowing at the
15 time that it happened, and it just -- the truck just
16 jackknifed.

17 Q. Was it a single-vehicle wreck --

18 A. Yes, sir.

19 Q. -- or were more vehicles involved?

20 A. Single vehicle.

21 Q. Were you injured?

22 A. No, I was not.

23 Q. Were you ticketed?

24 A. I can't remember, sir. I'm not sure at this
25 time but...

- 1 Q. Was the truck damaged?
- 2 A. Yes, it was, sir.
- 3 Q. And were you driving for G&P?
- 4 A. Yes.
- 5 Q. And when you go to work for G&P, where is
- 6 their office, or where do you pick up your truck?
- 7 A. 126 Access Road, Gaston.
- 8 Q. Access Road?
- 9 A. Yes, sir.
- 10 Q. And what was the second wreck? You said you
- 11 were driving a personal vehicle.
- 12 A. This was -- I can't remember exactly what
- 13 year, sir, but I was coming up to a stop sign. The car
- 14 turned short into my lane, and we hit each other.
- 15 Q. Were you deemed at fault?
- 16 A. I can't remember, sir.
- 17 Q. How long ago was that?
- 18 A. It was about --
- 19 Q. You said you couldn't remember, but
- 20 approximately?
- 21 A. This was back in the '90s.
- 22 Q. Okay.
- 23 Were you injured?
- 24 A. No, I was not.
- 25 Q. Have you had any moving violations, either on

1 your personal license or driving on your CDL?

2 A. I may have. I have a couple -- I had a couple
3 tickets in the past.

4 Q. Okay.

5 Can you tell me about those?

6 A. Just -- it was, like, maybe five or ten over
7 the speed limit that I got a ticket for.

8 Q. All right. How many tickets?

9 Did you hear my question, Mr. Tony?

10 Bruce?

11 THE VIDEOGRAPHER: Yes. I think we've lost
12 his feed.

13 MR. KASSEL: Okay.

14 THE VIDEOGRAPHER: Do you want me to go off
15 the record?

16 MR. KASSEL: Yeah. Let's go off the record
17 for a minute, and then tell me what we can do.

18 THE VIDEOGRAPHER: We're going off the record
19 at 10:20.

20 (A recess transpired.)

21 THE VIDEOGRAPHER: We are going back on the
22 record at 10:24.

23 BY MR. KASSEL:

24 Q. Mr. Toney, I was asking you questions about
25 getting speeding tickets or moving violations, and you

1 said you had some.

2 And the last question was, how many do you
3 have?

4 A. I don't know the exact amount at the moment,
5 sir.

6 Q. Approximately?

7 A. Okay. Are you asking how many I got at this
8 moment or just in the past have I had?

9 Q. In the last five years, how many do you have?

10 A. Approximately, maybe one.

11 Q. And when was that?

12 A. I think before the year came, I got a speeding
13 ticket for, maybe, five over, seven over, something like
14 that.

15 Q. And when was that, approximately?

16 A. It may have been October of last year.

17 Q. And was it while you were driving a personal
18 vehicle, or were you driving a truck?

19 A. A truck, sir.

20 Q. Has your CDL license ever been suspended for
21 any reason?

22 A. No, sir.

23 Q. Have you ever been disciplined by your company
24 for any traffic issues?

25 A. No, sir.

1 Q. Are you a member of a church?

2 A. Yes, sir.

3 Q. And what church?

4 A. Unionville AME Church.

5 Q. And do you have any position in that church?

6 A. No, sir.

7 Q. Are you a member of any social organizations?

8 A. I'm a Mason, sir.

9 Q. Have you ever been hospitalized for drugs or

10 alcohol?

11 A. No, sir.

12 Q. All right.

13 You live in Sumter County and you work for

14 G&P, which is in Gaston.

15 A. Yes, sir.

16 Q. And how many miles is that to you?

17 A. Roughly, maybe, 60 or 70 miles.

18 Q. And how often do you drive that?

19 A. Every week.

20 Q. Do you drive it every day?

21 A. No, sir. I drive to work, work during the

22 week. Then I drive back home.

23 Q. Okay.

24 Can you explain how that works?

25 A. I come in probably, like, Monday morning, work

1 during the week. And it depends on what's going on. I
2 may come in Friday. I may come in Saturday. Just --

3 Q. So, for example, on a Monday, you drive in on
4 your private vehicle.

5 A. Yes, sir.

6 Q. And then you park it.

7 A. Yes, sir.

8 Q. And then you get your truck.

9 A. Yes, sir.

10 Q. And then you, maybe, go on for several days.

11 A. Yes, sir.

12 Q. Okay.

13 Do you know where the courthouse is in Sumter
14 County?

15 A. Yes, sir.

16 Q. How far is that from your house?

17 A. Approximately 20, 25 miles.

18 Q. Okay.

19 Were you involved in a wreck with Mr. Thompson
20 in June 2017?

21 A. Yes, sir.

22 Q. Do you remember the wreck?

23 A. Yes, sir.

24 Q. What vehicle were you driving?

25 A. I was driving my Avalanche at the time, sir.

1 Q. And what color is it?

2 A. It's burgundy.

3 Q. Okay.

4 And at the time of the wreck, was anyone with
5 you?

6 A. No, sir.

7 Q. And at the time of the wreck, where were you
8 headed?

9 A. I was headed to a car shop.

10 Q. For what purpose?

11 A. To drop off a part.

12 Q. To drop off a part.

13 A. Yes, sir.

14 Q. Why were you doing that?

15 A. Because the car needed a part to be fixed.

16 Q. And what part was that?

17 A. It was some hinges to hold the hood down, keep
18 the hood closed.

19 Q. On the red -- on the burgundy Avalanche?

20 A. No, sir. It was another -- a car, sir.

21 Q. That you own?

22 A. Yes, sir.

23 Q. And you were dropping off a car part to get
24 fixed or to get replaced?

25 A. Well, I was going to get the car fixed.

- 1 Q. And what was the name of the car shop?
- 2 A. It was Mack's Towing.
- 3 Q. Can you say it again?
- 4 A. Mack's Towing.
- 5 Q. And where is it located?
- 6 A. Off of Highway 48.
- 7 Q. Highway 40?
- 8 A. Eight.
- 9 Q. And where is that?
- 10 A. Well, it's off of I-77, Exit 5, Exit 5 or 6.
- 11 It's one of them. It's Exit either 5 or 6. I can't
- 12 remember exactly.
- 13 Q. And when you started your trip to the car
- 14 shop, where did you leave from?
- 15 A. I left the car place.
- 16 Q. Did you begin your day leaving from your house
- 17 in Mayesville?
- 18 A. No, sir.
- 19 Q. Where is the car shop in relation to where the
- 20 wreck happened?
- 21 A. It's off of Highway 48 in Hopkins.
- 22 Q. In Hopkins.
- 23 A. Yes, sir.
- 24 Q. How far is the car shop from where the wreck
- 25 happened?

1 MR. DOOLITTLE: Objection to the form.

2 THE WITNESS: Approximately, maybe 10 miles.

3 BY MR. KASSEL:

4 Q. Okay.

5 So, as I understand it, the wreck happened
6 around noon. Is that your recollection?

7 A. (Nodding head.)

8 Q. Yes?

9 A. Yes, somewhere in that area, sir.

10 Q. Okay.

11 Can you tell me about your morning? Did you
12 wake up at your residence in Mayesville?

13 A. No, I didn't, sir.

14 Q. Where did you start your day?

15 A. I was in Columbia, sir, at the time.

16 Q. And where in Columbia?

17 A. I started my job -- I mean, I started my day
18 at G&P.

19 Q. Where did you spend the night?

20 A. At G&P.

21 Q. And what facilities do they have for you
22 there?

23 A. They have facilities that you can take showers
24 and everything there, use the restroom.

25 Q. And sleep?

- 1 A. Yes. I was sleeping in my truck.
- 2 Q. Oh. You were sleeping in the truck.
- 3 A. Yes, sir.
- 4 Q. And so what time did you get up?
- 5 A. I'm not sure, sir.
- 6 Q. Approximately?
- 7 A. Approximately, it was 10 a.m., approximately.
- 8 Q. Okay.
- 9 Tell me what you did when you got up.
- 10 A. I got up. I got up and took a shower, and I
- 11 got in my car.
- 12 Q. I'm sorry. You got in your what?
- 13 A. I took a shower, got cleaned up, and got in my
- 14 personal vehicle.
- 15 Q. The burgundy Avalanche.
- 16 A. Yes, sir.
- 17 Q. And then what did you do?
- 18 A. I went to the parts store.
- 19 Q. You went to the car shop?
- 20 A. I went to the parts store.
- 21 Q. The parts store. All right.
- 22 And what was the name of the parts store?
- 23 A. CPR.
- 24 Q. And where is it located?
- 25 A. I'm not sure of the street name, sir, but it's

1 in Columbia --

2 Q. How did you get there?

3 A. -- in West Columbia.

4 I drove there, sir.

5 Q. Tell me your route.

6 A. I can't remember at the time, sir, which route
7 I took.

8 Q. The parts store is different from the car
9 shop.

10 A. Yes, it is.

11 Q. And the parts store was in Columbia.

12 A. Yes. It's in West Columbia.

13 Q. In West Columbia.

14 A. (Nodding head.)

15 Q. And what time did you get to the parts store?

16 A. I'm not sure of the time, sir.

17 Q. Approximately?

18 A. Maybe 10:20, 10:30.

19 Q. Were you going to drive your truck for G&P the
20 day of the wreck, or was this a personal day for you?

21 A. I can't answer the question at the time, sir,
22 because, you know, I have to sit and wait to see what's
23 going on, and I don't know whether anything was going to
24 happen that day or not.

25 Q. When would they have told you whether they had

1 a job for you or not?

2 A. They probably would have and let me know that
3 they had something to do.

4 Q. And when would that have been? What time of
5 day, if they're going to call?

6 A. It depends on what's going on and how
7 everything lines up.

8 Q. Did they call you before the wreck?

9 A. No, sir.

10 Q. Had you driven the night before?

11 A. Yes, I had.

12 Q. When did you get to G&P?

13 A. I can't answer that at the moment, sir.

14 Q. You could answer it at a later time?

15 A. No, sir.

16 MR. DOOLITTLE: Object to the form.

17 BY MR. KASSEL:

18 Q. I'm not following what you mean.

19 Did you get to G&P, where you spent the night
20 in your truck -- did you get there the day before the
21 wreck?

22 A. I can't answer that at the moment, sir.

23 Just...

24 Q. How many nights did you sleep in your truck at
25 G&P before the wreck happened?

1 MR. DOOLITTLE: Objection to the form.

2 THE WITNESS: I'm trying to think, sir, but I
3 can't remember even what date the wreck was.

4 BY MR. KASSEL:

5 Q. Well, I'm not asking you the date of the
6 wreck.

7 I was just asking you, how many nights did you
8 spent at G&P in your truck before the wreck?

9 MR. DOOLITTLE: Objection to the form.

10 THE WITNESS: It may have been two.

11 BY MR. KASSEL:

12 Q. Okay.

13 Do you keep a log book?

14 A. I have electronic logs.

15 Q. And how do you do that?

16 A. Computer.

17 Q. Where is the computer?

18 A. It's in the truck.

19 Q. Can you print out something from that
20 computer?

21 A. No, I cannot.

22 Q. All right.

23 But you enter in information into a computer
24 in your truck.

25 A. Yes, I do.

1 Q. And you enter in the time that you're driving.

2 A. The time automatic starts when I turn it on.

3 Q. What information do you put in?

4 A. Just on or off duty.

5 Q. Okay.

6 And the logbook would indicate when you got to
7 G&P before the wreck.

8 A. Yes.

9 Q. Okay. All right. So you woke up. You took a
10 shower. You got in your private vehicle, your burgundy
11 Avalanche, and you went to Highway 48, to the parts
12 store.

13 A. The parts store's not in -- it's in West
14 Columbia.

15 Q. Okay. All right.

16 And did you get your part?

17 A. Yes, I did.

18 Q. And then where did you go?

19 A. I came down that highway that -- where the
20 accident was.

21 Q. And where were you headed? You were headed to
22 the car store, to the car shop.

23 A. Yes.

24 Q. And you think the car shop was on Highway 48.

25 A. It's on 48. Yes, sir.

1 Q. Is that Bluff Road?

2 A. Yes. That's what it was, Bluff Road.

3 Q. So you were -- were you fixing to get on I-77
4 at the time of the wreck?

5 A. Yes, sir.

6 Q. Were you fixing to head north on I-77?

7 A. Yes, sir. Yes, sir.

8 Q. Toward Charlotte?

9 A. Yes, sir.

10 Q. And then you were fixing to get off on Highway
11 48.

12 A. Yes, sir.

13 Q. And then, if you got off, which way would you
14 go?

15 A. I would make a right, sir.

16 Q. So at the time of the wreck, when you were
17 heading to the car shop and you had been at the parts
18 store, were you on 12th Street Extension?

19 A. I don't know the name of that street, sir, but
20 I was on Exit 2 ramp.

21 Q. Okay.

22 So the street that you were on, is that the
23 street where the wreck happened?

24 A. Yes, sir.

25 Q. And do you know what direction you were headed

1 on that?

2 A. No, sir. I don't remember which direction it
3 was.

4 Q. Were you coming from West Columbia?

5 A. Yes.

6 Q. West Columbia was behind you.

7 A. Yes.

8 Q. And you were headed toward I-77.

9 A. Yes, sir.

10 Q. And at least two lanes in one direction.

11 A. Yes, sir.

12 Q. And to get on I-77 from where you were, did
13 you have to make a left turn?

14 A. Yes, sir.

15 Q. And would you have had to yield to traffic
16 going in the opposite direction on that street, heading
17 into West Columbia?

18 MR. DOOLITTLE: Objection to the form.

19 THE WITNESS: There's a turning arrow there,
20 sir.

21 BY MR. KASSEL:

22 Q. There's a turning arrow.

23 A. Yes. There's a turning lane there.

24 Q. All right.

25 Is there a turning arrow or a turning lane?

1 A. There's a turning lane there with an arrow
2 with the stop light.

3 Q. Where were you?

4 A. I was sitting at the light with a car in front
5 of me.

6 Q. All right.

7 And is this the left turning lane?

8 A. Yes.

9 Q. And what kind of car was in front of you?

10 A. I can't remember exactly what it was, but it
11 was a pickup truck.

12 Q. What color was it?

13 A. I can't recall what it was. I think it was a
14 light color, but I'm not sure.

15 Q. And were you at a stop?

16 A. Yes.

17 Q. How long were you stopped?

18 MR. DOOLITTLE: Objection to the form.

19 THE WITNESS: I'm not sure, sir.

20 BY MR. KASSEL:

21 Q. Approximately?

22 A. Approximately two to five minutes.

23 Q. I'm sorry. Possibly what?

24 A. Approximately two to five minutes.

25 Q. And what were you waiting for?

1 A. Waiting for the light to turn green.

2 Q. And what color was it?

3 A. The light was green.

4 Q. What color was it before it was green?

5 A. It was red.

6 Q. And was that for all the traffic going in your
7 direction?

8 A. Yes.

9 Q. All right.

10 Tell me what happened.

11 A. The light turned green. I looked up. The
12 truck turned in front of me. And when the truck turned
13 in front of me, I was turning, and the accident
14 happened.

15 Q. What do you mean the truck turned in front of
16 you?

17 A. He was making a left turn at the same -- when
18 I was making one.

19 Q. And when you said, The truck turned in front
20 of me, are you talking about the truck that you had a
21 wreck with?

22 A. No, sir. It was a truck directly in front of
23 me, in the turn lane. He was turning, and I turned.

24 Q. I see.

25 A. But when he -- when I turned, that's when the

1 accident happened.

2 Q. Okay.

3 The truck in front of you, did he get hit?

4 A. No, he didn't, sir.

5 Q. And how far beyond him were you?

6 MR. DOOLITTLE: Objection to the form.

7 THE WITNESS: I don't know what the
8 approximate was, sir.

9 BY MR. KASSEL:

10 Q. Were you a car-length or a truck-length behind
11 him or two truck lengths behind him, or what?

12 MR. DOOLITTLE: Objection to the form.

13 THE WITNESS: I don't remember, sir.

14 BY MR. KASSEL:

15 Q. All right.

16 When the light turned for you, what kind of
17 light was it?

18 MR. DOOLITTLE: Objection to the form. Asked
19 and answered.

20 THE WITNESS: The light was green, sir.

21 BY MR. KASSEL:

22 Q. Okay.

23 And what kind of green light was it?

24 MR. DOOLITTLE: Objection to the form.

25 THE WITNESS: When I looked up at the light,

1 sir, and the car turned in front of me, I assumed
2 everything was green, and I went. I looked at it.

3 BY MR. KASSEL:

4 Q. No. What I'm asking you, Mr. Toney -- this is
5 not hard. Was it a round, green light? Was it an
6 arrow? What was it?

7 MR. DOOLITTLE: Objection to the form.

8 THE WITNESS: When I looked up, sir, I looked
9 at everything. I thought it was a green light along
10 with a round, green light; the arrow light, the green,
11 round light.

12 BY MR. KASSEL:

13 Q. All right.

14 You need to describe for me what the traffic
15 control device was at the intersection where you had
16 this wreck.

17 MR. DOOLITTLE: Objection to the form.

18 THE WITNESS: Sir, before I ever moved, I
19 looked up, and when I looked up, I was assuming there
20 was a green light and the round, circle light, the arrow
21 light and the circle light.

22 BY MR. KASSEL:

23 Q. You assumed or you saw?

24 MR. DOOLITTLE: Objection to the form.

25 BY MR. KASSEL:

1 Q. What are you saying?

2 A. When I looked up, I was thinking I saw
3 everything.

4 Q. All right. Tell me how many green lights
5 there were when you looked up.

6 MR. DOOLITTLE: Asked and answered.

7 BY MR. KASSEL:

8 Q. Do you understand my question?

9 A. Yes, sir. I understand your question.

10 Q. I'm asking you how many lights there were that
11 you were looking at.

12 MR. DOOLITTLE: Objection to the form.

13 THE WITNESS: Sir, before I proceeded, I
14 was -- when I looked up, I thought I saw three lights --

15 BY MR. KASSEL:

16 Q. You thought --

17 A. -- for me to make a turn.

18 Q. I'm sorry. I couldn't hear.

19 You thought you saw what?

20 A. Three lights.

21 Q. Three lights. Okay.

22 Can you describe each one of those lights?

23 A. You have an arrow turning -- pointing left.

24 You have two circle, green lights.

25 Q. Okay.

1 And were all three lights green?

2 A. From my knowledge, sir, yes.

3 Q. Okay.

4 But you could be wrong about that.

5 MR. DOOLITTLE: Objection to the form.

6 THE WITNESS: I'm not sure, sir.

7 BY MR. KASSEL:

8 Q. Okay. You're not sure.

9 It could be that the circular lights were
10 green but not the arrow light. Is that possible?

11 MR. DOOLITTLE: Objection to the form.

12 THE WITNESS: I'm not sure, sir.

13 BY MR. KASSEL:

14 Q. Okay. All right.

15 Where did the impact occur?

16 A. Mainly on my passenger side, front of the
17 vehicle.

18 Q. In what lane?

19 A. In the oncoming traffic lane, oncoming traffic
20 lane.

21 Q. Okay. And there are two of those.

22 Which one?

23 A. I can't remember exactly which one, sir.

24 Q. You don't know.

25 A. No, sir.

1 Q. Okay.

2 Can you describe the vehicle that you hit?

3 A. I can't describe it, sir.

4 Q. Do you know what color it was?

5 A. I vaguely -- I think it was a light vehicle,
6 light-colored vehicle.

7 Q. Did you see the vehicle before impact?

8 A. No, I didn't, sir.

9 Q. Was the first time that you saw the vehicle at
10 impact?

11 A. Yes, sir.

12 Q. When you were making your turn, and if you
13 looked down the street you were on, how far could you
14 see?

15 MR. DOOLITTLE: Object to the form.

16 THE WITNESS: I can't say a distance, sir.

17 BY MR. KASSEL:

18 Q. Could you see a good half mile?

19 MR. DOOLITTLE: Object to the form.

20 THE WITNESS: Possibly.

21 BY MR. KASSEL:

22 Q. Okay.

23 Was there anything blocking your view?

24 A. The vehicle that was in front of me at the
25 point of turning.

1 Q. But he's turning, so he's going to the left,
2 right?

3 A. Yes.

4 Q. He's turning. He's going toward the left. Is
5 that correct?

6 A. Yes, sir.

7 Q. All right.

8 And he's in front of you some distance.

9 MR. DOOLITTLE: Object to the form.

10 BY MR. KASSEL:

11 Q. Right?

12 A. Yes. We -- yes. He was in front of me at the
13 time before we left the light.

14 Q. I mean, you're not on his bumper, are you?

15 MR. DOOLITTLE: Object to the form.

16 THE WITNESS: No, sir.

17 BY MR. KASSEL:

18 Q. All right.

19 So you're following behind him and you say if
20 you look down the road, which is 12th Street
21 Extension -- if you look down that road, you can see
22 about a half of a mile.

23 MR. DOOLITTLE: Object to the form.

24 BY MR. KASSEL:

25 Q. You would agree with that.

1 MR. DOOLITTLE: Same objection.

2 THE WITNESS: I'm not sure, sir.

3 BY MR. KASSEL:

4 Q. And was anything blocking your view, looking
5 down that road?

6 MR. DOOLITTLE: Object to the form.

7 THE WITNESS: The truck was in front of me
8 before we made the turn.

9 BY MR. KASSEL:

10 Q. But as you're making the turn, was there
11 anything blocking your view?

12 MR. DOOLITTLE: Object to the form.

13 THE WITNESS: Well, the truck was blocking my
14 view before.

15 BY MR. KASSEL:

16 Q. Okay. All right.

17 And did the truck block your view the entire
18 time?

19 MR. DOOLITTLE: Object to the form.

20 THE WITNESS: Up until that turning point.

21 BY MR. KASSEL:

22 Q. So you couldn't see down the road at all
23 because of this truck in front of you.

24 MR. DOOLITTLE: Object to the form.

25 THE WITNESS: The truck was blocking my view.

1 BY MR. KASSEL:

2 Q. Totally.

3 A. Yes.

4 Q. Is that right?

5 A. Yes.

6 Q. Is that right?

7 A. Yes.

8 Q. Okay.

9 And what was your speed when you were making
10 this turn?

11 MR. DOOLITTLE: Object to the form.

12 THE WITNESS: I can't recall what it was, sir.

13 BY MR. KASSEL:

14 Q. Can you give us any estimate?

15 MR. DOOLITTLE: Object to the form.

16 THE WITNESS: Maybe 15 miles an hour, 20 miles
17 an hour.

18 BY MR. KASSEL:

19 Q. And what was the speed of the approaching
20 vehicle that you had the wreck with?

21 MR. DOOLITTLE: Object to the form.

22 THE WITNESS: I can't answer that, sir.

23 BY MR. KASSEL:

24 Q. Can you give an estimate?

25 MR. DOOLITTLE: Object to the form.

1 THE WITNESS: No, I cannot.

2 BY MR. KASSEL:

3 Q. And the reason you can't give an estimate is
4 because you say you never saw that vehicle until impact.
5 Is that right?

6 MR. DOOLITTLE: Object to the form.

7 THE WITNESS: I never saw the vehicle.

8 BY MR. KASSEL:

9 Q. Okay.
10 Until the impact.

11 A. No, sir.

12 Q. Did you have a duty to yield to traffic
13 approaching that intersection before you made your left
14 turn?

15 MR. DOOLITTLE: Object to the form.

16 THE WITNESS: No, sir.

17 BY MR. KASSEL:

18 Q. How come?

19 MR. DOOLITTLE: Object to the form.

20 THE WITNESS: I'm not understanding the
21 question, sir.

22 BY MR. KASSEL:

23 Q. Do you know what it means to yield to traffic
24 as a driver?

25 MR. DOOLITTLE: Object to the form.

1 THE WITNESS: Yes.

2 BY MR. KASSEL:

3 Q. What does it mean?

4 MR. DOOLITTLE: Object to the form.

5 THE WITNESS: It means you have to yield to
6 oncoming traffic.

7 BY MR. KASSEL:

8 Q. What does it mean to yield?

9 MR. DOOLITTLE: Object to the form.

10 THE WITNESS: Stop, like to slow down.

11 BY MR. KASSEL:

12 Q. And as you understand it, Mr. Toney, between a
13 vehicle like yourself turning left and a vehicle going
14 straight through an intersection, who typically yields?

15 MR. DOOLITTLE: Object to the form.

16 THE WITNESS: I do.

17 BY MR. KASSEL:

18 Q. And you knew that, of course, right?

19 MR. DOOLITTLE: Object to the form.

20 THE WITNESS: Yes.

21 BY MR. KASSEL:

22 Q. All right.

23 Were you injured in this wreck?

24 A. Yes, I was, sir.

25 Q. What injuries did you sustain?

1 A. I had a broken leg.

2 Q. Which leg?

3 A. My right leg.

4 Q. And what treatment did you have for that leg?

5 A. One week of hospital, one week of therapy.

6 Q. Did you have surgery?

7 A. Yes, I have.

8 Q. And what hospital were you cared for in?

9 A. It's not Baptist or Richland. It's the other
10 hospital. I can't remember which one it was, sir, right
11 off.

12 Q. What street is it on?

13 A. I can't remember, sir.

14 Q. Is it in the city of Columbia?

15 A. Yes, sir. It's not far from here, in the
16 Medical Park.

17 Q. Is it Providence?

18 A. To the best of my knowledge, sir, that's,
19 maybe, what it was.

20 Q. Who was the physician that did your surgery?

21 A. Dr. Jones, sir.

22 Q. Were you taken by EMS to the hospital?

23 A. Yes, I was.

24 Q. Were you -- did you have any conversation with
25 Mr. Thompson?

1 A. (Shaking head.) I never knew who he was.

2 Q. Did you overhear anything Mr. Thompson said?

3 A. No, sir.

4 Q. Have you ever contacted Mr. Thompson to see
5 how he is?

6 A. No, sir.

7 Q. Any reason you haven't done that?

8 MR. DOOLITTLE: Object to the form.

9 THE WITNESS: No, sir.

10 BY MR. KASSEL:

11 Q. Did you have any discussion with law
12 enforcement?

13 A. Nothing but they helped me get out of the car,
14 and that's it.

15 Q. Did you have any discussion with law
16 enforcement to explain to them how the wreck happened?

17 A. No, sir.

18 Q. Were you ticketed?

19 A. I never got a ticket.

20 Q. Did you bring any kind of claim for your
21 injuries against Mr. Thompson?

22 A. No, I haven't.

23 Q. Who do you think was at fault in the wreck?

24 MR. DOOLITTLE: Object to the form.

25 THE WITNESS: I can't answer that, sir.

1 BY MR. KASSEL:

2 Q. How come?

3 MR. DOOLITTLE: Object to the form.

4 THE WITNESS: I can't, sir.

5 BY MR. KASSEL:

6 Q. I know. I'm asking why not.

7 MR. DOOLITTLE: Object to the form.

8 BY MR. KASSEL:

9 Q. Did Mr. Thompson do something wrong?

10 MR. DOOLITTLE: Object to the form.

11 THE WITNESS: I don't know, sir.

12 BY MR. KASSEL:

13 Q. Did Mr. Thompson go through a red light?

14 MR. DOOLITTLE: Object to the form.

15 THE WITNESS: I don't know, sir.

16 BY MR. KASSEL:

17 Q. Did you have anything alcoholic to drink at
18 the time of the wreck?

19 A. No, sir.

20 Q. Or any time before the wreck?

21 A. No, sir.

22 Q. Any medications you were on?

23 A. No, sir.

24 Q. Have you made any statements, written
25 statements, concerning how this wreck happened?

1 A. No, sir.

2 Q. Have you made a recorded statement where
3 someone talked to you on the phone and you gave a
4 recorded statement?

5 A. No, sir.

6 Q. And did you report this -- obviously, you
7 reported this wreck to G&P.

8 MR. DOOLITTLE: Object to the form.

9 THE WITNESS: Well, they knew I was in an
10 accident.

11 BY MR. KASSEL:

12 Q. Are you back to driving?

13 A. Yes, sir.

14 Q. How long did you take before you got back to
15 driving?

16 A. Nearly 5 months, sir.

17 Q. At the time of the wreck, were you looking
18 down toward the passenger compartment of your vehicle?

19 MR. DOOLITTLE: Object to the form.

20 THE WITNESS: No, I was not, sir.

21 BY MR. KASSEL:

22 Q. Was the radio on?

23 A. I can't remember, sir.

24 Q. Were you eating anything?

25 A. Not at the time, sir.

1 Q. Were you drinking anything?

2 A. No, sir.

3 Q. A soda?

4 A. No, sir.

5 Q. Were you on the phone?

6 A. No, sir.

7 Q. Did you have a phone with you?

8 A. Yes, sir.

9 Q. And what was that phone number?

10 A. 803-972-3202.

11 Q. And was that the number at the time of the
12 wreck?

13 A. Yes.

14 Q. And who was the carrier?

15 A. Verizon.

16 Q. And Verizon was the carrier at the time of the
17 wreck.

18 A. Yes, sir.

19 Q. Mr. Toney, if you had a green light, a round,
20 green light, and that's all you had at the time of the
21 wreck, would you have had a duty to yield to oncoming
22 traffic in proximity to that intersection?

23 MR. DOOLITTLE: Object to the form.

24 THE WITNESS: Could you repeat the first part
25 of the question, sir.

1 BY MR. KASSEL:

2 Q. Mr. Toney, if you had simply a round, green
3 light and you were fixing to make a left turn, would you
4 have had a duty, an obligation, to yield to approaching
5 traffic that was close to the intersection?

6 MR. DOOLITTLE: Same objection.

7 THE WITNESS: (Nodding head.)

8 BY MR. KASSEL:

9 Q. And do you know what speed -- the speed limit
10 for that road was?

11 A. I have seen a few on that road. I think it
12 was 45.

13 Q. Okay.

14 And you understand that if you fail to yield
15 to an approaching vehicle traveling at 45 miles an hour,
16 that could result in a pretty significant impact.

17 MR. DOOLITTLE: Object to the form.

18 THE WITNESS: It's possible.

19 MR. KASSEL: Mr. Toney, thank you for your
20 patience with me. Those are my questions. I appreciate
21 your answers.

22 THE WITNESS: Yes, sir.

23 MR. DOOLITTLE: I don't have any questions.

24 THE VIDEOGRAPHER: Anybody else?

25 MR. FLOYD: No. We don't have anything.

1 THE VIDEOGRAPHER: Very good. The deposition
2 is over?

3 MR. KASSEL: Thank you all.

4 THE VIDEOGRAPHER: This concludes the video
5 deposition of Carlos Toney consisting of one media unit.
6 The original media of today's testimony will remain in
7 the custody of CompuScripts, Incorporated, located in
8 Columbia, South Carolina. We are going off the record
9 at 11:08.

10 (The deposition was concluded at 11:08 a.m.)

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CERTIFICATE OF REPORTER

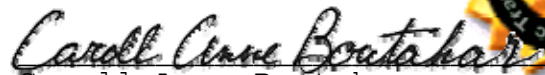
I, Caroll Anne Boutahar, Certified
Verbatim Reporter and Notary Public for the
State of South Carolina at Large, do hereby
certify:

That reading and signing of the
foregoing deposition by the witness was waived.

That the foregoing deposition was
taken before me on the date and at the time and
location stated on page 1 of this transcript; that
the deponent was duly sworn to testify to the
truth, the whole truth and nothing but the truth;
that the testimony of the deponent and all
objections made at the time of the examination were
recorded by me and were thereafter transcribed;
that the foregoing deposition as typed is a true,
accurate and complete record of the testimony of
the deponent and of all objections made at the
time of the examination to the best of my ability.

I further certify that I am neither
related to nor counsel for any party to the cause
pending or interested in the events thereof.

Witness my hand, I have hereunto
affixed my official seal this 8th day of June,
2020, at Columbia, Richland County, South Carolina.



Caroll Anne Boutahar
Certified Verbatim Reporter
Notary Public
State of South Carolina at Large
My Commission expires:
December 13, 2021



I N D E X

EXAMINATION

BY MR. KASSEL

Certificate of Reporter

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(None was proffered.)

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
	)	
	)	
Howell D. Thompson and Tara L. Thompson,	)	Civil Action No. 2019CP4302375
	)	
	)	
Plaintiffs,	)	
	)	
v.	)	UIM CARRIER LIBERTY MUTUAL
	)	INSURANCE COMPANY'S SUR-REPLY TO
	)	PLAINTIFF'S OPPOSITION TO MOTION
Carlos D. Toney,	)	TO DISMISS/MOTION FOR SUMMARY
	)	JUDGMENT
	)	
Defendant.	)	

This Sur-reply is submitted in direct response to Plaintiff's "Supplemental Memorandum in Opposition to UIM Carriers' Motion to Dismiss or for Summary Judgment," filed on January 27, 2022. For the reasons stated herein, as well as the reasons stated by Liberty Mutual Insurance Company's prior filings on this Motion and the arguments of counsel at the hearing of this Motion on January 6, 2022, which are incorporated by reference, Liberty Mutual asserts that the UIM Carriers' Motion to Dismiss or for Summary Judgment should be granted pursuant to the controlling holding of *Louden v. Moragne*, 327 S.C. 465 (Ct. App. 1997). Plaintiffs' Supplemental Memorandum cannot change the outcome.

I. Plaintiffs' Supplemental Memorandum is Untimely and Therefore the Argument Contained Therein Should Not Be Considered.

The Court heard this Motion in open court (Webex) on January 6, and on January 14, the Court issued written instruction granting the Motion and requiring the undersigned to provide a proposed order of dismissal within 15 days of January 14. The undersigned was also instructed to circulate the proposed order of dismissal to the other counsel prior to submitting for e-filing. Notably, the Court's January 14 written instruction did not countenance further briefing.

The undersigned circulated a proposed order of dismissal to counsel of record on January 26, and notified counsel that the proposed order would be e-filed at noon on January 28. On January 27, Plaintiffs' counsel provided the Supplemental Memorandum, after receipt of the proposed order but before it was submitted for e-filing.¹ Thus, Plaintiffs' Supplemental Memorandum is untimely, as the arguments contained therein could have been briefed prior the January 6 hearing and/or argued in the January 6 hearing. Indeed, one of the cases cited in Plaintiff's Supplemental Memorandum, *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009) was referenced in Plaintiffs' original memorandum filed on December 15, 2021, giving rise to the inference that Plaintiffs' were aware of the holdings of *Ex Parte Cannon* prior to the January 6 hearing. Plaintiffs' untimely submission of the Supplemental Memorandum deprived Movant Liberty Mutual Insurance Company of fair right of reply in open court on January 6, and therefore the Supplemental Memorandum should not be considered and the Court's January 14 preliminary ruling must be finalized.

II. In the Alternative, Should the Court Consider the Supplemental Memorandum: Plaintiffs' Argument Overstates and Misapplies the Doctrine of "Voluntary Appearance."

a. Plaintiffs' argument is well-crafted sleight-of-hand.

Plaintiffs' Supplemental Memorandum is based on the premise that Defendant Toney "voluntarily appeared" at a deposition on May 15, 2020, and therefore an equivalent to service of process (i.e. "voluntary appearance," as that term is used in Rule 4(d), SCRCPP) was achieved upon Defendant as of that date and all other arguments made heretofore on this Motion are rendered moot. Though well-argued, Plaintiffs' position is incorrect, as it fails to account for the

¹ In spite of the presence of the Supplemental Memorandum, the original proposed order drafted by the undersigned was e-filed on January 28, in order to comply with the Court's instruction from January 14. For the reasons stated herein, Liberty Mutual respectfully urges the Court to dispense with further briefing and sign the order, or, in the alternative, sign an order incorporating and denying the argument made in the Supplemental Memorandum.

absence of the party against whom the “voluntary appearance” doctrine is sought to be asserted.

In support of Plaintiffs’ position, Plaintiffs rely on several cases:

- *S.C. Dept. of Social Svcs. v. Burris*, 297 S.C. 537, 377 S.E.2d 578 (1989);
- *Israel v. Carolina Bar-B-Que*, 292 S.C. 282, 366 S.E.2d 123 (Ct. App. 1987);
- *Ex Parte Cannon*, *supra*, and cases cited therein (referenced in the Supplemental Memorandum via block quote);
- *Petty v. Weyerhaeuser*, 272 S.C. 282, 251 S.E.2d 735 (1979); and
- *Int’l Controls Corp. v. Vesco*, 490 F.2d 1334 (2d. Cir. 1974).

Plaintiffs’ position ignores the simple fact that in each of these cases (with the exception of *Int’l Controls Corp.* (distinguished in Section II.c., *infra*)), the party against whom the “voluntary appearance” doctrine was asserted was present enough in the action—whether in person or through counsel—such that the party was at least on notice that a “voluntary appearance” argument was being lodged against the party. In other words, the “voluntary” parties in the above-listed cases engaged in the presentation of *their own argument* on the issue of whether a voluntary appearance had occurred. In this case, Defendant Toney is not even on notice that Plaintiffs are arguing he has “voluntarily appeared” and should be subject to entry of judgment.² For this reason alone, Plaintiffs’ voluntary appearance argument should be discounted, as it amounts to legal “sleight-of-hand.” *See also* Section III, *infra*.

- b. Defendant Toney did not “voluntarily appear,” as that term of art is used in Rule 4(d).

Critically, 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.*

² As noted in Liberty Mutual’s prior filings on this Motion, Liberty Mutual’s counsel, as counsel for a UIM carrier, does not represent Defendant Toney. *See generally Crawford v. Henderson*, 356 S.C. 389, 589 S.E.2d 204 (Ct. App. 2003).

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). Plaintiffs’ sole factual support for the argument that Defendant Toney has voluntarily appeared is his deposition transcript attached as an exhibit to the Supplemental Memorandum. This record 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). Defendant Toney should not be subject to entry of judgment solely based on sitting for a Zoom deposition at the beginning of a pandemic.³ Plaintiffs have produced zero additional factual support for their newfound position, and thus there is no record of any continued involvement by—or notice to—Defendant Toney.

c. Even assuming applicability, Plaintiffs’ case law is distinguishable.

For the record, Liberty Mutual distinguishes Plaintiff’s supporting case law. Most of the “appearances” found in Plaintiffs’ cited cases involved the party’s active participation in the major dispositive trial or hearing, or provide other evidence of significant, continuing involvement by the appearing party. As has been demonstrated, none of these facts are present in the instant dispute. Specifically:

- *S.C. Dep’t. Soc. Svcs. v. Burris*: while not expressly stated in the opinion, it is clear that the paternity suit respondent “voluntarily appeared” by testifying *at the trial* and

³ The fact that there may be a covenant not to execute given to Defendant by Plaintiffs is of no import. A covenant not to execute judgment is not a covenant not to enter judgment. Imagine an unserved tort defendant’s surprise upon applying for a mortgage and being advised by a would-be lender of a tort judgment solely based upon that person’s *pro se* appearance at a Zoom deposition years prior.

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.

- *Israel v. Carolina Bar-B-Que*: 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. 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. 292 S.C. at 285-87, 356 S.E.2d at 125-127.
- *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*. *Ex parte Cannon*, 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.
- *Petty v. Weyerhaeuser*: an out-of-state corporate defendant was found to have entered a “general appearance,” because the in-house attorney *for the corporate defendant itself* sent a letter to opposing counsel making an “informal appearance.” 272 S.C. at 284, 251 S.E.2d at 736. Interestingly, this notice of appearance actually ran to the *benefit* of the corporate defendant, because it was held that an entry of a default judgment without notice to this “appearing” corporate defendant was improper, and therefore the case was remanded to consider whether the default judgment should be set aside. 272 S.C. at 288,

251 S.E.2d at 738. In any event, by the time the “voluntary appearance” argument was made, the corporate defendant was present and defending through local counsel. 272 S.C. at 285-86, 251 S.E.2d at 737.

- *Int’l Controls Corp. v. Vesco*: A careful reading of this case reveals that the “voluntary appearance” issue was not reached by the court, since the party against whom the voluntary appearance argument was made did not appeal the order at issue in the case. 490 F.2d at 1354 n. 27.

d. Plaintiff’s Supplemental Memorandum ignores an on-point case where a “voluntary appearance” was found not to have occurred.

As noted above, whether a voluntary appearance has occurred is subject to case by case review. Accordingly, this Court should consider the following case, which supports a finding of a “non-appearance” in the current dispute:

- *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.*

III. Further, in the Alternative: Plaintiffs’ Supplemental Memorandum Ignores the UIM Statute.

The legal sleight-of-hand described in Section II.a., *supra*, creates a procedural awkwardness that the UIM statute and construing case law is designed expressly to prevent. Since Defendant Toney has not been served and is not present in this action, the UIM carriers are tasked with rebutting Plaintiffs’ Supplemental Memorandum’s “voluntary appearance” argument without the participation of the party against whom the argument is made. To be in this position

defeats the purpose of the UIM statute's requirements of service of process upon the UIM carrier *and* the putative at-fault driver. As noted by the unanimous South Carolina Supreme Court, in affirming the dismissal of a bad-faith refusal to pay UIM benefits case, where the claimant failed to serve the putative at-fault driver with a summons and complaint prior to the expiration of the statute of limitations:

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. In the event the insured chooses to settle with the at-fault party's liability carrier, the underinsured carrier has the option to assume control of the defense of the action as provided in §38-77-160. In this case, *Williams's failure to pursue an action against the at-fault driver resulted in a total waiver of the Insurer's right to defend. The purpose of §38-77-160 is to avoid such a result.* AFFIRMED.

Williams v. Selective Ins. Co. of Southeast, 315 S.C. 532, 534-35, 446 S.E.2d 402, 404 (1994) (italics added; "all-caps" in original). Plaintiffs' belated argument that Defendant Toney has "voluntarily appeared" contravenes the entire purpose of §38-77-160. Plaintiffs, by their own admission, never summoned Toney into court. Now, the instant discussion concerning Toney's alleged "voluntary appearance" must be had in the abstract, to the prejudice of the UIM carriers and in violation of §38-77-160. The current situation is the very reason for the existence of the holdings of *Louden*, *Williams*, and §38-77-160's prescribed mechanism for making a UIM benefits claim.

Conclusion

The black-letter law of *Louden v. Moragne*, 327 S.C. 465 (Ct. App. 1997), and the UIM statute, S.C. Code Ann. § 38-77-160, must be followed by this Court and summary judgment must be entered in favor of Defendant and the UIM Carriers due to non-service on the putative at-fault driver, Plaintiffs' Supplemental Memorandum notwithstanding.

Respectfully submitted,

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Columbia, South Carolina

February 14, 2022

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Howell D. Thompson and Tara L.
Thompson,

Plaintiffs,

v.

Carlos D. Toney,

Defendant.

IN THE COURT OF COMMON PLEAS

FOR THE THIRD JUDICIAL CIRCUIT

C.A. No. 2019-CP-43-02375

**PLAINTIFFS' MOTION TO ALTER,
AMEND, AND RECONSIDER AUGUST
28, 2022 ORDER PURSUANT TO RULE
59(E), SCRCP**

TO: AARON HAYES, ESQUIRE ATTORNEY FOR DEFENDANT LIBERTY MUTUAL INSURANCE COMPANY; KARL BREHMER, ATTORNEY FOR HORACE MANN CASUALTY AND PROPERTY INSURANCE COMPANY

Plaintiffs Howell D. Thompson and Tara L. Thompson ("Plaintiffs") hereby give notice and respectfully move this Honorable Court, pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, to reconsider its Order entered August 29, 2022, dismissing Plaintiffs' case. Plaintiffs file this Motion within ten days of the entry of the August 29, 2022 Order. This Motion is based upon the following grounds as well as any raised in any subsequent memorandum in support.

PROCEDURAL BACKGROUND

This case arises out of a motor vehicle accident which occurred in Lexington County on June 2, 2017. Carlos Toney ("Toney"), a Sumter County resident, disregarded a traffic control device and turned in front of a vehicle operated by the Plaintiff Howell Thompson. The impact was extensive, and Mr. Thompson sustained multiple injuries, including a forearm fracture that took nearly four years to heal and required surgical intervention four times. As a result of the accident, Mr. Thompson has a permanent injury that limits the use of his left arm.

Plaintiffs settled their claims against Toney and his liability carrier, State Farm, on September 9, 2019. To consummate the settlement, Plaintiffs executed a covenant not to execute to preserve their ability to recover underinsured motorist coverage from their insurance policies.

Plaintiffs filed a Summons and Complaint against Toney in Sumter County on December 5, 2019. Plaintiffs served the Summons and Complaint on Liberty Mutual Insurance Company (“Liberty Mutual”) on December 19, 2019, and Horace Mann Casualty and Property Insurance Company (“Horace Mann”) on December 18, 2019, pursuant to sections 38-5-70 and 38-77-160. On December 19 and 20, 2019, Plaintiffs filed letters from the South Carolina Department of Insurance accepting service on behalf of Liberty Mutual and Horace Mann. *See* Proofs of Service. Plaintiffs did not personally serve Toney with the Complaint and, therefore, did not file a proof of service showing service on Toney.

Liberty Mutual filed an Answer on January 2, 2020, and an Amended Answer on February 20, 2020.¹ In the Answer and Amended Answer, Liberty Mutual set forth, in part, the following defenses:

FOR A TENTH DEFENSE
(Statute of Limitations)

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

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

¹ As discussed further herein, Liberty Mutual’s counsel sought consent from Plaintiffs’ counsel to amend its Answer to change the wording of the introductory paragraph from “uninsured” to “underinsured.”

FOR A FOURTEENTH DEFENSE
(Improper Service)

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

Liberty Mutual Answer, ¶¶ 21–22, 33–34; Liberty Mutual Amended Answer ¶¶ 21–22, 33–34.

Horace Mann filed an Answer on January 7, 2020, and set forth, in part, the following defense:

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, ¶ 9. In the Answer, Horace Mann stated the Answer was on behalf of Defendant, by and through the underinsured motorist carrier, Horace Mann Property and Casualty Insurance Company ("Defendant"). Horace Mann Answer, p. 1. Horace Mann did not raise a statute of limitations defense.² Both Liberty Mutual and Horace Mann raised defenses based on improper venue. Horace Mann Answer, ¶ 8; Liberty Mutual Answer, ¶¶ 19–20; Liberty Mutual Amended Answer ¶¶ 19–20. Horace Mann alleged "the appropriate venue would be the Lexington

² Horace Mann raised the following defenses: improper venue, process of service, and punitive damages. See Horace Mann Answer. Liberty Mutual raised the following defenses: failure to state a claim, comparative negligence, intervening and superseding negligence, sudden emergency, assumption of known risk, unavoidable accident, waiver and estoppel, improper venue, statute of limitations, spoliation, reservation and non-waiver of rights, punitive damages, improper service, bifurcation of punitive damages, and set off. See Liberty Mutual Amended Answer.

County Court of Common Pleas,” and Liberty Mutual simply stated it “pleads the defense of improper venue in the County of Sumter, State of South Carolina.” Horace Mann Answer, ¶ 8; Liberty Mutual Answer, ¶ 20.

On January 16, 2020, after reviewing Liberty Mutual’s Answer, Plaintiff’s counsel specifically inquired about certain defenses raised by Liberty Mutual’s counsel, stating:

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

Exhibit A. Counsel for Liberty Mutual responded: “Boiler plate at this stage. Given the recent appellate court ruling in Garrison v. Target, 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.” *Id.*

Subsequently, on February 19, 2020, counsel for Liberty Mutual sought consent from Plaintiff’s counsel to amend its Answer to change the wording in the introductory paragraph of its Answer from “uninsured” to “underinsured” and add defenses for setoff and a cap on punitive damages. Exhibit B. Plaintiff consented. *Id.* Despite assurances that Liberty Mutual was only filing an Amended Answer to change this wording to be more accurate and add defenses for setoff and a cap on punitive damages, Liberty Mutual changed its Answer in another respect—it changed the introductory paragraph of the Amended Answer to specifically reference section 38-77-160 of the South Carolina Code.³ *Compare* Liberty Mutual Answer with Amended Answer. The service

³ In footnote 2 of the Order, the Court cites to Liberty Mutual’s specific reference to section 38-77-160 to find that “the UIM carriers certainly have not waived their right to rely on the UIM statute[.]” Order at 8 n.2. As discussed further herein, Plaintiffs submit that this change in the Amended Answer to specifically reference section 38-77-160 despite Plaintiffs only consenting to the amendment after assurances that Liberty Mutual made three changes—changing uninsured to underinsured and adding defenses for setoff and a cap on punitive damages—is further evidence of Liberty Mutual’s gamesmanship tactics in this case and intent to keep an ace card up its sleeve

and statute of limitations defenses Liberty Mutual raised in its Amended Answer were identical to those “boiler plate” defenses it raised in its original Answer.

Robust litigation of this matter commenced from January 2020 to October 2021. The following timeline shows the active engagement in discovery by both Liberty Mutual and Horace Mann:

January 2, 2020	Liberty Mutual answers the complaint and serves interrogatories and requests to produce on Plaintiffs
January 7, 2020	Horace Mann answers the complaint
January 8, 2020	Horace Mann serves interrogatories and requests to produce on Plaintiffs
January 16, 2020	Email communication between Plaintiffs’ counsel and counsel for Liberty Mutual wherein Liberty Mutual counsel informs Plaintiffs’ counsel its defenses are “boiler plate” defenses
February 20, 2020	Liberty Mutual files an amended answer
March 5, 2020	Horace Mann responds to Plaintiffs’ discovery
March 10, 2020	Liberty Mutual subpoenas medical records from Lexington Radiology, Lexington Medical Center, Midlands Orthopaedics, Pain Specialists of Charleston, Palmetto Health Orthopaedics, Palmetto Imaging, Eye Center, Lexington Brain & Spine, Lexington County EMS, Lexington Family Practice, Lexington Orthopaedics
March 24, 2020	Liberty Mutual files Motion for Change of Venue
May 5, 2020	Liberty Mutual and Horace Mann take Plaintiffs’ depositions
May 15, 2020	Plaintiffs’ counsel takes deposition of Defendant Toney with participation by counsel for Liberty Mutual and

to play once the time for service expired. The Court erred in failing to estop Liberty Mutual from raising these issues. Further, as discussed further herein, Plaintiffs submit the Court erred in failing to differentiate the actions and inactions of Liberty Mutual with the actions and inactions of Horace Mann and instead focusing on the “UIM carriers” as a collective.

	Horace Mann
May 24, 2020	Liberty Mutual subpoenas Mr. Thompson's medical records from Prisma Health Plastic Surgery
June 15, 2020	Liberty Mutual subpoenas Thompson cell phone records from Verizon
June 22, 2020	Hearing on Liberty Mutual's Motion for Change of Venue
August 7, 2020	Liberty Mutual and Horace Mann take deposition of Officer Bryan Shumpert
August 17, 2020	Liberty Mutual and Horace Mann take deposition of Dr. Earl McFadden
August 20, 2020	Liberty Mutual responds to Plaintiffs' discovery
September 2, 2020	Liberty Mutual and Horace Mann take deposition of Dr. David Strickler
September 14, 2020	Liberty Mutual and Horace Mann take second deposition of Dr. Earl McFadden
September 21, 2020	Liberty Mutual and Horace Mann participate in drafting and presenting proposed Scheduling Order signed by the Court requiring the parties to mediate by March 31, 2021, and ordering trial on or after May 1, 2021
September 30, 2020	Deadline for Plaintiffs to facilitate service pursuant to Rule 3(a) of the South Carolina Rules of Civil Procedure
October 6, 2020	Liberty Mutual responds to Plaintiffs' requests to admit
October 7, 2020	Liberty Mutual and Horace Mann take deposition of Dr. David Fulton
October 14, 2020	Horace Mann responds to Plaintiffs' requests to admit
October 28, 2020	Liberty Mutual and Horace Mann take deposition of Dr. David Fulton
November 30, 2020	Liberty Mutual and Horace Mann reconvene deposition of Howell Thompson
December 7, 2020	Liberty Mutual and Horace Mann participate in deposition

	of Lori Campbell
March 4, 2021	Liberty Mutual/Horace Mann participate in drafting and presenting second Scheduling Order signed by the Court requiring the parties to mediate by June 1, 2021, and ordering trial on or after August 1, 2021
March 17, 2021	Liberty Mutual counsel seeks order of protection
May 26, 2021	Liberty Mutual and Horace Mann participate in status conference with Court
June 1, 2021	Liberty Mutual/Horace Mann participate in drafting and presenting third Scheduling Order signed by the Court requiring the parties to mediate by October 1, 2021, and ordering trial on or after November 1, 2021
July 1, 2021	Liberty Mutual identifies Dr. David DuPay as an orthopaedic expert
July 14, 2021	Liberty Mutual and Horace Mann participate in hearing on Plaintiffs' motion for protection from discovery
August 9, 2021	Plaintiffs take deposition of Dr. David DuPay
August 23, 2021	Liberty Mutual subpoenas records from Lindsay Moore, MSPAS
September 10, 2021	Liberty Mutual and Horace Mann participate in deposition of Dr. Mirsad Mujadzic
September 15, 2021	Liberty Mutual/Horace Mann participate in drafting and presenting fourth Scheduling Order signed by the Court requiring the parties to mediate by November 1, 2021 and ordering trial on or after January 10, 2022
October 25, 2021	Liberty Mutual and Horace Mann participate in mediation but failed to resolve the case (Proof of ADR, filed November 8, 2021)
October 26, 2021	Liberty Mutual files Motion to Dismiss
October 29, 2021	Horace Mann files Motion to Dismiss
November 18, 2021	Liberty Mutual serves supplemental answers to interrogatories producing documents from a private investigator

Exhibit C.

On October 26, 2021, Liberty Mutual filed a Motion to Dismiss or, in the alternative, Motion for Summary Judgment, alleging Plaintiffs failed to serve the Complaint on Defendant Toney within the statute of limitations and, therefore, the action should be dismissed. On October 29, 2021, Horace Mann filed a Motion to Dismiss for Failure to Obtain Service of Process which was substantively identical to Liberty Mutual's Motion. Plaintiffs submitted Memoranda in Opposition on December 15, 2021, and January 27, 2022. The Court held a hearing on January 6, 2022. On August 28, 2022, the Court issued an Order granting the insurance carriers' motions and dismissing the case. This Motion timely follows.

STANDARD OF REVIEW

“[I]t is proper to view a Rule 59(e) motion not only as a vehicle to request the trial court ‘alter or amend the judgment,’ but also as a vehicle to seek ‘reconsideration’ of issues and arguments.” *Elam v. South Carolina Dept. of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004). “A motion under Rule 59(e) long has been viewed as ‘motion for reconsideration’ despite the absence of those words from the rule. Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented.” *Id.* at 21, 602 S.E.2d at 778–79 (citing *Arnold v. State*, 309 S.C. 157, 420 S.E.2d 834 (1992)). “There is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.” *Id.* at 22, 602 S.E.2d at 779.

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contemplate two basic situations in which a party should consider filing a Rule 59(e) motion. A party *may wish* to file such a motion

when she believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and the party wishes for the court to reconsider or rule on it. A party *must* file such a motion when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review.

Id. at 24, 602 S.E.2d at 780 (emphasis original).

DISCUSSION

I. The Court erred in finding this action was never commenced against the at-fault driver

Under prevailing South Carolina law, Defendant Toney was served in the action within the Statute of Limitations. Although Plaintiffs did not personally serve Defendant Toney with the Summons and Complaint upon filing, service was accomplished as of May 15, 2020, when Defendant Toney voluntarily appeared for his deposition and gave testimony in this case. Plaintiffs respectfully submit the Court erred in finding this action was never commenced.

Pursuant to Rule 3 of the South Carolina Rules of Civil Procedure, an action is commenced when a summons and complaint are filed with the court as long as “(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing.” The statute of limitations expired in this matter on June 2, 2020. However, because Plaintiffs filed the Summons and Complaint prior to the expiration of the statute of limitations, they had until September 30, 2020, to serve the Complaint on Defendant Toney in any manner allowable under South Carolina law. Pursuant to Rule 4(d) of the South Carolina Rules of Civil Procedure, “[v]oluntary appearance by defendant is equivalent to personal service.”

South Carolina courts have repeatedly held that a party has voluntarily appeared in an action based on conduct taken in the action without contesting service. For example, in *South Carolina Department of Social Services v. Burris*, 297 S.C. 537, 377 S.E.2d 578 (1989), the

Supreme Court held that, by testifying at a hearing, the defendant made a voluntary appearance as contemplated by Rule 4(d) and, therefore, “[h]is contention that this lack of service [failure to serve pleadings on him] deprived the Family Court of personal jurisdiction is without merit.” Similarly, the Court of Appeals held that a defendant had made a voluntary appearance when he participated in the defense of a case, including testifying, without raising any defense of lack of service. *Israel v. Carolina Bar-B-Que*, 292 S.C. 282, 366 S.E.2d 123 (Ct. App. 1987). More recently, in *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009), the Court of Appeals again found that a defendant had made a voluntary appearance by, among other things, making himself available for testimony at a hearing without objection.

Defendant Toney voluntarily appeared at a deposition as party-Defendant and gave testimony in this case without raising objections as to service. He was not served or compelled to attend by subpoena. Instead, he was sent a Notice of Deposition and voluntarily appeared to testify. Exhibit D. The Notice of Deposition included the case caption at the top, which put him on notice that he was a defendant in this suit that was filed in Sumter County and included the civil action number where he could access all pleadings in this matter. At the deposition, he was placed under oath to give testimony, was told there was a lawsuit pending, and was questioned about the motor vehicle accident. Exhibit E. Defendant Toney did not raise any objections to the deposition or service. Instead, he willingly participated in the defense of this action.

Importantly, counsel for Liberty Mutual and Horace Mann participated in the deposition of Defendant Toney. Neither counsel questioned Defendant Toney about whether he was served with the suit in this matter or raised any objections to his participation in the deposition. The only objections on the record made by the UIM counsel were objections to the form of the question, including questions dealing with Defendant Toney’s negligent conduct. Exhibit E.

The purpose behind requiring service is a simple one. The requirements of service do “not arise from an arcane or highly technical application of the rules. Rather, [the service requirements] serve[] an essential function—ensuring that notice is properly received by all entitled to it.” *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005). “A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court.” *Id.* at 652, 611 S.E.2d at 318 (quoting *Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992)). It 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.

The Court found Toney did not voluntarily appear in the action because “[t]he court file for this case reveals no documents filed by Toney nor any notices of appearance by any counsel on behalf of Toney.” Order at 17. Contrary to the Court’s finding, this is indicative of a defendant who does not want to appear or spend money to hire counsel to defend himself in an action where he is already protected from judgment. The lack of filings by Defendant Toney does not obviate the well-settled law that parties may voluntarily appear, by means other than court filings, as Defendant Toney did in this case through his voluntary appearance and testimony without raising objections as to service. Thus, the Court erred in finding the action was not commenced by Defendant Toney’s voluntary appearance at his deposition and participation in the defense of this case. Because service was accomplished as of May 15, 2020, well within the timeframe allowed for service under Rule 3(a)(2), the Court should have denied the UIM carriers’ motions to dismiss.

II. The Court erred in construing the motions as motions for summary judgment instead of motions to dismiss under Rule 12(b) of the South Carolina Rules of Civil Procedure

The Court erred in construing the Motions as motions for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure instead of motions to dismiss pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure. In the Order, the Court incorrectly found a motion for summary judgment “was the appropriate vehicle for the Court to rule on a statute of limitations issue of this type” and relied on *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 452 (Ct. App. 2014) to make this determination. Order at 5. However, *McMaster* is not applicable to this case.

In *McMaster*, the plaintiff brought a medical malpractice action on June 16, 2011, against two defendants. 411 S.C. at 143, 767 S.E.2d at 453. In his deposition, the plaintiff testified that the basis for his claims was that his doctor prescribed him too much Adderall. *Id.* Subsequently, the defendants moved for summary judgment on the grounds that the plaintiff did not commence the action within the statute of limitations. *Id.* The Court agreed. *Id.* at 143–48, 767 S.E.2d at 453–56. Importantly, the Court found that the cause of action first arose in May 2008 when the plaintiff “was hospitalized for Adderall induced psychosis.” *Id.* at 145, 767 S.E.2d at 454. Thus, the Court found the statute of limitations expired in May 2011, which was *prior to Plaintiff filing the action in June 2011*.

Because *McMaster* involved a medical malpractice claim where the discovery rule applied, the parties needed to participate in discovery in order to determine when the plaintiff was first put on notice of the cause of action so that the parties and the Court could determine whether Plaintiff filed the action within the statute of limitations. This is why the statute of limitations issue in *McMaster* was appropriate for summary judgment.⁴ The plaintiff in *McMaster* would have been

⁴ Similarly, the *McMaster* Court relied on *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995) to note that summary judgment was appropriate when a plaintiff did not commence an action within the statute of limitations. *McMaster*, 411 S.C. at 143, 767 S.E.2d at 453. However,

on notice at the outset of the case that the defendants were raising a statute of limitation defense; however, the parties needed to participate in discovery to determine when the plaintiff was first on notice. Once the Court determined that the statute of limitations ran in May 2011, *prior to Plaintiff filing the action*, the issue was appropriate for summary judgment. In other words, the issue was appropriate for summary judgment in *McMaster* because (1) it was timely raised at the beginning of the litigation to put the plaintiff on notice and (2) there were no intervening actions that could have been taken at any point in the proceedings to remedy the statute of limitations deficiency.

Thus, the issue in *McMaster* was a strict statute of limitations issue which required the Court to determine whether a suit that not filed until June 2011 was commenced within the statute of limitations that expired in May 2011. There were no service or waiver issues in *McMaster*. Thus, Plaintiffs respectfully submit the Court erred in finding that the issues in this matter were of the same “type” as those in *McMaster*. Order at 5.

Here, the issue is not a solely statute of limitations issue. Instead, it is a service issue. The statute of limitations issue in this case is predicated upon and may only be determined *after* the disposition of the service issue, which our rules require to be timely brought via a Rule 12(b) motion to dismiss. Plaintiffs filed this action within the statute of limitations, and the question is whether they served it in accordance with Rule 3(a)(2) of the South Carolina Rules of Civil Procedure or whether some other provision of South Carolina law acts as a bar to the insurance carriers raising the service issue.⁵ Put simply, in *McMaster*, the plaintiffs did not file the action

Kreutner is also materially different than the instant case. In *Kreutner*, the plaintiff filed the action in October 1992 when the statute of limitations ran in May 1992. 320 S.C. at 285, 465 S.E.2d at 90.

⁵ Plaintiffs note the Court stated, “the Statute of Limitations in this matter expired no later than June 2, 2020.” Order at 2, 14. Although the statute of limitations was set to expire on June 2, 2020, the Court failed to acknowledge that the time for service was extended until September 30, 2020, under South Carolina law. Because Plaintiffs filed this action prior to the expiration of the

within the statute of limitations and that fact alone foreclose the action without the Court having to consider service. However, here, Plaintiffs filed the action within the statute of limitations and the question is whether they appropriately served the action within the appropriate timeframe under South Carolina Law. Unlike *McMaster*, the foundational question here requires the Court to consider *service*, not filing.

South Carolina courts have determined issues of service must be raised in a Rule 12(b)(5) motion. *Unisun Ins. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000). As discussed in *Unisun*, even if the issues before the Court also include a statute of limitations defense, the issue of service must be timely raised by a Rule 12(b) motion because the “statute of limitations claim is inextricably tied to the” service claim. *Id.* at 541, 537 S.E.2d at 561. Thus, in order to preserve any statute of limitations claim, the UIM carriers had to properly preserve the service claim by pleading the service issues properly and timely raising them in the case. In other words, had service not been at issue here, the motions could have been analyzed under Rule 56. But, because the statute of limitations defense stems from the failure of service, the Court should have analyzed purported failure of service in the motions under Rule 12.

The entire purpose of Rule 12 is to require parties to timely raise issues to the Court and other parties to prevent unfair surprise and preserve the resources of both the court and litigants. Had the UIM carriers appropriately raised the lack of service issue timely, Plaintiffs could have cured any defect. Plaintiffs filed the action on December 5, 2019, and had until September 30, 2020, to procure service on the at-fault driver.⁶ Liberty Mutual and Horace Mann could have filed

statute of limitations on June 2, 2020, Plaintiffs had until September 30, 2020, to serve the action in accordance with Rule 3(a)(2).

⁶ As discussed herein, Plaintiffs assert service was accomplished as of May 15, 2020, when Defendant Toney voluntarily appeared in this case and gave testimony.

a Rule 12(b) motion raising lack of service at any time in the almost nine months remaining for service after they first appeared in this action. Instead, Liberty Mutual and Horace Mann chose to keep an ace card up their sleeve to play only after the statute of limitations and time for service had expired, wasting the resources of both this Court and Plaintiffs.

This type of gamesmanship is exactly what Rule 12(b) and resulting waiver law seek to prevent, and it should not be tolerated by the Court. Liberty Mutual and Horace Mann claim that service of the at-fault driver was fundamental and absolute; yet, they did not raise these issues to the Court immediately. Had Liberty Mutual and Horace Mann raised improper service by filing a timely Rule 12(b) motion, Plaintiffs would have been able to cure the defect. Instead, Liberty Mutual and Horace Mann chose to move forward with unnecessary discovery in order to run out of the clock and obtain a dismissal of this action. The carriers burdened this Court and Plaintiffs by litigating this case for nearly two years, wasting valuable time and resources. Liberty Mutual falsely represented to Plaintiffs numerous times that it would not be pursuing an improper service defense—once when it informed Plaintiffs’ counsel its improper service defense was only boiler plate and again when it responded to Plaintiffs’ interrogatories in August 2020 that Defendant Toney had “been served [and could] respond on his own.” Exhibits A and F. *See* Rule 11(a), SCRCP (“The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay.”). Plaintiffs relied on these representations as the rules so allow. This is the type of gamesmanship that our rules do not allow, and the Court should not reward Liberty Mutual and Horace Mann with a dismissal for these actions.

South Carolina law is clear that where statute of limitations issues are inextricably tied to issues surrounding service, a litigant must appropriate and timely raise the issue to the Court and other litigants. Accordingly, the Court erred in construing the UIM carriers' claims as a statute of limitations issue under Rule 56 instead of a service issue under Rule 12(b).

III. The Court erred in relying on *Louden* and ignoring controlling South Carolina law

Plaintiffs respectfully submit the Court erred in relying solely on *Louden* and ignoring controlling South Carolina law. In the Order, the Court stated *Louden* was “entirely on point to the instant dispute” and discounted all other applicable and controlling authority simply because the cases did not specifically concern underinsured motorist coverage. Order at 7–12. However, this was improper.

Louden is not dispositive in this matter because the *Louden* Court 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 Plaintiffs its defense was merely boiler plate. See *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 331, 730 S.E.2d 282, 286 (2012) (“[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked.” (quoting *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985))).

The Court automatically discounted Plaintiffs' waiver and estoppel arguments in this matter because it believed it was constrained by the *Louden* decision. However, a foundational tenant of South Carolina law is that "even though an appellate court has decided a case containing a certain issue, unless that issue was actually raised on appeal those cases are not dispositive." *Theisen v. Theisen*, 394 S.C. 434, 446, 716 S.E.2d 271, 276–77 (2011); *see also Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 529 S.E.2d 11 (2000) (explaining the fact that an appellate court decided a case on its merits does not mean the order was appealable where there the issue of appealability was never raised to the appellate court). Thus, the *Louden* case is not dispositive of Plaintiffs' waiver and estoppel arguments where the issues of waiver and estoppel were not raised in the *Louden* case. The case before the Court is an entirely separate and distinct case from the *Louden* case, and the Court erred in dismissing the instant case based entirely on the *Louden* decision.

Plaintiffs also submit the Court erred in finding that the *Louden* decision was a "specific rule" that "must prevail over a general rule" of waiver. Order at 8. The *Louden* decision is not in conflict with general waiver law. *Louden* and South Carolina cases concerning waiver work in concert in the same legal system. A review of the *Louden* decision shows that waiver by the UIM carrier was not raised in that case or considered by the Court because it was not relevant to the facts of that case.

In the underlying *Louden* circuit court order, the only waiver argument that was raised to the circuit court was the plaintiff's argument that the defendant and underinsured motorist carrier waived the requirement of filing within the statute of limitations by virtue of the release executed as part of the settlement with the liability carrier. Exhibit G at 20. The circuit court found this argument was "without merit" because the release was only signed by the plaintiff. *Id.* The circuit

court went on to find: “There is nothing in the record before me to indicate that either the defendant or the underinsured motorist carrier waived the statute of limitations or is estopped to assert it as a bar to the plaintiff’s action.” *Id.* Again, waiver as to the statute of limitations was only raised to the circuit court in the context of the release. There were no arguments regarding waiver of service or personal jurisdiction defenses or equitable estoppel arguments due to the insurer’s conduct. However, this discussion in *Louden* is insightful because it shows the court did find that an analysis of waiver and estoppel was applicable in the UIM context.

Further, the *Louden* case is distinguishable in other respects. In the *Louden* case, the insurance carrier filed an answer without mentioning the UIM carrier anywhere in the answer. *Id.* at 26–27. It was signed by “attorneys for the defendant” and only mentioned defendant within. *Id.* The *Louden* Answer had a service defense at the very top which read: “That there has been no proper service of process over the Defendant and the Court lacks in personam jurisdiction.” *Id.* at 26. Further, the attorney representing the UIM carrier in *Louden* immediately took steps to investigate service. He sent a letter to the Clerk of Court and copied the plaintiff’s attorney requesting “copies of the proofs of service in your file.” *Id.* at 29. As discussed further in herein, this is markedly different from the UIM carriers in this case who buried a general, nonspecific service defense in their answers without raising personal jurisdiction and knew that a proof of service was not on file showing service on Defendant Toney.

Plaintiffs agree with the Court that an analysis of the *Williams* case and the unique nature of the UIM legal fiction is helpful to give further context to what led to the *Louden* decision. In *Williams*, the plaintiff was injured in a motor vehicle accident and settled with the at-fault driver’s liability insurance carrier on a covenant not to execute. *Williams v. Selective Ins. Co. of Se.*, 315 S.C. 532, 533, 446 S.E.2d 402, 403 (1994). Subsequently, the plaintiff filed a claim for

underinsured motorist benefits with her insurance company, claiming her medical bills exceeded the \$25,000 she recovered from the liability insurance. *Id.* After the UIM carrier denied coverage, the plaintiff filed an action directly against the UIM carrier for breach of contract and bad faith. *Id.* at 533–34, 446 S.C. at 403. The UIM carrier moved for summary judgment, alleging section 38-77-160 required the plaintiff to file an action against the at-fault driver and the plaintiff could no longer do so because the statute of limitations had expired. *Id.* The court granted summary judgment, and the *Williams* court agreed. *Id.* The *Williams* Court stated:

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. In the event the insured chooses to settle with the at-fault party's liability carrier, the underinsured carrier has the option to assume control of the defense of the action as provided in § 38–77–160. In this case, *Williams*'s failure to pursue an action against the at-fault driver resulted in a total waiver of Insurer's right to defend. The purpose of § 38–77–160 is to avoid such a result.

Id. at 534–35, 446 S.E.2d at 404.

As explained in *Williams*, the purpose of section 38-77-160 is for a plaintiff to initiate an action against the at-fault driver and give notice to the UIM carrier instead of filing against the UIM carrier directly. This allows the UIM carrier to defend the action in the name of the at-fault driver to avoid any prejudice that might result from a jury knowing that an insurance company will be paying any judgment. This allows the UIM carrier to raise defenses that the at-fault driver could have raised. *See, e.g., Broome v. Watts*, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995) (“*Williams* further held that the purpose of § 38-77-160 is to avoid the result of a total waiver of the UIM carrier’s right to defend.”). If the UIM carrier can take advantage of a defendant’s defense, then it must also suffer the consequences of not adequately raising it or waiving it. *See Williams*, 315 S.C. at 534 n.1, 446 S.E.2d at 404 n.1 (explaining an UIM carrier can waive a

defense if it takes actions inconsistent with an intention to rely on the defense). Otherwise, the Court is giving UIM carriers a bulletproof shield to avoid their contractual duty to their insureds.

“The central purpose of the UIM statute is to provide coverage when the injured party’s damages exceed the liability limits of the at-fault motorist.” *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). South Carolinians, like Plaintiffs, accept the offer of UIM coverage from their insurance companies, “pa[y] the corresponding premiums for coverage[,] and are entitled to this contractual benefit.” *O’Neill v. Smith*, 388 S.C. 246, 255, 695 S.E.2d 531, 535–36 (2010). “[T]o deny an injured party the benefit of the party’s own UIM coverage would itself violate public policy because it would abrogate the purpose surrounding UIM coverage, which is to benefit the insured party[.]” *Id.* at 254, 695 S.E.2d at 535. Here, Liberty Mutual and Horace Mann accepted premiums for providing underinsured motorist coverage, and Liberty Mutual and Horace Mann are attempting to avoid their contractual obligations through gamesmanship tactics in this litigation. The insurers want to have their cake and eat it too. They want the Court to find that they have standing to assert defenses on behalf of the defendant in this action but do not have standing to waive the defenses in this action. Here, Liberty Mutual and Horace Mann only want to act on behalf of the defendant when it is beneficial to them. This is a fallacy, and the Court’s ruling gives a windfall to insurance companies by giving them incentive to sandbag plaintiffs by withholding service defenses until the defect is no longer curable.

The Court erred in finding that waiver did not apply in the UIM context. The Court did not cite to any South Carolina law to support its finding that waiver did not apply to the “unique nature of UIM” or that the UIM context “transcends the traditional Rule 12 analysis.” Order at 6. Instead, the requirement to timely file a Rule 12(b) motion and the resulting waiver for failing to

do so is a foundational tenant of South Carolina law that applies generally to all matters before the circuit court. It is clear that the purpose of serving a summons and complaint is to bring a litigant into the jurisdiction of the Court. See *BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 8–9, 753 S.E.2d 537, 541 (2014) (“The purpose of the summons is to acquire jurisdiction of the person of the defendant and to give him notice of the action and an opportunity to appear and defend.”). “Personal jurisdiction may be waived, but subject matter jurisdiction may not be waived.” *Ex parte Cannon*, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009). “[A]llowing for the waiver of service is consistent with the principle that a defendant can waive personal jurisdiction.” *White Oak Manor*, 407 S.C. at 9, 753 S.E.2d at 541. These principles apply in all cases, including UIM cases. Accordingly, the Court erred in failing to consider controlling South Carolina law regarding waiver and estoppel and relying solely on *Louden*.

IV. The Court erred in finding that Plaintiffs failed to comply with section 38-77-160 of the South Carolina Code

The Court erred in finding Plaintiffs “violate[d] the UIM statute” by failing to personally serve the at-fault driver. Order at 7, 8, 17. Section 38-77-160 provides: “No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability *are served* in the manner provided by law *upon the insurer* writing the underinsured motorist provision.” By its plain language, the only service required by section 38-77-160 is service on the insurer. Plaintiffs complied with section 38-77-160 when they served copies of the Summons and Complaint in this action against Defendant Toney on Liberty Mutual and Horace Mann. Thus, the Court erred in finding Plaintiffs failed to comply with section 38-77-160.

V. The Court erred in finding Liberty Mutual and Horace Mann appropriately pled lack of service of the Complaint on the at-fault driver in their Answers

Plaintiffs respectfully submit the Court erred in finding Liberty Mutual and Horace Mann sufficiently raised lack of service on the at-fault driver in their Answers. Order at 8 (“As the Court noted in the Order, a party must raise a service of process defense either in its pleading or in a motion in order to avoid waiver.”). The Court stated: “Of course, the defense is waived if not included in the party’s first response to the suit, whether that is a pleading or a motion.” *Id.* However, the Court erred in finding “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.” Order at 8. Plaintiffs respectfully submit the Court failed to consider the actions and inactions of each insurance carrier separately and, instead, lumped “the UIM carriers” together.

A review of Answer filed by Horace Mann shows that Horace Mann did not specifically raise service of process issues as they related to Defendant Toney, section 38-77-160, or a statute of limitations defense. In its Answer, Horace Mann raised the following service of process defense: “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, ¶ 9. It is unclear from Horace Mann’s Answer whether it was raising service issues as it related to itself or Defendant Toney. In the introduction to its Answer, Horace Mann stated the Answer was filed on behalf of Defendant, by and through the underinsured motorist carrier, Horace Mann Property and Casualty Insurance Company (“Defendant”). Horace Mann Answer, p. 1. However, the caption of the Answer notes it is the Answer of “HORACE MANN PROPERTY AND CASUALTY INSURANCE COMPANY, THE UNDERINSURED MOTORIST CARRIER.” *Id.* Thus, it is unclear whether the reference to “this Defendant” in Horace Mann’s service of process defense is Horace Mann or Toney. This one-

sentence, boiler plate defense was not sufficient to put Plaintiffs on notice that Horace Mann was contending that Plaintiffs failed to serve the Complaint on Toney and therefore could not proceed with the instant action against Horace Mann because they never commenced an action against the at-fault driver.⁷

A review of Liberty Mutual's Answer and Amended Answer shows that Liberty Mutual also failed to specifically plead lack of service on the at-fault driver. In its Answer and Amended Answer, Liberty Mutual set forth the following defense: "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." Again, this one-sentence, boiler plate defense is not sufficient under South Carolina rules to specifically plead this defense and put Plaintiffs on notice of the issues related to service. This is especially true where Plaintiffs did serve Liberty Mutual in accordance with the South Carolina Rules of Civil Procedure, such that part of the defense was clearly a misstatement of fact, and Liberty Mutual's counsel informed Plaintiffs' counsel he would not be raising service issues in a motion.

Plaintiffs respectfully submit *Unisun* is controlling in this case, and the Court erred in not relying on it and misconstruing it. *Unisun* makes it clear that a party waives a defense by failing to plead it with specificity. *Unisun Ins. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000). The defenses pled in the instant case are nearly identical to those pled in *Unisun*. In *Unisun*, the defendant included a boiler plate defense that the plaintiff "failed to serve Bruce Hawkins within the three-year statute of limitations." *Id.* at 542, 537 S.E.2d at 562. The Court of Appeals found

⁷ This is especially true when considering the fact that Horace Mann and Liberty Mutual, participated in the litigation of this matter for nearly two years before filing the untimely motion to dismiss based on Plaintiffs' purported failure to serve Toney. Thus, the Court should have found that the carriers further waived the defense of improper service when took extensive actions that were entirely inconsistent with any intent to rely on service as a defense.

the defense “insufficient, standing alone, to raise the defense of insufficiency of service of process.” *Id.* at 542–43, 537 S.E.2d at 562.

In the Order, the Court construed this statement as requiring the insurers to have pled both insufficiency of process in conjunction with the statute of limitations, stating “UIM carriers here have pled with specificity, and their defenses must be read in conjunction and do not ‘stand alone’ like the imprecise pleading from *Unisun*.” Order at 9. This is a misstatement of *Unisun*’s ruling. Instead, the *Unisun* found that a defendant must plead actual facts to support the defense, such as specifying the nature of the “defects in the service of process” as well as referencing the intent to move for dismissal under Rule 12(b). *Id.* Here, both insurers’ attempts to pled insufficiency of process was not specific enough to put Plaintiffs on notice of the nature of the alleged defects.

Further, even under the Court’s interpretation of *Unisun*, the Court failed to recognize that Horace Mann did not raise any statute of limitations defense in its Answer. Horace Mann only raised the following defenses: improper venue, process of service as to Horace Mann, and punitive damages. See Horace Mann Answer. It further did not seek to amend its Answer to raise the statute of limitations defense subsequently. *Cf. Loudon*, 327 S.C. at 467, 486 S.E.2d at 526 (explaining State Farm subsequently amended its answer to assert an additional defense that the statute of limitations had expired). The Court stated in its Order: “Further, to the extent the rule from *Unisun* may be fairly summarized as requiring pleading Rule 12(b)(5) and statute of limitations in conjunction with each other in order to preserve the defense of complete non-service, the Court finds that the UIM carriers have done so.” Order at 9. However, this finding was incorrect because Horace Mann failed to plead a 12(b)(5) defense with specificity as to Defendant Toney and also failed to plead a statute of limitations defense in its Answer. The Court should

have found Horace Mann was unable to raise the service and statute of limitations issues in its motion to dismiss.

Accordingly, the Court should have found that both Liberty Mutual and Horace Mann waived these defenses by failing to adequately assert the defenses in their Answer and denied the Motions to Dismiss.

VI. The Court erred in finding the underinsured motorist carriers did not waive any issues related to service by participating in robust litigation for two years and waiting until the eve of trial to file their motions to dismiss

Even if Liberty Mutual and Horace Mann properly pled insufficiency of process defenses, the Court erred in finding Liberty Mutual and Horace Mann did not waive this defense by engaging in robust litigation for nearly two years without filing a Rule 12(b) motion. Exhibit C. The Court itself noted litigation in this matter was “protracted.” Order at 13.

The Court found the UIM carriers’ participation in robust discovery over a period of almost two years did not amount to waiver simply because “the timing of this Motion is nearly identical to the timing of the successful motion in *Louden*.” Order at 10 n.3. However, for the reasons discussed above, the *Louden* case is not dispositive in this matter because issues of waiver were not raised to or considered by the *Louden* court. This statement shows that the Court did not properly consider Plaintiffs’ arguments as to waiver, and instead made its ruling because it felt it was constrained by the *Louden* case. Further, although the *Louden* case indicates summary judgment was granted in June 1996, it does not indicate when the motion for summary judgment was filed. *Louden*, 327 S.C. at 466–67, 486 S.E.2d at 526. The *Louden* case does not indicate the extent of the participation by the UIM carrier in the case, including the extent of discovery completed in the case, the participation by the UIM carrier in scheduling orders or mediation, etc.

In this case, Liberty Mutual and Horace Mann waived the service issue by participating in the litigation and failing to timely file a Rule 12(b) motion. The Court erred in finding *Maybank* did not apply to this case. In *Maybank*, the plaintiff argued the defendant waived its right to assert a personal jurisdiction defense when it actively participated in litigation and failed to file a Rule 12(b) motion. *Maybank v. BB&T Corp*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016). The Supreme Court agreed, finding a party who “continues to participate in litigation after challenging personal jurisdiction in their initial responsive pleading to a court” waives the defense. *Id.* The Court noted the defendant “gambled that it could argue personal jurisdiction on the eve of trial after actively participating in litigation over the course of two and a half years,” and the defendant lost. *Id.* at 566, 787 S.E.2d at 511.

Here, Liberty Mutual and Horace Mann gambled that they could run the clock on the statute of limitations prior to raising a Rule 12(b) motion to dismiss based on insufficiency of service of process. Like in *Maybank*, Liberty Mutual and Horace Mann participated in almost two years of protracted litigation. They participated in two motions hearings before the Court, the submission of four scheduling orders to the Court, and mediation. They participated in extensive discovery in the case, including 13 depositions and sending subpoenas for Plaintiffs’ medical records. Exhibit C. They even hired an expert witness to contest Plaintiffs’ damages. Every action Liberty Mutual and Horace Mann took was contrary to the intent to raise a service defense. These actions occurred even after the time for service ran in September 2020. According to the last Scheduling Order, trial was to occur on or after January 1, 2022. Like in *Maybank*, here, Liberty Mutual and Horace Mann waited until the eve of trial, at the end October 2021, to file their motions.

Liberty Mutual further made representations during litigation that directly contradicted any intent to raise improper service to the Court. For example, in its answers to Plaintiffs’

interrogatories, Liberty Mutual stated: “These interrogatories were addressed to “Defendant”, presumably Carolos D. Toney, as captioned above. Counsel for Liberty Mutual Insurance Company, an underinsured motorist carrier, does not represent Carlos D. Toney and is under no obligation to respond to requests directed to Defendant Toney, who has been served with this lawsuit and can respond on his own. However, and without waiving this general objection, please see below[.]” Exhibit F. This is further evidence that Liberty Mutual waived any service-related defenses. Liberty Mutual made this representation in August 2020. This was within the timeframe that Plaintiffs could have still served Defendant Toney had they known Liberty Mutual was contesting service and jurisdiction of the Court. Instead, Liberty Mutual again led Plaintiffs to believe service was not an issue in the case.

Despite Liberty Mutual and Horace Mann’s arguments to the contrary, the motions were not based on any fact learned over the resulting two years of litigation. Their motions were based on facts that existed at the time their filed their answers. Neither Liberty Mutual nor Horace Mann questioned Defendant Toney at his deposition as to whether he had been served with the Complaint. Instead, both Liberty Mutual and Horace Mann continued with the litigation of this matter for nearly two years.

Liberty Mutual and Horace Mann are further guilty of laches because they did not raise the issues related to service of Defendant Toney until nearly two years into the protracted litigation. In fact, Liberty Mutual and Horace Mann did not raise service until over a year after the deadline for serving Defendant Toney. This delay was unreasonable.

Laches is the 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 v. Cherokee Cnty., 237 S.C. 548, 559, 118 S.E.2d 324, 330 (1961). Liberty Mutual and Horace Mann should have undertaken an investigation into whether Defendant Toney had been served and timely raised the issue to the Court. Waiting two years to make this determination was unreasonable, especially considering the UIM carriers' arguments to the Court that service on Defendant Toney was fundamental to this case. Neither Liberty Mutual nor Horace Mann have set forth any colorable reason why they waited nearly two years to raise any issues to the Court's attention. The carriers did not act diligently or reasonably in this case. As such, they have waived any improper service arguments. *See Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465, 470 (2007) ("The equitable doctrine of laches is equivalent to the legal doctrine of waiver . . ."). Accordingly, the Court erred in granting the motions.

VII. The Court erred in refusing to estop Liberty Mutual from raising a service defense despite Liberty Mutual's counsel assuring Plaintiffs' counsel that no service issues existed within the timeframe remaining for serving the complaint

Plaintiffs respectfully submit the Court erred in finding they only met three of the six elements of estoppel. Order at 13.

"[E]quitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017) (quoting 28 Am. Jur. 2d Estoppel and Waiver § 27 (2011)). "The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." *Id.* (quoting *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007)).

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 truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

Id. at 601, 799 S.E.2d at 916–17 (quoting *Strickland*, 375 S.C. at 84–85, 650 S.E.2d at 470).

As noted by the South Carolina Supreme Court,

Waiver implies an intention to give up a known right, and generally rests in agreement, express or implied. But there may be a waiver by estoppel, in which case the conduct of one, inconsistent with a known fact and inducing a belief that such fact would not be asserted, precludes him from asserting that he has not intentionally relinquished the right founded on such fact.

Johnson v. Life & Cas. Ins. Co. of Tennessee, 191 S.C. 96, 3 S.E.2d 805, 807 (1939) (quoting *Gandy v. Insurance Co.*, 52 S.C. 224–29, 29 S.E. 655, 656 (1898)). In this connection, “the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations.” *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E. 2d 384, 388 (1994).

First, the Court incorrectly found that Liberty Mutual did not issue a false representation because it was truthful in stating that its service defense was boiler plate as of January 16, 2020, but did not make any representations about whether the defense would still be boiler plate later in the litigation. Liberty Mutual knew on January 16, 2020, that an affidavit of service had not been filed showing service on Defendant Toney. After reviewing Liberty Mutual’s Answer, Plaintiffs’ counsel reached out to counsel for Liberty Mutual to determine whether the defenses for statute of limitations, spoliation, and improper service were “serious omissions” that Liberty Mutual would “be filing a motion upon” or whether they were boiler plate defenses. Exhibit A. Liberty Mutual’s counsel responded that the defenses were “boiler plate this stage,” meaning that it would not be filing a motion to contest improper service, spoliation, or statute of limitations. Liberty Mutual further represented there were no service issues in its interrogatory responses in August 2020. Exhibit F.

Despite these representations, Liberty Mutual filed a motion contesting service—making the representations false.

The Court focuses on Liberty Mutual’s caveat that the defense was only boiler plate “at this stage” in the litigation. However, as discussed above, the facts to support the improper service defense existed at the time Liberty Mutual’s counsel made the representation and did not change in the nearly two years before Liberty Mutual filed its motion. It is not as if Plaintiffs filed an affidavit showing service on Defendant Toney and then Liberty Mutual later discovered the affidavit was fraudulent. Instead, there was no affidavit filed showing service and Liberty Mutual knew of this when it informed Plaintiffs’ counsel it did not intend to contest service. The Court should have considered all facts reasonably known to Liberty Mutual at that stage of the litigation. The purported service issue existed and should have been known to Liberty Mutual’s counsel at the time it made the representation that it did not intend to raise the issue to the Court.

Although Liberty Mutual’s counsel did state it only included the defenses in an effort not to prematurely waive any issues, this does not save Liberty Mutual’s representation from being false. Specifically, Liberty Mutual’s counsel stated: “Given the recent appellate court ruling in *Garrison v. Taget*, I’m probably going to have to start pleading every defense available under Title 1 to 63 to be sure I haven’t waived anything.” Exhibit A. This statement merely gives insight as to the reasoning behind including the defenses in the first place. However, upon a specific inquiry by Plaintiffs’ counsel of whether Liberty Mutual intended to raise the issues to the Court, Liberty Mutual’s counsel said no. At that point, Liberty Mutual’s counsel should have evaluated, and presumably did evaluate, the merits of the defenses raised and determined whether the defenses were viable. Therefore, the intent when first placing the defenses in the Answer was to not waive them, but counsel waived the defense as of January 16, 2020, when it represented to Plaintiffs’ counsel that it did not intend to file

a motion regarding the defense. Had Liberty Mutual's counsel had any concerns regarding service, he could have requested more information from Plaintiffs' counsel about whether service occurred, indicated that he needed to participate in discovery on the issue before deciding whether to raise the service issue, or simply told Plaintiffs' counsel that he believed the defense was viable. In the nearly two years of litigation, Liberty Mutual's counsel did not attempt to determine whether service occurred and instead moved forward with litigating the case. Instead, it knew at the outset that service had not been procured and wished to run out the clock on the statute of limitations.

Further, the fact that Liberty Mutual amended its Answer to include a specific reference to section 38-77-160 despite assuring Plaintiffs' counsel there were only three changes to the amended answer—and Plaintiffs' counsel only consenting to an Amended Answer with those narrow changes—also shows that Liberty Mutual's representation was false and it intended to mislead Plaintiffs' counsel until the statute of limitations had run and service was no longer curable. Exhibit B.

Even if Liberty Mutual did not have a specific intention to relinquish its ability to raise improper service, this does not prevent the Court from estopping Liberty Mutual because of their false representation and actions in this matter. In *Janasik*, the Supreme Court noted: “Equitable estoppel is the inhibition to assert such right by reason of mischief following one's own fault and may arise even though there was no intention on the part of the party estopped to relinquish or change any existing right.” 307 S.C. at 344, 415 S.E.2d at 387. Thus, the Court erred in failing to estop Liberty Mutual solely because their counsel expressed an ambiguous intent to reserve “every defense available under Title 1 to 63.” Exhibit A. Despite this vague statement, every action Liberty Mutual took in this case was antithetical to any intention to raise an improper service defense in this action. Rather, Liberty Mutual's conduct in this matter supported its direct statement to Plaintiffs' counsel

that the improper service defense raised in its answer was merely boiler plate and it was not filing a motion on the same. Liberty Mutual participated in extensive discovery in this action, including thirteen depositions, subpoenaing medical records, hiring a private investigator, and hiring an expert witness to contest damages. Exhibit C. It also led Plaintiffs to believe that it was not questioning service in its answers to Plaintiffs' interrogatories when it stated it was under no obligation to respond to requests propounded on Defendant Toney because he "has been served with this lawsuit and can respond on his own." Exhibit F. It further sought relief from this Court to change the venue of the action and participated in another hearing on Plaintiffs' discovery motion. When asked specifically whether Liberty Mutual would be filing a motion on the purported improper service, its counsel said no. The Court should have estopped it from doing so.

Second, the Court erred in finding Plaintiffs' counsel was in possession of the underlying information and therefore could not meet the lack of knowledge element. The Court misconstrues this element when it found that Plaintiffs had knowledge that they had not personally served Defendant Toney with the Complaint. This is not the lack of knowledge required by this element. Plaintiffs specifically asked if Liberty Mutual would be filing a motion to assert improper service, and Liberty Mutual's counsel responded that the improper service defense was merely boiler plate such that it did not intend to file a motion to contest service. Thus, the lack of knowledge required by this element is that a lack of knowledge that the representation that Liberty Mutual's defense of improper service was merely boiler plate was false. Plaintiffs have met this element. They did not know that Liberty Mutual intended to file a motion to contest service. Even if Plaintiffs should have known that Defendant Toney had not been served, they did not know that Liberty Mutual intended to assert the service defense after being assured that Liberty Mutual did not intend to raise any serious omissions as to service. Further, even if Plaintiffs should have known of an issue with service, a

party can waive service issues. Plaintiffs had a right to rely on the representation made by Liberty Mutual's counsel. *See Trustees of Cent. Laborers Welfare Fund v. Lowery*, 924 F.2d 731, 733 (7th Cir. 1991) ("Where a defendant leads a plaintiff to believe that service is adequate and that no such defense will be interposed, . . . courts have not hesitated to conclude that the defense is waived.").

Finally, the Court erred in finding Plaintiffs did not rely on Liberty Mutual's representation. The Court based this finding on an email exchange between Liberty Mutual's counsel and Plaintiffs' counsel in October 2021 where in Liberty Mutual requested a copy of the affidavit of service and Plaintiffs' counsel responded, "Will have to look for the service in the hard file." Order at 15. The Court found "Plaintiffs' counsel's response to an informal request for the Affidavit of Service does not align with the response of a party who was under the impression that there would be no challenge to service; rather, it aligns with the response of a party who was under the impression that service was readily provable and who was prepared to represent as much to an opposing party." Order at 15. This is not true. This is simply the response of a party that did not realize service was an issue because the carriers had litigated the case for nearly two years at that point. Plaintiffs' counsel did not see an affidavit of service in the electronic case file and informed Liberty Mutual's counsel that he would have to check the hard file to see if an affidavit of service was there. This statement in no way means that Plaintiffs' counsel did not rely on Liberty Mutual's representation nor is it dispositive of the waiver, voluntary appearance, estoppel, and other issues relating to service on Defendant Toney.

Accordingly, the Court erred in finding Plaintiffs failed to meet the elements of equitable estoppel. Due to Liberty Mutual's representation that it did not intend to raise improper service to the Court, it should now be estopped from raising improper service.

VIII. Liberty Mutual further waived improper service and personal jurisdiction defenses by accepting the jurisdiction of the Court when it filed the Motion to Change Venue and participated in extensive discovery

Liberty Mutual further waived the service defense by filing a motion related to venue without simultaneously raising insufficiency of service and lack of personal jurisdiction over Defendant Toney. Both Liberty Mutual and Horace Mann pled a defense of improper venue in their Answers. Subsequently, on March 24, 2020, Liberty Mutual filed a Motion to Change Venue without raising improper service or lack of personal jurisdiction over Defendant Toney. Rule 12(g) provides:

A party who makes a motion under this rule may join with it any other motions herein provided for and then available to him. If a party makes a motion under this rule but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

Rule 12(g) required Liberty Mutual to raise all available 12(b) defenses in the venue motion, including insufficient service of process and lack of personal jurisdiction over Defendant Toney.

The Court found that the Motion to Change Venue was not a Rule 12(b) motion, and, therefore, Liberty Mutual did not waive the defenses of insufficient service and lack of personal jurisdiction by not including them in the Motion. However, *Breland* makes it clear that motions to change venue stem from Rule 12(b)(3). *Breland v. Love Chevrolet Olds, Inc.*, 339 S.C. 89, 94, 529 S.E.2d 11, 13 (2000). In fact, the *Breland* court stated: “the analysis of the [change of venue] issue is identical to a Rule 12(b)(3), SCRCF motion.” *Id.* Because the analysis of the different types of venue motions are identical, Liberty Mutual also needed to raise any other Rule 12(b) defenses it intended to rely on in March 2020. The Court erred in not considering *Breland*.

Further, even if the Court does not construe Liberty Mutual’s motion to change venue as a 12(b) motion, Liberty Mutual still waived any jurisdictional arguments related to service by seeking relief from the Court without first raising lack of personal jurisdiction. “If the defendant wishes to preserve an objection to personal jurisdiction, he cannot request any relief which may

be granted only if the court has jurisdiction.” *Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 213, 321 S.E.2d 179, 181 (Ct. App. 1984). As the UIM legal fiction gives the insurer the right to step into the shoes of the defendant to defend the action, every action that Liberty Mutual took in this case was on behalf of Defendant Toney. Liberty Mutual was required to raise insufficiency of service and lack of personal jurisdiction over Defendant Toney. Instead of doing so, Liberty Mutual sought relief from the Court which the Court only had the power to grant if personal jurisdiction existed.

Liberty Mutual took advantage of the Court time and time again. It not only filed a motion to change venue asking the Court for relief, but it also used the power of the Court to subpoena medical records from Plaintiffs’ medical providers. Exhibit C. If the Court did not have jurisdiction in this matter, the Liberty Mutual would not have the power to compel non-parties to produce documents. Liberty Mutual also obtained sworn testimony from numerous witnesses in this case and procured discovery from Plaintiffs. Exhibit C. These actions are all inconsistent with any argument that the Court does not have jurisdiction in this matter. Liberty Mutual cannot both take advantage of the Court’s jurisdiction but also disclaim the Court’s jurisdiction. Accordingly, the Court should have found that Liberty Mutual waived any service arguments by filing the venue motion on March 24, 2020.

IX. The Court erred in granting the insurance carriers’ motions based on purported prejudice to Toney

Plaintiffs respectfully submit the Court erred in granting the insurance carriers’ motions based on any purported prejudice to Defendant Toney. In the Order, the Court stated:

As an additional sustaining ground for the Court’s ruling in this regard, the Court finds that the danger [of] unfair prejudice to *Defendant* should the instant case continue to trial (i.e., his name would be on a verdict form and he would be subject to entry of judgment, all without ever having been served a copy of the Summons

and Complaint filed against him) mitigates in favor of this Motion being granted regardless of timing.

Order at 10 n.3.

Plaintiffs note this finding shows that this issue is really a jurisdictional issue that should have timely been raised by a Rule 12(b) motion to dismiss. However, Plaintiffs submit that the Court erred in finding there would be prejudice to Defendant Toney in this matter.

First, Defendant Toney was aware that this action was pending because he voluntarily appeared for a deposition after being sent a Notice of Deposition which showed his name as a defendant in the caption. Thus, Defendant Toney knew of this action and the possibility of his name appearing on a verdict form.

Second, there is no prejudice to Defendant Toney here because he is protected by a Covenant Not to Execute. Exhibit H. The Covenant specifically informs Defendant Toney that the Plaintiffs could file an action against him in order to pursue any underinsurance motorist coverage. The Covenant protects Defendant Toney from any judgment in this case. This is a red herring set forth by the insurers to persuade the Court to act based on imaginary prejudice to Defendant Toney in order to avoid their contractual obligations to Plaintiffs.

Further, there is no prejudice to the UIM carriers in denying their motions to dismiss and requiring this case to move forward with the trial that was already scheduled. The parties have extensively litigated this case and unsuccessfully attended mediation. The UIM carriers have been on notice of these claims for over two years and have spent that time marshaling their defenses. They have hired an expert witness to context damages, hired a private investigator, taken numerous depositions, and subpoenaed Plaintiffs' medical records. The case is ready for trial. *Cobb v. Maccaro*, 310 S.C. 303, 305, 423 S.E.2d 156, 157 (Ct. App. 1992) (“[A]voidance of trial is not a substantial right.”). Plaintiffs, on the other hand, will suffer extreme prejudice in the dismissal of

this action and will have to wait numerous years for this case to move through the appellate system prior to a trial on the merits of their case. In that time, it is likely that witnesses' memories will dim or witnesses may be unavailable. Therefore, Plaintiffs respectfully submit the Court erred in only considering the imaginary prejudice to Defendant Toney.

CONCLUSION

Plaintiffs respectfully submit the Court should grant the Motion to Reconsider based on any or all of the grounds state hereinabove. Accordingly, Plaintiffs respectfully request the Court reconsider the August 28, 2022 Order and deny the UIM carriers' motions to dismiss.

(Signature page follows)

Respectfully submitted,

SMITH | ROBINSON
Smith Robinson Holler DuBose and Morgan, LLC

s/Jonathan M. Robinson
G. Murrell Smith, Jr. (S.C. Bar # 66263)
Jonathan M. Robinson (S.C. Bar # 68285)
Shanon N. Peake (S.C. Bar # 102723)
2530 Devine Street
Columbia, SC 29204
803-254-5445
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KASSEL McVEY

John D. Kassel (S.C. Bar # 3286)
Theile B. McVey (S.C. Bar # 16682)
P.O. Box 1476
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803-256-4242
JKassel@kassellaw.com

ANDREW N. SAFRAN, LLC

Andrew N. Safran (S.C. Bar # 4811)
P.O. Box 12089
Columbia, SC 29211
803-256-6689
msa6631@aol.com

*Counsel for Plaintiffs Howell D. Thompson
and Tara L. Thompson*

September 7, 2022

EXHIBIT A

From: [John Kassel](#)
To: [Richard E. McLawhorn](#)
Cc: [Stephanie Fanning](#)
Subject: RE: thompson v. toney

Well just the affirmative ones. That was good money for a needle stick. And interesting that constructive notice could be the basis for recklessness or a conscious disregard...jk

John D. Kassel
 Kassel McVey, Attorneys at Law
 P.O. Box 1476
 1330 Laurel Street
 Columbia, South Carolina 29202
 803.256.4242 office
 803.360.2521 cell
www.kassellaw.com

From: Richard E. McLawhorn <rem@swblaw.com>
Sent: Thursday, January 16, 2020 9:35 AM
To: John Kassel <JKassel@kassellaw.com>
Cc: Stephanie Fanning <SFanning@kassellaw.com>
Subject: RE: thompson v. toney

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



Richard E. McLawhorn, Jr. | *Member*
 Sweeny, Wingate & Barrow, P.A.

1515 Lady St. (29201)
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From: John Kassel <JKassel@kassellaw.com>
Sent: Thursday, January 16, 2020 9:32 AM
To: Richard E. McLawhorn <rem@swblaw.com>
Cc: Stephanie Fanning <SFanning@kassellaw.com>
Subject: thompson v. toney

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

John D. Kassel
Kassel McVey, Attorneys at Law
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EXHIBIT B

From: [Richard E. McLawhorn](#)
To: [Jamie Rutkoski](#)
Subject: RE: Toney v. Thompson Amended Answer
Date: Wednesday, February 19, 2020 1:40:47 PM

Thanks!



Richard E. McLawhorn, Jr. | *Member*
 Sweeny, Wingate & Barrow, P.A.

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From: Jamie Rutkoski <jrutkoski@kassellaw.com>
Sent: Wednesday, February 19, 2020 1:23 PM
To: Richard E. McLawhorn <rem@swblaw.com>
Subject: RE: Toney v. Thompson Amended Answer

That's fine, I'll still consent.

Jamie Rutkoski

Kassel McVey
 Attorneys At Law
 Post Office Box 1476
 1330 Laurel Street
 Columbia, South Carolina 29202
 (803) 256-4242 fax:(803)256-1952

This message may contain information that is confidential or privileged under an attorney-client relationship. It is intended only for use of the individual or entity to which it is addressed, and any other dissemination, distribution, or copying of this communication is strictly prohibited and may be illegal under federal or state law. If you have received this in error, please notify us immediately by replying to this email and by deleting the original message and any copies. Thank you.

From: Richard E. McLawhorn <rem@swblaw.com>
Sent: Wednesday, February 19, 2020 12:20 PM
To: Jamie Rutkoski <jrutkoski@kassellaw.com>
Subject: RE: Toney v. Thompson Amended Answer

We did add in a defense of set off and punitive damages cap. Let me know if you consent with those additional defenses.



Richard E. McLawhorn, Jr. | *Member*
Sweeny, Wingate & Barrow, P.A.

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From: Jamie Rutkoski <jrutkoski@kassellaw.com>
Sent: Wednesday, February 19, 2020 11:58 AM
To: Richard E. McLawhorn <rem@swblaw.com>
Subject: RE: Toney v. Thompson Amended Answer

Richard,

So sorry I didn't get back to you last week! We consent to the amended answer so long as it's just the change of uninsured to underinsured.

Have a good week,

Jamie Rutkoski

Kassel McVey
Attorneys At Law
Post Office Box 1476
1330 Laurel Street
Columbia, South Carolina 29202
(803) 256-4242 fax:(803)256-1952

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From: Richard E. McLawhorn <rem@swblaw.com>

Sent: Wednesday, February 19, 2020 10:32 AM
To: Jamie Rutkoski <jrutkoski@kassellaw.com>
Subject: Toney v. Thompson Amended Answer

Jamie,

Attached is the amended answer that we would like to file in this case for Liberty Mutual. Let me know if you consent. If I don't hear back by the end of the week, we'll go ahead and file a motion.

Thanks,



Richard E. McLawhorn, Jr. | *Member*
Sweeny, Wingate & Barrow, P.A.

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Columbia, SC 29211

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EXHIBIT C

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and	)	Civil Action No.: 2019CP4302375
Tara L. Thompson,	)	
	)	
Plaintiffs,	)	
	)	LIBERTY MUTUAL INSURANCE
v.	)	COMPANY'S FIRST REQUESTS FOR
	)	PRODUCTION TO TARA L. THOMPSON
Carlos D. Toney,	)	
	)	
	)	
Defendant.	)	

The above-named Defendants, requests, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, that the above-named Plaintiff produce and permit the inspection, copying and/or photographing of:

DEFINITIONS

The term "documents" when used herein means all originals of any nature whatsoever, identical copies, and all non-identical copies thereof, pertaining to any medium upon which intelligence or information is recorded in your possession, custody or control, regardless of where located; including, without limiting the generality of the foregoing, punch cards, print out sheets, movie film, slides, photographs, records, microfilm, notes, letters, memoranda, ledgers, worksheets, books, magazines, notebooks, diaries, calendars, appointment book registers, charts, cables, papers, agreements, contracts, purchase orders, acknowledgments, invoices, authorizations, budgets, analysis, projections, transcripts, minutes of meetings of any kind, correspondence, telegrams, drafts, data processing discs or tapes, or computer produced interpretations thereof, instructions, announcements, schedules, and price lists. In all cases

where originals and/or non-identical copies are not available, "document" also means identical copies of original documents and copies of non-identical copies.

NOTE: These requests shall be deemed continuing so as to require supplemental production pursuant to Rule 26(e) of the South Carolina Rules of Civil Procedure.

The documents to be produced are the following:

1. All medical reports, bills, hospital records or any other bills, reports or records relating to any alleged personal injury.
2. All repair bills, estimates, reports, or other written or printed documents relating to any claimed damage to personal or real property.
3. All statements or any other written or printed documents concerning any claims for lost wages, income or for any other damages allegedly resulting from the incident as set forth in the Complaint.
4. All photographs, diagrams, drawings, or other similar material relating to the claims set forth in the Complaint.
5. All statements of possible witnesses, whether written, oral, summarized, or otherwise reproduced in any manner, relating to the incident as set forth in the Complaint.
6. All tax returns, both Federal and State returns, for the five (5) years preceding the incident set forth in the Complaint as well as any returns made subsequent to the incident set forth in the Complaint.
7. Any other documents or materials which you intend to introduce in the trial of this case.
8. Produce a complete copy of any and all cellular telephone records for any phone used by Plaintiff while operating any vehicles owned, leased, used or controlled by Plaintiff for

the period beginning six months prior to the date of the subject collision and ending one week after the date of the subject collision.

9. Copy of Plaintiff's automobile insurance policy(ies) in effect at the time of this accident.

10. Copy of Plaintiff's vehicle tax payment receipts for all vehicles owned by the Plaintiff's at the time of this accident.

11. Copy of any text message and/or Facebook, Instagram, Whatsapp, and/or any other type of electronic or paper communications to any person and/or entity regarding the incident.

12. Make the cell phone in any Plaintiff's possession at the time of incident available for inspection by Defendant and/or Defendant's expert(s).

13. Provide any maintenance records for the vehicle operated by any Plaintiff at the time of the incident.

14. Produce a copy of the application and/or claims for benefits and/or claims for payments submitted by Plaintiff to any insurance company for personal injuries and/or property damage allegedly sustained by Plaintiff the subject collision.

15. Produce all documents comprising a report made by any person, firm, association or other entity (including insurance adjusters) that has conducted any investigation to determine any of the facts pertaining to any of the issues in this action.

16. Produce all documents comprising a report made by any person you expect to call as an expert witness on the trial of the case.

17. Produce all documents relating to any facts or information relating to the subject matter of this action furnished to you by any expert you expect to call as an expert witness on the trial of this case.

18. Produce all documents relating to any written or recorded statement of Plaintiff or any other potential witnesses, concerning any fact relevant to the subject matter of this action.

19. Produce all payroll records regarding Plaintiff for a period beginning one year prior to the date of the subject collision and ending sixty days after the subject collision.

20. Produce all title certificates, bills of sale, certificates of registration, and other title documents regarding the subject vehicle (the vehicle Plaintiff was operating in the subject collision).

21. Produce all repair orders and bills pertaining to the subject vehicle and/or Plaintiff on the date of the subject collision, and within sixty days prior to the date of the subject collision and sixty days subsequent to the date of the collision.

22. Produce all documents relating to any damage estimates or appraisals made of the Plaintiff's vehicle involved in the subject incident (the vehicle being operating by Plaintiff in the subject incident).

23. Produce any and all communications, correspondence, emails, documents and/or records sent to or retrieved from any federal, state or local government, person or entity in regard to Plaintiff.

24. Produce a copy of the Plaintiff's driver's license in effect on the date of the subject collision.

25. Produce all investigative reports or other reports of the driving record or habits of Plaintiff.

26. Produce copies of all citations issued to the driver as a result of Plaintiff's actions on the date of the subject incident.

27. Returns to any subpoena or FOIA requests that you have served to date in this

action, or any that are served in the future through the trial of this action.

28. Produce a certified copy of any liability insurance policies, including, but not limited to any excess or umbrella policies, covering Plaintiff and/or the vehicle operated by Plaintiff on the date of the subject incident. This request is also meant to discover and shall include any information regarding any agreements to extend coverage beyond the original limits.

29. Produce any photographs, movies and videotapes taken by Plaintiff, or by Plaintiff's agents, attorneys, investigators or insurance carriers, or in the possession of Plaintiff or her agents, attorneys, investigators, or insurance carriers, which you intend to use at the trial of this case, that reflect the scene of the subject incident, the vehicles involved in the collision or of any of the parties to this case.

30. Produce any drawings or diagrams of the scene of the subject incident which are in the possession and/or custody of Plaintiff, or Plaintiff's agents, attorneys, investigators, or insurance carriers, which Plaintiff intends to use in any deposition taken in this case.

31. Produce any drawings or diagrams of the scene of the collision which is the subject of the Complaint which are in the possession and/or custody of Plaintiff and/or Plaintiff's agents, attorneys, investigators, or insurance carriers, which Plaintiff intends to use at the trial of this case.

32. Produce any exhibits prepared by Plaintiff, or Plaintiff's agents, attorneys, investigators, or insurance carriers, which are in the possession, custody or control of same, and which Plaintiff intends to use at any deposition taken in this case.

33. Produce any exhibits prepared by Plaintiff, or Plaintiff's agents, attorneys, investigators, or insurance carriers, which are in the possession, custody or control of same, and which Plaintiff intends to use at the trial of this case.

34. All documents identified in Plaintiff's Answers to Defendant's Standard and Supplemental Interrogatories.

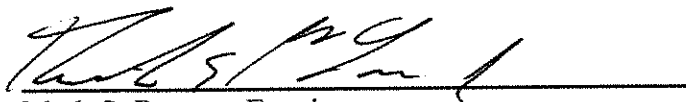
35. All documents sent to and/or received from any insurance company related to the accident described in Plaintiff's Complaint.

If you contend any item need not be produced, identify such item and set forth the basis for your failure to produce same.

It is requested that this production be made within thirty (30) days after the date of service of this Request at the office of Sweeny, Wingate & Barrow, 1515 Lady Street, Columbia, South Carolina, 29211. Visual inspection and copies may be made of any and all documents.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow, Esquire
Richard E. McLawhorn, Esquire
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR THE DEFENDANTS

Columbia, South Carolina
January 2, 2020

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Liberty Mutual Insurance Company, do hereby certify that I have served a copy of the foregoing First Request to Produce to Tara Thompson in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

John D. Kassel, Esquire
Theile B. McVey
Jamie R. Rutkoski, Esquire
Kassel McVey, Attorneys at Law, LLC
1330 Laurel Street
P.O. Box 1476
Columbia, SC 29202
Attorneys for Plaintiffs



M. Esther Oliver

Columbia, South Carolina
January 2, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and) Civil Action No.: 2019CP4302375
Tara L. Thompson,)
)
Plaintiffs,)
)
v.) LIBERTY MUTUAL INSURANCE
) COMPANY'S FIRST REQUESTS FOR
) PRODUCTION TO HOWELL D.
Carlos D. Toney,) THOMPSON
)
)
)
)
Defendant.)

The above-named Defendants, requests, pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, that the above-named Plaintiff produce and permit the inspection, copying and/or photographing of:

DEFINITIONS

The term "documents" when used herein means all originals of any nature whatsoever, identical copies, and all non-identical copies thereof, pertaining to any medium upon which intelligence or information is recorded in your possession, custody or control, regardless of where located; including, without limiting the generality of the foregoing, punch cards, print out sheets, movie film, slides, photographs, records, microfilm, notes, letters, memoranda, ledgers, worksheets, books, magazines, notebooks, diaries, calendars, appointment book registers, charts, cables, papers, agreements, contracts, purchase orders, acknowledgments, invoices, authorizations, budgets, analysis, projections, transcripts, minutes of meetings of any kind, correspondence, telegrams, drafts, data processing discs or tapes, or computer produced interpretations thereof, instructions, announcements, schedules, and price lists. In all cases

where originals and/or non-identical copies are not available, "document" also means identical copies of original documents and copies of non-identical copies.

NOTE: These requests shall be deemed continuing so as to require supplemental production pursuant to Rule 26(e) of the South Carolina Rules of Civil Procedure.

The documents to be produced are the following:

1. All medical reports, bills, hospital records or any other bills, reports or records relating to any alleged personal injury.
2. All repair bills, estimates, reports, or other written or printed documents relating to any claimed damage to personal or real property.
3. All statements or any other written or printed documents concerning any claims for lost wages, income or for any other damages allegedly resulting from the incident as set forth in the Complaint.
4. All photographs, diagrams, drawings, or other similar material relating to the claims set forth in the Complaint.
5. All statements of possible witnesses, whether written, oral, summarized, or otherwise reproduced in any manner, relating to the incident as set forth in the Complaint.
6. All tax returns, both Federal and State returns, for the five (5) years preceding the incident set forth in the Complaint as well as any returns made subsequent to the incident set forth in the Complaint.
7. Any other documents or materials which you intend to introduce in the trial of this case.
8. Produce a complete copy of any and all cellular telephone records for any phone used by Plaintiff while operating any vehicles owned, leased, used or controlled by Plaintiff for

the period beginning six months prior to the date of the subject collision and ending one week after the date of the subject collision.

9. Copy of Plaintiff's automobile insurance policy(ies) in effect at the time of this accident.

10. Copy of Plaintiff's vehicle tax payment receipts for all vehicles owned by the Plaintiff's at the time of this accident.

11. Copy of any text message and/or Facebook, Instagram, Whatsapp, and/or any other type of electronic or paper communications to any person and/or entity regarding the incident.

12. Make the cell phone in any Plaintiff's possession at the time of incident available for inspection by Defendant and/or Defendant's expert(s).

13. Provide any maintenance records for the vehicle operated by any Plaintiff at the time of the incident.

14. Produce a copy of the application and/or claims for benefits and/or claims for payments submitted by Plaintiff to any insurance company for personal injuries and/or property damage allegedly sustained by Plaintiff the subject collision.

15. Produce all documents comprising a report made by any person, firm, association or other entity (including insurance adjusters) that has conducted any investigation to determine any of the facts pertaining to any of the issues in this action.

16. Produce all documents comprising a report made by any person you expect to call as an expert witness on the trial of the case.

17. Produce all documents relating to any facts or information relating to the subject matter of this action furnished to you by any expert you expect to call as an expert witness on the trial of this case.

18. Produce all documents relating to any written or recorded statement of Plaintiff or any other potential witnesses, concerning any fact relevant to the subject matter of this action.

19. Produce all payroll records regarding Plaintiff for a period beginning one year prior to the date of the subject collision and ending sixty days after the subject collision.

20. Produce all title certificates, bills of sale, certificates of registration, and other title documents regarding the subject vehicle (the vehicle Plaintiff was operating in the subject collision).

21. Produce all repair orders and bills pertaining to the subject vehicle and/or Plaintiff on the date of the subject collision, and within sixty days prior to the date of the subject collision and sixty days subsequent to the date of the collision.

22. Produce all documents relating to any damage estimates or appraisals made of the Plaintiff's vehicle involved in the subject incident (the vehicle being operating by Plaintiff in the subject incident).

23. Produce any and all communications, correspondence, emails, documents and/or records sent to or retrieved from any federal, state or local government, person or entity in regard to Plaintiff.

24. Produce a copy of the Plaintiff's driver's license in effect on the date of the subject collision.

25. Produce all investigative reports or other reports of the driving record or habits of Plaintiff.

26. Produce copies of all citations issued to the driver as a result of Plaintiff's actions on the date of the subject incident.

27. Returns to any subpoena or FOIA requests that you have served to date in this

action, or any that are served in the future through the trial of this action.

28. Produce a certified copy of any liability insurance policies, including, but not limited to any excess or umbrella policies, covering Plaintiff and/or the vehicle operated by Plaintiff on the date of the subject incident. This request is also meant to discover and shall include any information regarding any agreements to extend coverage beyond the original limits.

29. Produce any photographs, movies and videotapes taken by Plaintiff, or by Plaintiff's agents, attorneys, investigators or insurance carriers, or in the possession of Plaintiff or her agents, attorneys, investigators, or insurance carriers, which you intend to use at the trial of this case, that reflect the scene of the subject incident, the vehicles involved in the collision or of any of the parties to this case.

30. Produce any drawings or diagrams of the scene of the subject incident which are in the possession and/or custody of Plaintiff, or Plaintiff's agents, attorneys, investigators, or insurance carriers, which Plaintiff intends to use in any deposition taken in this case.

31. Produce any drawings or diagrams of the scene of the collision which is the subject of the Complaint which are in the possession and/or custody of Plaintiff and/or Plaintiff's agents, attorneys, investigators, or insurance carriers, which Plaintiff intends to use at the trial of this case.

32. Produce any exhibits prepared by Plaintiff, or Plaintiff's agents, attorneys, investigators, or insurance carriers, which are in the possession, custody or control of same, and which Plaintiff intends to use at any deposition taken in this case.

33. Produce any exhibits prepared by Plaintiff, or Plaintiff's agents, attorneys, investigators, or insurance carriers, which are in the possession, custody or control of same, and which Plaintiff intends to use at the trial of this case.

34. All documents identified in Plaintiff's Answers to Defendant's Standard and Supplemental Interrogatories.

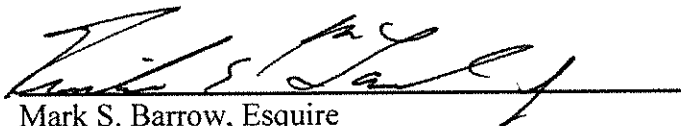
35. All documents sent to and/or received from any insurance company related to the accident described in Plaintiff's Complaint.

If you contend any item need not be produced, identify such item and set forth the basis for your failure to produce same.

It is requested that this production be made within thirty (30) days after the date of service of this Request at the office of Sweeny, Wingate & Barrow, 1515 Lady Street, Columbia, South Carolina, 29211. Visual inspection and copies may be made of any and all documents.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow, Esquire
Richard E. McLawhorn, Esquire
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

ATTORNEYS FOR THE DEFENDANTS

Columbia, South Carolina
January 2, 2020

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Liberty Mutual Insurance Company, do hereby certify that I have served a copy of the foregoing First Request to Produce to Howell Thompson in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

John D. Kassel, Esquire
Theile B. McVey
Jamie R. Rutkoski, Esquire
Kassel McVey, Attorneys at Law, LLC
1330 Laurel Street
P.O. Box 1476
Columbia, SC 29202
Attorneys for Plaintiffs



M. Esther Oliver

Columbia, South Carolina
January 2, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and) Civil Action No.: 2019CP4302375
Tara L. Thompson,)
)
Plaintiffs,)
) LIBERTY MUTUAL INSURANCE
v.) COMPANY'S FIRST INTERROGATORIES
) TO TARA L. THOMPSON
Carlos D. Toney,)
)
)
Defendant.)

YOU ARE HEREBY SERVED the following written Interrogatories on behalf of Liberty Mutual Insurance Company ("Insurer"), to be answered separately and in writing by the above-named Plaintiff, within thirty (30) days after the service hereof under the provisions of Rule 33 of the South Carolina Rules of Civil Procedure.

1. Give the names, addresses and telephone numbers of persons known to the Plaintiff or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. For each person known to the Plaintiff or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Defendants of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

3. Set forth a list of photographs, plats, sketches, videos or other prepared documents and/or material in possession of the Plaintiff that relate to the claim or defense in the case.

4. Set forth the names, addresses and telephone numbers of all physicians who have treated the Plaintiff and all hospitals to which the Plaintiff has been admitted in connection with said injuries and also set forth a statement of all medical costs involved.

5. Set forth the names, addresses and telephone numbers of all insurance companies which have the coverage (i.e. health and/or accident), related to the claim and set forth the number or numbers of the policies involved and the amount or amounts of coverage provided in each policy.

6. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the Plaintiff.

7. List the names, addresses and telephone numbers of any expert witness(es) the Plaintiff proposes to use at the trial of the case and a complete summary of the testimony expected from the witness(es).

8. Does Plaintiff now, or has Plaintiff ever, received disability benefits, any income, pension benefits, or workers' compensation from any state or federal government agency, any persons, employers or insurers? If so, please state:

- (a) The nature of such payments;
- (b) The dates Plaintiff received such payments;
- (c) The source, by name and address, of such payments;
- (d) The injuries or disabilities entitling Plaintiff to such payments;
- (e) Whether Plaintiff has any present disability which is, in whole or in part, attributable to such prior injuries or disabilities, and whether such disabilities, and whether such disabilities, if any, existed at the time of the incident alleged in the Complaint.

9. State whether or not the Plaintiff consumed alcoholic beverages of any type, or consumed any type of medication or drugs within the forty-eight (48) hours immediately preceding the incident referred to in the Complaint. As to the medication, state the name, amount, frequency and the physicians, if any, who prescribed such medication.

10. Describe in detail what effects, if any, Plaintiff's injuries have had upon Plaintiff's daily activities including, but not limited to, Plaintiff's ability to perform tasks associated with Plaintiff's employment.

11. Has the Plaintiff ever been involved in any other legal actions, either as a Plaintiff or a Defendant? If so, give the nature of the action, resolution of the action, and counsel of record.

12. List with specificity any serious illnesses or injuries sustained by the Plaintiff which resulted in medical treatment or hospitalization, providing the dates of hospitalization, nature of illness or injury, and treating physician.

13. If the Plaintiff has a prescription for corrective lenses, state how long the Plaintiff has been required to wear prescription lenses and the names, addresses and telephone numbers of the Plaintiff's optometrist/ophthalmologist who diagnosed the prescription.

14. Please state the date Plaintiff has had eye examinations for the past five (5) years and the names, addresses and telephone numbers of the optometrist/ophthalmologist who performed such examinations.

15. Please state the rate of speed Plaintiff was traveling at the time of the accident referred to in the Complaint.

16. Please state Plaintiff's destination at the time of the accident referred to in the Complaint.

17. Has Plaintiff ever previously suffered any type of injury either prior to or following the accident referred to in the Complaint.

18. Please provide the following regarding the Plaintiff, and any other passenger(s) in the vehicle at the time of the accident:

- (a) Date of Birth;
- (b) Social Security Number;
- (c) Driver's License Number;
- (d) State in which Driver's License is issued;
- (e) Any name used in the past by the Plaintiff and/or passenger(s) besides the name currently listed on the Driver's License (i.e., maiden name, prior name before a name change, etc.).

19. As to each expert witness listed in response to Interrogatory No. 5 above, please state:

- a. A complete statement of all opinions the witness will express and the basis and reasons for those opinions;
- b. The data and other information considered by the witness in forming said opinions;
- c. A description of any exhibits the witness or counsel intends to introduce to summarize or support these opinions (to be provided in response to Plaintiff's Requests for Production);
- d. The witness's qualifications, including a list of all publications authored in the previous ten years by said witness;
- e. A list of all other cases in which, during the previous five years, the witness testified as an expert at trial or by deposition; and
- f. A statement of the compensation to be paid for the study and testimony in the case.

20. For all photographs relating to this case which are in the possession of Plaintiff or Plaintiff's counsel, please provide:

- a. A brief description of the content of the photograph;
- b. The date the photograph was taken; and
- c. The name, address, and employer of the person who took the photograph.

21. Describe in detail what damage, if any, was done to your vehicle in the collision,

and give the cost of repair for your vehicle.

22. If Plaintiff is claiming lack of fault in this collision, or claims that another person or entity was at fault in addition to Plaintiff, please state the name and address of the persons or entities Plaintiff believes were at fault and please state the reasons why they were at fault. A full and complete response should:

- a. Identify all witnesses that support this contention;
- b. Identify all writings that support this contention;
- c. Identify all court cases upon which you base this contention; and
- d. Identify all statutes that you rely on to support this contention.

22. Set forth any information you have or any reason you have to believe that there was any defect or failure on the part of any vehicle or equipment involved in the collision.

23. Has Plaintiff or anyone on Plaintiff's behalf obtained any statement in any form from any potential witness or party in the case that concerns the events described in the Complaint? If so, please state from whom those statements were taken and who has possession of those statements.

24. Did Plaintiff and/or any representative of Plaintiff speak with any Defendant and/or any representative of any Defendant at any time after the subject collision? If so, please state the nature of the conversation and any remarks Plaintiff may have made.

25. Did Plaintiff, at the time of the subject collision, own and insure any vehicles other than the vehicle involved in the subject collision? If so, please set forth separately:

- a. Each vehicle and the insurance company and policy number thereon;
- b. The owner of the vehicle and any named insureds under that vehicle's policy; and
- c. The amounts of coverage provided

26. As to the vehicle involved in the subject collision, describe in detail:

- a. The make, model, and year;
- b. The license plate number;
- c. The mileage; and

- d. The date of the last inspection and/or service prior to the accident.
27. List every employer Plaintiff has worked for since the age of 18 and provide the following:
- Name of employer
 - Address of employer
 - Telephone number of employer
 - Dates worked for each employer
 - Job description of each employer
 - Salary/compensation received for each employer

These Interrogatories shall be deemed continuing so as to require supplemental answers if Plaintiff or Plaintiff's attorneys obtain further information between the time answers are served and the time of trial.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

/s/ Richard E. McLawhorn, Jr.

Mark S. Barrow, Esquire, SC Bar No.: 7821

Richard E. McLawhorn, Jr., Esquire, SC Bar No.: 100179

1515 Lady Street

Post Office Box 12129

Columbia, South Carolina 29211

Telephone: (803) 256-2233

Fax: (803) 256-9177

msb@swblaw.com

rem@swblaw.com

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY, PURPORTED UM
CARRIER**

Columbia, South Carolina

January 2, 2020

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Liberty Mutual Insurance Company, do hereby certify that I have served a copy of the foregoing First Interrogatories to Tara Thompson in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

John D. Kassel, Esquire
Theile B. McVey
Jamie R. Rutkoski, Esquire
Kassel McVey, Attorneys at Law, LLC
1330 Laurel Street
P.O. Box 1476
Columbia, SC 29202
Attorneys for Plaintiffs



M. Esther Oliver

Columbia, South Carolina
January 2, 2020

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and) Civil Action No.: 2019CP4302375
Tara L. Thompson,)
)
Plaintiffs,)
)
v.) LIBERTY MUTUAL INSURANCE
) COMPANY'S FIRST INTERROGATORIES
) TO HOWELL D. THOMPSON
Carlos D. Toney,)
)
)
)
Defendant.)

YOU ARE HEREBY SERVED the following written Interrogatories on behalf of Liberty Mutual Insurance Company ("Insurer"), to be answered separately and in writing by Plaintiff, within thirty (30) days after the service hereof under the provisions of Rule 33 of the South Carolina Rules of Civil Procedure.

1. Give the names, addresses and telephone numbers of persons known to the Plaintiff or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and indicate who has possession of such statements.

2. For each person known to the Plaintiff or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Defendants of the important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

3. Set forth a list of photographs, plats, sketches, videos or other prepared documents and/or material in possession of the Plaintiff that relate to the claim or defense in the case.

4. Set forth the names, addresses and telephone numbers of all physicians who have treated the Plaintiff and all hospitals to which the Plaintiff has been admitted in connection with said injuries and also set forth a statement of all medical costs involved.

5. Set forth the names, addresses and telephone numbers of all insurance companies which have the coverage (i.e. health and/or accident), related to the claim and set forth the number or numbers of the policies involved and the amount or amounts of coverage provided in each policy.

6. Set forth an itemized statement of all damages, exclusive of pain and suffering, claimed to have been sustained by the Plaintiff.

7. List the names, addresses and telephone numbers of any expert witness(es) the Plaintiff proposes to use at the trial of the case and a complete summary of the testimony expected from the witness(es).

8. Does Plaintiff now, or has Plaintiff ever, received disability benefits, any income, pension benefits, or workers' compensation from any state or federal government agency, any persons, employers or insurers? If so, please state:

- (a) The nature of such payments;
- (b) The dates Plaintiff received such payments;
- (c) The source, by name and address, of such payments;
- (d) The injuries or disabilities entitling Plaintiff to such payments;
- (e) Whether Plaintiff has any present disability which is, in whole or in part, attributable to such prior injuries or disabilities, and whether such disabilities, and whether such disabilities, if any, existed at the time of the incident alleged in the Complaint.

9. State whether or not the Plaintiff consumed alcoholic beverages of any type, or consumed any type of medication or drugs within the forty-eight (48) hours immediately preceding the incident referred to in the Complaint. As to the medication, state the name, amount, frequency and the physicians, if any, who prescribed such medication.

10. Describe in detail what effects, if any, Plaintiff's injuries have had upon Plaintiff's daily activities including, but not limited to, Plaintiff's ability to perform tasks associated with Plaintiff's employment.

11. Has the Plaintiff ever been involved in any other legal actions, either as a Plaintiff or a Defendant? If so, give the nature of the action, resolution of the action, and counsel of record.

12. List with specificity any serious illnesses or injuries sustained by the Plaintiff which resulted in medical treatment or hospitalization, providing the dates of hospitalization, nature of illness or injury, and treating physician.

13. If the Plaintiff has a prescription for corrective lenses, state how long the Plaintiff has been required to wear prescription lenses and the names, addresses and telephone numbers of the Plaintiff's optometrist/ophthalmologist who diagnosed the prescription.

14. Please state the date Plaintiff has had eye examinations for the past five (5) years and the names, addresses and telephone numbers of the optometrist/ophthalmologist who performed such examinations.

15. Please state the rate of speed Plaintiff was traveling at the time of the accident referred to in the Complaint.

16. Please state Plaintiff's destination at the time of the accident referred to in the Complaint.

17. Has Plaintiff ever previously suffered any type of injury either prior to or following the accident referred to in the Complaint.

18. Please provide the following regarding the Plaintiff, and any other passenger(s) in the vehicle at the time of the accident:

- (a) Date of Birth;
- (b) Social Security Number;
- (c) Driver's License Number;
- (d) State in which Driver's License is issued;
- (e) Any name used in the past by the Plaintiff and/or passenger(s) besides the name currently listed on the Driver's License (i.e., maiden name, prior name before a name change, etc.).

19. As to each expert witness listed in response to Interrogatory No. 5 above, please state:

- a. A complete statement of all opinions the witness will express and the basis and reasons for those opinions;
- b. The data and other information considered by the witness in forming said opinions;
- c. A description of any exhibits the witness or counsel intends to introduce to summarize or support these opinions (to be provided in response to Plaintiff's Requests for Production);
- d. The witness's qualifications, including a list of all publications authored in the previous ten years by said witness;
- e. A list of all other cases in which, during the previous five years, the witness testified as an expert at trial or by deposition; and
- f. A statement of the compensation to be paid for the study and testimony in the case.

20. For all photographs relating to this case which are in the possession of Plaintiff or Plaintiff's counsel, please provide:

- a. A brief description of the content of the photograph;
- b. The date the photograph was taken; and
- c. The name, address, and employer of the person who took the photograph.

21. Describe in detail what damage, if any, was done to your vehicle in the collision,

and give the cost of repair for your vehicle.

22. If Plaintiff is claiming lack of fault in this collision, or claims that another person or entity was at fault in addition to Plaintiff, please state the name and address of the persons or entities Plaintiff believes were at fault and please state the reasons why they were at fault. A full and complete response should:

- a. Identify all witnesses that support this contention;
- b. Identify all writings that support this contention;
- c. Identify all court cases upon which you base this contention; and
- d. Identify all statutes that you rely on to support this contention.

22. Set forth any information you have or any reason you have to believe that there was any defect or failure on the part of any vehicle or equipment involved in the collision.

23. Has Plaintiff or anyone on Plaintiff's behalf obtained any statement in any form from any potential witness or party in the case that concerns the events described in the Complaint? If so, please state from whom those statements were taken and who has possession of those statements.

24. Did Plaintiff and/or any representative of Plaintiff speak with any Defendant and/or any representative of any Defendant at any time after the subject collision? If so, please state the nature of the conversation and any remarks Plaintiff may have made.

25. Did Plaintiff, at the time of the subject collision, own and insure any vehicles other than the vehicle involved in the subject collision? If so, please set forth separately:

- a. Each vehicle and the insurance company and policy number thereon;
- b. The owner of the vehicle and any named insureds under that vehicle's policy; and
- c. The amounts of coverage provided

26. As to the vehicle involved in the subject collision, describe in detail:

- a. The make, model, and year;
- b. The license plate number;
- c. The mileage; and

- d. The date of the last inspection and/or service prior to the accident.
27. List every employer Plaintiff has worked for since the age of 18 and provide the following:
- a. Name of employer
 - b. Address of employer
 - c. Telephone number of employer
 - d. Dates worked for each employer
 - e. Job description of each employer
 - f. Salary/compensation received for each employer

These Interrogatories shall be deemed continuing so as to require supplemental answers if Plaintiff or Plaintiff's attorneys obtain further information between the time answers are served and the time of trial.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

/s/ Richard E. McLawhorn, Jr.

Mark S. Barrow, Esquire, SC Bar No.: 7821

Richard E. McLawhorn, Jr., Esquire, SC Bar No.: 100179

1515 Lady Street

Post Office Box 12129

Columbia, South Carolina 29211

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Fax: (803) 256-9177

msb@swblaw.com

rem@swblaw.com

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY, PURPORTED UM
CARRIER**

Columbia, South Carolina

January 2, 2020

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Liberty Mutual Insurance Company, do hereby certify that I have served a copy of the foregoing First Interrogatories to Howell Thompson in connection with the above-referenced case by mailing a copy of the same by United States Mail, postage prepaid, to the following address:

John D. Kassel, Esquire
Theile B. McVey
Jamie R. Rutkoski, Esquire
Kassel McVey, Attorneys at Law, LLC
1330 Laurel Street
P.O. Box 1476
Columbia, SC 29202
Attorneys for Plaintiffs



M. Esther Oliver

Columbia, South Carolina
January 2, 2020

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

HOWELL D. THOMPSON AND
TARA L. THOMPSON,

Plaintiffs,

vs.

C.A. No.: 2019-CP-43-02375

CARLOS D. TONEY,

Defendant.

VIDEOTAPED DEPOSITION OF JOHN HARPER SHARP

DATE TAKEN: Monday, January 3, 2022

TIME START: 1:06 p.m.

TIME END: 1:30 p.m.

LOCATION: Conducted via Videoconference

REPORTED BY: SHERI L. BYERS
Registered Professional Reporter
EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29202
803.212.0012

APPEARANCES VIA VIDEOCONFERENCE:

ATTORNEYS FOR THE PLAINTIFFS
HOWELL D. THOMPSON AND TARA L. THOMPSON:

KASSEL MCVEY, ATTORNEYS AT LAW
BY: JOHN D. KASSEL, ESQUIRE
1330 Laurel Street
Columbia, South Carolina 29201
803.256.4242
jkassel@kassellaw.com

ATTORNEYS FOR THE DEFENDANT
CARLOS D. TONEY:

BROWN & BREHMER
BY: JAMES FLOYD, ESQUIRE
1720 Main Street, Suite 201
Columbia, South Carolina 29201
803.771.6600
jdf@brownandbrehmer.com

ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY:

SWEENY, WINGATE & BARROW, P.A.
BY: AARON J. HAYES, ESQUIRE
1515 Lady Street
Columbia, South Carolina 29201
803.256.2233
ajh@swblaw.com

ALSO PRESENT:

ROA 322

MICHAEL ARRISON, VIDEOGRAPHER

3

I N D E X

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BY MR. HAYES	12, 18
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E X H I B I T S

(None were proffered.)

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No. 2019-CP-43-02375

Howell D. Thompson and Tara L.
Thompson,

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

ANSWERS TO INTERROGATORIES

TO: JOHN D. KASSEL, THEILE B. MCVEY AND JAMIE R. RUKOSKI, ATTORNEYS
FOR PLAINTIFFS:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier ("Defendant"), by and through the undersigned counsel, does hereby respond to the Interrogatories of the Plaintiff, as follows:

GENERAL OBJECTIONS

A. Defendant objects to these Interrogatories to the extent that they call for information, documents and/or materials that are subject to protection from disclosure by the attorney-client privilege, the work product doctrine, trade secrecy, or any other applicable privilege, law or rule.

B. Defendant's responses to these Interrogatories do not constitute admissions and/or acknowledgments that any such information, material and/or document responsive to such Request is relevant to any issue in the litigation between the parties.

C. Defendant objects to these Interrogatories to the extent they effectively exceed the scope of Rules 26 and 33 of the South Carolina Rules of Civil Procedure.

D. Defendant has made a reasonable and good faith effort to comply with the Interrogatory requests of the Plaintiff and has searched for the requested documentation in the places where the documentation was most likely to be found. In the event additional information is discovered that is responsive to these Interrogatories, Defendant will supplement these responses.

INTERROGATORIES:

1. Give the names and addresses of persons known to the defendant or counsel to be witnesses concerning the facts of the case and indicate whether or not written or recorded statements have been taken from the witnesses and, if so, indicate who has possession of such statements.

**ANSWER: Howell D. Thompson
144 Lakeside Road
Chapin, SC 29036**

**Tara L. Thompson
144 Lakeside Road
Chapin, SC 29036**

**Carlos D. Toney
373 Lower Lee School Road
Mayesville, SC 29104**

Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier is not in possession of any statements.

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Defendant or the Defendant's attorney that relates to the claim of this case.

ANSWER: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier is in possession of the following documents:

- **Police Report**

- **Horace Mann Dec Page**

3. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim, and set forth the numbers of the policies involved and the amount of liability coverage provided in each policy.

**ANSWER: Horace Mann Property and Casualty Insurance Company
PO Box 19463
Springfield, IL 62794-9463
Policy No: 39-78982440
UIM Limits: \$50,000.00/\$100,000.00**

4. List the name and address of each expert witness the Defendant expects to call as a witness at the trial of the case.

ANSWER: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier has not retained any expert witness at this time.

5. For each person known to the Defendant or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the Plaintiff of important facts known to or observed by such witness, or provide a copy of any written or recorded statements taken from such witnesses.

ANSWER: Howell D. Thompson is a named Plaintiff in this action and is expected to testify as to how the accident occurred and the injuries and damages he received as a result of the accident.

Tara L. Thompson is a named Plaintiff in this action and is expected to testify as to the injuries Howell D. Thompson received as a result of this accident as well as the damages she sustained.

Carlos D. Toney is the named Defendant in this action and is expected to testify as to how the accident occurred.

6. Identify each exhibit that you intend to introduce at trial.

ANSWER: This party has not yet made this determination and will have to supplement this interrogatory at a later date.

7. Identify all alcoholic beverages, prescription drugs or nonprescription drugs you consumed within 24 hours of the motor vehicle wreck.

ANSWER: The UIM carrier does not have this information in its possession.

8. State whether or not the Defendant received a traffic ticket or summons to traffic court as a result of this collision. If so, state the offense charged and the disposition thereof. Specifically state whether or not the Defendant plead guilty, forfeited bond, was convicted after a trial or acquitted after a trial.

ANSWER: The UIM carrier does not have this information in its possession.

9. Did the Defendant receive any medical treatment as a result of the wreck? If so, identify each provider and/or facility.

ANSWER: The UIM carrier does not have this information in its possession.

10. Please state the amount for repairs to the Defendant's vehicle.

ANSWER: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier does not have information regarding this request.

11. Provide the Defendant's cell phone number and the name of his cell phone carrier on (date of wreck).

ANSWER: The UIM carrier does not have this information in its possession.

12. Pursuant to S.C. Code Ann. 15-38-15 (D), please identify any person or entity, whether a party or not, whom you allege contributed to any injury or damages to the Plaintiff or Plaintiff's Decedent.

ANSWER: The UIM carrier does not have this information in its possession.

13. Pursuant to S.C. Code Ann. 15-38-15 (A), for any damages alleged by Plaintiff, please identify the apportionment of damages you believe to be attributable to any party to his action (for example, Defendant #1 is 20% responsible for damages, Defendant #2 is 80% responsible for damages and Plaintiff is 0% responsible for damages).

ANSWER: The UIM carrier does not have this information in its possession.

BROWN & BREHMER

By:



Karl S. Brehmer (SC Bar # 12849)

1720 Main Street, Suite 201

Post Office Box 7966

Columbia, South Carolina 29202

(803) 771-6600

ksb@brownandbrehmer.com

*Attorney for Horace Mann Property and
Casualty Insurance Company, the
underinsured motorist carrier*

March 5, 2020

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No. 2019-CP-43-02375

Howell D. Thompson and Tara L.
Thompson,

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

**RESPONSES TO REQUESTS FOR
PRODUCTION**

TO: JOHN D. KASSEL, THEILE B. MCVEY AND JAMIE R. RUKOSKI, ATTORNEYS
FOR PLAINTIFFS:

Pursuant to Rule 34 of the South Carolina Rules of Civil Procedure, Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier ("Defendant"), by and through the undersigned counsel, does hereby respond to the Requests for Production of the Plaintiff, as follows:

GENERAL OBJECTIONS

A. Defendant objects to these requests to the extent that they call for information and material that is protected from disclosure by the attorney/client privilege, the work product doctrine, trade secrecy, or any other applicable privilege law or rule.

B. Defendant's responses to these requests does not constitute an admission or acknowledgment that any such information is relevant to any issue in the litigation between the parties or that such document or documents referenced by any response is responsive to any request.

C. Defendant objects to these requests to the extent that they attempt, whether individually or collectively, to impose a burden on Defendant that exceeds the requirements of the South Carolina Rules of Civil Procedure.

D. Defendant has made a reasonable and good faith effort to comply with the production requests of the Plaintiff and has searched for the requested documentation in the places where the documentation was most likely to be found. In the event additional information is discovered that is responsive to these production requests, Defendant will supplement these responses.

REQUESTS FOR PRODUCTION:

1. Any and all photographs of the accident scene, the Plaintiff's vehicle or the Defendant's vehicle.

RESPONSE: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier is not in possession of any documents responsive to this request.

2. Any and all statements of possible witnesses, whether written, oral, summarized, or otherwise reproduced in any manner, relating to the accident as set forth in the Complaint.

RESPONSE: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier is not in possession of any documents responsive to this request.

3. Copy of all statements of the Plaintiffs or Defendant relating to this accident as set forth in the Complaint.

RESPONSE: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier is not in possession of any documents responsive to this request.

4. Copy of any and all documents that relate to a claim or defense in this case.

RESPONSE: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier is in possession of the documents listed in answer to Interrogatory 2 and said documents are attached hereto and produced herewith.

5. Copy of resume for each expert witness expected to be called by the Defendant at trial.

RESPONSE: N/A

6. Copy of all materials relied upon by each expert witness in forming his or her opinions.

RESPONSE: N/A

7. Copy of any written reports by each expert witness intended to be called by the Defendant at trial.

RESPONSE: N/A

8. Copy of all documents and photographs and video reflecting any accident reconstruction of the motor vehicle wreck.

RESPONSE: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier is not in possession of any documents responsive to this request.

9. Copy of each exhibit you intend to introduce at trial.

RESPONSE: This party has not yet made this determination and will have to supplement this interrogatory at a later date.

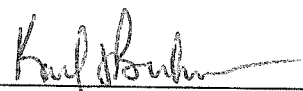
10. Copies of all material you subpoena in this case including all medical records.

RESPONSE: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier has not issued any subpoenas to date.

11. Copies of medical records of Defendant as a result of treatment caused by the wreck.

RESPONSE: Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier is not in possession of any documents responsive to this request.

BROWN & BREHMER

By: 
Karl S. Brehmer (SC Bar # 12849)
1720 Main Street, Suite 201
Post Office Box 7966
Columbia, South Carolina 29202
(803) 771-6600
ksb@brownandbrehmer.com
*Attorney for Horace Mann Property and
Casualty Insurance Company, the
underinsured motorist carrier*

March 5, 2020

ROA 332

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No. 2019-CP-43-02375

Howell D. Thompson and Tara L.
Thompson,

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

CERTIFICATE OF SERVICE

I, the undersigned employee of Brown and Brehmer, do hereby certify that I have caused the below referenced to be served via U.S. mail, postage prepaid, *or by other delivery as indicated*, to all parties of record at the address(es) shown below.

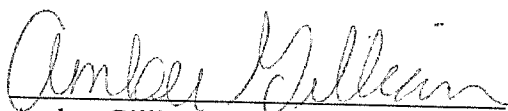
DOCUMENT(S) SERVED:

1. **Answers to Interrogatories and Responses to Requests for Production of Plaintiff**

PARTIES SERVED:

John D. Kassel
Theile B. McVey
Jamie R. Rutkoski
PO Box 1476
Columbia, SC 29202
Attorneys for Plaintiffs

Richard E. McLawhorn, Jr.
PO Box 12129
Columbia, SC 29211
Attorney for Liberty Mutual Insurance Company, the purported UM carrier


Amber Gilliam

March 5, 2020

ROA 333



SWEENY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Eye Center
Attn: Records Custodian
1655 Bernadin Ave
Columbia, SC 29201

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

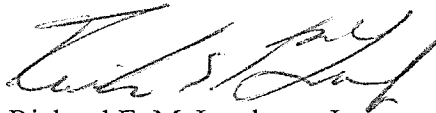
Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER

) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L. Thompson,

) Civil Action No.: 2019CP4302375

Plaintiff,

v.

AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS

Carlos D. Toney,

Defendant.

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Eye Center**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Eye Center** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
EYE CENTER

By: (print name)

(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF RICHLAND

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: Eye Center, 1655 Bernadin Ave, Columbia, SC 29201

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE

Sweeny, Wingate & Barrow, PA
Post Office Box 12129
Columbia, SC 29211

DATE AND TIME March 24, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature

March 10, 2020

Date

Richard E. McLawhorn, Jr.

Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211

(803) 256-2233

Clerk of Court/Issuing Officer's Signature

Date

Print Name

Pro Se Litigant's Name, Address and Telephone Number :

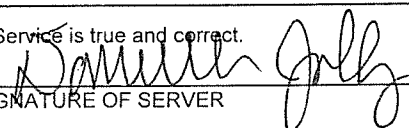
PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Eye Center, 1655 Bernadin Ave, Columbia, SC 29201		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/10/2020


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENEY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Lexington Brain & Spine
Attn: Records Custodian
222 E. Medical Lane, Suite 200
West Columbia, SC 29169

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

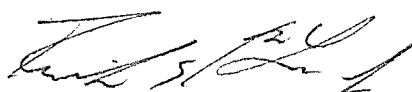
Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Lexington Brain & Spine**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Lexington Brain & Spine** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
LEXINGTON BRAIN & SPINE

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF LEXINGTON

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: Lexington Brain & Spine, 222 E. Medical Lane, Suite 200, West Columbia, SC 29169

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

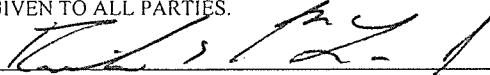
☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE Sweeny, Wingate & Barrow, PA Post Office Box 12129 Columbia, SC 29211	DATE AND TIME March 24, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

	March 10, 2020	Richard E. McLawhorn, Jr.
Attorney/Issuing Officer's Signature	Date	Print Name
Indicate if Attorney for Plaintiff or Defendant		
Attorney's Address and Telephone Number :		
1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211		
(803) 256-2233		

Clerk of Court/Issuing Officer's Signature	Date	Print Name
Pro Se Litigant's Name, Address and Telephone Number :		

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Lexington Brain & Spine, 222 E. Medical Lane, Suite 200, West Columbia, SC 29169		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/10/2020

SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: [REDACTED]
DOB: [REDACTED]

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Lexington County EMS
Attn: Records Custodian
407 Ball Park Road
Lexington, SC 29072

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

RECEIVED MAR 13 2020

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Lexington County EMS**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Lexington County EMS** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
LEXINGTON COUNTY EMS

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF LEXINGTON

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: **Lexington County EMS, 407 Ball Park Road, Lexington SC 29072**

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE

**Sweeny, Wingate & Barrow, PA
Post Office Box 12129
Columbia, SC 29211**

DATE AND TIME **March 24, 2020, 10:00 AM**

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211

(803) 256-2233

March 10, 2020

Date

Richard E. McLawhorn, Jr.

Print Name

Clerk of Court/Issuing Officer's Signature

Pro Se Litigant's Name, Address and Telephone Number :

Date

Print Name

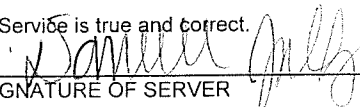
PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Lexington County EMS, 407 Ball Park Road, Lexington SC 29072		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/10/2020


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

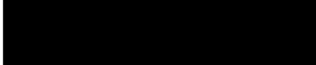
(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENEY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Lexington Family Practice
Attn: Records Custodian
1846 Dutch Fork Road
Irmo, SC 29063

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

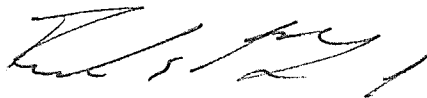
In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

RECEIVED MAR 13 2020

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Lexington Family Practice**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Lexington Family Practice** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
LEXINGTON FAMILY PRACTICE

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF LEXINGTON

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: Lexington Family Practice, 1846 Dutch Fork Road, Irmo, SC 29063

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

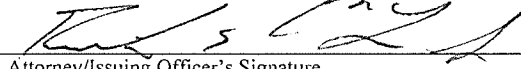
☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE Sweeny, Wingate & Barrow, PA Post Office Box 12129 Columbia, SC 29211	DATE AND TIME March 24, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

March 10, 2020
DateRichard E. McLawhorn, Jr.
Print Name

Attorney/Issuing Officer's Signature

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211

(803) 256-2233

Clerk of Court/Issuing Officer's Signature

Date

Print Name

Pro Se Litigant's Name, Address and Telephone Number :

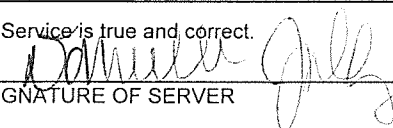
PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Lexington Family Practice, 1846 Dutch Fork Road, Irmo, SC 29063		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/10/2020


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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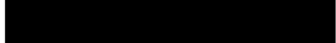
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SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENEY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Lexington Orthopaedics
Attn: Records Custodian
146 North Hospital Drive
West Columbia, SC 29169

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

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In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

RECEIVED MAR 13 2020

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Lexington Orthopaedics**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Lexington Orthopaedics** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
LEXINGTON ORTHOPAEDICS

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF LEXINGTON

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: Lexington Orthopaedics, 146 North Hospital Drive, West Columbia, SC 29169

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

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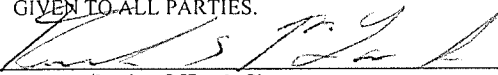
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I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

	March 10, 2020	Richard E. McLawhorn, Jr.
Attorney/Issuing Officer's Signature	Date	Print Name
Indicate if Attorney for Plaintiff or Defendant		
Attorney's Address and Telephone Number :		
1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211		
(803) 256-2233		

Clerk of Court/Issuing Officer's Signature	Date	Print Name
Pro Se Litigant's Name, Address and Telephone Number :		

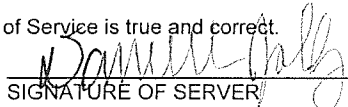
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	PLACE	
SERVED ON Lexington Orthopaedics, 146 North Hospital Drive, West Columbia, SC 29169		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/10/2020


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENEY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Lexington Radiology Associates
Attn: Records Custodian
2720 Sunset Blvd
West Columbia, SC 29169

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Lexington Radiology Associates**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Lexington Radiology Associates** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
LEXINGTON RADIOLOGY
ASSOCIATES

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF LEXINGTON

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: **Lexington Radiology Associates, 2720 Sunset Blvd, West Columbia, SC 29169**☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

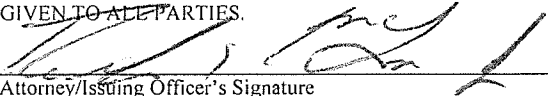
PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):**SEE ATTACHMENT**

PLACE Sweeny, Wingate & Barrow, PA Post Office Box 12129 Columbia, SC 29211	DATE AND TIME March 24, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

	March 10, 2020	Richard E. McLawhorn, Jr.
Attorney/Issuing Officer's Signature	Date	Print Name
Indicate if Attorney for Plaintiff or Defendant		
Attorney's Address and Telephone Number :		
1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211		
(803) 256-2233		

Clerk of Court/Issuing Officer's Signature	Date	Print Name
Pro Se Litigant's Name, Address and Telephone Number :		

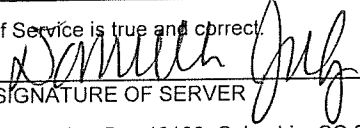
PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Lexington Radiology Associates, 2720 Sunset Blvd, West Columbia, SC 29169		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/10/2020


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

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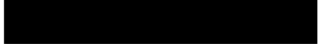
(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCF, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Lexington Medical Center
Attn: Records Custodian
2720 Sunset Blvd
West Columbia, SC 29169

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

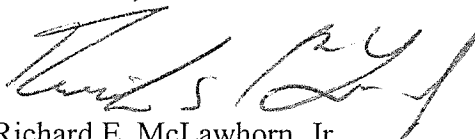
Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosure

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Lexington Medical Center**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Lexington Medical Center** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
LEXINGTON MEDICAL CENTER

By: (print name)

(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF LEXINGTON

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: Lexington Medical Center, 2720 Sunset Blvd, West Columbia, SC 29169

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE

Sweeny, Wingate & Barrow, PA
Post Office Box 12129
Columbia, SC 29211

DATE AND TIME March 24, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES

Attorney/Issuing Officer's Signature

March 19, 2020
Date

Richard E. McLawhorn, Jr.
Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211

(803) 256-2233

Clerk of Court/Issuing Officer's Signature

Date

Print Name

Pro Se Litigant's Name, Address and Telephone Number :

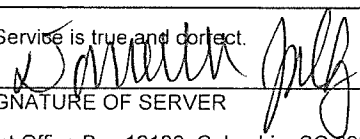
PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Lexington Medical Center, 2720 Sunset Blvd, West Columbia, SC 29169		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/11/2020


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

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(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

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(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

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(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENEY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Midlands Orthopaedics
Attn: Records Custodian
1910 Blanding Street
Columbia, SC 29201

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees:** \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

RECEIVED MAR 13 2020

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosure

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Midlands Orthopaedics**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Midlands Orthopaedics** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
MIDLANDS ORTHOPAEDICS

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF RICHLAND

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: **Midlands Orthopaedics, 1910 Blanding Street, Columbia, SC 29201**☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

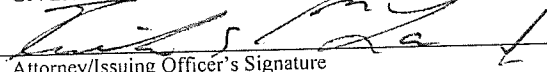
PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):**SEE ATTACHMENT**

PLACE Sweeny, Wingate & Barrow, PA Post Office Box 12129 Columbia, SC 29211	DATE AND TIME March 24, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.


 Attorney/Issuing Officer's Signature
 Indicate if Attorney for Plaintiff or Defendant
 Attorney's Address and Telephone Number :
 1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211
 (803) 256-2233

March 10, 2020
DateRichard E. McLawhorn, Jr.
Print Name

Clerk of Court/Issuing Officer's Signature
 Pro Se Litigant's Name, Address and Telephone Number :

Date

Print Name

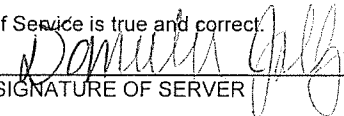
PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Lexington Medical Center, 2720 Sunset Blvd, West Columbia, SC 29169		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/16/2020


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

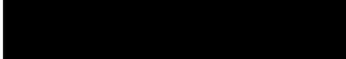
(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Pain Specialists of Charleston
Attn: Records Custodian
2695 Elms Plantation Blvd
Charleston, SC 29406

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

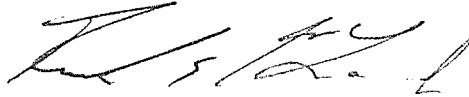
In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

ELECTRONICALLY FILED - 2022 Sep 07 5:29 PM - SUMTER - COMMON PLEAS - CASE#2019CP4302375

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Pain Specialists of Charleston**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Pain Specialists of Charleston** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
PAIN SPECIALISTS OF
CHARLESTON

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF CHARLESTON

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: **Pain Specialists of Charleston, 2695 Elms Plantation Blvd, Charleston, SC 29406**

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

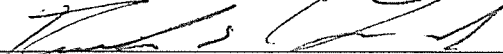
☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE Sweeny, Wingate & Barrow, PA Post Office Box 12129 Columbia, SC 29211	DATE AND TIME March 10, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.



March 10, 2020

Richard E. McLawhorn, Jr.

Attorney/Issuing Officer's Signature

Date

Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211

(803) 256-2233

Clerk of Court/Issuing Officer's Signature

Date

Print Name

Pro Se Litigant's Name, Address and Telephone Number :

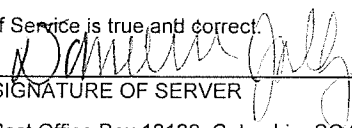
PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Pain Specialists of Charleston, 2695 Elms Plantation Blvd, Charleston, SC 29406		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/10/2020


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privilege and otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENEY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Palmetto Health Orthopaedics
Attn: Records Custodian
101 Business Park Blvd, Floor 2
Columbia, SC 29203

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

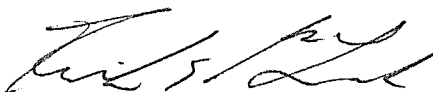
In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

RECEIVED MAR 13 2020

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Palmetto Health Orthopaedics**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Palmetto Health Orthopaedics** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
PALMETO HEALTH
ORTHOPAEDICS

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF RICHLAND

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: **Palmetto Health Orthopedics, 101 Business Park Blvd, Floor 2, Columbia, SC 29203**☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

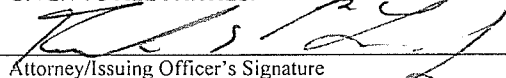
☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE Sweeny, Wingate & Barrow, PA Post Office Box 12129 Columbia, SC 29211	DATE AND TIME March 24, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.


March 14, 2020
DateRichard E. McLawhorn, Jr.
Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211

(803) 256-2233

Clerk of Court/Issuing Officer's Signature

Date

Print Name

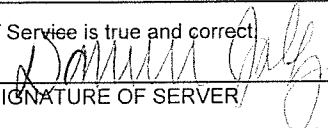
Pro Se Litigant's Name, Address and Telephone Number :

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Palmetto Health Orthopedics, 101 Business Park Blvd, Floor 2, Columbia, SC 29203		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/10/2020SIGNATURE OF SERVER Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

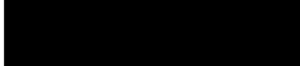
(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENEY WINGATE & BARROW P.A.

March 10, 2020

Reply to: Main Office

Richard E. McLawhorn, Jr.
(803) 256-2233 x7183
rem@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Palmetto Imaging
Attn: Records Custodian
1331 Lady Street
Columbia, SC 29201

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

Enclosed please find a Subpoena Duces Tecum in the above-referenced matter, which I hereby serve upon you. As you will note, the Subpoena is requesting **any and all medical records and radiology films in your possession** for your treatment of **Howell D. Thompson** including **all bills for services rendered**. If you will comply with this request for records by the date and time indicated on the subpoena, there may be no need for anyone to appear at my office for a deposition.

As you are aware, under South Carolina Rule of Civil Procedure 45, a Subpoena must be responded to appropriately or a Motion to Quash must be filed.

Please take notice that this communication and subpoena do comply with **the Health Insurance Portability and Accountability Act of 1996 (HIPAA)**, as it contains the satisfactory assurance that reasonable efforts are being made to give the patient notice of the request for their health information. As you will see at the bottom of this letter, a copy of the letter and subpoena have been provided to the attorney for the patient; therefore, the patient has clear notice of this request.

In addition, please note that under S.C. CODE ANN. § 44-115-80 **a physician may charge only the following fees**: \$25.00 for records search, \$.65 cents per copy for pages 1-30, \$.50 per copy for pages beyond 30, actual postage costs, and any applicable sales tax. Please advise of the cost for the copies, and we will then forward a check for the amount due. Also, **PLEASE CONTACT OUR OFFICE SHOULD THE COSTS OF MEDICAL RECORDS EXCEED \$200.**

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.



Richard E. McLawhorn, Jr.

REM/dfj

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Palmetto Imaging**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Palmetto Imaging** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
PALMETTO IMAGING

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF RICHLAND

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: Palmetto Imaging, 1331 Lady Street, Columbia, SC 29201

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

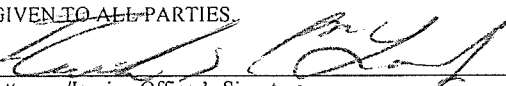
☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE Sweeny, Wingate & Barrow, PA Post Office Box 12129 Columbia, SC 29211	DATE AND TIME March 24, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

	March 10, 2020	Richard E. McLawhorn, Jr.
Attorney/Issuing Officer's Signature	Date	Print Name
Indicate if Attorney for Plaintiff or Defendant		
Attorney's Address and Telephone Number :		
1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211		
(803) 256-2233		

Clerk of Court/Issuing Officer's Signature	Date	Print Name
Pro Se Litigant's Name, Address and Telephone Number :		

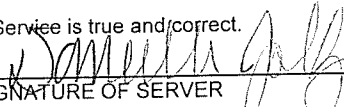
PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Palmetto Imaging, 1331 Lady Street, Columbia, SC 29201		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 3/10/2020


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

**REQUEST FOR MEDICAL RECORDS, RADIOLOGY FILMS AND BILLING RECORDS
FOR SERVICES RENDERED**

Any and all medical records, radiology films, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**
SSN: 
DOB: 

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.



SWEENEY WINGATE & BARROW P.A.

May 24, 2021

Reply to: Main Office

Aaron J. Hayes
(803) 256-2233 x7129
ajh@swblaw.com

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Prisma Health Plastic Surgery
Attn: Records Custodian
2 Medical Park Rd #302
Columbia, SC 29203

RE: Howell & Tara Thompson v. Carlos Toney (UM Client: F&ME Consultants)
Civil Action No.: 2019CP4302375
Our File: 5590-12532

To Whom It May Concern:

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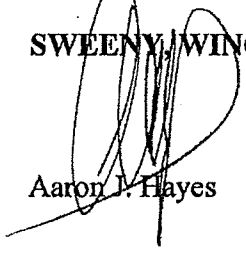
RECEIVED MAY 26 2021

ROA 411

Should you have any questions concerning this matter, or if there are any problems regarding this request, please do not hesitate to give me a call.

Yours truly,

SWEENEY, WINGATE & BARROW, P.A.


Aaron J. Hayes

AJH/jln

Enclosures

cc: Theile B. McVey, Kassel McVey, Attorneys at Law, LLC
Jamie R. Rutkoski, Esquire, Kassel McVey, Attorneys at Law, LLC
John D. Kassel, Esquire, Kassel McVey, Attorneys at Law, LLC
Karl S. Brehmer, Esquire, Brown & Brehmer Law Firm

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF LEXINGTON

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: Prisma Health Plastic Surgery, Attn: Records Custodian, 2 Medical Park Rd #302, Columbia, SC 29203

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE

Sweeny, Wingate & Barrow, PA
Post Office Box 12129
Columbia, SC 29211

DATE AND TIME June 7, 2021, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature

Indicate if Attorney for Defendant

Attorney's Address and Telephone Number :

1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211

(803) 256-2233

May 24, 2021

Date

Aaron J. Hayes

Print Name

Clerk of Court/Issuing Officer's Signature

Pro Se Litigant's Name, Address and Telephone Number :

Date

Print Name

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Prisma Health Plastic Surgery, Attn: Records Custodian, 2 Medical Park Rd #302, Columbia, SC 29203		MANNER OF SERVICE Certified Mail
SERVED BY Jennifer L. Newbanks		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.
 Executed on May 24, 2021

SIGNATURE OF SERVER

Post Office Box 12128, Columbia, SC 29211
 ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

SUBPOENA DUCES TECUM ATTACHMENT

REQUEST FOR MEDICAL RECORDS AND BILLING RECORDS

Any and all medical records, reports, documents, inter-department notes or records, including but not limited to, any and all psychiatric records, EMS report and/or records, statements for services, test results, x-ray results, progress notes, consultation notes, office notes, nurses' notes, health care questionnaires, correspondence, bills for services rendered, evaluations, interviews, charts, diagrams, treatment plans, medical flow charts, telephone call reports, medical logs, disability determination information, and any other written or printed information in your medical file concerning treatment of:

Name: **Howell D. Thompson**

SSN:

DOB:

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Howell D. Thompson**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Prisma Health Plastic Surgery** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
PRISMA HEALTH PLASTIC
SURGERY

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2021.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF RICHLAND

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: Verizon, Attn: VSAT, 180 Washington Valley Road, Bedminster, NJ 07921

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION

DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

Any and all records stored in any medium pertaining to incoming calls, outgoing calls, monthly statements, subscriber information, text message data, phone internet usage data and historic cell site data for cell phone usage for phone number (803) 518-6113, for the time period of June 6, 2017 through June 7, 2017 only.

PLACE

Sweeny, Wingate & Barrow, PA
Post Office Box 12129
Columbia, SC 29211

DATE AND TIME June 29, 2020, 10:00 AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature

Date

Richard E. McLawhorn, Jr.

Print Name

Indicate if Attorney for Plaintiff or Defendant

Attorney's Address and Telephone Number :

1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211

(803) 256-2233

Clerk of Court/Issuing Officer's Signature

Date

Print Name

Pro Se Litigant's Name, Address and Telephone Number :

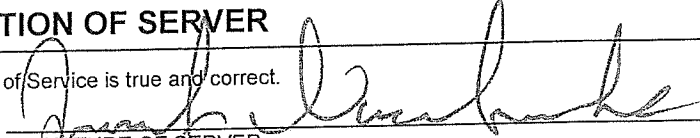
PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Verizon, Attn: VSAT, 180 Washington Valley Road, Bedminster, NJ 07921		MANNER OF SERVICE Certified Mail
SERVED BY Danielle Jolly		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 6/15/20


SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211
ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued, or regarding a subpoena commanding appearance at a deposition, or production or inspection directed to a non-party, the court in the county where the non-party resides, is employed or regularly transacts business in person, shall quash or modify the subpoena if it:

(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

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(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.) Civil Action No.: 2019CP4302375
Thompson,)

Plaintiff,)

v.)

Carlos D. Toney,)

Defendant.)

**AFFIDAVIT OF AUTHENTICITY AND
ACCURACY OF RECORDS**

I HEREBY CERTIFY that the records attached hereto are true, correct, accurate and authentic copies of the records of **Verizon**. This affidavit is made by the undersigned, who has knowledge of the matter with regards to these records. These records were made at or near the time of each occurrence of the matters set forth therein or were made at or near the time of each occurrence of the matters set forth therein by persons with knowledge of those matters. These records have been kept in the course of the regularly conducted business of **Verizon** and these records were made by its regularly conducted activity as a regular practice.

RECORDS CUSTODIAN FOR
VERIZON

By: (print name)
(title)

(signature)

Sworn to and subscribed before me
this _____ day of _____, 2020.

Notary Public for the State of _____
My Commission Expires: _____

STATE OF SOUTH CAROLINA

ISSUED BY THE CIRCUIT COURT IN THE COUNTY OF SUMTER

HOWELL D. THOMPSON AND TARA L.
THOMPSON, Plaintiff

v.

SUBPOENA IN A CIVIL CASE

CARLOS D. TONEY, Defendant

Case Number: 2019CP4302375

Pending in SUMTER County

TO: Lindsay W. Moore, MSPAS, PA-C, CLCP, Moore Medical Consulting, LLC, 1150 Hungryneck Blvd. Ste, C-378, Mt. Pleasant, SC 29464

☐ YOU ARE COMMANDED to appear in the above named court at the place, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME , AM

☐ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME , AM

☒ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects in your possession, custody or control at the place, date and time specified below (list documents or objects):

SEE ATTACHMENT

PLACE Post Office Box 12129 Columbia, SC 29211	DATE AND TIME September 1, 2021, 5:00 PM

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME , AM

ANY SUBPOENAED ORGANIZATION NOT A PARTY TO THIS IS HEREBY DIRECTED TO RULE 30(b)(6), SOUTH CAROLINA RULES OF CIVIL PROCEDURE, TO FILE A DESIGNATION WITH THE COURT SPECIFYING ONE OR MORE OFFICERS, DIRECTORS, OR MANAGING AGENTS, OR OTHER PERSONS WHO CONSENT TO TESTIFY ON ITS BEHALF, SHALL SET FORTH, FOR EACH PERSON DESIGNATED, THE MATTERS ON WHICH HE WILL TESTIFY OR PRODUCE DOCUMENTS OR THINGS. THE PERSON SO DESIGNATED TESTIFY AS TO MATTERS KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION

I CERTIFY THAT THE SUBPOENA IS ISSUED IN COMPLIANCE WITH RULE 45(c)(1), AND THAT NOTICE AS REQUIRED BY RULE 45(b)(1) HAS BEEN GIVEN TO ALL PARTIES.

Attorney/Issuing Officer's Signature Indicate if Attorney for Plaintiff or Defendant Attorney's Address and Telephone Number : 1515 Lady Street (29201), Post Office Box 12129, Columbia, SC 29211 (803) 256-2233	August 18, 2021 Date 23	Aaron J. Hayes Print Name

Clerk of Court/Issuing Officer's Signature Pro Se Litigant's Name, Address and Telephone Number :	Date	Print Name

PROOF OF SERVICE

SERVED	DATE	FEES AND MILEAGE TO BE TENDERED TO WITNESS UPON DAILY ARRIVAL ☐ YES ☐ NO AMOUNT \$
	PLACE	
SERVED ON Lindsay W. Moore, MSPAS, PA-C, CLCP, Moore Medical Consulting, LLC, 1150 Hungryneck Blvd. Ste, C-378, Mt. Pleasant, SC 29464		MANNER OF SERVICE Certified Mail
SERVED BY Jennifer L. Graham		TITLE Paralegal

DECLARATION OF SERVER

I certify that the foregoing information contained in the Proof of Service is true and correct.

Executed on 8/18/2021

SIGNATURE OF SERVER

Post Office Box 12129, Columbia, SC 29211

ADDRESS OF SERVER

Rule 45, South Carolina Rules of Civil Procedures, Parts (c) and (d):

(c) Protection of Persons Subject to Subpoenas.

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(2)(A) A person commanded to produce and permit inspection and copying of designated electronically stored information, books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial. A party or an attorney responsible for the issuance and service of a subpoena for production of books, papers and documents without a deposition shall provide to another party copies of documents so produced upon written request. The party requesting copies shall pay the reasonable costs of reproduction.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time in the court that issued the subpoena for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

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(i) fails to allow reasonable time for compliance; or

(ii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to travel more than 50 miles from the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held; or

(iii) requires disclosure of privileged or otherwise protected matter and no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) If a subpoena:

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party nor an officer, director or managing agent of a party, nor a general partner of a partnership that is a party, to incur substantial expense to travel from the county where that person resides, is employed or regularly transacts business in person, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1)(A) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

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(D) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(6)(B). The court may specify conditions for the discovery.

(2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, the receiving party must take reasonable steps to retrieve the information. The person who produced the information must preserve the information until the claim is resolved.

ATTACHMENT TO SUBPOENA DUCES TECUM

All documents which you have reviewed related to your retention as an expert witness in this litigation;

All written or documentary information upon which you rely in the formation of any opinions you have formulated with regard to this litigation;

All written or documentary information received from any attorney which relates to this litigation;

All written or documentary information sent to anyone by you which relates to this litigation;

All resource materials which you rely upon in the formation of any of your opinions in this litigation;

All notes taken by you which relate to this litigation;

Itemization of any documents reviewed by you in consideration of this litigation, and which are no longer in your possession;

All reports, and drafts of reports, which you have prepared or which you directed to be prepared related to this litigation;

Any and all photographs, plats, sketches, charts, diagrams, or other prepared documents which have been prepared by you, or reviewed by you in considering this litigation;

Any and all books, chapters of books, segments of books, magazine articles, seminar materials or other written information which has either been published, or offered for publication by you.

Any and all office notes, inter-department notes, correspondence, bills for services rendered, evaluations, interviews, telephone call reports, and any and all other written or printed information in your file concerning this litigation

With regard to all of the foregoing, you are additionally requested to bring any of the information sought above, which was not actually prepared by you, but which was prepared or created either at your direction, or under your control and supervision.

Pursuant to Rule 45, SCRCP, you are not required to appear for a deposition, you are only required to produce the documents on or before the date shown on the Subpoena.

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT

Howell D. Thompson and) Civil Action No.: 2019CP4302375
Tara L. Thompson,)
) **Plaintiffs,**)
) **LIBERTY MUTUAL INSURANCE**
) **COMPANY'S RESPONSES TO**
v.) **PLAINTIFFS' REQUEST TO ADMIT**
) **Carlos D. Toney,**)
) **Defendant.**)

TO: JOHN D. KASSEL, ESQUIRE, THEILE B. MCVEY, ESQUIRE, JAMIE R. RUTKOSKI, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS AND TO THE PLAINTIFFS ABOVE-NAMED:

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, the following constitute Liberty Mutual Insurance Company's response to Plaintiffs' Request for Admissions:

1. Admit or deny that Mr. Carlos Toney testified in his deposition taken on May 15, 2020 that he was sitting at the light in the left hand turning lane with a vehicle in front of him moments before the wreck.

RESPONSE: Admits so much of this Request as coincides with the testimony provided on Page 27 of the Deposition Transcript of Carlos D. Toney. Any remaining portions of this Request are denied.

2. Admit or deny that Mr. Carlos Toney testified in his deposition taken on May 15, 2020 that the vehicle in front of him in the left hand turning lane was a pickup truck.

RESPONSE: Admits so much of this Request as coincides with the testimony provided on Page 27 of the Deposition Transcript of Carlos D. Toney. Any remaining portions of this Request are denied.

3. Admit or deny that Mr. Carlos Toney's vehicle was the only vehicle present in the left hand turning lane of 12th Street Extension when he began his left turn maneuver.

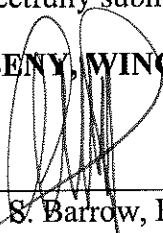
RESPONSE: After a reasonable inquiry, Liberty Mutual does not have sufficient information to form a belief as to this Request to Admit, and therefore denies same. Liberty Mutual reserves the right to amend this response as discovery progresses.

4. Admit or deny that Mr. Carlos Toney's vehicle and a pickup truck were the only vehicle's present in the left hand turning lane of 12th Street Extension when Mr. Toney began his left turn maneuver.

RESPONSE: After a reasonable inquiry, Liberty Mutual does not have sufficient information to form a belief as to this Request to Admit, and therefore denies same. Liberty Mutual reserves the right to amend this response as discovery progresses.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow, Esquire
Richard E. McLawhorn, Jr., Esquire
Aaron J. Hayes, Esquire
Post Office Box 12129
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msb@swblaw.com, rem@swblaw.com
ajh@swblaw.com

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY, PURPORTED UM
CARRIER**

Columbia, South Carolina

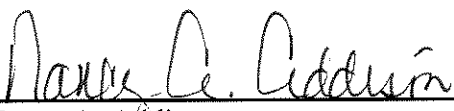
October 6, 2020

CERTIFICATE OF SERVICE

I, the undersigned legal assistant of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Liberty Mutual Insurance Company, do hereby certify that I have served a copy of the foregoing Answers to Plaintiffs' Request to Admit in connection with the above-referenced case by electronic mail only, to the following address:

John D. Kassel, Esquire
Theile B. McVey, Esquire
Jamie R. Rutkoski, Esquire
Kassel McVey, Attorneys at Law, LLC
Post Office Box 1476
Columbia, SC 29202

(Attorneys for the Plaintiffs)



Nancy A. Addison

Columbia, South Carolina

October 6, 2020

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Howell D. Thompson and Tara L.
Thompson,

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

IN THE COURT OF COMMON PLEAS

THIRD JUDICIAL CIRCUIT

Case No. 2019-CP-43-02375

**HORACE MANN PROPERTY AND
CASUALTY INSURANCE COMPANY'S
ANSWERS TO PLAINTIFFS'
REQUEST TO ADMIT**

**TO: JOHN D. KASSEL, THEILE B. MCVEY AND JAMIE R. RUKOSKI, ATTORNEYS
FOR PLAINTIFFS:**

Pursuant to Rule 36 of the South Carolina Rules of Civil Procedure, Horace Mann Property and Casualty Insurance Company, the underinsured motorist carrier ("Horace Mann"), by and through the undersigned counsel, does hereby respond to Plaintiffs' Requests to Admit as follows:

REQUESTS TO ADMIT

1. Admit or deny that Mr. Carlos Toney testified in his deposition taken on May 15, 2020 that he was sitting at the light in the left hand turning lane with a vehicle in front of him moments before the wreck.

ANSWER: Admitted to the extent that this Request comports with Defendant's testimony. Horace Mann craves reference to the Deposition Transcript of Carlos D. Toney and hereby denies this Request to the extent that any portion thereof conflicts with the testimony therein.

2. Admit or deny that Mr. Carlos Toney testified in his deposition taken on May 15, 2020 that the vehicle in front of him in the left hand turning lane was a pickup truck.

ANSWER: Admitted to the extent that this Request comports with Defendant's testimony. Horace Mann craves reference to the Deposition Transcript of Carlos D. Toney and hereby denies this Request to the extent that any portion thereof conflicts with the testimony therein.

3. Admit or deny that Mr. Carlos Toney's vehicle was the only vehicle present in the left hand turning lane of 12th Street Extension when he began his left turn maneuver.

ANSWER: Horace Mann craves reference to the Deposition Transcript of Carlos D. Toney which does not provide sufficient information for Horace Mann to form a belief as to this Request. As a result, Horace Mann hereby denies this Request and reserves the right to amend its answer if additional information relevant to this Request is obtained.

4. Admit or deny that Mr. Carlos Toney's vehicle and a pickup truck were the only vehicle's present in the left hand turning lane of 12th Street Extension when Mr. Toney began his left turn maneuver.

ANSWER: Horace Mann craves reference to the Deposition Transcript of Carlos D. Toney which does not provide sufficient information for Horace Mann to form a belief as to this Request. As a result, Horace Mann hereby denies this Request and reserves the right to amend its answer if additional information relevant to this Request is obtained.

BROWN & BREHMER

By: s/James D. Floyd
Karl S. Brehmer (SC Bar # 12849)
James D. Floyd (SC Bar # 101035)
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*Attorneys for Horace Mann Property and
Casualty Insurance Company, the
underinsured motorist carrier*

October 14, 2020

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS
THIRD JUDICIAL CIRCUIT
Case No. 2019-CP-43-02375

Howell D. Thompson and Tara L.
Thompson,

Plaintiffs,

vs.

Carlos D. Toney,

Defendant.

CERTIFICATE OF SERVICE

I, the undersigned employee of Brown and Brehmer, do hereby certify that I have caused the below referenced to be served via e-mail, to all parties of record at the e-mail address(es) shown below.

DOCUMENT(S) SERVED:

1. **Horace Mann Property and Casualty Insurance Company's Answers to Plaintiffs' Request to Admit**

PARTIES SERVED:

John D. Kassel, Esq.
jkassel@kassellaw.com
Theile McVey, Esq.
tmcvey@kassellaw.com
Jamie R. Rutkoski, Esq.
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Attorneys for Plaintiffs

Richard E. McLawhorn, Jr., Esq.
rem@swblaw.com
Aaron J. Hayes, Esq.
AJH@swblaw.com

*Attorneys for Liberty Mutual Insurance
Company, the purported UM carrier*

s/James D. Floyd
James D. Floyd

October 14, 2020

ROA 432

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	THE THIRD JUDICIAL CIRCUIT
	)	
Howell D. Thompson and Tara L. Thompson	)	Civil Action No.: 2019CP4302375
	)	
	)	
Plaintiff,	)	
	)	
v.	)	LIBERTY MUTUAL INSURANCE
	)	COMPANY'S SUPPLEMENTAL
Carlos D. Toney	)	ANSWERS TO PLAINTIFFS'
	)	INTERROGATORIES
	)	
Defendant.	)	

TO: JOHN D. KASSEL, ESQUIRE, THEILE B. MCVEY, ESQUIRE, AND JAMIE R. RUTKOSKI, ESQUIRE, ATTORNEYS FOR THE PLAINTIFFS AND TO THE PLAINTIFFS ABOVE-NAMED:

Pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, the following constitute the Liberty Mutual Insurance Company's Answers to Interrogatories propounded by the Plaintiff.

These Answers are continuing in nature and additional information will be supplied as obtained.

SUPPLEMENTAL ANSWERS

2. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the Defendant or the Defendant's attorney that relates to this claim in this case.

SUPPLEMENTAL ANSWER:

- Marshall Investigative Internet Presence Review Report, Howell Thompson (48 pages) (to be produced from the undersigned, via flash drive(s) and/or secure document sharing link);

- Marshall Investigative Internet Presence Review Report, Tara Thompson (102 pages) (to be produced from the undersigned, via flash drive(s) and/or secure document sharing link); and
 - Social Media Underlying Data Capture, performed by Marshall Investigative (to be produced from the undersigned via flash drive(s) and or secure document sharing link). Includes, but not limited to:
 - Videos
 - Photos
 - Text posts
5. Identify each exhibit that you intend to introduce at trial.

SUPPLEMENTAL ANSWER:

- From Social Media Underlying Data Capture:
 - Facebook videos “54123” and “76439,” depicting Plaintiffs on a jetski on/about June 15, 2019;
 - Facebook videos “20929,” “87621,” and “54210,” depicting Plaintiff H. Thompson on a rope swing on/about September 8, 2019;
 - Facebook video “46349,” depicting Plaintiff H. Thompson contacting ground with body while hiking on/about March 2, 2019;
 - Facebook video “79935,” depicting Plaintiff H. Thompson ice skating on about March 22, 2019;
 - Facebook photos, depicting Plaintiffs on a large watercraft on/about July 20, 2018;
 - Facebook photo, depicting Plaintiff H. Thompson snorkeling on/about July 20, 2018; and
 - Facebook photo, depicting Plaintiff H. Thompson on a tube behind a boat on/about June 17, 2018.

***For reference, videos are referred to by the last 5 digits of the unique numerical portion of the file extension name for each video, so for example video “54123” would be located in this manner:**

rschall Social Media Report > Social Media Capture posts photos videos > Tara Thompson IPA > Match 1 - Tara Thompson Facebook > Videos > Individual Videos > Videos			
Name	Type	Compressed size	Password ...
 https-www.facebook.com-tara.thompson.31542-videos-2388056987924665-Oct-27-21-05-10-38-GMT-0500-(CDT)_0	MP4 Video	433 KB	No
 https-www.facebook.com-tara.thompson.31542-videos-2388057087924655-Oct-27-21-05-12-28-GMT-0500-(CDT)_0	MP4 Video	1,001 KB	No
 https-www.facebook.com-tara.thompson.31542-videos-2388057624591268-Oct-27-21-05-14-23-GMT-0500-(CDT)_0	MP4 Video	1,748 KB	No
 https-www.facebook.com-tara.thompson.31542-videos-2389095741154123-Oct-27-21-05-09-12-GMT-0500-(CDT)_0	MP4 Video	7,199 KB	No
 https-www.facebook.com-tara.thompson.31542-videos-2389205011143196-Oct-27-21-05-03-38-GMT-0500-(CDT)_0	MP4 Video	1,714 KB	No
 https-www.facebook.com-tara.thompson.31542-videos-2389205124476518-Oct-27-21-05-07-35-GMT-0500-(CDT)_0	MP4 Video	710 KB	No
 https-www.facebook.com-tara.thompson.31542-videos-2389205417809822-Oct-27-21-05-06-54-GMT-0500-(CDT)_0	MP4 Video	543 KB	No

LMU reserves the right to supplement this response as review of Social Media Underlying Data Capture is ongoing.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.

s/ Aaron J. Hayes

Mark S. Barrow

Richard E. McLawhorn, Jr.

Aaron J. Hayes

1515 Lady Street

Post Office Box 12129

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(803) 256-2233

**ATTORNEYS FOR LIBERTY MUTUAL
INSURANCE COMPANY, PURPORTED UIM
CARRIER**

Columbia, South Carolina

November 18, 2021

CERTIFICATE OF SERVICE

I, the undersigned attorney of the law offices of Sweeny, Wingate & Barrow, P.A., attorneys for Liberty Mutual Insurance Company, do hereby certify that I have served a copy of the foregoing Supplemental Answers to Plaintiffs' Interrogatories in connection with the above-referenced case by mailing a copy of the same by **ELECTRONIC MAIL ONLY**, to the following address:

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Jamie R. Rutkoski, Esquire
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James D. Floyd, Esquire
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Attorneys for Horace Mann Property & Casualty Ins. Co.
ksb@brownandbrehmer.com
jdf@brownandbrehmer.com

s/ Aaron J. Hayes
Aaron J. Hayes

Columbia, South Carolina

November 18, 2021



1226 Pickens Street
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info@garberreporting.com
Telephone: (803) 256-4500 | Fax (803) 256-1999

HOWELL D. THOMPSON

May 05, 2020

Howell D. Thompson and Tara L. Thompson

VS

Carlos D. Toney

2019-CP-43-02375

REPORTER: Patricia Bachand

ROA 437

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF SUMTER) C/A NO.: 2019-CP-43-02375

3
4 Howell D. Thompson and)
5 Tara L. Thompson,)
6 Plaintiffs,) VIDEO CONFERENCE DEPOSITION
7 vs.) OF
8 Carlos D. Toney,) HOWELL D. THOMPSON
9 Defendant.)

10 _____)
11
12 Video conference deposition on oral examination of
13 HOWELL D. THOMPSON, reported by Patricia G. Bachand, Court
14 Reporter and Notary Public in and for the State of South
15 Carolina; pursuant to Rule 30 of the South Carolina Rules
16 of Civil Procedure; said video conference deposition was
17 taken on Tuesday, the 5th day of May 2020, scheduled for
18 ten o'clock a.m. and commencing at the hour of 10:10 a.m.

APPEARANCES:

REPRESENTING THE PLAINTIFFS (VIA VIDEO CONFERENCE):

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1330 Laurel Street

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(jkassel@kassellaw.com)

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(rem@swblaw.com)

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Columbia, South Carolina 29202



1226 Pickens Street
Columbia, South Carolina 29201
info@garberreporting.com
Telephone: (803) 256-4500 | Fax (803) 256-1999

TARA L. THOMPSON

May 05, 2020

Howell D. Thompson and Tara L. Thompson

VS

Carlos D. Toney

2019-CP-43-02375

REPORTER: Patricia Bachand

ROA 440

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF SUMTER) C/A NO.: 2019-CP-43-02375

3
4 Howell D. Thompson and)
5 Tara L. Thompson,)
6 Plaintiffs,) VIDEO CONFERENCE DEPOSITION
7 vs.) OF
8 Carlos D. Toney,) TARA L. THOMPSON
9 Defendant.)

10 _____)
11
12 Video conference deposition on oral examination of
13 TARA L. THOMPSON, reported by Patricia G. Bachand, Court
14 Reporter and Notary Public in and for the State of South
15 Carolina; pursuant to Rule 30 of the South Carolina Rules
16 of Civil Procedure; said video conference deposition was
17 taken on Tuesday, the 5th day of May 2020, scheduled for
18 one o'clock p.m. and commencing at the hour of 11:28 a.m.

APPEARANCES:

REPRESENTING THE PLAINTIFFS (VIA VIDEO CONFERENCE):

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REPRESENTING THE UIM CARRIER (VIA VIDEO CONFERENCE):

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0001

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
 2 COUNTY OF SUMTER) CASE NO.: 2017-CP-43-02375
 3
 4 Howell D. Thompson and)
 5 Tara L. Thompson,)
 6 Plaintiffs,) DEPOSITION OF
 7 vs.) OFFICER BRYAN SCHUMPERT
 8 Carlos D. Toney,) AUGUST 7, 2020
 9 Defendant.)
 10 _____)
 11)

12 Video conference deposition on oral examination of
 13 OFFICER BRYAN SCHUMPERT, reported by Donna M. Currey, Court
 14 Reporter and Notary Public in and for the State of South
 15 Carolina; pursuant to Rule 30 of the South Carolina Rules
 16 of Civil Procedure; said deposition was taken via Zoom
 17 Video Conference on Friday, the 7th day of August, 2020,
 18 scheduled for 10:02 a.m., and commencing at the hour of
 19 10:02 a.m.
 20
 21
 22
 23
 24
 25

0002

1 APPEARANCES (BY VIDEO CONFERENCE):
 2
 3 REPRESENTING THE PLAINTIFF:
 4 JOHN D. KASSEL, ESQ.
 5 Kassel McVey
 6 1330 Laurel Street
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 8 (jkassel@kassellaw.com)
 9
 10 REPRESENTING LIBERTY MUTUAL:
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 17 REPRESENTING HORACE MANN:
 18 JAMES D. FLOYD, ESQ.
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1 STATE OF SOUTH CAROLINA
2 COURT OF COMMON PLEAS
3 COUNTY OF SUMTER
4 HOWELL D. THOMPSON AND
5 TARA L. THOMPSON,
6 Plaintiffs,
7 vs. CASE NO. 2019-CP-43-02375
8 CARLOS D. TONEY,
9 Defendant.

10 DEPOSITION OF: DAVID DuPUY, M.D.
11 DATE: August 9, 2021
12 TIME: 10:00 a.m.
13 LOCATION: OrthoCarolina
14 710 Park Center Drive
15 Matthews, NC
16 TAKEN BY: Counsel for the Plaintiff
17 REPORTED BY: SOLANGE RUIZ-URIBE, Court Reporter
18
19
20
21
22
23

24

25

↑

1 APPEARANCES OF COUNSEL:

2 ATTORNEYS FOR THE PLAINTIFF

HOWELL D. THOMPSON AND TARA L. THOMPSON:

3

KASSEL McVEY

4

BY: JOHN D. KASSEL

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ATTORNEYS FOR THE DEFENDANT

LIBERTY MUTUAL INSURANCE COMPANY:

8

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ATTORNEYS FOR THE DEFENDANT

UIM HORACE MANN:

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BROWN AND BREHMER

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BY: JAMES "JAY" D. FLOYD

VIA TELECONFERENCE

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18

19

20

21

ROA 445

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF SUMTER) C/A NO.: 2019-CP-43-02375
3
4 Howell D. Thompson and)
5 Tara L. Thompson,)
6 Plaintiffs,) VIDEO CONFERENCE DEPOSITION
7 vs.) OF
8 Carlos D. Toney,) EARL B. MCFADDEN, JR., M.D.
9 Defendant.)
10 _____)

11

12 Video conference deposition on oral examination of
13 EARL B. MCFADDEN, JR., M.D., reported by Patricia G.
14 Bachand, Court Reporter and Notary Public in and for the
15 State of South Carolina; pursuant to Rule 30 of the South
16 Carolina Rules of Civil Procedure; said video conference
17 deposition was taken on Monday, the 17th day of August
18 2020, scheduled for 7:30 a.m. and commencing at the hour of
19 7:39 a.m.

20

21

22

23

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25▲

2

1

APPEARANCES:

2

3

REPRESENTING THE PLAINTIFFS (VIA VIDEO CONFERENCE):

4

JOHN D. KASSEL, ESQ.

5

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10

REPRESENTING LIBERTY MUTUAL (VIA VIDEO CONFERENCE):

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12

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16

17

REPRESENTING THE UIM CARRIER (VIA VIDEO CONFERENCE):

18

JAMES FLOYD, ESQ.

19

Brown & Brehmer Law Firm

ROA 447

1 STATE OF SOUTH CAROLINA COURT OF COMMON PLEAS
COUNTY OF SUMTER
2 -----X
3 HOWELL D. THOMPSON and TARA L.
THOMPSON,
4 Plaintiffs,
5 vs. CASE NO. 2019-CP-43-02375
6 CARLOS D. TONEY,
7 Defendant.
8 -----X

9 V I D E O D E P O S I T I O N

10 WITNESS: DAVID E. STICKLER, M.D.
11 DATE: September 2, 2020
12 TIME: 2:48 p.m.
13 LOCATION: 15 Monckton Boulevard
Columbia, South Carolina 29206
14
15 TAKEN BY: Attorney for the Plaintiffs
16 REPORTED BY: Colette Cantoni,
Realtime Court Reporter
17 COMPUSCRIPTS, INC.
888.988.0086
18
19
20
21
22
23
24

25



2

1 APPEARANCES:

2

ATTORNEYS FOR PLAINTIFFS:

3

KASSEL, McVEY, ATTORNEYS AT LAW

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ATTORNEYS FOR DEFENDANT CARLOS TONEY:

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12

ATTORNEYS FOR DEFENDANT

13

LIBERTY MUTUAL INSURANCE COMPANY:

14

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15

BY: AARON J. HAYES, ESQUIRE

1515 Lady Street

16

Columbia, South Carolina 29201

803-256-2233

17

ajh@swblaw.com

18 ALSO PRESENT:

19

BRUCE BALMER, CIRM, CLVS, CCVS,

Videographer

20

21

(ALL PERSONS APPEARING VIA A VIDEOCONFERENCE,

22

INCLUDING THE COURT REPORTER AND VIDEOGRAPHER)

23

ROA 449

STATE OF SOUTH CAROLINA
COUNTY OF SUMTER

IN THE COURT OF COMMON PLEAS

HOWELL D. THOMPSON AND
TARA L. THOMPSON,

Plaintiffs,

vs.

C.A. No.: 2019-CP-43-02375

CARLOS D. TONEY,

Defendant.

VIDEOTAPED DEPOSITION OF MIRSAD MUJADZIC, MD

DATE TAKEN: Friday, September 10, 2021

TIME START: 1:24 p.m.

TIME END: 4:23 p.m.

LOCATION: Prisma Health
2 Medical Park, Suite 306
Columbia, South Carolina

REPORTED BY: SHERI L. BYERS
Registered Professional Reporter
EVERYWORD, INC.
P.O. Box 1459
Columbia, South Carolina 29202
803.212.0012

↑

APPEARANCES:

ATTORNEYS FOR THE PLAINTIFFS

HOWELL D. THOMPSON AND TARA L. THOMPSON:

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jkassel@kassellaw.com

ATTORNEYS FOR THE DEFENDANT

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ATTORNEYS FOR LIBERTY MUTUAL INSURANCE
COMPANY/CARLOS D. TONEY:

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BY: AARON J. HAYES, ESQUIRE
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ajh@swblaw.com

1 STATE OF SOUTH CAROLINA
2 COUNTY OF SUMTER
3
4 HOWELL D. THOMPSON and TARA L.
5 THOMPSON,
6 Plaintiffs,
7 vs. CASE NO. 2019-CP-43-02375
8 CARLOS D. TONEY,
9 Defendant.
10

11 W E B C O N F E R E N C E
12 D E B E N E E S S E
13 V I D E O D E P O S I T I O N

14 WITNESS: EARL B. McFADDEN, JR., MD
15 DATE: Monday, September 14, 2020
16 TIME: 7:33 a.m.
17 LOCATION: 104 Saluda Pointe Drive
18 Lexington, South Carolina 29072
19 TAKEN BY: Attorneys for Plaintiffs
20 REPORTED BY: CAROLL ANNE BOUTAHAR
21 Certified Verbatim Reporter
22 (Appearing by web conference)

23 - - - - -
24 COMPUSCRIPTS, INC.
25 A South Carolina Corporation
26 Court Reporters & Legal Videographers
27 www.compuscripts.com
28 1.888.988.0086

24 Charleston Columbia Greenville
25 864.735.0684 803.988.0086 843.640.5383

↑

2

1 APPEARANCES:

2

ATTORNEYS FOR THE PLAINTIFFS:

3

4 KASSEL McVEY ATTORNEYS AT LAW
BY: JOHN D. KASSEL, ESQUIRE
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5 Columbia, South Carolina 29201
803.256.4242
6 jkassel@kassellaw.com
(Appearing by web conference)

7

8

ATTORNEYS FOR THE DEFENDANT:

9

SWEENEY WINGATE & BARROW
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10 1515 Lady Street
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19 ALSO PRESENT:

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ROA 453



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DAVID FULTON, MD

October 07, 2020

Howell D. Thompson and Tara L. Thompson

VS

Carlos D. Toney

2019-CP-43-02375

REPORTER: Janice Stanton

ROA 454

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF SUMTER) THE FIFTH JUDICIAL CIRCUIT
3 CA NO.: 2019-CP-43-02375
4
5

6 Howell D. Thompson and Tara L.)

7 Thompson,)

8)

9 Plaintiffs,)

10 vs.)

11)

12 Carlos D. Toney,)

13)

14 Defendant.)

15 _____)

16

17

18 Deposition on oral examination of DAVID FULTON, MD,
19 reported by Janice L. Stanton, Court Reporter and Notary
20 Public in and for the State of South Carolina; pursuant to
21 Rule 30 of the South Carolina Rules of Civil Procedure;
22 said deposition was held remotely via Zoom video-conference
23 on Wednesday, the 7th day of October, 2020, scheduled for
24 7:00 a.m. and commencing at the hour of 7:05 a.m.
25

APPEARANCES:

REPRESENTING THE PLAINTIFF: Howard D & Tara L. Thompson

JAMIE RUTKOSKI, ESQ.

Kassel McVey

1330 Laurel Street

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REPRESENTING THE DEFENDANT: Horace Mann Insurance Company

JAMES D. FLOYD, ESQ.

Floyd, Brown & Brehmer

1720 Main Street, Suite 203

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REPRESENTING THE DEFENDANT: Liberty Mutual Insurance Co.

AARON J. HAYES, ESQ.

Sweeny, Wingate & Barrow, PA

1515 Lady Street

Columbia, South Carolina 20201

ajh@swblaw.com

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF SUMTER) THE THIRD JUDICIAL CIRCUIT
3 CA NO.: 2019-CP-43-02375
4
5
6 Howell D. Thompson and Tara L.)
7 Thompson,)
8)
9 Plaintiffs,) VIDEO DEPOSITION OF
10 vs.) DAVID FULTON, MD
11)
12 Carlos D. Toney,)
13)
14 Defendant.)
15 _____)

16
17
18 Video deposition on oral examination of DAVID FULTON,
19 MD., reported by Janice L. Stanton, Court Reporter and
20 Notary Public in and for the State of South Carolina;
21 pursuant to Rule 30 of the South Carolina Rules of Civil
22 Procedure; said video deposition was held remotely via Zoom

23 video-conference on Wednesday, the 28th day of October,
24 2020, scheduled for 7:00 a.m. and commencing at the hour of
25 7:04 a.m.▲

2

1 APPEARANCES:

2

3 REPRESENTING THE PLAINTIFF: Howard D & Tara L. Thompson

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5 Kassel McVey

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7 Columbia, South Carolina 29201

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10 REPRESENTING THE DEFENDANT: Horace Mann Insurance Company

11 JAMES D. FLOYD, ESQ.

12 Floyd, Brown & Brehmer

13 1720 Main Street, Suite 203

14 Columbia, South Carolina 29201

15 jdf@brownandbrehmer.com

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17 REPRESENTING THE DEFENDANT: Liberty Mutual Insurance Co.

18 AARON J. HAYES, ESQ.

19 Sweeny, Wingate & Barrow, PA

20 1515 Lady Street

21 Columbia, South Carolina 29201

ROA 458

1 STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
2 COUNTY OF SUMTER) CASE NO.: 2019-CP-43-02375
3
4 Howell D. Thompson and)
5 Tara L. Thompson,)
6 Plaintiffs,) DEPOSITION OF
7 vs.) HOWELL D. THOMPSON
8 Carlos D. Toney,) NOVEMBER 30, 2020
9 Defendant.)
10 _____)

11
12 Video conference deposition on oral examination of
13 HOWELL D. THOMPSON, reported by Donna M. Currey, Court
14 Reporter and Notary Public in and for the State of South
15 Carolina; pursuant to Rule 30 of the South Carolina Rules
16 of Civil Procedure; said deposition was taken via Zoom
17 Video Conference on Monday, the 30th day of November, 2020;
18 scheduled for 10:00 a.m., and commencing at the hour of
19 10:05 a.m.

20
21
22

23

24

25▲

2

1

APPEARANCES:

2

3

REPRESENTING THE PLAINTIFF:

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JOHN D. KASSEL, ESQ.

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REPRESENTING LIBERTY MUTUAL:

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RICHARD E. MCLAWHORN, JR., ESQ.

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REPRESENTING HORACE MANN INSURANCE:

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JAMES D. FLOYD, ESQ.

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Brown & Brehmer

ROA 460

1 STATE OF SOUTH CAROLINA
COURT OF COMMON PLEAS
2 COUNTY OF SUMTER
3
4 HOWELL D. THOMPSON AND TARA L. THOMPSON
Plaintiffs,
5
6 vs. CASE NO. 2019-CP-43-02375
7 CARLOS TONEY,
Defendants.
8
9

10
11 W E B C O N F E R E N C E
D E B E N E E S S E
D E P O S I T I O N
12

13 WITNESS: LORI ALLISON ELLIOTT CAMPBELL
14 DATE: Monday, December 7, 2020
15 TIME: 1:03 p.m.
16 LOCATION: 7201 Fairfield Road
Columbia, South Carolina 29203
17
18 TAKEN BY: Attorneys for Plaintiffs
19
20 REPORTED BY: CAROLL ANNE BOUTAHAR
Certified Verbatim Reporter
(Appearing by web conference)

21 - - - - -
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↑

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1 APPEARANCES:

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ATTORNEYS FOR THE DEFENDANT:

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ATTORNEYS FOR THE UIM CARRIER:

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19

20

ROA 462

EXHIBIT D

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS

COUNTY OF SUMTER)

Howell D. Thompson and Tara L. Thompson,) C/A No.: 2019-CP-430-2375

Plaintiffs,)

v.)

Carlos D. Toney,)

Defendant.)

**NOTICE OF TAKING
DEPOSITION OF
CARLOS TONEY**

TO: RICHARD MCLAWHORN, ATTORNEY FOR DEFENDANT:

YOU WILL PLEASE TAKE NOTICE THAT, pursuant to Rule 30 of the SCRPC, Plaintiffs, by and through their undersigned counsel, will take the deposition of Carlos Toney. This deposition will be taken upon oral examination before a Notary Public or other officer authorized by law to take depositions. The deposition will commence at **10:00 AM on the 15th day of May 2020**, and will continue from day to day until completion, at **Wingate & Barrow, P.A., 1515 Lady Street, Columbia, SC 29201**. You are invited to attend and take such part as shall be fitting and proper.

Kassel McVey, Attorneys at Law

By:

John D. Kassel

jkassel@kassellaw.com

Theile B. McVey

Tmcvey@kassellaw.com

Jamie R. Rutkoski

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Attorneys for Plaintiff

March 12, 2020
Columbia, South Carolina

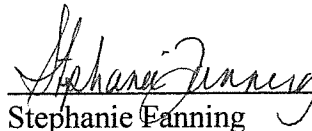
ROA 464

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF SUMTER	)	
Howell D. Thompson and Tara L. Thompson,	)	Civil Action No.: 2019-CP-430-2375
	)	
Plaintiffs,	)	
	)	CERTIFICATE OF SERVICE
v.	)	
	)	
Carlos Toney,	)	
	)	
Defendant.	)	

I, Stephanie Fanning, Paralegal, an employee of Kassel McVey Attorneys at Law, counsel for Plaintiffs in the above-entitled matter, do hereby certify that on the 12th day of **March, 2020**, I caused the attached **PLAINTIFFS NOTICE OF TAKING DEPOSITION** to be served upon counsel for Defendants by depositing a true and correct copy in the United States Mail and addressed as follows:

Wingate & Barrow, P.A
Attn: Richard McLawhorn, Esquire
1515 Lady Street
Columbia, South Carolina 29201

Brown and Brehmer
Attn: Karl Brehmer, Esquire
1720 Main Street, Ste. 201
Columbia, SC 29201


 Stephanie Fanning

March 12, 2020

Columbia, South Carolina.