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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 II**

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EXHIBIT E

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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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. [REDACTED], 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
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

Page

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E X H I B I T S

(None was proffered.)

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EXHIBIT F

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 ANSWERS TO PLAINTIFFS'
Carlos D. Toney) INTERROGATORIES
))
))
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 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.

General Objection

These Interrogatories were addressed to "Defendant," presumably Carlos 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:

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: Liberty Mutual Insurance Company ("LMU"), as an underinsured motorist carrier ("UIM carrier"), answers as follows:

- Plaintiff Howell Thompson. This Plaintiff has been deposed.
- Plaintiff Tara Thompson. This Plaintiff has been deposed.
- Defendant Carlos D Toney. This Defendant has been deposed.
- Officer B. Schumpert. This witness has been deposed.
- Dr. Earl McFadden. This witness has been deposed.
- Such other medical providers as listed by Plaintiffs in Plaintiffs' responses to Interrogatories.
- LMU reserves the right to supplement this response.

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.

ANSWER: LMU, as a UIM carrier, answers as follows:

- Form TR-310, related to the auto accident referenced in Plaintiffs' Complaint
- Medical Records Concerning Plaintiff Howell Thompson, from the following providers:
 - Lexington Medical Center
 - Palmetto Orthopedic Clinic Group
 - Lexington Orthopedics
 - Midlands Orthopedics and Neurosurgery
 - Lexington County EMS
 - Palmetto Imaging
 - Pain Specialists of Charleston
 - The Eye Center
 - Lexington Brain and Spine Institute
 - Lexington Radiology Associates
 - Palmetto Health Orthopedics (Radiology films)
 - Lexington Medical Center (Radiology films)
- LMU Declarations Page for Policy No. BAA (18) 56 29 36 95.
- Arrest Record Report (no data) for Plaintiff Howell Thompson.
- Driver's Record for Plaintiff Howell Thompson.
- Verizon Wireless Call Logs for Plaintiff for the time period covering the wreck at issue in this case.
- Documents produced to LMU in discovery by all other parties.
- LMU reserves the right to supplement this response.

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: LMU, as a UIM carrier, answers as follows:

- State Farm Insurance, upon information and belief the liability insurance carrier of Defendant Carlos Toney.
- Horace Mann Property and Casualty Insurance Company, upon information and belief the personal UIM carrier of Plaintiff Howell Thompson.
- Liberty Mutual Insurance, Providing Coverage Through American Fire and Casualty Company, c/o Sweeny, Wingate & Barrow, P.A.:
Policy No. BAA (18) 56 29 36 95
UM/UIM Coverage at \$1,000,000 each accident

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: LMU, as a UIM carrier, has not yet named an expert witness in this case. LMU reserves the right to supplement this response.

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: Please see LMU's Response to Interrogatory No. 1.

6. Identify each exhibit that you intend to introduce at trial.

ANSWER: LMU, as a UIM carrier, has not yet determined what exhibits, if any, will be introduced at trial. LMU reserves the right to supplement this response.

7. Identify all alcoholic beverages, prescription drugs or nonprescription drugs you consumed within 24 hours of the motor vehicle wreck.

ANSWER: LMU, as a UIM carrier, is not in possession of any information responsive to this request.

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: LMU, as a UIM carrier, is not in possession of any information responsive to this request.

9. Did the Defendant receive any medical treatment as a result of the wreck? If so, identify each provider and/or facility.

ANSWER: LMU, as a UIM carrier, is not in possession of any information responsive to this request.

10. Please state the amount for repairs to the Defendant's vehicle.

ANSWER: LMU, as a UIM carrier, is not in possession of any information responsive to this request.

11. Provide the Defendant's cell phone number and the name of his cell phone carrier on (date of wreck).

ANSWER: LMU, as a UIM carrier, is not in possession of any information responsive to this request.

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: Objection. This Interrogatory calls for a legal conclusion, thereby improperly invading the province of the judge and/or jury. However, and without waiving said objection, LMU, as a UIM carrier, is not in possession of any information responsive to this request. LMU reserves the right to supplement this response.

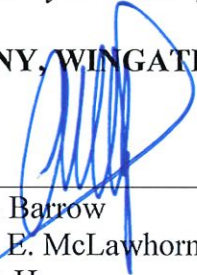
13. Pursuant to S.C. Code Ann. 15-38-15 (A), for any damages alleged by Plaintiff, please identify the apportionment of damages you believe to be attributable to any party to this

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: Please see LMU's Response to Interrogatory No. 12.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, P.A.



Mark S. Barrow
Richard E. McLawhorn, Jr.
Aaron J. Hayes
1515 Lady Street
Post Office Box 12129
Columbia, South Carolina 29211
(803) 256-2233

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

Columbia, South Carolina

August 17, 2020

20

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 Answer 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:

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
jkassel@kassellaw.com
Tmcvey@kassellaw.com
jrutkoski@kassellaw.com


M. Esther Oliver

Columbia, South Carolina

August 21, 2020

EXHIBIT G

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

'97 OCT 14 PM 4:12

Louella E. Loudon Appellant,

Filed Common Pleas
8th Judicial Circuit
Greenwood, SC

v.

Juanita Moragne Respondent.

50827

Appeal From Greenwood County
Don S. Rushing, Circuit Court Judge

Opinion No. 2685
Submitted May 6, 1997 - Filed June 16, 1997

AFFIRMED

William C. Bettis, of Ayers & Smithdeal, of Greenwood, for
appellant.

Robert A. McKenzie and Gary H. Johnson, II, both of
McDonald, McKenzie, Rubin, Miller & Lybrand, of Columbia;
and Douglas A. Churdar, of Greenville, for respondent.

HEARN, J.: Louella E. Loudon brought this negligence action against Juanita Moragne as the result of an automobile accident. The trial judge granted summary judgment in favor of Moragne, finding Loudon failed to personally serve Moragne within the applicable statute of limitations. We affirm.¹

Facts

Louden and Moragne were involved in an automobile accident on May 1, 1992. On October 13, 1993, Loudon settled her claim against Moragne and her liability carrier for \$15,000. As part of the settlement agreement, Loudon executed

¹ We decide this case without oral argument pursuant to Rule 215, SCACR.

LOUDEN v. MORAGNE

a release in which she agreed not to execute any judgment against Moragne. However, Louden reserved the right to bring a direct action against Moragne to establish Louden's entitlement to underinsured motorist benefits. The release states:

PROVIDED, HOWEVER, it is expressly understood, and agreed between the parties, that the undersigned may bring an action against James Moragne and Juanita Moragne if necessary, for the sole purpose of establishing the liability, if any, of any underinsured motorist carrier providing coverage.

On August 22, 1994, Louden filed this negligence action against Moragne. Three days later, Louden served State Farm Mutual Automobile Insurance Company with a copy of the summons and complaint, thereby notifying State Farm that she intended to claim benefits under her underinsured motorist coverage. Louden did not, however, serve Moragne with a copy of the summons and complaint.

State Farm appeared on behalf of Moragne and filed a timely answer asserting that Moragne had not been personally served, and therefore the court lacked in personam jurisdiction. Moragne was personally served on January 20, 1996. State Farm then amended its answer asserting the additional defense that the statute of limitations had expired for bringing the action against Moragne.

In June 1996, the trial judge granted summary judgment in favor of Moragne on the ground that the statute of limitations barred the action.

L

Louden argues the trial judge erred in dismissing the action based on the statute of limitations. She asserts the release agreement between the parties terminated the original right of action, and concomitantly granted her a new right of action based on contract, thereby impliedly waving the original statute of limitations. We disagree.

Louden argues that the release created a new right of action in contract for the purpose of establishing her entitlement to underinsured motorist benefits, and that the statute of limitations for this new right began to run from the date of the release. We believe the clear language of the release indicates that Louden merely preserved her right to pursue a tort action against Moragne to establish her entitlement to underinsured motorist benefits. This was a right which existed from the date of the accident and was not "created" by the terms of the release. Thus, the trial court correctly construed the agreement and applied the correct three year statute of limitations.

Roll # 50827
CASE NO. 94-391

IN THE COURT OF COMMON PLEAS

Louella E. Loudon

Juanita Moragne

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other- _____

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Other- _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenwood, South Carolina, this 25th day of June, 1996.

/s/ Don S. Rushing
PRESIDING JUDGE

This judgment was entered on the 1 day of July, 1996, and a copy mailed first class this 1 day of July, 1996 to attorneys of record or to parties (when appearing pro se) as follows:

Jordan Ayers

Bob McKenzie

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Pat Danahy
CLERK OF COURT

1976 AUG 23 AM 10:14

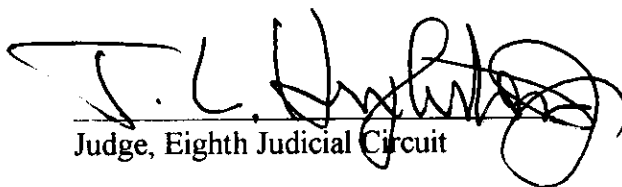
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENWOOD	)	C.A. NO 94-CP-24-391
	)	Final Court of Common Pleas
Louella E. Loudon,	)	Eighth Judicial Circuit
	)	Greenwood, South Carolina
Plaintiff,	)	CONSENT ORDER
	)	
vs.	)	
	)	
Juanita Moragne,	)	
	)	
Defendant.	)	

It appears that Douglas A. Churdar's services are no longer needed by the Defendant and that the Defendant will be adequately represented by Robert A. McKenzie of the law firm of McDonald, McKenzie, Rubin, Miller and Lybrand. Now, on Motion by Douglas A. Churdar, and with the consent of Plaintiff's counsel, Judson F. Ayers and co-counsel Robert A. McKenzie

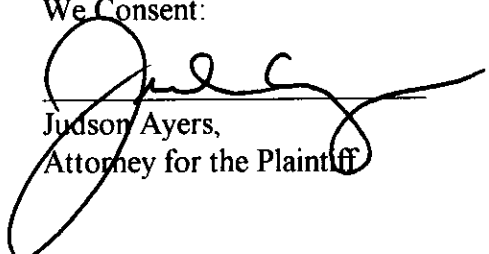
IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Douglas A. Churdar is hereby relieved as counsel of record for the Defendant, and Robert A. McKenzie shall represent the Defendant exclusively in this litigation.

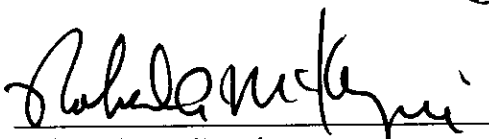
AND IT IS SO ORDERED.

Date: 8/22/96


Judge, Eighth Judicial Circuit

We Consent:


Judson Ayers,
Attorney for the Plaintiff


Robert A. McKenzie,
Attorney for the Defendant

ROA 530

Law Offices
DOUGLAS A. CHURDAR, P.C.

712 EAST WASHINGTON STREET
GREENVILLE, SOUTH CAROLINA 29601
TELEPHONE (864) 233-0203
TELECOPIER (864) 233-3020

August 19, 1996

The Honorable Pat Darragh
Greenwood County Clerk of Court
County Courthouse
Greenwood SC 29646

**Re: Louella E. Loudon v Juanita Moragne
C.A. No. 94-CP-24-391**

Dear Clerk:

Enclosed please find a signed Consent Order releasing me as attorney for the Defendant.
Please have this Order executed and return clocked copies to me in the envelope provided.

Please call me with any questions or comments you might have. Thank you very much.

Sincerely,


Douglas A. Churdar

DAC:dlk
cc: Susan Kilgore-4162286480
Enclosure(s)

50827

1996 JUL 30 PM 1:21

**The State of South Carolina
In The Supreme Court**

Filed Court of Common Pleas
Eighth Judicial Circuit
Greenwood, South Carolina

**APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas**

Don S. Rushing, Circuit Court Judge

Case No. 94-CP-24-391

Louella E. Loudon, ... Appellant,

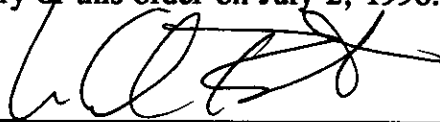
v.

Juanita Moragne, ... Respondent.

NOTICE OF APPEAL

Louella E. Loudon appeals the order of the Honorable Don S. Rushing dated June 27, 1996. Appellant received written notice of entry of this order on July 2, 1996.

July 25, 1996



Wm. Chad Bettis
P. O. Box 1268
Greenwood, S.C. 29648
(864) 229-1947
Attorney for Appellant

Other Counsel of Record:

Robert A. McKenzie
P. O. Box 58
Columbia, S.C. 29202-0058
(803) 252-0500
Attorney for Respondent

Douglas A. Churdar
P. O. Box 10309
Greenville, S.C. 29603
(803) 233-0203

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ROA 532

**The State of South Carolina
In The Supreme Court**

**APPEAL FROM GREENWOOD COUNTY
Court of Common Pleas**

Don S. Rushing, Circuit Court Judge

Case No. 94-CP-24-391

Louella E. Loudon, ... Appellant,

v.

Juanita Moragne, ... Respondent.

PROOF OF SERVICE

I certify that I have served the Notice of Appeal on Juanita Moragne by depositing a copy of it in the United States Mail, postage prepaid, on July 25, 1996, addressed to her attorney for record, Robert A. McKenzie, P. O. Box 58, Columbia, South Carolina 29202-0058 and Douglas A. Churdar, P. O. Box 10309, Greenville, South Carolina 29603.

July 25, 1996



Wm. Chad Bettis
P. O. Box 1268
Greenwood, S.C. 29648
(864) 229-1947
Attorney for Appellant

ROA 533

STATE OF SOUTH CAROLINA
COUNTY OF GREENWOOD

IN THE COURT OF COMMON PLEAS

CASE NO.: 94-CP-24-391

LOUELLA E. LOUDEN,
PLAINTIFF,

-VS-

JUANITA MORAGNE,
DEFENDANT.

Filed Court of Common Pleas
Eighth Judicial Circuit
Greenwood, South Carolina
ORDER GRANTING
SUMMARY JUDGMENT

#50827

This matter came to be heard before me at chambers in the Greenwood County Courthouse on Monday, June 3, 1996. In attendance were Judson F. Ayers representing the plaintiff and Robert A. McKenzie representing the defendant. The matter was before the court upon the defendant's Motion for Summary Judgment seeking to bar this action on the basis of the three year statute of limitations. The court heard arguments on the matter and received a Memorandum of Law from the plaintiff's attorney. At the hearing, it was agreed among the parties and the court that the parties would submit to the court an agreed stipulation of facts within ten (10) days or if an agreed upon stipulation could not be reached, the parties would submit necessary affidavits and other evidentiary matters to allow the court to make a determination. It was also agreed that within the passage of an additional ten (10) days each party would submit to the court a proposed order. The parties reached an agreement concerning stipulations of fact and filed them within the time period established. The court has now considered the matter and the motion of the defendant to dismiss based upon the statute of limitations is granted.

10/16/96
[Signature]

ROA 534

The plaintiff and the defendant were in an automobile accident near Greenwood, South Carolina on May 1, 1992. The plaintiff claimed personal injuries from this accident and made a claim against the defendant with the defendant's automobile liability insurer, Allstate Insurance Company. The plaintiff and Allstate reached an agreement whereby Allstate paid to the plaintiff the policy limits of the defendant's policy and in exchange the plaintiff executed a "release" which released the defendant, her insurer and all in privity with her but which reserved unto the plaintiff the right to bring an action against the defendant "for the sole purpose of establishing the liability, if any, of any underinsured motorist carrier providing coverage." The release further provided that in the event it was necessary to obtain a jury verdict against the defendant, certain procedures would be used to protect the defendant against the effects of the judgment. The release also provided that the defendant expressly denied liability to the plaintiff. The date of this release document was October 13, 1993. On August 22, 1994, the plaintiff filed the instant action. On August 25, 1994, the underinsured motorist carrier of the plaintiff, State Farm Mutual Automobile Insurance Company, was served with a copy of the Summons and Complaint through the office of the Chief Insurance Commissioner pursuant to § 15-9-270 and § 38-77-160 S.C. Code Ann. (1976). The defendant was not served. The underinsured carrier appeared in the name of the defendant and interposed a timely answer which asserted as a defense that the defendant had not been personally served and the court lacked in personam jurisdiction. The defendant was not personally served before January 20, 1996. On that day a copy of



ROA 535

the Summons and Complaint was left with her mother in Greenwood by the sheriff of Greenwood County. After this service, the defendant filed an Amended Answer asserting that the plaintiff's claim was time barred. The parties have stipulated "effective service on the defendant did not occur until after the passage of more than three years from the date of the accident."

Section 15-3-530 (5) establishes the applicable statute of limitations for personal injury arising from the negligence of another after April 5, 1988, to be three years. Clearly, the defendant would be entitled to rely upon the statute of limitations to defeat the plaintiff's claim. To avoid this result, the plaintiff asserts that its underinsured motorist carrier and not the defendant is the real party in interest and since the underinsured motorist carrier was served within the three year limitation period no prejudice has resulted to it. The plaintiff argues that the defendant's release from personal liability makes her a defendant in name only thus negating any requirement that she be served within the three year period. Alternatively, the plaintiff argues that the release document itself which reserves unto the plaintiff the right to bring a suit against the defendant to establish the liability of the underinsured motorist carrier effectively waived the statute of limitations.

The short answer to the plaintiff's assertions is that the South Carolina Supreme Court in the case of Williams v. Selective Insurance Company of the Southeast, ____ S.C. ____ 446 S.E.2d 402 (1994), has effectively disposed of both of these contentions of the plaintiff. In the Williams case the plaintiff attempted to eliminate the step of suing the at fault driver to establish

3d6
[Signature]

ROA 536

liability and damages and brought a direct action against the insurer for underinsured benefits. The suit against the insurer was brought within the three year statutory period. By the time summary judgment was sought by the insurer, the three year statute of limitations for bringing the tort action had elapsed. The trial judge ruled that § 38-77-160 of South Carolina Code Ann. (1976), as amended 1993, required the bringing of the action against the tortfeasor and since more than three years had elapsed from the accident, the tort action could never be brought. In affirming, the Supreme Court held that the insured must preserve the right of action against an at fault driver so long as the underinsured carrier has not agreed to the amount and to the payment of underinsured motorist benefits and since the statute of limitations had run, an action against the at fault driver could never be brought. In a footnote to the decision, the court stated "We reject Williams' argument that insurer waived the statute of limitations defense in the action against the at fault driver by failing to act on Williams' claim for benefits until after the statute had run. The record in this case indicates no action by insurer inconsistent with an intention to rely on the statute."

The effect of the plaintiff in this case not serving the defendant is the same as the plaintiff's failure to bring an action in the Williams case. Rule 3(a) SCRPC provides "A civil action is commenced by filing and service of a Summons and Complaint." (emphasis added.) The insurer in this case at the outset asserted in its Answer that it was requiring service on the defendant and was relying on the proper commencement of the suit. The plaintiff



ROA 537

did not act upon this until after the passage of the time for commencing the action.

The plaintiff's position that the defendant and the underinsured motorist carrier waived the bar of the statute of limitations in the release is without merit. The release bears the signature of only the plaintiff. The plaintiff reserved her right to seek recovery of underinsured motorist benefits and while this reservation anticipated the bringing of an action to establish the plaintiff's entitlement, there is no mention of the statute of limitations and its waiver cannot be discerned from the reading of the document. To the contrary, the plaintiff in reserving the right to proceed to establish her entitlement to underinsured motorist benefits acknowledged by her signature that the defendant was contesting liability. 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. See Moates v. Bobb, ____ S.C. ____, ____ S.E.2d ____ (S.C. App. Opinion No. 2504 Davis Advance Sheets filed April 29, 1996).

Neither defendant nor the underinsured motorist carrier has done anything to waive any of the rights provided by law. The Answer filed on behalf of the defendant in response to the plaintiff's Complaint asserted that the defendant had not been served and the court lacked jurisdiction. Upon service after the expiration of three years, the statute of limitations was plead. Certainly nothing was done after the action was filed or after it was actually commenced by service to make the plaintiff think the statute would not be a defense. The release document entered into



between the plaintiff and the defendant's insurer had the effect of protecting the defendant but did not either directly or by implication have the effect of waiving the statute of limitations.

The plaintiff's final position is that the release transmuted the cause of action from one in tort to one in contract and that the statute of limitations would begin to run from the date of the release which is the alleged contractual document. Suffice it to say that neither the defendant nor the underinsured motorist carrier was a party to the release. Under the law, defendant's liability must be established in tort and the release document certainly contemplates establishing liability that way against the underinsured motorist carrier. The only way to do this would be to comply with § 38-77-160 S.C. Code Ann., supra.

For the foregoing reasons, the defendant's Motion for Summary Judgment is granted. The plaintiff's action is hereby dismissed with prejudice.


DON S. RUSHING, JUDGE
~~ELEVENTH~~ JUDICIAL CIRCUIT

Eighth
Chief Judge for Administrative Purposes


Greenwood, South Carolina

June 27th, 1996.



ROA 539

IN THE COURT OF COMMON PLEAS

Louella E. Lousden

Roll # 50827
CASE NO. 94-391

Juanita Moya

PLAINTIFF(S)

DEFENDANT(S)

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☒ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other- _____

☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Other- _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenwood, South Carolina, this 25th day of June, 19 96.

2/ Don S. Rushing
PRESIDING JUDGE

This judgment was entered on the 1 day of July, 19 96, and a copy mailed first class this 1 day of July, 19 96 to attorneys of record or to parties (when appearing pro se) as follows:

Judson Ayers

Bob Mc Kenzie

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Pat Danahy
CLERK OF COURT

AYERS AND SMITHDEAL, P C

COPY

ATTORNEYS AND COUNSELLORS AT LAW

July 25, 1996

JUDSON F. AYERS
JOSEPH C. SMITHDEAL
WM. CHAD BETTIS

FIRST FLOOR, THE GRIER BUILDING
POST OFFICE DRAWER 1268
GREENWOOD, SOUTH CAROLINA 29648
TELEPHONE (864) 229-1947
FAX (864) 229-0988

The Honorable Clyde N. Davis, Jr.
Clerk of The South Carolina Supreme Court
P. O. Box 11330
Columbia, South Carolina 29211

Re: Louella Loudon v. Juanita Moragne
Case No. 94-CP-24-391

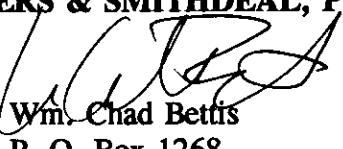
Dear Mr. Davis:

Enclosed for filing is a notice of appeal in the above case. Also enclosed are the following:

1. Proof of service of the notice of appeal on respondent
2. A copy of the order which is to be challenged on appeal
3. A filing fee of \$100.00

Very truly yours,

AYERS & SMITHDEAL, P C


Wm. Chad Bettis

P. O. Box 1268
Greenwood, South Carolina 29648
(864) 229-1947
Attorney for Appellant

cc: Robert A. McKenzie
P. O. Box 58
Columbia, South Carolina 29202-0058
(803-252-0500)

Douglas A. Churdar
P. O. Box 10309
Greenville, South Carolina 29603
(864)-233-0203
Attorneys for Respondent

Greenwood County Clerk of Court
JFA/bss

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ROA 541

STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)
LOUELLA E. LOUDEN,)
PLAINTIFF,)
-VS-)
JUANITA MORAGNE,)
DEFENDANT.)

IN THE COURT OF COMMON PLEAS
CASE NO.: 94-CP-24-391

Filed Court of Common Pleas
Eighth Judicial Circuit
Greenwood, South Carolina
ORDER GRANTING
SUMMARY JUDGMENT

#5082

This matter came to be heard before me at chambers in the Greenwood County Courthouse on Monday, June 3, 1996. In attendance were Judson F. Ayers representing the plaintiff and Robert A. McKenzie representing the defendant. The matter was before the court upon the defendant's Motion for Summary Judgment seeking to bar this action on the basis of the three year statute of limitations. The court heard arguments on the matter and received a Memorandum of Law from the plaintiff's attorney. At the hearing, it was agreed among the parties and the court that the parties would submit to the court an agreed stipulation of facts within ten (10) days or if an agreed upon stipulation could not be reached, the parties would submit necessary affidavits and other evidentiary matters to allow the court to make a determination. It was also agreed that within the passage of an additional ten (10) days each party would submit to the court a proposed order. The parties reached an agreement concerning stipulations of fact and filed them within the time period established. The court has now considered the matter and the motion of the defendant to dismiss based upon the statute of limitations is granted.

10/6/96


ROA 542

The plaintiff and the defendant were in an automobile accident near Greenwood, South Carolina on May 1, 1992. The plaintiff claimed personal injuries from this accident and made a claim against the defendant with the defendant's automobile liability insurer, Allstate Insurance Company. The plaintiff and Allstate reached an agreement whereby Allstate paid to the plaintiff the policy limits of the defendant's policy and in exchange the plaintiff executed a "release" which released the defendant, her insurer and all in privity with her but which reserved unto the plaintiff the right to bring an action against the defendant "for the sole purpose of establishing the liability, if any, of any underinsured motorist carrier providing coverage." The release further provided that in the event it was necessary to obtain a jury verdict against the defendant, certain procedures would be used to protect the defendant against the effects of the judgment. The release also provided that the defendant expressly denied liability to the plaintiff. The date of this release document was October 13, 1993. On August 22, 1994, the plaintiff filed the instant action. On August 25, 1994, the underinsured motorist carrier of the plaintiff, State Farm Mutual Automobile Insurance Company, was served with a copy of the Summons and Complaint through the office of the Chief Insurance Commissioner pursuant to § 15-9-270 and § 38-77-160 S.C. Code Ann. (1976). The defendant was not served. The underinsured carrier appeared in the name of the defendant and interposed a timely answer which asserted as a defense that the defendant had not been personally served and the court lacked in personam jurisdiction. The defendant was not personally served before January 20, 1996. On that day a copy of



ROA 543

the Summons and Complaint was left with her mother in Greenwood by the sheriff of Greenwood County. After this service, the defendant filed an Amended Answer asserting that the plaintiff's claim was time barred. The parties have stipulated "effective service on the defendant did not occur until after the passage of more than three years from the date of the accident."

Section 15-3-530 (5) establishes the applicable statute of limitations for personal injury arising from the negligence of another after April 5, 1988, to be three years. Clearly, the defendant would be entitled to rely upon the statute of limitations to defeat the plaintiff's claim. To avoid this result, the plaintiff asserts that its underinsured motorist carrier and not the defendant is the real party in interest and since the underinsured motorist carrier was served within the three year limitation period no prejudice has resulted to it. The plaintiff argues that the defendant's release from personal liability makes her a defendant in name only thus negating any requirement that she be served within the three year period. Alternatively, the plaintiff argues that the release document itself which reserves unto the plaintiff the right to bring a suit against the defendant to establish the liability of the underinsured motorist carrier effectively waived the statute of limitations.

The short answer to the plaintiff's assertions is that the South Carolina Supreme Court in the case of Williams v. Selective Insurance Company of the Southeast, ____ S.C. ____ 446 S.E.2d 402 (1994), has effectively disposed of both of these contentions of the plaintiff. In the Williams case the plaintiff attempted to eliminate the step of suing the at fault driver to establish

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[Signature]

ROA 544

liability and damages and brought a direct action against the insurer for underinsured benefits. The suit against the insurer was brought within the three year statutory period. By the time summary judgment was sought by the insurer, the three year statute of limitations for bringing the tort action had elapsed. The trial judge ruled that § 38-77-160 of South Carolina Code Ann. (1976), as amended 1993, required the bringing of the action against the tortfeasor and since more than three years had elapsed from the accident, the tort action could never be brought. In affirming, the Supreme Court held that the insured must preserve the right of action against an at fault driver so long as the underinsured carrier has not agreed to the amount and to the payment of underinsured motorist benefits and since the statute of limitations had run, an action against the at fault driver could never be brought. In a footnote to the decision, the court stated "We reject Williams' argument that insurer waived the statute of limitations defense in the action against the at fault driver by failing to act on Williams' claim for benefits until after the statute had run. The record in this case indicates no action by insurer inconsistent with an intention to rely on the statute."

The effect of the plaintiff in this case not serving the defendant is the same as the plaintiff's failure to bring an action in the Williams case. Rule 3(a) SCRCF provides "A civil action is commenced by filing and service of a Summons and Complaint." (emphasis added.) The insurer in this case at the outset asserted in its Answer that it was requiring service on the defendant and was relying on the proper commencement of the suit. The plaintiff



ROA 545

did not act upon this until after the passage of the time for commencing the action.

The plaintiff's position that the defendant and the underinsured motorist carrier waived the bar of the statute of limitations in the release is without merit. The release bears the signature of only the plaintiff. The plaintiff reserved her right to seek recovery of underinsured motorist benefits and while this reservation anticipated the bringing of an action to establish the plaintiff's entitlement, there is no mention of the statute of limitations and its waiver cannot be discerned from the reading of the document. To the contrary, the plaintiff in reserving the right to proceed to establish her entitlement to underinsured motorist benefits acknowledged by her signature that the defendant was contesting liability. 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. See Moates v. Bobb, ____ S.C. ____, ____ S.E.2d ____ (S.C. App. Opinion No. 2504 Davis Advance Sheets filed April 29, 1996).

Neither defendant nor the underinsured motorist carrier has done anything to waive any of the rights provided by law. The Answer filed on behalf of the defendant in response to the plaintiff's Complaint asserted that the defendant had not been served and the court lacked jurisdiction. Upon service after the expiration of three years, the statute of limitations was plead. Certainly nothing was done after the action was filed or after it was actually commenced by service to make the plaintiff think the statute would not be a defense. The release document entered into

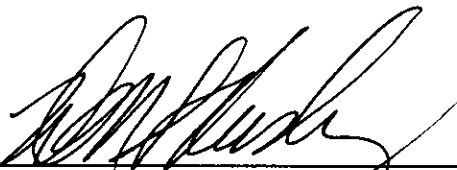


ROA 546

between the plaintiff and the defendant's insurer had the effect of protecting the defendant but did not either directly or by implication have the effect of waiving the statute of limitations.

The plaintiff's final position is that the release transmuted the cause of action from one in tort to one in contract and that the statute of limitations would begin to run from the date of the release which is the alleged contractual document. Suffice it to say that neither the defendant nor the underinsured motorist carrier was a party to the release. Under the law, defendant's liability must be established in tort and the release document certainly contemplates establishing liability that way against the underinsured motorist carrier. The only way to do this would be to comply with § 38-77-160 S.C. Code Ann., supra.

For the foregoing reasons, the defendant's Motion for Summary Judgment is granted. The plaintiff's action is hereby dismissed with prejudice.


DON S. RUSHING, JUDGE
~~ELEVENTH~~ JUDICIAL CIRCUIT

Eighth
Chief Judge for Administrative Purposes


Greenwood, South Carolina

June 27th, 1996.



ROA 547

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD) CASE NO.: 94-CP-24-391

1996 JUN 13 AM 10:34

LOUELLA E. LOUDEN,
PLAINTIFF,
-VS-
JUANITA MORAGNE,
DEFENDANT.

STIPULATION

Filed Court of Common Pleas
Eighth Judicial Circuit
Greenwood, South Carolina

It is agreed and stipulated by counsel for the parties as follows:

1. The plaintiff and defendant were involved in an automobile accident near Greenwood, South Carolina on May 1, 1992.

2. The plaintiff claimed personal injuries as a result of this accident.

3. The plaintiff was paid the policy limit of the defendant's liability insurance policy with Allstate Insurance Company on October 13, 1993, and executed a "Release," a copy of which is attached hereto.

4. On August 22, 1994, the instant action was filed in the Court of Common Pleas for Greenwood County seeking damages for personal injuries allegedly sustained by plaintiff as a result of the May 1, 1992, accident with the defendant.

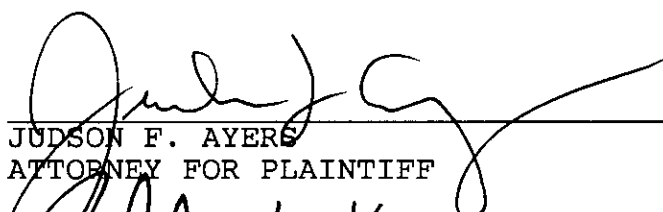
5. The plaintiff served State Farm Mutual Automobile Insurance Company with a copy of the Summons and Complaint as plaintiff's underinsured motorist carrier through the office of the Chief Insurance Commissioner on August 25, 1994.

6. The underinsured motorist carrier answered in the name of the defendant and interposed as a defense, inter alia, that the defendant had not been personally served and the Court lacked in personam jurisdiction.

7. On January 20, 1996, the Summons and Complaint in this action were left with defendant's mother by the sheriff of Greenwood County. Although there may be a technical question as to this service, the defendant and the underinsured carrier agree that service effective on or after that date will not be challenged and the issue of the statute of limitations is the only question involved in the summary judgment motion.

8. After receipt of the Summons and Complaint by the defendant, an amended answer was filed which set up as an additional defense that the plaintiff's action was time barred by the three year statute of limitations.

9. Effective service on the defendant herself did not occur until after the passage of more than three years from the date of the accident.



JUDSON F. AYERS
ATTORNEY FOR PLAINTIFF



ROBERT A. MCKENZIE
ATTORNEY FOR DEFENDANT

STATE OF SOUTH CAROLINA)
)
COUNTY OF GREENVILLE)

RELEASE

For the sole consideration of fifteen thousand dollars, the undersigned hereby releases and forever discharges James Moragne and Juanita Moragne his heirs, executors, administrators, agents and assigns, and Allstate Insurance Company, its agents, servants, employers, employees, bailees, and bailors, none of whom admit any liability to the undersigned, from any and all claims, demands, damages, actions, causes of action or suits of any kind or nature whatsoever, concerning any injuries, known or unknown, both to person and property, which have resulted or may in the future develop from an automobile accident which occurred in Greenwood County, South Carolina on May 1, 1992.

PROVIDED, HOWEVER, it is expressly understood, and agreed between the parties, that the undersigned may bring an action against James Moragne and Juanita Moragne if necessary, for the sole purpose of establishing the liability, if any, of any underinsured motorist carrier providing coverage.

PROVIDED FURTHER, under no circumstances will the undersigned pursue any additional claims against, or payments of any kind from James Moragne and Juanita Moragne or Allstate Insurance Company beyond that agreed upon in this release. Should it become necessary for the undersigned to pursue his remedies and obtain a jury verdict in order to establish his damages for underinsurance purposes, at such time as the judgement is rendered, the undersigned shall immediately move that the judgement be entered against the underinsured motorist carrier as the real party in interest and not against James Moragne and Juanita Moragne. Should the court not allow the judgement to be entered solely against the underinsured motorist carrier, then in that event, the undersigned shall immediately mark the judgement satisfied against James Moragne and Juanita Moragne without prejudice to the undersigned to further pursue his/her legal remedies against his/her underinsured motorist carrier.

The undersigned hereby declares that the terms of this settlement have been completely read and are fully understood and voluntarily accepted for the purpose of making a full and final compromise, adjustment and settlement of any kind for any and all claims between the parties, disputed or otherwise, on account of the injuries and damages above mentioned, and for the express purpose of including forever any further or additional claims arising out of the aforesaid matter.

The undersigned acknowledges that this is a compromise settlement of a doubtful or disputed claim, and though the undersigned has claimed James Moragne and Juanita Moragne and Allstate Insurance Company to be legally liable, such liability was and is expressly denied by James Moragne and Juanita Moragne and Allstate Insurance Company.

FILED FROM CLERK'S OFFICE - 2022 Sep 07 5:29 PM - SUMTER - COMMON PLEAS - CASE#2019CP4302375

ROA 550

ELECTRONICALLY FILED - 2022 Sep 07 5:29 PM - SUMTER - COMMON PLEAS - CASE#2019CP4302375

In presence of:

Signed (X)

Signed (X)

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENWOOD	)	CASE NO.: 94-CP-24-391
LOUELLA E. LOUDEN,	)	Filed Court of Common Pleas
Plaintiff,	)	Eighth Judicial Circuit
-vs-	)	Greenwood, South Carolina
JUANITA MORAGNE,	)	ANSWER
Defendant.	)	(JURY TRIAL DEMANDED)

The Defendant for her answer alleges:

FOR A FIRST DEFENSE

1. That there has been no proper service of process over the Defendant and the Court lacks in personam jurisdiction.

FOR A SECOND DEFENSE

1. That she denies each and every allegation contained in the Complaint not hereinafter specifically admitted or explained.

2. That paragraphs one (1) and two (2) of the Complaint are admitted upon knowledge, information and belief.

3. That she admits so much of paragraph three (3) of the Complaint as can be construed to allege that on the date set forth, at the approximate time set forth and at the place set forth there was a collision involving her vehicle and the Plaintiff's vehicle, but the remaining allegations of paragraph three are denied.

4. That paragraphs four (4) and five (5) of the Complaint are denied.

FOR A THIRD DEFENSE

1. The Defendant would show that if she was negligent or reckless as alleged in the Complaint, which allegations are herein expressly denied, the Plaintiff was herself at the time and place in question negligent, careless, reckless, wilful and wanton and the negligence, carelessness, recklessness, wilfulness and wantonness on the part of the Plaintiff combined and concurred with any negligence and recklessness on the part of the Defendant, proximately contributed to any injuries or damages sustained by the Plaintiff, and the Defendant pleads that the Plaintiff's claim should either be barred or her recovery diminished under the doctrine of comparative negligence.

FOR A FOURTH DEFENSE

1. The Defendant would show that the Plaintiff's claim for punitive damages is violative of the both the constitutions of the United States of America and the state of South Carolina.

WHEREFORE, having fully answered, the Defendant prays that the Complaint be dismissed with costs.

MCDONALD, MCKENZIE, FULLER,
RUBIN AND MILLER

By: 

ROBERT A. MCKENZIE
ATTORNEYS FOR THE DEFENDANT
1704 Main Street
Post Office Box 58
Columbia, South Carolina 29202
(803) 252-0500

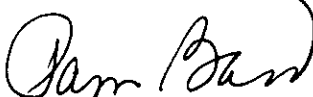
Columbia, South Carolina

October 24, 1994

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that copies of the Defendant's ANSWER, INTERROGATORIES TO PLAINTIFF and REQUEST FOR PRODUCTION OF DOCUMENTS were served upon the attorney for Plaintiff by depositing said paper(s) in the United States Mail, Columbia, South Carolina, on the 24th day of October, 1994, with the first class postage duly affixed and a return address clearly indicated on the envelope, addressed as follows:

Mr. Judson F. Ayers
Attorney at Law
Post Office Box 1268
Greenwood, South Carolina 29648



PAMELA F. BASS, Secretary to
ROBERT A. MCKENZIE
ATTORNEY FOR THE DEFENDANT

RE: Louella E. Loudon vs. Juanita Moragne
Case Number: 94-CP-24-391

McDONALD, McKENZIE, FULLER, RUBIN AND MILLER

ATTORNEYS AT LAW

2ND FLOOR, 1704 MAIN STREET

COLUMBIA, SOUTH CAROLINA 29201

TELEPHONE

(803) 252-0500

MAIL ADDRESS

P. O. Box 58

COLUMBIA, SOUTH CAROLINA 29202-0058

HEYWARD E. McDONALD

ROBERT A. McKENZIE

ROBERT F. FULLER

HYMAN S. RUBIN, JR.

BEN N. MILLER III

JAMES B. LYBRAND, JR.

MARY LOWNDES BRYAN

STEVEN W. ROMIG †

RONALD E. ALEXANDER

ROBERT M. COOK II

KEVIN T. BROWN

TELECOPIER

(803) 252-6705

† CERTIFIED BANKRUPTCY SPECIALIST

October 24, 1994

The Honorable Pat Darragh
Clerk of Court for Greenwood County
Greenwood County Courthouse
Room 114
Greenwood, South Carolina 29646

RE: Louella E. Loudon vs. Juanita Moragne
Case Number: 94-CP-24-391

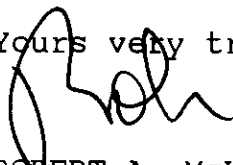
Dear Ms. Darragh:

I am enclosing the original and one copy of the Defendant's Answer in the above-captioned matter. Proof of service is attached to the original and service is being effected on the Plaintiff's attorney by means of a copy of this letter. Please file the original, clock the copy and return the clocked copy to me in the provided envelope.

I am also taking the liberty of serving Interrogatories and Request for Production on the Plaintiff's attorney by means of a copy of this letter. I request that he acknowledge service of these documents by signing and returning the enclosed postal card.

I would appreciate it if you would send me copies of the proofs of service in your file. I am enclosing a self-addressed, stamped envelope with which you may return these. If there is a charge, please let me know.

Yours very truly,



ROBERT A. McKENZIE

RAM:pfb

Enclosures

cc: Mr. Judson F. Ayers, Attorney

ROA 555

ELECTRONICALLY FILED - 2022 Sep 07 5:29 PM - SUMTER - COMMON PLEAS - CASE#2019CP4302375

1996 APR -2 AM 11: 29

STATE OF SOUTH CAROLINA)
COUNTY OF GREENWOOD)
Louella E. Louden,)
Plaintiff,)
-vs-)
Juanita Moragne,)
Defendant.)

IN THE COURT OF COMMON PLEAS
CASE NUMBER: 94-CP-24-391

AMENDED ANSWER
Filed Court of Common Pleas
Eighth Judicial Circuit
Greenwood, South Carolina

The Defendant for her Answer alleges:

FOR A FIRST DEFENSE

1. That there has been no proper service of process over the Defendant and the Court lacks in personam jurisdiction.

FOR A SECOND DEFENSE

1. That this action is barred by the applicable Statute of Limitations.

FOR A THIRD DEFENSE

1. That she denies each and every allegation contained in the Complaint not hereinafter specifically admitted or explained.

2. That paragraphs one (1) and two (2) of the Complaint are admitted upon knowledge, information and belief.

3. That she admits so much of paragraph three (3) of the Complaint as can be construed to allege that on the date set forth, at the approximate time set forth and at the place set forth there was a collision involving her vehicle and the Plaintiff's vehicle, but the remaining allegations of paragraph three are denied.

4. That paragraphs four (4) and five (5) of the Complaint are denied.

FOR A FOURTH DEFENSE

1. The Defendant would show that if she was negligent or reckless as alleged in the Complaint, which allegations are herein expressly denied, the Plaintiff was herself at the time and place in question negligent, careless, reckless, wilful and wanton and the negligence, carelessness, recklessness, wilfulness and wantonness on the part of the Plaintiff combined and concurred with any negligence and recklessness on the part of the Defendant, proximately contributed to any injuries or damages sustained by the Plaintiff, and the Defendant pleads that the Plaintiff's claim should either be barred or her recover diminished under the doctrine of comparative negligence.

FOR A FIFTH DEFENSE

1. The Defendant would show that the Plaintiff's claim for punitive damages is violative of both the constitutions of the United States of America and the State of South Carolina.

WHEREFORE, having fully answered, the Defendant prays that the Complaint be dismissed with costs.

MCDONALD, MCKENZIE, RUBIN,
MILLER AND LYBRAND, L.L.P.
1704 Main Street
Post Office Box 58
Columbia, South Carolina 29202
(803) 252-0100

BY: 

ROBERT A. MCKENZIE
ATTORNEYS FOR THE DEFENDANT

HUNTER, CHURDAR AND FOSTER
Post Office Box 10309
Greenville, South Carolina 29603
(803) 233-0203

BY: 
DOUGLAS A. CHURDAR
ATTORNEYS FOR THE DEFENDANT

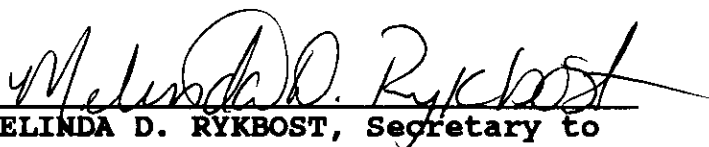
Columbia, South Carolina

April 1, 1996

CERTIFICATE OF SERVICE BY MAIL

I hereby certify that a copy of the Defendant's AMEDNED ANSWER was served upon the attorney for the Plaintiff by depositing said paper(s) in the United States Mail, Columbia, South Carolina, on the 1st day of April, 1996, with the first class postage duly affixed and a return address clearly indicated on the envelope, addressed as follows:

Mr. Judson F. Ayers
Attorney at Law
Post Office Box 1268
Greenwood, South Carolina 29648


MELINDA D. RYKBOST, Secretary to
ROBERT A. MCKENZIE
ATTORNEY FOR THE DEFENDANT

RE: Louella E. Loudon vs. Juanita Moragne
Case Number: 94-CP-24-391

McDONALD, McKENZIE, RUBIN, MILLER AND LYBRAND, L.L.P.

ATTORNEYS AT LAW

2ND FLOOR, 1704 MAIN STREET

COLUMBIA, SOUTH CAROLINA 29201

HEYWARD E. McDONALD

ROBERT A. McKENZIE

HYMAN S. RUBIN, JR.

BEN N. MILLER III

JAMES B. LYBRAND, JR.

RONALD E. ALEXANDER

KEVIN T. BROWN

ROBERT J. ELAM

ROBERT M. COOK II

GARY L. JOHNSON II

MAIL ADDRESS

P. O. Box 58

COLUMBIA, SOUTH CAROLINA 29202-0058

TELEPHONE (803) 252-0500

FAX (803) 252-6705

April 1, 1996

**The Honorable Pat Darragh
Clerk of Court for Greenwood County
Greenwood County Courthouse
Greenwood, South Carolina 29646**

**RE: Louella E. Loudon vs. Juanita Moragne
Case Number: 94-CP-24-391**

Dear Ms. Darragh:

I am enclosing herewith the original and a copy of the Defendant's Amended Answer in the above-captioned matter with proof of service attached. Service is being effected upon the Plaintiff's attorney by means of a copy of this letter. Please file the original document and return the copy to me after it has been clocked in the self-addressed, stamped envelope you will find enclosed.

Yours very truly,



ROBERT A. MCKENZIE

RAM:mdr

Enclosures

**cc: Mr. Judson F. Ayers
Attorney for the Plaintiff
Mr. Douglas A. Churdar
Attorney at Law**

ROA 560

1994 AUG 22 PM 1:46

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF GREENWOOD)

Louella E. Loudon,
)
)
 Plaintiff,
)
)
 vs.
)
)
 Juanita Moragne,
)
)
 Defendant.
)

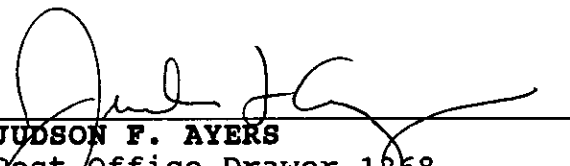
Filed Court of Common Pleas
 Eighth Judicial Circuit
 Greenwood, South Carolina

SUMMONS
94-CP-24-391
JURY TRIAL DEMANDED

TO THE DEFENDANT(S) ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint hereto attached and to serve a copy of your Answer on the Plaintiff's attorney at The Grier Building, First Floor, 327 Main Street, Greenwood, South Carolina within thirty (30) days after the service of this Summons upon you, exclusive of the day of service. If you fail to answer the Complaint within that time, the Plaintiff shall apply to the Court for a judgment by default against you for the relief demanded in said Complaint.

JUDSON AYERS & ASSOCIATES, P C


JUDSON F. AYERS
 Post Office Drawer 1268
 Greenwood, South Carolina 29648
 (803) 229-1947
ATTORNEY FOR PLAINTIFF

Greenwood, South Carolina
 August 18, 1994

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF GREENWOOD)

Louella E. Loudon,
)
)
 Plaintiff,
)
)
 vs.
)
)
 Juanita Moragne,
)
)
 Defendant.
)

COMPLAINT
 94-CP-24-391
 JURY TRIAL DEMANDED

Plaintiff alleges:

1. That plaintiff is a citizen and resident of the County of Greenwood, State of South Carolina.
2. That the defendant is a citizen and resident of the County of Greenwood, State of South Carolina.
3. That on or about the 1st day of May, 1992, at approximately 7:30 a.m., plaintiff was driving her automobile in an easterly direction on S.C. 24-424 in the County of Greenwood, State of South Carolina; that at the same time and place, the defendant was driving her automobile in a northerly direction on Jebosha Drive and failed to stop at a stop sign and crashed into plaintiff's automobile, damaging the same and injuring plaintiff as hereinbelow described.
4. That at the time and place aforesaid, the defendant was guilty of one or more of the following acts of negligence and recklessness which proximately caused the accident and plaintiff's resulting injury:
 - a. In failing to maintain a proper lookout;
 - b. In failing to keep her vehicle under

proper control;

- c. In failing to stop her automobile at the stop sign facing defendant's direction of travel;
- d. In driving too fast for conditions then and there existing;
- e. In failing to apply brakes;
- f. In failing to have her automobile equipped with proper brakes which failed to work when applied, if applied at all;
- g. In driving her automobile into the automobile of the plaintiff;
- h. In failing to stop her automobile before it collided with plaintiff's automobile;
- i. In unlawfully entering the highway;
- j. In failing to use the degree of care and caution that a reasonably prudent person would have used under the circumstances then and there prevailing;

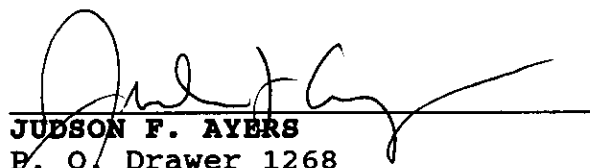
said acts being in violation of the statutory and common laws of the State of South Carolina.

5. That as a direct and proximate result of the defendant's negligence and recklessness as aforesaid, the plaintiff suffered great physical harm and injury from being thrown about within the vehicle, all of which has caused and will in the future cause plaintiff to undergo much physical and mental pain and suffering, has caused and will in the future cause plaintiff to have to spend money for medical services, has caused and will in the future cause plaintiff to lose money in the nature of wages and earnings, has caused plaintiff to be permanently injured, has impaired plaintiff's earning capacity and has impaired plaintiff's enjoyment

of life.

WHEREFORE, plaintiff prays for judgment against the defendant for actual and punitive damages to be determined by the jury, for the costs of this action, and for such other and further relief as the court may deem just and proper.

JUDSON AYERS & ASSOCIATES, PC


JUDSON F. AYERS
P. O. Drawer 1268
Greenwood, South Carolina 29648
(803) 229-1947
ATTORNEY FOR PLAINTIFF

Greenwood, S.C.
August 18, 1994

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF GREENWOOD)

Louella E. Loudon,)
)
 Plaintiff,)
)
 vs.) INTERROGATORIES
) 94-CP-24-_____
)
 Juanita Moragne,)
)
 Defendant.)

TO: THE ABOVE-NAMED DEFENDANT(S):

You are hereby notified to answer separately and in writing under oath, pursuant to Rule 33 of the South Carolina Rules of Civil Procedure, the following interrogatories and to serve your answers to these interrogatories upon the undersigned within thirty (30) days from the date of service.

Defendant is required, when answering these interrogatories, to furnish all information that is available to them, their attorneys or agents, or anyone acting on behalf of their attorneys or agents.

These interrogatories are deemed to be continuing, such as to require Defendant to file and serve supplemental answers should they learn of additional information called for by these interrogatories between the time their answers are filed and the time of the trial. Said supplemental answers are required to be served within a reasonable time after the discovery of such additional information.

You are under a duty to promptly amend prior answers to these interrogatories if you obtain information upon the basis of which you know the response was incorrect when made or you know the response, though correct when made, is no longer true.

1. Give the names and addresses of persons known to the parties 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. Give the names and addresses of persons you intend to call as witnesses at the trial of the case.

3. Set forth a list of photographs, plats, sketches or other prepared documents in possession of the parties that relate to the claim or the defense in the case.

4. Set forth a list of photographs, plats, sketches or other prepared documents of any kind which you intend to introduce as exhibits or evidence in the trial of the case.

5. Set forth the names and addresses of all insurance companies which have liability insurance coverage relating to the claim, and set forth the number or numbers of the policies involved and the amount or amounts of liability coverage provided in each policy.

6. List the names and addresses of any expert witnesses whom the parties propose to use as witnesses at the trial of the case.

7. For each person known to the parties or counsel to be a witness concerning the facts of the case, set forth either a summary sufficient to inform the other party 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.

8. State where you had been just prior to the collision, where you were going at the time of the collision, and the purpose of the trip.

9. Describe in your own words how the collision occurred and state specifically and in detail what the claim or contention of the Defendant will be regarding any cause or contributing cause of the collision, including a statement in detail of the facts or information upon which this contention is based.

10. State your date of birth, driver's license number, Social Security number, and any other names you have gone by during your lifetime.

11. State whether or not you have a copy of any statement which the Plaintiff has previously made concerning the action or its subject matter and which is in your possession, custody or control. (For the purpose of this question, a statement previously made is (1) a written statement, or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

12. State the speed of your vehicle at all times material to the collision in question, including specifically your speed at the time of impact, and if your brakes were on at the time of the impact, please state your speed before applying your brakes.

13. State in detail what intoxicating beverages you had consumed and what drugs or medications you had taken during the 24-hour period immediately preceding the collision.

14. Describe in detail what damage, if any, was done to your vehicle in the collision, and give the cost or repair of your vehicle.

15. Describe in detail any conversations you have had with the Plaintiff or Plaintiff's representative following the collision in question.

16. Describe any information you have indicating, or any reason you have to believe, that there was defect or failure on the part of any vehicle or equipment involved in the collision.

17. Describe any traffic citation you received as a result of this collision by stating the name and location of the Court involved, the violations of the law charged in that citation, and the date, place and manner (i.e., type of plea, bail, forfeit, trial, etc.) of disposition of the citation.

18. State whether or not you were acting within the course and scope of any agency, employment, or service at the time of the collision, and describe the type of relationship of the persons involved.

19. Were there any obstructions to visibility for any of the operators of the vehicles involved in this collision at the time of or immediately before the collision in question which you contend was a factor or contributed to cause the collision in question.

20. If you had a valid driver's license at the time of the accident, please describe it as to type, license number, and any restrictions thereof, and if the license has ever been suspended give the details of such suspension.

21. Do you contend that the Plaintiff violated any traffic law at the time of or immediately prior to the collision in question? If so, please describe either by statute number or generally what you contend to be such traffic violations.

22. If you have alleged in your Answer that the accident in question was an "unavoidable accident," describe in detail what you contend to be the non-human agency or condition which was the cause of the accident to the exclusion of the conduct of any party to the event.

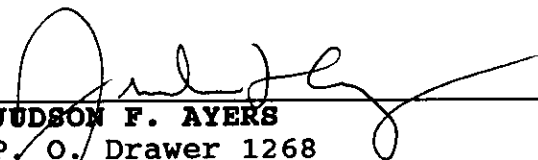
23. If you have alleged in your Answer that someone else's conduct or some other condition or event was the "sole proximate cause" of the accident in question, describe in detail the identity of such other person, event or condition.

24. Has Defendant been involved in any motor vehicle collision before the date of the occurrence made the basis of this suit? If so, give details as to where, when, how, with whom, whether a lawsuit resulted therefrom, the style and number of the case and the court in which it was filed.

25. Describe any criminal record which you may have, including the nature of the charge, date and place of arrest, and conviction, if any.

These Interrogatories shall be deemed continuing so as to require additional information when same is obtained by Defendant's counsel or by Defendant.

JUDSON AYERS & ASSOCIATES, P C


JUDSON F. AYERS
P. O. Drawer 1268
Greenwood, South Carolina 29648
(803) 229-1947
ATTORNEY FOR PLAINTIFF

Greenwood, S. C.
August 18, 1994

JUDSON AYERS
& ASSOCIATES, P.C.
THE GRIER BUILDING
P. O. BOX 1268
GREENWOOD, SC 29648

ROA 568

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
)
 COUNTY OF GREENWOOD)

Louella E. Loudon,
 Plaintiff,

vs.

Juanita Moragne,
 Defendant.

REQUEST TO PRODUCE
 94-CP-24-_____

TO THE ABOVE-NAMED DEFENDANT(S):

The plaintiff, by and through her undersigned attorney hereby requests, pursuant to R. 34 of the South Carolina Rules of Civil Procedure, that the defendant produce and permit the plaintiff to inspect and copy the following documents:

1. Any and all photographs of plaintiff's and/or defendant's vehicle following the collision and any and all other photographs, plats, drawings, or video tape reproductions taken or made in connection to with the accident which has been made a subject of the Complaint, both prior to and subsequent to plaintiff's injury.

2. Any and all statements of any parties and/or witnesses in regard to the collision, whether written, recorded, or video tape reproductions, or in any form whatsoever, taken or made in connection to with the accident which has been made a subject of the Complaint, both prior to and subsequent to plaintiff's injury.

3. A copy of any report or statement from any expert or proposed expert witness in regard to the plaintiff or related to

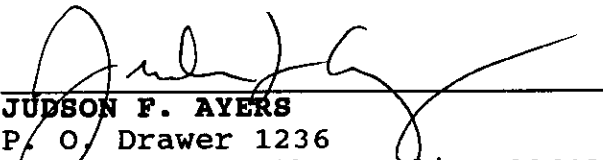
this case or its subject matter as well a copy of the curriculum vitae of the said expert.

4. Any and all documents or photographs of any type, nature, or description whatsoever not produced in response to any of the preceding requests which the defendant will rely upon at trial, either for the proof of their case or impeachment purposes.

5. Any and all documents identified in response to plaintiff's Interrogatories numbered 1 - 25.

The plaintiff requests that these documents be made available for inspection and copying at the offices of the plaintiff's attorney at First Floor Grier Building, Main Street, Greenwood, South Carolina, 29646, or at such place as may be mutually agreed upon the parties at 10:00 A.M. on the 30th day after service of this request. In lieu of production for inspection and copying at the aforesaid time and place, the defendant's attorney may, if they so desire, comply with this request by forwarding legible photostatic copies of these documents to Post Office Drawer 1268, Greenwood, South Carolina 29648 prior to the time and date aforesaid.

JUDSON AYERS & ASSOCIATES, P C


JUDSON F. AYERS
P. O. Drawer 1236
Greenwood, South Carolina 29648
(803) 229-1947
ATTORNEY FOR PLAINTIFF

Greenwood, S. C.
August 28, 1994

JUDSON AYERS
& ASSOCIATES, P.C.
THE GRIER BUILDING
P. O. BOX 1268
GREENWOOD, SC 29648

ROA 570

EXHIBIT H

STATE OF SOUTH CAROLINA

COVENANT NOT TO EXECUTE

COUNTY OF LEXINGTON

THIS COVENANT made this 9th day of SEPTEMBER 2019, by Howell Dewitt Thompson and Tara Thompson hereinafter referred to as "Covenantors."

WHEREAS, on June 2, 2017, in County, South Carolina, the Covenantor, Howell Dewitt Thompson, was involved in a motor vehicle accident with Carlos Demetius Toney; and

WHEREAS, the motor vehicle being driven by Carlos Demetius Toney was owned by Carlos Demetius Toney and insured by State Farm Mutual Automobile Insurance Company; and

WHEREAS, the motor vehicle being driven by Carlos Demetius Toney had only Twenty-Five Thousand and 00/100 Dollars (\$25,000.00) per person and Fifty Thousand and 00/100 Dollars (\$50,000.00) per accident bodily injury liability coverage with State Farm Mutual Automobile Insurance Company under Policy Number 205038340A; and

WHEREAS, there may be additional liability coverage that applies hereto; and

WHEREAS, the motor vehicle being driven by the Covenantor, Howell Dewitt Thompson, was insured by an unknown insurance company, under an unknown policy number, and the policy on same provides for underinsured motorist coverage; and qualification as an underinsured motor vehicle being in dispute in the case at bar; and

WHEREAS, any execution of any judgment received as a result of the injuries claimed herein, will be satisfied from any additional or excess liability coverage or underinsured motorist coverage and not from the personal assets of Carlos Demetius Toney, and

WHEREAS, Covenantors agree that their sole recovery additional hereto is limited to recovery under any liability or underinsured motorist policy and not from execution, except to the extent of any applicable liability coverage and/or underinsured motorist coverage, against the personal assets of Carlos Demetius Toney, and

WHEREAS, this Covenant does not prohibit Covenantors from pursuing and collecting other liability coverage, whether denominated as excess or primary, or other underinsured motorist coverages; and

WHEREAS, pursuit of other liability coverage or underinsured motorist coverage will not affect the personal or individual exposure of Carlos Demetius Toney, except to the extent of any applicable liability coverage or underinsured motorist coverage; and

WHEREAS, the damages sustained by the Covenantors in the motor vehicle accident of June 2, 2017 may exceed the liability limits of the insurance policy of Carlos Demetius Toney, and the Covenantors are desirous of protecting their right to proceed to suit against Carlos Demetius Toney for purposes of collecting additional liability coverage and/or underinsured benefits; and

NOW, FOR AND IN CONSIDERATION OF the payment to the Covenantors of the sum of Twenty-Five Thousand and 00/100 Dollars (\$25,000.00), the sufficiency and receipt of which is hereby acknowledged, the Covenantors agree as follows:

1. That in the event the Covenantors are unable to resolve by agreement their claim with any additional liability insurance carrier or the underinsured carrier, the Covenantors shall have the right to bring suit against Carlos Demetius Toney and prosecute same to final judgment.

2. Notwithstanding any judgment that may be rendered in said suit, it is the express intent of the parties that Carlos Demetius Toney, their respective heirs and assigns, shall never at any time, be liable to the Covenantors, their subrogees, heirs, or assigns, beyond the consideration expressed herein, by reason of any damages or injuries on which such judgment may be based except as herein stated. In consideration of the payment to the Covenantors of the sum of Twenty-Five Thousand and 00/100 Dollars (\$25,000.00), Covenantors, their subrogees, heirs, or assigns, shall not at any time, nor shall anyone for them or in their behalf, enforce against Carlos Demetius Toney, by execution or otherwise, any judgment that may be rendered in the above-mentioned lawsuit except as herein stated. Upon reduction to judgment of the aforementioned lawsuit that Covenantors, their subrogees, heirs, or assigns will immediately provide Carlos Demetius Toney with an executed Satisfaction of said Judgment in any case presented by Covenantors against them for the accident dated June 2, 2017, unless such Satisfaction of Judgment will impede collection or pursuit of additional liability coverage or underinsured motorist coverage. If Satisfaction of Judgment will impede collection or pursuit of additional liability coverage or underinsured motorist coverage, Covenantors, their subrogees, heirs, or assigns will provide Carlos Demetius Toney a Satisfaction of Judgment upon the earlier of the following events: (a) payment of said judgment by any other liability insurance carrier and/or underinsured motorist carrier or (b) final resolution of any additional liability coverage and/or underinsured motorist coverage claim. If immediate satisfaction of the Judgment is not filed after either payment of the judgment or final resolution of any other liability or underinsured motorist claim, this Covenant may be recorded as a Satisfaction of Judgment.

3. Covenantors, Howell Dewitt Thompson and Tara Thompson, expressly reserve all rights of action, claims, demands or other legal remedies against all firms and persons except as modified by the terms of this Covenant. This Covenant is not a release, nor shall it be construed as a release of any party, person, firm or corporation.

4. Covenantors expressly represent that they are aware and fully advised that the execution of this instrument will fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against Carlos Demetius Toney, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys, except as herein stated.

5. In executing this agreement, Covenantors represent and warrant they have relied on their investigation and on the investigation and advice of their attorney, if represented, and have not relied on any statement, representation, or commitment of any kind made by Carlos Demetius Toney, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

6. All provisions and recitals in this Covenant are intended to be and are Covenants of the parties and are a material part of this agreement and binding on the parties hereto, their personal representatives, successors, assigns, heirs, officers, employees, agents, servants or attorneys.

7. The Covenantors agree that if there exists any valid subrogation, assignment, lien, or interest, whether created by contract, statute or otherwise, that they will satisfy any such interest as required by law and that the Covenantors will protect, save, defend, and hold harmless Carlos Demetius Toney and State Farm Mutual Automobile Insurance Company from any such subrogation, assignment, claims, or interests. By entering this agreement, State Farm Mutual Automobile Insurance Company and Carlos Demetius Toney do not make any representation as to the effect of this agreement on the Covenantors' claim for additional liability coverage or underinsured motorist coverage and the Covenantors and their attorney expressly acknowledge this disclaimer.

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

9. The parties expressly recognize that the payment made herein in this agreement is in partial settlement and satisfaction of a ~~doubtful and~~ disputed claim, that Carlos Demetius Toney denies any liability to the Covenantors and that this agreement and payment is not intended as, nor should it be construed as, an admission of liability. ^{20K}

10. All parties agree that this Covenant is a product of negotiation and agreement among the parties. It is further agreed that there are no collateral or outside agreements of any kind between the parties and that this covenant constitutes the entire agreement between the parties.

11. The provisions and stipulations hereof shall inure to the benefit of, and

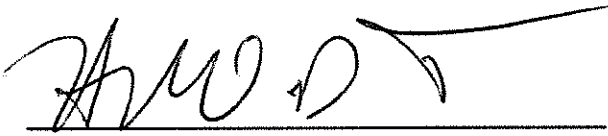
shall be binding upon, the heirs, executors, administrators, assigns and successors in interest of the parties hereto.

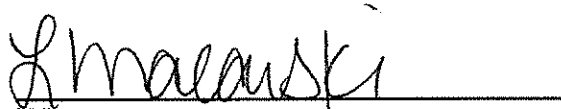
12. The execution of the Covenant Not to Execute is acknowledged to have taken place in the State of South Carolina. Further, that such Covenant shall be construed pursuant to South Carolina Law.

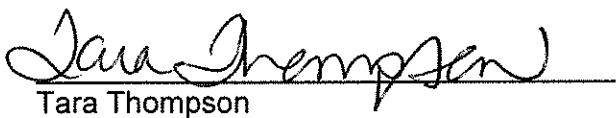
13. Covenantors acknowledge that they have been advised to seek the services of an attorney for advice and counsel on the consequences of executing this Covenant Not to Execute. Further, Covenantors acknowledge that State Farm Mutual Automobile Insurance Company and Carlos Demetius Toney made no representations on the availability of excess liability coverage and/or underinsured motorist coverage should this Covenant be executed.

14. Should any damages be incurred by State Farm Mutual Automobile Insurance Company or Carlos Demetius Toney due to the failure to immediately satisfy any judgment hereafter rendered, Covenantors agree to save, defend, hold harmless State Farm Mutual Automobile Insurance Company and Carlos Demetius Toney from any and all liability therefor.

IN WITNESS WHEREOF, the parties have executed this agreement on the day, month and year first above written.


Howell Dewitt Thompson


Witness


Tara Thompson


Witness

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
	)	
	)	LIBERTY MUTUAL INSURANCE
	)	COMPANY'S
	)	AND
v.	)	HORACE MANN PROPERTY &
	)	CASUALTY INSURANCE COMPANY'S
Carlos D. Toney,	)	
	)	MEMORANDUM OF LAW IN OPPOSITION
	)	TO PLAINTIFFS' MOTION TO
Defendant.	)	RECONSIDER THE ORDER OF
	)	DISMISSAL

TO: ALL OF PLAINTIFFS' COUNSEL OF RECORD, AND TO THE PLAINTIFFS ABOVE-NAMED:

INTRODUCTION: THE COURT GOT IT RIGHT

Liberty Mutual Insurance Company and Horace Mann Property & Casualty Insurance Company¹ assert that the Court's August 29, 2022 Order of Dismissal properly applies the law to the straightforward facts of this case. Plaintiffs' Motion to Alter, Amend, or Reconsider the August 28 [sic] Order ("the Motion") improperly disregards the unambiguous, well-settled rule from *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997), as well as the facts of this case to date.

Plaintiffs' Motion incorrectly asks this Court to overturn twenty-five years of *Louden* precedent. Plaintiffs' Motion improperly includes new arguments and exhibits. Plaintiffs' nine assignments of "error" are inaccurate. Finally, Plaintiffs' Motion ignores the obvious: Plaintiffs

¹ Unless context dictates otherwise, the two UIM carriers in this case may be jointly referred to as "Liberty Mutual" or "UIM carriers," for ease of reference.

never served the at-fault driver and have known (or should have known) from “day one” that this was the case. The Motion must be denied, and the UIM Carriers request an Order to that effect.

ARGUMENT

I. The *Louden* Rule has not changed. Neither should this Court’s well-reasoned Order, which is correct in all its holdings.

Shockingly, Plaintiffs do not cite to *Louden* until page 16 of the Motion, as if *Louden* is some sort of “footnote” to an ancillary matter in this case. To the contrary, *Louden* provides the clear answer to the question of what happens to a UIM case when the plaintiff fails to serve the summons and complaint upon the putative at-fault driver:

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) (affirming summary judgment in favor of a UIM carrier). Plaintiffs never served (much less “properly served”) putative at-fault driver Carlos D. Toney with the Summons and Complaint in this case, and therefore the case is over, as noted correctly by the Court in the August 29, 2022 Order. Plaintiffs’ attempt to distinguish *Louden* is a futile attempt to find a different answer to an old, already-answered question. Therefore, the Order must stand as written.²

II. Plaintiffs’ Motion improperly advances new arguments, which must be disregarded as untimely. Therefore, Liberty Mutual must object.

² In opposition to the instant Motion, Liberty Mutual incorporates by reference all of its prior arguments made in support of its underlying Motion for Summary Judgment/Motion to Dismiss (filed October 26, 2021), to include the Memorandum in Support of Motion for Summary Judgment/Motion to Dismiss (filed November 30, 2021), the Reply to Plaintiff’s Memorandum in Opposition (filed December 21, 2021), the arguments of counsel at the hearing held on January 6, 2022, and the Sur-reply to Plaintiff’s Supplemental Memorandum in Opposition (filed February 14, 2022).

“A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.” *Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) (citations omitted). There appears to be nothing in Plaintiffs’ Motion that could not have been raised in advance of the issuance of the Court’s August 29, 2022 Order. Therefore, the new arguments (and accompanying exhibits) raised by Plaintiff in this Motion must be disregarded as improper and untimely. Liberty Mutual objects to any and all previously undisclosed arguments and exhibits, including but not necessarily limited to:

- Exhibit B, email exchange between counsel from February 19, 2020;
- Exhibit C, compilation of various discovery requests, discovery responses, deposition transcripts, and subpoenas;
- Exhibit D, Notice of Deposition, Carlos D. Toney;
- Exhibit F, Interrogatory Response from Liberty Mutual from August 20, 2020 and arguments related to said Interrogatory Response, *see, e.g.*, Motion at pp. 25-26, 29-30;
- Exhibit G, apparent court record from *Louden v. Moragne*, and all arguments therefrom, including but not limited to Motion at p. 18;
- Exhibit H, Covenant Not To Execute signed by Plaintiffs in favor of Carlos D. Toney;
- Plaintiffs’ allegations of “gamesmanship” with respect to Liberty Mutual’s Consent Amended Answer, *see, e.g.*, Motion at p. 4 n. 3, p. 31, and defense of this claim, *see id* at p. 15;
- Arguments related to Toney’s intent, including but not limited to “[i]t is clear from his voluntary appearance at the deposition that Defendant Toney was on notice of this

action and his role as a defendant in same and did not intend to contest service,” Motion at pp. 10-11;

- Distinguishing of *McMaster v. Dewitt*, Motion at pp. 12-13;
- Plaintiffs’ allegations of Liberty Mutual’s “numerous” “false representations” to Plaintiffs, Motion at p. 15;
- Additional distinguishing of *Louden v. Moragne*, Motion at pp. 16-18;
- Additional distinguishing of *Williams v. Selective Ins. Co.*, Motion at pp. 18-20;
- Plaintiffs’ allegations of the UIM carriers accepting premiums but then “sandbagging” in order to avoid paying claims, Motion at p. 20;
- Arguments parsing the Answers of the UIM carriers, Motion at pp. 22-23;
- Holding it against Liberty Mutual that Liberty Mutual hired an expert, Motion at p. 26;
- Holding it against Liberty Mutual and Horace Mann that certain questions were not asked at Toney’s deposition, Motion at p. 27;
- Plaintiffs’ “laches” argument, Motion at pp. 27-28;
- Plaintiffs’ “waiver by estoppel” argument, citing *Johnson v. Life & Cas. Ins. Co. of Tenn.*, Motion at p. 29;
- Plaintiffs’ argument holding it against Liberty Mutual that Plaintiffs had not filed an Affidavit of Service at the time of Liberty Mutual’s Answers, Motion at p. 30-31;
- Citation to and argument from *Trustees of Cent. Laborers Welfare Fund v. Lowery*, Motion at p. 33;
- Citation to and argument from *Payne v. Holiday Towers, Inc.*, Motion at pp. 34-35; and

- Plaintiffs' arguments of prejudice towards themselves/lack of prejudice to Toney due to Covenant Not to Execute, Motion at pp. 35-37.

III. Plaintiffs' nine claims of "error" by the Court are inaccurate under the facts and the law.

For the sake of argument and subject to the objection in Section II, *supra*, Liberty Mutual addresses each of Plaintiffs' nine assignments of error in the order raised in the Motion:

1. The Court correctly concluded that the action was never commenced as to the putative at-fault driver.

Plaintiffs assign error to the Court for holding that Toney's appearance at a Zoom deposition in May 2020 was not a "voluntary appearance" under Rule 4(d), SCRCP. Plaintiffs assert that the deposition attendance was equivalent to personal service of the summons and complaint and was accomplished prior to the expiration of the statute of limitations in July 2020, and thus they "commenced" their action against Toney within the required timeframe. Plaintiffs' argument misses the mark. The Court thoroughly analyzed this issue on pages 17 and 18 of the Order of Dismissal, wherein the Court held that *no voluntary appearance occurred*, as that term is used in the *Rules*. As no voluntary appearance occurred, the Court was correct in holding that the action was never commenced as to Toney, *see* Rule 3(a), SCRCP, and therefore the case must be dismissed pursuant to *Louden*.

Plaintiffs cannot simply speak a "voluntary appearance" into existence; rather, the facts of the case must support such a contention. *See Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) ("[n]o specific act constitutes an appearance . . . courts decided on a case by case basis whether a defendant's act demonstrates an intent to submit to the court's jurisdiction.") (citations omitted). As the Court noted on page 18 of the Order, nearly all of the cases cited by Plaintiffs in support of the "voluntary appearance"

argument involved continuous participation in the case by the party against whom the voluntary appearance doctrine was asserted. No such record exists in this case, and thus there is no foundation for a finding of “voluntary appearance.” Therefore, the Court made no error in concluding that the action was never commenced as to Toney.

2. The Court correctly analyzed the underlying Motion to Dismiss as one a Rule 12 motion and a motion for summary judgment.

Plaintiffs assign error to this Court for analyzing the underlying Motion as a motion for summary judgment rather than a motion to dismiss. Again, Plaintiffs miss the mark. The Court painstakingly and thoroughly analyzed this case under the Rule 12 standard *and* the Rule 56 standard to reach the same conclusion: this case must be dismissed. (*See* Order at pp. 3-7 (analyzing the case through the lens of a motion for summary judgment); *id.*, at pp. 7-12 (in the alternative, analyzing the case through the lens of a Rule 12 motion).) This Court made no error in this regard.

3. The Court correctly relied upon *Louden* and related cases.

Plaintiffs assign error to this Court for relying on the *Louden* decision. Plaintiffs’ argument in this regard is astounding, as this case is on “all fours” with *Louden*, as discussed in Section I, *supra*. In addition, Plaintiffs boldly state:

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

(Motion, at p. 16.) Regardless of whether the *Louden* court considered issues similar to Plaintiffs’ above-quoted itemized list, this Court certainly did so with great specificity in its

Order, as each of these items is discussed in *addition* to the rule from *Louden*. (See, e.g., Order at p. 9 (holding that the UIM carriers pled with specificity); *id.* at p. 10 n. 3 (holding that UIM carriers did not waive defenses by participating in discovery); *id.* at pp. 11-12 (holding that the UIM carriers made the appropriate Rule 12 motion at an appropriate time, and therefore there is no Rule 12(g) waiver or waiver due to a preexisting statutory venue transfer motion); *id.* at pp. 12-17 (holding that UIM carriers are not equitably estopped to assert defense of non-service/statute of limitations).) Plaintiffs are incorrect to state that the Court relied entirely upon *Louden*. (See Motion, at p. 17 (“the Court erred in dismissing the instant case based entirely on the *Louden* decision”).)

Further, Liberty Mutual notes that the *Louden* court record, though improperly cited to by Plaintiffs in their Motion to Reconsider, actually supports the UIM carriers’ position in this matter. For instance, the *Louden* court apparently discounted a statute of limitations defense waiver argument by *Louden*, in which *Louden* asserted there was no statute of limitations problem because of the presence of a signed release in favor of the at-fault driver. The *Louden* court found there was no waiver of the statute of limitations defense because only the plaintiff was a signatory on the release, which is an identical situation to the Covenant Not to Execute signed only by the Plaintiffs in this case. (Compare Motion, at pp. 17-18 with Motion at Ex. H (Covenant Not to Execute).) Plaintiffs also cite to the *Louden* UIM counsel’s handling of the service issue, which involved UIM counsel placing the defense into the Answer and sending a letter to the clerk of court requesting proofs of service. (Motion, at p. 18.) Plaintiffs ignore the fact that in this case, Plaintiffs received *three* Answers from two separate UIM carriers pleading improper service and an email from Liberty Mutual’s counsel stating that no defenses were being waived, all of which transpired *before* the statute of limitations ran. (See Ans. of LMU, Ans. of

Horace Mann, Am. Ans. of LMU; *see also* Jan. 16, 2020 email between counsel, cited extensively by all parties and located in the record at Ex. A to Pls.’ Resp. to LMU Mot. to Dismiss and Mot. for Summ. J.) Plaintiffs also ignore the fact that counsel for Liberty Mutual made a verbal request to Plaintiffs for an Affidavit of Service, and Plaintiffs advised in essence that they would look for it. (*See* Ex. B to LMU’s Reply to Pls.’ Resp. in Opp. to Mot. to Dismiss, filed Dec. 21, 2021.)

In any event, the Court was correct to rely on *Louden*, because *Louden* definitively answers the question posed in this case. Nothing in the *Louden* decision or record supports Plaintiffs’ position in this Motion.

4. The Court correctly held that Plaintiffs violated the UIM statute.

Plaintiffs assign error to the Court for holding that Plaintiffs violated the UIM statute by not serving Defendant Toney with the Summons and Complaint. However, the Court was correct in finding a violation of the UIM statute because a violation has indeed occurred. S.C. Code Ann. § 38-77-160 requires that the UIM carrier be served with pleadings “in the action” that establishes liability against the at-fault driver. If the action is never commenced as to the at-fault driver because process is never served upon the at-fault driver, then the UIM statute has been violated as a matter of law and logic. *See Louden, supra; Williams v. Selective Ins. Co.*, 315 S.C. 532, 534-35, 446 S.E.2d 402, 404 (1994).

5. The Court correctly held that the UIM carriers appropriately pled the defense of lack of service.

Plaintiffs assign error to this Court for holding that the UIM carriers properly pled improper service defenses in their respective Answers. Plaintiffs are wrong. The Court

painstakingly and correctly analyzed this issue in the Order on pages 2 and 7 through 11. The UIM carriers pled appropriately and with specificity.

To the extent that Plaintiffs' Motion attempts to distinguish the verbiage of Liberty Mutual's and Horace Mann's respective Answers, the UIM carriers note that the real issue in this case is not one of pleading, but rather statutory interpretation. The violation of S.C. Code Ann. § 33-77-160 discussed in Section III.4, *supra*, supersedes all such considerations. Liberty Mutual has nothing further to add its prior briefing and the Court's analysis of this issue.

6. The Court correctly held that there is no waiver of defense attributable to the UIM Carriers.

Plaintiffs assign error to the Court for holding that the UIM carriers' participating in pre-trial discovery waives their position on the underlying Motion to Dismiss/Motion for Summary Judgment. In this portion of their Motion, Plaintiffs rehash their argument from *Maybank v. BB&T Corp.*, 416 S.C. 541, 787 S.E.2d 498 (2016). This Court correctly held that *Maybank* is distinguishable and therefore inapplicable to the instant case. (*See Order*, at pp. 5, 10-11.) Liberty Mutual requests that the Court stand on its ruling concerning Plaintiffs' *Maybank* argument.

7. The Court correctly held that Liberty Mutual is not equitably estopped from asserting defects with service of process.

Plaintiffs assign error to this Court for not equitably estopping Liberty Mutual from asserting the *Louden* issue. However, the Court was correct to hold that Plaintiffs' equitable estoppel argument fails under any statement of the doctrine.³ Plaintiffs' position is built upon an erroneous, self-serving reading of the plain language of the January 16, 2020 email between

³ Plaintiffs' "estoppel by waiver" argument, made on page 29 of the Motion, is untimely and inaccurate.

counsel. The Court weighed and considered all of the evidence surrounding this issue on pages 12 through 17 of the Order, and Liberty Mutual agrees with the Court's reasoning in this regard and requests that the Court hold to same.

Liberty Mutual would be remiss if it did not address for the record how Liberty Mutual, not Plaintiffs, is the one who has been misled on the issue of service. Plaintiffs attach "Exhibit F" to their Motion, which is Liberty Mutual's Answers to Plaintiffs' Interrogatories, served upon Plaintiffs on August 21, 2020. Plaintiffs assert that Liberty Mutual's General Objection to answering interrogatories addressed to "Defendant" is somehow a waiver of the *Louden* problem. In the Objection, the undersigned noted that Liberty Mutual does not represent Toney, "who has been served with this lawsuit and can respond on his own." (Motion, at Exhibit F p. 1.) As is now known, Toney had not been served at the time that Interrogatory Answer was issued in August of 2020, and by implication Plaintiffs must have already known this fact because they were the ones who had the duty to serve Toney in the first place and file an affidavit accordingly. Plaintiffs, upon receiving this erroneous Objection to Interrogatory Answer, said nothing. Plaintiffs knew Liberty Mutual did not have key information in its possession, and yet they said nothing. Later, when pressed for an affidavit of service, Plaintiffs continued to obfuscate, claiming in October of 2021 that they would "look for" one. If anyone should be estopped in this case, it is Plaintiffs, not the UIM carriers. "Silence, when it is intended, or when it has the effect of misleading a party, may operate as equitable estoppel." *Hedgepath v. Amer. Tel. & Tel. Co.*, 348 S.C. 340, 361, 559 S.E.2d 327, 339 (Ct. App. 2001) (quoting *Southern Dev. Land & Golf Co. v. South Carolina Pub. Serv. Auth.*, 311 S.C. 29, 33, 426 S.E.2d 748, 751 (1993)).

8. The Court correctly held that neither the statutory venue transfer motion nor the discovery between the parties operate as a waiver of the defects in this case.

Plaintiffs assign error to this Court for holding that the UIM Carrier's participation in discovery and Liberty Mutual's making of a venue transfer motion did not amount to a waiver of the *Louden* issue. Plaintiffs' thesis statement for this portion of their Motion is that "Liberty Mutual cannot both take advantage of the Court's jurisdiction but also disclaim the Court's jurisdiction." (Motion, at p. 35.) Plaintiffs' argument is a sleight-of-hand, as Plaintiffs are intentionally conflating the UIM carriers (who have filed motions and participated in discovery) with Defendant Toney (who is not properly before the Court). *See Ex Parte Allstate*, 339 S.C. 202, 207, 528 S.E.2d 679, 681-82 (Ct. App. 2000) (noting that a UIM carrier is not in privity with the at-fault defendant driver). There is nothing untoward about the UIM carriers' participation in the suit prior to filing the underlying dispositive motion.⁴

The Court was correct in finding that the discovery (written and depositions) conducted between Plaintiffs and the UIM Carriers is no bar to the filing of the Motion to Dismiss/Motion for Summary Judgment. It is axiomatic that many cases have a period of discovery prior to the filing of a successful dispositive motion. Additionally, as the Court noted in the Order on page 10 (footnote 3), the timing of the underlying Motion to Dismiss/Motion for Summary Judgment in this case is nearly identical to the timing of the successful motion from *Louden*. (*See also*

⁴ Interestingly, the UIM carrier in *Louden* answered only in the name of the at-fault defendant, Moragne, without reference to itself. (*See* Motion at Ex. G p. 27.) Even still, the *Louden* court had no issue finding that the case should be dismissed because Moragne was not timely served. This feature of the *Louden* case completely undercuts Plaintiffs' repeated assertions in the instant Motion such as "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 ... Liberty Mutual sought relief from the Court which the Court only had the power to grant if personal jurisdiction existed." (Motion, at p. 35.) The UIM carriers and Toney are not one-and-the-same. It is error for Plaintiffs to so argue.

LMU Memo. in Supp. of Mot. Dismiss at Mot. for Summ. J., at pp. 4-5 (detailed comparison of timeline of the instant case versus the timeline of *Louden*.)

The Court was correct in finding that Liberty Mutual's venue transfer motion was not an impediment to the filing of the underlying Motion to Dismiss/Motion for Summary Judgment. To the extent a statutory venue transfer motion could be construed to preclude the subsequent filing of a motion to dismiss because of Rule 12(g), there would still be no impediment to a Rule 56 motion. Further, there is no Rule 12(g) problem at all, because the venue transfer motion was made pursuant to S.C. Code Ann. § 15-7-30 *et seq.*, not Rule 12(b)(3). (See LMU's Reply to Pls.' Resp. in Opp. to Mot. to Dismiss/Mot. for Summ. J., at pp. 11-12.)

9. The Court correctly analyzed the issue of prejudice as to Defendant Toney.

Plaintiffs assign error to this Court for analyzing the possible prejudice to the absent Defendant, Carlos D. Toney. However, the Court was correct to consider the prejudice to Toney as an additional sustaining ground for its Order of Dismissal, especially since Plaintiffs seek to attach a judgment to him without notice. Even though there is a Covenant Not to Execute Judgment in this case, that is not the same thing as a Covenant Not to Enter Judgment. (See Motion, at Ex. H ¶ 2 (Covenant Not to Execute) (providing for entry of judgment and withholding of satisfaction in certain circumstances).) Further, the Covenant Not to Execute may have been violated by Plaintiffs, as they arguably failed to keep Toney abreast of the legal case even as it was approaching trial:

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

(*Id.*, at ¶ 8 (emphasis added).) Defendant Toney was promised notice of the trial date by the Plaintiffs in the Covenant, and the *Rules of Civil Procedure* afford every party litigant the right to be on notice of an action via service of process. Plaintiffs did not afford Toney these basic rights, and now they wish to put his name on a verdict form and enter a judgment against him, contrary to the *Louden* rule. “The fact that any judgment rendered will not ultimately be collected from the named defendant but from the insurance company does not excuse the fundamental requirements of personal service.” *Louden*, 327 S.C. at 468, 486 S.E.2d at 526. In light of the foregoing, Plaintiffs’ claim that “Defendant Toney knew of this action and the possibility of his name appearing on a verdict form,” Motion at p. 36, rings hollow.

Plaintiffs’ opposing claim of prejudice—the alleged prejudice to themselves for having their case dismissed prior to trial and potentially having to appeal this Court’s Order of Dismissal—is of their own making. *See* Section IV, *infra*.

IV. Plaintiffs’ Motion ignores the undisputed fact that Plaintiffs have always known that service was never achieved.

Plaintiffs’ Motion to Reconsider ignores one concrete, indisputable fact: Plaintiffs were the ones tasked with procuring service, *see* Rule 4(a), SCRPC, and they did not do so. All arguments between the parties notwithstanding, Plaintiffs have always known (or should have known) that they never engaged a process server or mail carrier to locate and serve Mr. Toney. Instead of admitting as much to Liberty Mutual when Liberty Mutual’s counsel asked for an Affidavit of Service, Plaintiffs responded with an email to the effect of we “will have to look for [it].” (*See* Ex. B to LMU’s Reply to Pls.’ Resp. in Opp. to Mot. to Dismiss, filed Dec. 21, 2021.) If Plaintiffs’ primary position of estoppel due to “detrimental reliance” were true, Plaintiffs would have and should have said so right then instead of hinting to Liberty Mutual to that an Affidavit of Service would be forthcoming as soon as Plaintiffs’ had a chance to look through

their file. (*Id.*) With great temerity, Plaintiffs now seek to shift the consequences for their failure procure service, under the fiction that the UIM carriers played some role in this failure. This ought not to be done.

CONCLUSION

The Court's Order of Dismissal, in all its particulars, is a correct application of the law and the facts. Plaintiffs' Motion to Alter, Amend, and Reconsider must be denied.

Respectfully submitted,

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Columbia, South Carolina

September 23, 2022

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SUMTER) COURT OF COMMON PLEAS NONJURY

3
4 HOWELL D. THOMPSON AND TARA L.)
5 THOMPSON,) TRANSCRIPT
6 PLAINTIFFS,) OF
7 VS.) RECORD
8 CARLOS D. TONEY,) 2019-CP-43-2375
9 DEFENDANT.)

10 July 22nd, 2020
11

12 B E F O R E:

13 THE HONORABLE GEORGE M. MCFADDEN, JR., Judge.
14

15 A P P E A R A N C E S:

16 JOHN D. KASSEL and ANDREW N. SAFRAN
17 ESQ.
Attorney for the Plaintiff

18 AARON J. HAYES
19 ESQ.
20 Attorney for the UIM carrier Liberty Mutual Insurance
Company
21
22

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24 DCRP, Digital Courtroom Recorder Project
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I N D E X

(WHEREUPON, there were no exhibits marked or testimony
taken during this hearing.)

1 P R O C E E D I N G S

2
3 THE COURT: My very good law clerk has provided me with
4 an outline here, what we have today, and my normal request
5 is to simply tell me who wants to go first and what you're
6 asking for.

7 MR. HAYES: May it please the Court, Your Honor.
8 Aaron Hayes on behalf of Liberty Mutual Insurance
9 Company.

10 THE COURT: Yes, sir.

11 MR. HAYES: Just to clarify before we get started, on
12 the roster I think we were listed for two motions but I
13 think we just got doubled up for just this one. I, I only
14 have one motion in my, my file to be heard today and that
15 will be my motion to change venue. I, I see my opposing
16 counsel nodding yes. So, I assume that means we just got
17 double notice on the roster.

18 THE COURT: Okay. All right.

19 UNIDENTIFIED SPEAKER: We, we had a motion for the
20 plaintiff's motion for response.

21 MR. KASSELL: It's, it's the same thing.

22 UNIDENTIFIED SPEAKER: Okay.

23 MR. KASSELL: So, Aaron is correct. It's just their
24 motion to change venue.

25 UNIDENTIFIED SPEAKER: Okay. Perfect.

1 THE COURT: All right. So, the venue motion, sir.

2 MR. HAYES: Yes, Your Honor.

3 It's Liberty Mutual's position that this is a Lexington
4 County case. This is a Lexington plaintiff, a Lexington
5 wreck, Lexington doctors, Lexington law enforcement. But we
6 find ourselves in Sumter County.

7 And, Your Honor, this, this issue has been well briefed
8 by the parties on both sides. I have submitted our motion
9 and two memoranda in support that we filed. I know Mr.
10 Kassel has submitted his memoranda in response. I would go
11 ahead and incorporate my motion and memoranda into the
12 record and I'm not gonna reiterate everything that's said in
13 there because I -- as I said, I believe both parties covered
14 their positions in their written briefs but just to go over
15 a few things in support of our request that the Court
16 transfer this case to Lexington.

17 As everyone knows, Your Honor, the statute allows a
18 case to be transferred if the convenience of the witnesses
19 that should be done.

20 THE COURT: Yes, sir.

21 MR. HAYES: Distance of -- the distances the witness
22 has to travel create a presumption that it will be more
23 convenient for the closer county and the interest of justice
24 are served when a jury of the vicinity where the incident
25 happened passes on the credibility of the witnesses that

1 they will ultimately see in a jury trial.

2 Your Honor, I think both of those are present in this
3 case for the reasons I just stated and for the reasons
4 mentioned in our, our briefs.

5 Part of our presentation to the Court in a supplemental
6 memorandum of law in support of this motion are factual aff
7 -- are our factual exhibits to support our position and
8 those include, and I would draw the Court's attention to the
9 plaintiff's own responses to discovery provided, provided in
10 this case and the plaintiff's own deposition transcript.
11 When Your Honor looks at those items that we've attached,
12 the Court will see that all or the plaintiff testified that
13 all the medical treatment he sought was in Richland and
14 Lexington County, primarily Lexington County if you also
15 look at the plaintiff's discovery responses to
16 interrogatories.

17 Your Honor, so, I'm not gonna belabor the point any
18 further.

19 THE COURT: Sure.

20 MR. HAYES: I, I just want to point out to the Court
21 that the Court has discretion in -- with this record in
22 front of it to move this case where it should be.

23 THE COURT: Yes, sir.

24 MR. HAYES: If you look at the plaintiff's own
25 interrogatory responses, the plaintiff's own deposition

1 transcript, the Court has the discretion to make the common
2 sense decision to put this case where it belongs and I'll
3 reserve reply to Mr. Kassel's argument. And I thank the
4 Court for hearing me this morning, Your Honor.

5 THE COURT: Certainly and I appreciate your brevity,
6 sir, because I do read everything I've been given.

7 MR. Kassel.

8 MR. KASSELL: Good morning, Your Honor.

9 THE COURT: Hey, sir.

10 MR. KASSELL: John Kassel for the plaintiff.

11 Thank you, Your Honor, for setting up this hearing and
12 Ms. Sanders for doing it. Y'all have made this very easy
13 for us and I appreciate that.

14 In stopping -- judge, if I -- going down a road that
15 you've already plowed, I don't want to do that. I'll tell
16 you that this is a wreck case with a very complex injury to
17 a nonunion in Mr. Thompson's arm that has not been able to
18 heal and it's gonna involve a lot of medical testimony.

19 We filed the case in Sumter County because the
20 defendant lives in Sumter County, and, under the statute,
21 we're entitled to file in Sumter County. There can be a
22 motion to change venue but the party that wants to change
23 venue has the burden of proof.

24 He's got to prove convenience of witnesses. He's got
25 to prove ends of justice.

1 when you look at the case law, typically how that is
2 done, every case I've read is through affidavits and -- but,
3 you know, you look at the MCKissick case that I cite, you
4 know, they, they filed MCKissick 23 affidavits. And I cite
5 the Garrett case and they, they filed 10 affidavits, you
6 know, talking about the materiality of witnesses, what they
7 would say, what the inconvenience was, what the specific
8 hardship was.

9 In this case, judge, the, the defendant has not
10 presented to you one affidavit. And the purpose of the
11 affidavits is to give Your Honor the ability to make a
12 ruling on the in -- the inconvenience if it actually exists.
13 They have -- they failed in that burden. And so I don't
14 really need to come forward. But I want to come forward.

15 They have to show the materiality of witnesses before
16 they can even talk about my (indiscernible), can talk about
17 distances, and they have to demonstrate, through affidavits,
18 what these folks are gonna say.

19 When you look at the affidavits in MCKissick and in
20 Garrett, they're very specific. The ones that, that the
21 Court relied on not -- were simply saying I was an eye
22 witness to a wreck. But I can tell you how fast the
23 ambulance in MCKissick was going at the time of the
24 collision. Otherwise the Court has found that those
25 affidavits that are just very general do not demonstrate the

1 materiality that is required.

2 In -- MCKissick says that a Trial Court or an -- nor an
3 Appellate Court can consider the convenience of any witness
4 when the materiality of the witnesses testimony has not been
5 shown. They haven't produced one affidavit showing the
6 materiality of any witness.

7 Now, there are a lot of doctors in this case that they
8 haven't demonstrated that it -- what those doctors are gonna
9 say and why they're material nor have they shown that any of
10 those doctors have indicated any hardship in a trial in
11 Sumter or, or in, in any jurisdiction nor have they shown
12 any affidavit of the ends of justice.

13 But, judge, what they have done is simply given you
14 mileage and they said everyone lives closer to Lexington
15 than they do to Sumter. I say, without materiality, you
16 don't even get to that.

17 But, Your Honor, you know, sitting as a trial judge,
18 that, under our rules, medical testimony is virtually a
19 hundred percent or most of the time done through deposition,
20 video deposition. I don't anticipate dragging any physician
21 into your courtroom to give medical testimony. It will all
22 be done through a discovery deposition and then a video
23 deposition.

24 I mean I haven't brought a doctor to trial in years.
25 You know, the last time was probably in the '90s when that

1 occurred.

2 And so the idea that there's gonna be any inconvenience
3 to doctors really I don't think is gonna be a factor at all.

4 You know, when I look at all the doctors, doctors that
5 Howie went to, Howie Thompson went to, there are four, four
6 main doctors which have all -- turns out to Richland County.

7 So, Mr. -- Doctor Kingery, he lives in Richland County.
8 He's actually close -- he's not -- he's a neighbor of mine
9 in the Shandon neighborhood. Doctor Fulton has an office in
10 Richland County and is also a neighbor of mine in, in, in
11 Columbia. Earl McFadden has an office in Richland County
12 and now a new doctor that's gonna be seeing Howie Thompson
13 for this nonunion, Doctor Mujadzic, he also practices in
14 Richland County.

15 So, the four main physicians that will talk about the
16 complex nature of this injury all have offices in Richland
17 County and have treated and seen Howie in Richland County as
18 well as in Lexington County. But they have seen him in
19 Lexington -- in Richland County as well, Doctor Fulton has.

20 So if -- even if we were talking about moving this
21 trial from Sumter, the likely place to try it would, under a
22 change of venue, would be Richland County. There's more
23 connection to Richland County. But I'm not asking the Court
24 to do that cause there's no reason to do that.

25 I'm asking the Court to deny the motion to change venue

1 and let us try it where we had a right to bring it, which
2 was in Sumter County, and if there's medical testimony
3 that's gonna be presented, it will be presented by video.

4 Thank you, Your Honor.

5 THE COURT: Yes, sir.

6 Mr. -- I can't read my own writing now, sir.

7 Does anyone else wish to say anything?

8 Mr. Safran, anybody else?

9 MR. SAFRAN: Just very briefly.

10 Your Honor, I think Mr. Kassel's covered it pretty
11 substantially and our -- the only points I would make are
12 the -- is that I heard earlier in the argument from counsel
13 that they were focusing on the idea of the substantial right
14 of having a juror be in the vicinity of the accident to be
15 one that would ultimately sit on this case.

16 well, in fact, it's the opposite. I think the Supreme
17 Court said repeatedly that the substantial rights for the
18 jury that is the domicile county of the defendant to be able
19 to sit in and to hear this case. I don't think they're
20 cases that talk in any way about how it, it -- venue may be
21 somewhere else, that, that has any bearing. Really cases
22 repeatedly say the substantial right vests really in the
23 county where the defendant resides, which is exactly what we
24 went to.

25 Your Honor, I think that the venue statute over the

1 last several years, obviously it's been reined in. It's
2 been more or less done in a fashion in order to limit the,
3 the opportunity and we actually chose one that we were
4 clearly statutorily entitled to choose.

5 Basically the, the notion that because of this case
6 being so medically intensive that we're gonna drag every
7 doctor over to Sumter is really I think, you know, very thin
8 in that, as Mr. Kassel pointed out, jury trials these days
9 do not involve bringing these doctors. They're all gonna be
10 there by video deposition.

11 But, you know, if we're gonna be consistent and honest
12 about it, if there would be any possibility of, of a need to
13 move it, I can tell you Mr. Kassel wasn't able to -- Doctor
14 McFadden only has an office in Columbia. He resides in
15 Columbia. Same thing with Doctor Kingery. Same thing with
16 Doctor Fulton and now doctor -- I always mispronounce his
17 name, but I guess Mujadzic, he's in Columbia.

18 So, again, we don't advocate moving it but if there was
19 any possible reason to do it, Richland County would be the
20 one most logical. So, I would really just kind of reiterate
21 those points.

22 THE COURT: All right. Anyone else?

23 Any reply?

24 MR. HAYES: Your Honor, if I may be heard briefly in
25 reply?

1 THE COURT: Yes, sir, certainly.

2 MR. HAYES: Your Honor, just to respond to two points
3 that, that came my way.

4 First of all, Mr. Kassel mentioned we should of
5 submitted affidavits. It's my position that the plaintiff's
6 own discovery responses and the plaintiff's own testimony in
7 his deposition transcript attached to our memorandum is
8 substantially similar if not better than an affidavit
9 because those are the representations of a party made in a
10 case.

11 Then also the issue of the materiality of the witnesses
12 who will be inconvenienced by coming to Sumter, yeah, that
13 materiality's established by the plaintiff's own statements
14 in his responses to the interrogatories. These are
15 plaintiff's doctors stated by plaintiff who will testify
16 about his extensive injuries related to this wreck.

17 Your Honor, and I'll conclude with the fact that, when
18 I think about this motion, I think about the fact that we
19 will be explaining to a Sumter County jury a wreck that
20 happened in Lexington County. I think there's an underlying
21 awkwardness there that the Court is entitled to correct with
22 this motion. I think the case law gives Your Honor the
23 discretion to put this the, the (indiscernible) where it
24 happened.

25 Thank you, Your Honor.

1 THE COURT: Yes, sir.

2 All right. Anyone else?

3 MR. KASSELL: Judge, just a -- Jack Kassel again.

4 THE COURT: Yes, sir.

5 MR. KASSELL: The case law requires affidavits cause
6 they're sworn testimony. That's remarkably different than
7 discovery responses I've reduced where I list every
8 conceivable witness, witness that know. And it's because I
9 listed every witness that I know to inform the defendant the
10 materiality becomes very important. And what I've done, in
11 my affidavit that I submitted, was try to inform the Court
12 of all of those providers, which ones were really the most
13 material and important, and Howie Thompson did that as well
14 in his deposition. And out of all of them, they're really
15 mainly four orthopedics and they're all in Richland County.

16 And so, so that's important and I, and I don't know
17 what the awkwardness of this would be of trying this case in
18 Sumter with a Lexington wreck. I mean I, I think a Sumter
19 jury could handle that pretty well and, you know, a Sumter
20 jury has the opportunity to look at the credibility of its
21 resident, which is one of the factors in the changing of
22 venue motion if you look at the, the local county where the
23 defendant is.

24 So, I, I think we can try this case in Sumter.

25 THE COURT: Okay. To all of you, I appreciate your

1 patience with us. It is not my policy and it rarely happens
2 that I give out rulings at a hearing. I simply prefer to
3 read one more time and then make a ruling and we will do
4 that and send out a ruling by email. It is, it is my goal
5 to do that by the end of the week.

6 Any other questions, folks?

7 MR. KASSELL: No. Thank you, Your Honor, and thank
8 you, Ms. Sanders, for setting this up. We appreciate it.

9 THE COURT: All right. Well, a good day to all of you.

10 MR. SAFRAN: Thank you.

11 THE COURT: Thank you.

12 MR. HAYES: Thank you. Thank you, Your Honor, for
13 hearing us.

14 THE COURT: Yes, sir.

15

16 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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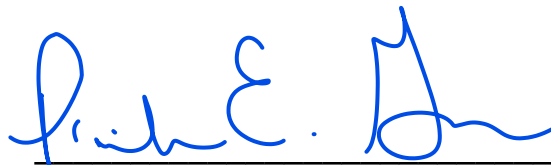
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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Sumter County, South Carolina, on the 22nd day of July, 2020.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 1st, 2022



PAMELA E. GREEN, Court Reporter

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COURT OF COMMON PLEAS NONJURY

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TRANSCRIPT

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OF

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RECORD

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2019-CP-43-2375

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2019-CP-43-2375

July 14th, 2021

B E F O R E:

THE HONORABLE GEORGE M. MCFADDEN, JR., Judge.

APPEARANCES:

JOHN D. KASSEL

ESQ.

Attorney for the Plaintiffs

AARON J. HAYES

ESQ.

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Attorney for the UIM carrier Liberty Mutual Insurance
Company

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DCRP, Digital Courtroom Recorder Project

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I N D E X

(WHEREUPON, there were no exhibits marked or testimony
taken during this hearing.)

1 P R O C E E D I N G S

2
3 MR. KASSELL: -- everybody squeeze this in. We
4 appreciate it very much.

5 This is my motion for protection. It has to do with a
6 deposition of a Doctor Mujadzic who's the plastic surgeon in
7 Columbia who has done one of several surgeries on the
8 plaintiff.

9 The plaintiff, Howie Thompson, suffered significant
10 injury that resulted in what's called a nonunion of his
11 ulna. The ulna fracture never healed, and, as a result, it
12 led to years of instability and pain and it has finally
13 gotten to the point where it is healed.

14 I assisted my friend, Mr. Hayes, in trying to get the
15 deposition of Doctor Mujadzic for him to take cause he's an
16 important witness and that is set coming up.

17 As soon after we set that deposition and got it
18 scheduled, and we got it scheduled, it was noticed in June,
19 a month later, the defense lists Doctor DuPuy as an expert
20 and he is a non treating physician. He is an, an expert who
21 it -- does a record review and he gives opinions. And I got
22 an expert disclosure that listed what his opinions were and
23 essentially was the reason for the nonunion was due to
24 patient noncompliance. And he, he doesn't describe what the
25 patient noncompliance is or when it occurred or how many

1 acts of noncompliance or what's involved in it and my
2 concern is this.

3 We have the deposition set of Doctor Mujadzic and I
4 would like -- and, you know, and, judge, these doctor
5 depositions in wreck cases like this one, you know, it, it
6 is the main event. Doctor Mujadzic is a busy practitioner
7 in Columbia. It's unlikely he's gonna come testify when
8 this case tries in Sumter. And so everybody loads up for
9 the deposition and Mr. Hayes has noticed his deposition as a
10 video deposition.

11 So, I want Doctor Mujadzic to be in a position to
12 directly discuss Doctor DuPuy's opinions about noncompliance
13 as the cause of this nonunion. And without being able so
14 far to identify what specific acts of noncompliance, and the
15 dates for those noncompliance issues are, then I'm sort of
16 having Doctor Mujadzic shoot at shadows.

17 It is important to note something about Doctor DuPuy
18 and his opinions. His opinion about noncompliance as the
19 cause is at odds with every treating physician in the case
20 that is had an opportunity to actually see the plaintiff.
21 That includes Matt McFadden who looked at the plaintiff.
22 That includes Doctor David Fulton who did two surgeries on
23 the plaintiff. It includes Gary Lourie, an expert who
24 looked at the plaintiff as well.

25 All three of those physicians say that they can not

1 identify a cause of the nonunion, that nonunions in these
2 kinds of fractures, open fractures, happen and there may not
3 be an explanation. And none of those physicians have opined
4 that it was -- had anything to do with noncompliance.

5 So, Doctor DuPuy's opinion is pretty important to me
6 and I would like Doctor Mujadzic to be able to address it
7 full head on knowing exactly what is the opinion, that the
8 opinion is -- you know, if you're talking about
9 noncompliance, what do you claim the noncompliance is, when
10 did it occur, and how did it, how did it create this, this
11 issue of nonunion.

12 You know, it -- without -- so what I've done is I've
13 asked Mr. Hayes either take your disclosure and give me the
14 basis, you know, give me the, the basis for the opinion,
15 tell me what are the dates of the noncompliance and what are
16 the acts constituting the noncompliance, or, if you don't
17 want to do that because he says he has difficulty doing that
18 because he's not a medical person and he would prefer to
19 defer to Doctor DuPuy to identify his opinion, I'm actually
20 really asking for factual information. If you're claiming
21 noncompliance, what did he do.

22 Did he work too hard in the yard. Did he fall down.
23 Did he do something. Give me the dates. Give me the
24 incidences that you claim so we can have Doctor Mujadzic
25 address it and see what he says about it. That, of course,

1 would be of tremendous benefit to a jury, to have the full
2 robust discussion of my claims and their defenses in the
3 case.

4 So, the lift I'm asking here I think is pretty light.
5 And if Mr. Hayes doesn't feel comfortable trying to
6 articulate Doctor DuPuy's opinion cause he doesn't want to
7 lose any of the intricacies of it, okay, even though I'm
8 just asking for factual information that justifies his
9 opinion, then I said look, why don't we switch the dates of
10 these depositions.

11 Let me take DuPuy. Let's take his deposition. And
12 then, after that, go ahead and I'll help you set up the
13 deposition of Doctor Mujadzic but now I'll be armed with
14 Doctor DuPuy's thinking, his thought process, and I can ask
15 directly, and you can as well, Doctor Mujadzic, the last
16 treating doc, what do you think about this. What do you
17 think about this defense. What's your, what's your response
18 to it.

19 I think I'm not asking for that much. But I don't want
20 to be blindsided, you know, and trial by ambush by putting
21 up essentially a witness at trial who hasn't had the
22 opportunity to hear from the defense expert who is just now
23 been named.

24 There's no prejudice in them providing me some detail
25 to their disclosure or to switch the dates of the depo. It

1 doesn't hurt them in the, in the slightest. It won't extend
2 any deadline that we have. It will simply allow us to have
3 a full discussion of these issues.

4 So, I'm asking the Court, in my motion, to either have
5 the defendant identify fully what are the issues of
6 noncompliance they rely on in Doctor DuPuy's opinion, and,
7 if not that, then just let us take Doctor DuPuy's opinion in
8 his depo and then have the deposition of, of Doctor
9 Mujadzic.

10 We have a mediation I think scheduled in September that
11 should go forward without incident. You know, the case
12 isn't set for trial until after November. If we don't get
13 it settled, you know, that date's not going away. So, I
14 don't really see any prejudice.

15 THE COURT: Yes, sir.

16 MR. KASSEL: Thank you.

17 MR. HAYES: Thank you, Your Honor.

18 Aaron Hayes on behalf of Liberty Mutual Insurance
19 Company. And, Your Honor, I, I -- just to, to clarify,
20 Mr. Kassel didn't touch on it, I, I represent the UIM
21 carrier in this matter. I do not represent the captioned
22 defendant, Mr. Toney, for the purposes of, of today's
23 proceedings.

24 Your Honor, with all due respect to Mr. Kassel, and we
25 work very well together on this case so far, I, I just -- my

1 client fails to see the issue here and my client fails to
2 see anywhere in the rules where what Mr. Kassel's asking for
3 is authorized. He's asking the Court to change the order of
4 depositions that have been scheduled by the parties, noticed
5 by the parties, and for which the witnesses will be ready.

6 Your Honor, I'm, I'm just simply not aware of any
7 mechanism to, to grant what Mr. Kassel is asking for. We
8 scheduled these depositions and we're ready for these
9 depositions to go forward.

10 On, on the, the other side of his request that my
11 client or myself be compelled to articulate my expert's
12 opinions with further specificity, I have a couple of issues
13 with that, Your Honor, and the first thing I would note is I
14 think we did so. It's embedded in Mr. Kassel's motion and
15 I'll just, I'll just tell it to the Court. This is my
16 expert's opinion in this case, and, Your Honor, Mr. Kassel
17 did touch on it just for your context that, that I think the
18 main driver in this case are repeated surgeries on an arm
19 that was injured during an auto wreck.

20 Our expert is gonna testify to a reasonable degree of
21 medical certainty that patient noncompliance, after
22 plaintiff's initial ulna surgery, necessitated subsequent
23 surgeries and treatment. That -- that's my expert's
24 opinion, Your Honor, and I think that's clear. I think that
25 puts Mr. Kassel on notice of what he's required to be on

1 notice of under the rules and I -- I'm not aware of any
2 requirement or rule that I elocute, for lack of a better
3 word, everything my expert is going to say. I don't want to
4 do that cause I'm not a doctor.

5 And I will also note, and, and Mr. Kassel put this in
6 his motion, you know, there's always discovery questions
7 that go along with an expert witness disclosure. You know,
8 tell me what your expert looked at. Tell me what your
9 expert reviewed. Tell me what your expert has in his file.

10 Your Honor, my expert is retained for the purposes of
11 trial and that's it. So he's not a treating physician.

12 So, everything Doctor DuPuy has is what Mr. Kassel has
13 as far as deposition transcripts that have gone before, the
14 medical records produced by Mr. Kassel. I believe we did
15 obtain some via subpoena but they're probably substantially
16 similar to what Mr. Kassel produced.

17 So, what my expert is looking at when he has formulated
18 this opinion is what we've all been looking at over the past
19 18 months of this case I believe it's been since it's filed
20 to include deposition transcripts of the plaintiff of which
21 there were two and of which the second deposition I, I
22 believe focused almost entirely on the instances that Mr.
23 Kassel references as far as patient noncompliance.

24 Your Honor, these, issues are out there in this case in
25 the medical records and in the depositions. My expert has

1 reviewed them and formulated this opinion. I, I just don't
2 think we've done anything wrong by issuing this opinion
3 summary. In fact, I think we've done it the right way and
4 I'm not aware of any requirement that I be compelled to
5 state with any further specificity the nitty gritty medical
6 details that my expert has reviewed and considered for many
7 reasons not least of which I'm not a doctor.

8 Now, of course, Mr. Kassel has issued discovery
9 requests via subpoena to my expert and interrogatory to me,
10 which we will respond to in time. Those were just recently
11 issued and are not yet due. But, of course, we will do
12 that.

13 So, Your Honor, all this to say I, I just don't see the
14 issue here, Your Honor. I don't see a problem, and, and if
15 there's no problem, then there need be no solution. I think
16 these depositions just proceed as scheduled. Doctor DuPuy
17 is set to testify in August. Doctor Mujadzic is set to
18 testify next week.

19 I don't even know if Doctor Mujadzic has been named by
20 an expert by -- as an, an expert by the plaintiffs. I was
21 spoke -- I spoke with Mr. Kassel about that. There's been a
22 lot of ink traded in this case and I reviewed my file, could
23 not find where he -- where Mr. Kassel's doctors even been
24 named as an expert at all.

25 So, the extent to which he would need to rebut

1 something my expert says well, I, I to -- he may not be in
2 an expert witness capacity, Your Honor, that -- based on the
3 disclosures that we've had so far from Mr. Kassel, and in
4 the event that he is disclosed as an expert, and my expert
5 testifies first, Doctor Mujadzic, Mr. Kassel's presumed
6 expert, could review Doctor DuPuy's transcript. It could
7 issue an affidavit or a report, offer himself for deposition
8 again, or appear at trial.

9 The, the -- Mr. Kassel is not going to lose the
10 opportunity to have Doctor Mujadzic's take on what Doctor
11 DuPuy testifies to. That's just simply not gonna happen.

12 And so, Your Honor, they're many arguments that I could
13 make and, and, and I, I don't think that there is a problem
14 here, and I don't think that -- and, therefore, necessarily,
15 I don't think that either remedy proposed by Mr. Kassel has
16 any merit and we would just ask that these depositions
17 proceed as noticed and as scheduled and the parties will
18 continue on through discovery and mediation.

19 So, Your Honor, I'll, I'll, I'll stop talking. But I
20 think we've complied with the rules and we would ask that
21 this motion be denied.

22 THE COURT: Mr. Kassel.

23 MR. KASSEL: The, the problem that needs a solution is
24 being blindsided by whatever Doctor DuPuy is gonna come up.
25 I mean we set together the deposition date for Doctor

1 Mujadzic. That was done. It was done in June for a July
2 deposition. A month later they name this new guy who's
3 coming up with this brand new defense, and they don't
4 describe to me what the defense is.

5 That's the problem and it's the problem because these
6 depositions are the ball game, you know, because no, no
7 one's gonna be able to get Doctor Mujadzic to drive to
8 Sumter, you know. Everyone does a video deposition. That's
9 what they've noticed here. And getting an affidavit from
10 him isn't gonna solve my problem. You know, that's a
11 hearsay problem.

12 I need for him to be able to give testimony under oath
13 and depose him again. I mean that's not necessarily good
14 judicial resources. We -- it's very simply we could get
15 this problem straightened out.

16 The Court does have the authority. Under the rules,
17 Rule 26(c) that I cite, you know, says that the judge can
18 take notice of events including matters in depositions to
19 alleviate oppression, to alleviate and make sure that
20 justice is done. And, again, what we're asking for is
21 minimal.

22 You know, it -- I sent a standard interrogatory. Tell
23 me the facts upon which you, you rely. Tell me the facts
24 that this witness is gonna testify to. They've never
25 answered that. Tell me the facts. You know, do you

1 consider him missing an appointment noncompliance. That'd
2 be nice to know. What appointment, you know.

3 You consider him not drinking enough milk to increase
4 your calcium levels. Is that an act of noncompliance. He
5 fell on a porch. Is that an act of noncompliance. What are
6 you claiming. I don't know.

7 So, either have them spell it out, and if that's -- and
8 I think that information is available particularly factual
9 matters. And, if not, just let's do DuPuy first and then
10 we'll do Mujadzic.

11 MR. HAYES: Just, just one more thing briefly, Your
12 Honor, if I may.

13 Your Honor, I, I read to you my expert disclosure and
14 the basis of my expert's opinion, which I believe is
15 sufficiently specific under the rules.

16 It, it, it, it -- just, just, just to let you know,
17 Your Honor, and to illustrate the point of, of, of what I'm
18 saying, Mr. Kassel's expert witness disclosures are along
19 the lines of it is anticipated that the medical providers
20 will provide expert opinions regarding the nature of Mr.
21 Thompson's injuries. That was Mr. Kassel's expert witness
22 disclosure and I don't even want to stand in Court and
23 downplay that because I went and deposed those witnesses.
24 There's been many depositions in this case.

25 And I think that's the same thing that needs to happen

1 here, Your Honor. I gave a very specific expert witness
2 disclosure and I believe he can depose my expert on the day
3 we have noticed and I can depose this other doctor,
4 Mujadzic, on the day I have noticed and, and that's just how
5 litigation works.

6 Thank you, Your Honor.

7 MR. KASSEL: If, if he had any concern with my expert
8 disclosure, I would of worked to get it done to his
9 satisfaction. It wasn't an issue for him. This is an issue
10 for me. That's the difference.

11 THE COURT: All right. Here's my ruling either to the
12 delight or chagrin on one or both of you.

13 I'm not gonna grant the first motion regarding having
14 him supply you with certain information (indiscernible).

15 I am gonna grant the second request of switching the
16 depositions around. As my original mentor 30 years ago use
17 to say, Rodney Peeples of all people, the trial is a search
18 for the truth. I don't see any prejudice that can occur
19 here, and, at best, it might save having to take another
20 deposition after Doctor DuPuy testifies.

21 So, Mr. Kassel, would you get me an order please?

22 MR. KASSEL: Yes, sir.

23 THE COURT: Mr. Hayes?

24 Is that right, Mr. Hayes?

25 MR. HAYES: Yes. Yes, Your Honor.

1 THE COURT: I understand your carrier's not gonna be
2 happy with this but I got to make a call.

3 MR. HAYES: Well, judge, I've been in Court enough to
4 win some and lose some and know that it's all right no
5 matter what happens. So, I appreciate the Court's
6 consideration.

7 THE COURT: Well, you know, I've often thought if I had
8 been a better lawyer I wouldn't have to work for the State
9 but here I am.

10

11 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas for Sumter County, South Carolina, on the 14th day of July, 2021.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 1st, 2022



PAMELA E. GREEN, Court Reporter

1 STATE OF SOUTH CAROLINA)
2 COUNTY OF SUMTER) COURT OF COMMON PLEAS NONJURY

3
4 HOWELL D. THOMPSON AND TARA L.)
5 THOMPSON,) TRANSCRIPT
6 PLAINTIFFS,) OF
7 VS.) RECORD
8 CARLOS D. TONEY,) 2019-CP-43-2375
9 DEFENDANT.)

10 January 6th, 2022
11

12 B E F O R E:

13 THE HONORABLE R. KIRK GRIFFIN, Judge.
14

15 A P P E A R A N C E S:

16 JOHN D. KASSEL
17 ESQ.
Attorney for the Plaintiff

18 AARON J. HAYES
19 ESQ.
20 Attorney for the UIM carrier Liberty Mutual Insurance
Company

21 KARL BREHMER
22 ESQ.
23 Attorney for UIM carrier Horace Mann Insurance Company

24 Transcribed by Pamela E. Green, from
25 DCRP, Digital Courtroom Recorder Project

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I N D E X

(WHEREUPON, there were no exhibits marked or testimony
taken during this hearing.)

1 P R O C E E D I N G S

2
3 THE COURT: All right. For the record, this is Case
4 Number 2019-CP-43-02375, Howell D. Thompson and Tara L.
5 Thompson versus Carlos D. Toney.

6 It's my understanding that we have a motion to dismiss
7 before the Court here this morning, and, Mr. Hayes, I'll
8 recognize either you or Mr. Brehmer to -- for your arguments
9 since this is your motion.

10 MR. HAYES: Yes. Yes, Your Honor, and I, I did not
11 speak with Mr. Brehmer about this beforehand. But I believe
12 I, I will be making the argument from the UIM carrier
13 prospective if, if that's okay with Mr. Brehmer, and may it
14 please the Court?

15 THE COURT: Yes, sir.

16 MR. HAYES: Your Honor, I, I think, at the end of the
17 day, this motion could be summarized as what we have here is
18 a, a civil case with plaintiffs but no defendant, and, for
19 the UIM carriers, my client, Liberty Mutual Insurance
20 Company in particular, this means there can be no UIM claim
21 and this case must be dismissed.

22 Your Honor, UIM cases are governed by Statute 38-77-160
23 and the case law interpreting 38-77-160 is crystal clear.
24 Service on the at fault driver within the Statute of
25 Limitations is an absolute requirement to trigger UIM

1 coverage, and there is no dispute, having conducted
2 discovery in this case, there is no dispute that the
3 plaintiffs never served the named defendant, Mr. Carlos
4 Toney, and there is no dispute that the Statute of
5 Limitations has run, and, therefore, this case must be
6 dismissed.

7 Your Honor, there are several cases that have addressed
8 this issue but the one that stands out, and, and on which we
9 are on all fours, is Louden versus Moragne, 327 S.C. 465.
10 Louden is identical---

11 THE COURT: Mr. Hayes?

12 MR. HAYES: ---to our case.

13 THE COURT: Hold on. Hold on one second, Mr. Hayes. I
14 see that we've apparently lost Mr. Kassel for a second. I
15 don't know if he can hear us but I can't see him. So, I
16 don't know if he's got a poor connection or --.

17 (Pause.)

18 MR. KASSEL: Can anyone hear me?

19 THE COURT: We -- you -- we lost you there for a moment
20 and I stopped Mr. Hayes. He had just begun to talk about
21 Louden v. Moragne when we lost your feed. So, I'll have him
22 pick up where he left off.

23 MR. KASSEL: Yeah, and I lost all you guys as well.
24 I -- you know, let's go forward but, if this is a problem,
25 you know, I -- maybe what we should consider doing, since

1 this is an important motion, is, if it's possible, to do
2 this in person.

3 THE COURT: Well, let's, let's see how, how the
4 remainder of, of this goes. But I stopped him when I
5 realized that, that we had lost the feed for a moment.

6 MR. KASSEL: Thank you.

7 THE COURT: So, we're gonna pick up where he left off.

8 MR. KASSEL: Thank you.

9 MR. HAYES: Thank you, Your Honor.

10 Your Honor, as I was saying, the, the case stands out
11 and the one on which we are on all fours is Louden versus
12 Moragne, 327 S.C. 465. And, Your Honor, we filed an initial
13 brief in support of this motion on November the 30th, 2021,
14 and I'll incorporate that into the record of today's
15 hearing. But there are two key quotes from Louden that
16 really speak to the heart of what we're doing here today.

17 The first one is from 486 of the Louden case. It is
18 undisputed that Moragne was not served until after the
19 running of the Statute of Limitations. Louden argues that
20 although Moragne is the named defendant, the underinsured
21 motorist carrier's the real party in interest. We find this
22 argument unpersuasive.

23 The fact that any judgment rendered will not ultimately
24 be connected -- collected from the named defendant but for
25 the insurance company does not excuse the fundamental

1 requirement of service. And the other quote from Louden
2 really speaks to this issue is the holding and that comes
3 from 469 in the Louden case.

4 Service on the at fault driver is an essential
5 component of a negligence action. Thus, we hold that the
6 named defendant in an action for benefits under a
7 plaintiff's underinsured motorist policy must be properly
8 served with the summons and complaint prior to the running
9 of the Statute of Limitations. And so that was the ultimate
10 holding in Louden which resulted in the dismissal of the
11 case on the UIM carriers motion for summary judgment.

12 And as we put into our memorandum that we filed on
13 November 30th, the timeline between the Louden case and
14 the current case are eerily similar in, in how they
15 transpired. If this case -- the, the Louden case involved
16 late service on the named defendant. This case involves no
17 service on the named defendant.

18 So, if the Louden case resulted in dismissal for late
19 service, how much more should this case be dismissed in it
20 is a case of no service?

21 The Louden facts, we put them in our memorandum, but
22 just to highlight them for the Court, that wreck took place
23 on May 1, 1992. The action was filed on August 22, 1994,
24 but only the UIM carriers were served. Eventually the at
25 fault defendant, Moragne, was served several months after

1 the running of the Statute of Limitations. But the Court
2 held that that did not matter. And, in this particular
3 case, we have an even worst -- we have an even more
4 significant situation.

5 In this case the accident happened on June the 2nd of
6 2017. This action was filed on December 5th of 2019 and
7 served only on the UIM carriers. The Statute of Limitations
8 expired June the 2nd of 2020. There's been no service or,
9 to my knowledge, attempted service on the at fault driver.
10 And we filed this motion at the same time that the Louden
11 UIM carrier got their motion granted when you compare the
12 amount of time from filing of the suit to when the motion,
13 the motion was actually dealt with.

14 And so, Your Honor, if you compare this case to the
15 Louden case, they're identical and the Louden case compels
16 one result. This case must be dismissed because the UIM
17 statute has been violated. There can be no UIM claim. An
18 essential component is service on the at fault driver, Mr.
19 Toney. That has not happened, and, therefore, this case
20 must be dismissed.

21 And, Your Honor, I know we've traded a lot of emails
22 with the Court. I appreciate the Court's consideration of
23 those and I, I am in receipt of Mr. Kassel's response brief
24 to this and I filed a reply brief. And so I would, would,
25 would reserve right of reply before I dive into those

1 arguments unless the Court wants me to go ahead and dive
2 into them now. I would, I would appreciate it if the Court
3 would allow me to reply to Mr. Kassel's position.

4 THE COURT: All right. Thank you, Mr. Hayes. I've
5 read -- I have the briefs. I've, I've read them. So, I
6 will hear from Mr. Kassel and give you the right to reply
7 since this is, this is your motion.

8 Mr. Kassel, be happy to hear from you, sir.

9 MR. KASSEL: May it please the Court.

10 John Kassel, Judge Griffin. Thank you very much for
11 squeezing us in and allowing us to participate.

12 I represent -- have the privilege of representing Howie
13 Thompson and his wife, Tara. They were involved, of course,
14 in a very significant motor vehicle wreck that took place in
15 Sumter -- that took place in Lexington County with a Sumter
16 defendant, Carlos Toney. It involved ex -- very extensive
17 injuries far exceeding the liability coverage.

18 We settled with State Farm, the liability carrier, for
19 \$25,000 on a covenant that Your Honor has requested and was
20 sent and then a summons and complaint against Mr. Toney was
21 filed in Sumter County in the courthouse. And it was not
22 served on Mr. Toney. That is correct.

23 But it was served, pursuant to the statute, on both UIM
24 carriers in a timely fashion, Liberty Mutual and Horace
25 Mann, in compliance with 38-77-160 and that statute says no

1 action may be brought under the uninsured motorist provision
2 unless copies of the pleadings and the action establishing
3 liability, which is the complaint against Mr. Toney, are
4 served in the manner provided by law upon the insurer,
5 that's Liberty Mutual and Horace Mann, writing the
6 underinsured motorist provision. We complied with that
7 statute.

8 As a result, counsel for both Liberty Mutual and Horace
9 Mann appeared and filed answers and we went forward. They
10 also knew, of course, that no one appeared on behalf of Mr.
11 Toney, that they were the only defense counsel in the case
12 at that time.

13 They -- Liberty Mutual raised a defense of lack of
14 service, and Statute of Limitations, and venue in a -- what
15 I call a barebones fashion that I want to hit on in a
16 moment. That prompted me to issue an email exchange with
17 counsel for Liberty Mutual, and I asked him if he was going
18 to file a motion at this stage of the litigation or was this
19 defense just boilerplate. In other words, did he have any
20 real omission, did he have any real concerns, or was this
21 just some kind of boilerplate, and his response back to me
22 was this was just boilerplate, that -- my interpretation of
23 that was no motion was coming and no motion did come on
24 service or Statute of Limitations.

25 And, instead, judge, and this is what's important

1 today, instead of filing a Rule 12(b) motion, as I was
2 asking whether he was gonna do or not, instead, what the
3 underinsured carriers chose to do was to engage with me in a
4 nearly two year discovery litigation battle. And during
5 that two years -- of nearly two years of litigation and
6 discovery, they participated in discovery. They sent me
7 discovery. They exchanged discovery with me. They
8 subpoenaed all my client's medical records from multiple
9 providers. They participated in over -- in some 13
10 depositions that took place including, judge, the deposition
11 of the defendant, Carlos Toney.

12 They arranged the deposition of Carlos Toney. They
13 take -- and found a date. The notice was sent to them, the
14 carriers. They procured his attendance at the meeting and,
15 interestingly, I don't know what the conversation was but it
16 certainly did not preclude Mr. Toney from participating in
17 the deposition.

18 Did someone say to him look, there's no lawsuit here?
19 There is no lawsuit. Therefore, there can't be a
20 deposition.

21 You didn't come by subpoena. You're here voluntarily.
22 His participation in a deposition where he is grilled about
23 what happened in the wreck, and that is defended by the UIM
24 carriers will be argued as waiver by both, Your Honor,
25 waiver by both of them of any defect in service.

1 The UIM carriers participated in these depositions.
2 The UIM carrier, Liberty Mutual, hired an expert witness to
3 defend the case. They, they engaged in a motion to change
4 venue. They wrote a memo. They went to a hearing. They
5 participated in mediation. And it was only after all of
6 that, after nearly two years, did they file a motion in this
7 case regarding service and Statute of Limitations and I say
8 they filed it on the eve of trial.

9 We had a scheduling order that said trial not before
10 January of 2022. They filed it in October. Their memo --
11 memorandum came out in November.

12 Here's what's important. There was apparently no
13 service on Mr. Toney and what that does in any case is
14 raises the issue of personal jurisdiction. You can't have
15 personal jurisdiction over a defendant unless there's
16 service, and, without personal jurisdiction, a Court doesn't
17 have the ability to have control over the participants in
18 rendering judgment against a defendant and we'll all agree
19 on that.

20 What there seems to be disagreement on is some
21 fundamental principles regarding personal jurisdiction and,
22 number one, personal jurisdiction can be waived. It's not
23 like subject matter jurisdiction. Personal jurisdiction can
24 be waived. We cite the Maybank versus BB&T case, Supreme
25 Court opinion in 2016, where the Court found that BB&T had

1 waived any possible personal jurisdiction defense and that
2 it was within the trial judge's discretion to find that
3 personal jurisdiction was waived. Personal jurisdiction can
4 be waived.

5 So then you look at what are the various ways that you
6 can waive personal jurisdiction and, primarily, an important
7 way that you waive personal jurisdiction is by not timely
8 filing a motion to contest service. A 12(b)(5) motion, for
9 example. And I cite the Unisun versus Hawkins case, judge,
10 in my brief to say that that Court found that a rule
11 12(b)(5) motion is the proper vehicle for challenging lack
12 of delivery of a summons and complaint, and there's no
13 contest, in this case, that there was timely filing of a
14 12(b)(5) motion. There was not.

15 The answers were I think in January of '20 -- of '19 --
16 of 2020. There was no 12(b)(5) motion, any motion to
17 dismiss in 2020. It only came in October of 2021. That's
18 (indiscernible). And if you, if you read Rule 12(b), 12(b)
19 says a motion making any of the defenses, like 12(b)(5),
20 shall be made before pleading if a further pleading is
21 permitted, and that's the intent of the rule is to get these
22 motions in timely. And these motions need -- the need to
23 file a motion is paramount even if there is a defense
24 articulated in a complaint.

25 And in the Maybank opinion where they found waiver of

1 personal jurisdiction, there had been an answer. The bank
2 had put in its answer that it was challenging personal
3 jurisdiction but it didn't do that. It didn't proceed to,
4 to articulate that defense for over a year that the judge
5 and, and the Court in that case found that there was waiver
6 in the Maybank case.

7 And here's what was important about Maybank, judge, and
8 the reason that I cite it, that it's -- even though they had
9 an answer, they never challenged personal jurisdiction.
10 And, instead, what they did was they engaged in discovery
11 for -- in that case for over a year. Our case was nearly
12 two years. But, in that case, it was over a year.

13 The bank waived its right to contest personal
14 jurisdiction by not timely contesting it until over a year
15 had expired, and, in fact, the Court noted that it wasn't
16 even until two and a half years into the case that they
17 finally challenged it. And here's what the Court said that
18 was important.

19 Even if you comply with Rule 12(a) to file an answer or
20 even a motion for that matter, you can -- those -- that --
21 you can still waive the defense and, in that case, they
22 found that the Court -- the Court found that the bank had
23 waived the defense by engaging in litigation for a year.

24 In that case they had filed that, that -- a -- the
25 Court noted the bank had filed an amended answer, filed a

1 corporate exposure form, had opposed remand, had opposed the
2 motion for attorney's fees, had submitted responses to
3 discovery. That was enough participation in litigation to
4 find waiver of any personal jurisdiction defense.

5 And please note that the discovery in our case is far
6 in excess of what was found in Maybank where you had the
7 exchanging of discovery for nearly two years, 13
8 depositions, hiring expert witness, taking the defendant's
9 deposition, not challenging the defendant's deposition by
10 saying there's no case here to, to even be brought. Liberty
11 Mutual and Horace Mann failed to file a motion for nearly
12 two years, and to, to this day, they have never justified to
13 this Court their failure to file a timely motion and instead
14 engaged in litigation.

15 They've never justified saying that they were permitted
16 to do that under South Carolina rules. And the policy of
17 these rules is clear. The policy is they have these motions
18 raised timely so as not to waste judicial resources and,
19 importantly, to fix defects in a man -- in -- to fix defects
20 timely so they could be done so if there's a Statute of
21 Limitations problem or a service problem it can be fixed and
22 that -- I cite the Datskow versus Teledyne case to make
23 exactly that point.

24 It's a federal case out of the Second Circuit where the
25 Court found that it would of been simple to fix the problem

1 if it had been mentioned by the defendants and raised to the
2 motion. We also cite Varner versus Howell, our Supreme
3 Court opinion, that found that failure to assert an
4 improper -- failure to assert the defense of improper
5 service for over two years until the summary judgment
6 motions were rendered waived any issues regarding service.

7 So, it's got -- the service issue has to be raised by
8 motion. It has to be raised timely.

9 We also cite the Unisun case, judge, that also talks
10 about the specificity in the answer. If my friends want to
11 arrange well, we did raise it, we put it in an answer,
12 Unisun says it's got to be done with specificity. In the
13 Unisun case, they cite Howell -- Garner versus Howell and
14 say that if you're gonna raise it, you're gonna raise
15 service questions, the Supreme Court says a party who fails
16 to properly raise a defense of insufficient service of
17 process, what they're arguing here, under Rule 12, raises
18 any issue of or defense regarding service including a
19 Statute of Limitations defense.

20 They didn't raise it under Rule 12 in their answer or
21 in a motion and then Unisun goes further and says that you
22 have to raise it in an answer. It's got to be specific.
23 They'll -- they've -- there's got to be a specific defense
24 pled. In that case, in Unisun, what the defendant had
25 raised was well, plaintiffs have failed to serve the

1 defendant, Bruce Hawkins, within three years -- within the
2 three year Statute of Limitations. The Court said that
3 wasn't specific enough. It didn't point out the manner that
4 the plaintiff failed to satisfy the rule and it didn't point
5 out that there wasn't -- that he was moving pursuit to Rule
6 12. And the Court in Unisun stated, having failed to
7 properly plead the defense of insufficiency of service of
8 process either by motion or by his answer, it waived the
9 defense and also waived the Statute of Limitations.

10 So, when you look at -- Unisun stands for the
11 proposition that, if you put the defense in your answer, it
12 has to be specific in saying that plaintiffs have failed to
13 serve the defendant, Bruce Hawkins, within three -- within
14 the three year Statute of Limitations. Compare that to
15 Liberty Mutual's defense in their answer. They say --
16 Liberty Mutual says the insurer would show that plaintiff's
17 claims are barred because insurer and defendant have not
18 been served in accordance with the South Carolina Rules of
19 Civil Procedure.

20 It's, it's no more specific than what was turned down
21 in Unisun, and, in fact, it's wrong by the way because it
22 says the insurer had not been served. Of course, we served
23 the insurer. It's vague, it's untrue, and it's not
24 specific.

25 So, they're raising it in their answer under Unisun

1 doesn't say. They didn't plead 12(b)(5). They didn't plead
2 it timely. They engaged in litigation. Their answer
3 raising the defense was not specific all contrary to South
4 Carolina law.

5 We also raise, judge, a Rule 12(g) argument and this is
6 important. Rule 12(g) says that you have a Rule 12(b)
7 motion, you got to bring it -- the lawyer or other 12(b)
8 motions before they're waived.

9 In March of '20, way back in March of '20, Liberty
10 Mutual filed a motion to change venue from Sumter to
11 Lexington. That was heard before Judge McFadden and the,
12 the motion was denied. There was -- there's -- they filed a
13 motion. They appear in Court. They raise this venue
14 provision, which was a 12(b)(3) motion.

15 They cite that they were -- they're operating under the
16 statute talking about transferring for the convenience of
17 witnesses. But I cite the Breland versus Love Chevrolet
18 case, Supreme Court decision, to say that this is really a
19 12(b)(3) motion. In, in Breland, they wanted out of Hampton
20 County and they filed a motion to transfer and they -- the
21 judge, the judge said this is really a 12(b)(3) motion.

22 They're bringing a 12(b)(3) motion in March of '20.
23 They don't mention one word about lack of service respect --
24 lack of service and it's at that time, judge, that if they
25 had raised it, we could of fixed any defects that they said

1 were made and they failed to do it. And, under 12(g), I
2 think they have waived the motion.

3 In addition, judge, and what's a little troubling to
4 me, and I appreciate your time in allowing me to put, put
5 this before you, is we do make an estoppel argument and the
6 way I'm doing this, this really could be part of the waiver
7 argument or it could be separate as an estoppel argument.
8 But when I got the answer from Liberty Mutual talking about
9 service defenses, Statute of Limitations, I emailed counsel
10 and, and said the answer has defenses of Statute of
11 Limitations, spoliation, and improper service.

12 Are these serious omissions you will be filing a motion
13 upon or more of a boilerplate pleading at this stage of the
14 litigation. I'm asking him. I mean is there a real problem
15 here or is this just what defense lawyers put in their
16 answers and the answer back from my friend was boilerplate
17 at this stage.

18 Given the recent Appellate Court ruling in Garrison
19 versus Target, I'm probably gonna have to start pleading
20 every defense available under Title 1 to 63 to be sure I
21 haven't waived any of them. But he's telling me he's not
22 filing a motion. What he's telling me is I don't have a
23 serious omission. I'm just covering my bases and putting
24 everything in my answer and I rely on that.

25 Turns out it's false. He's not intentionally

1 misleading me. It's false in that he's telling me he's not
2 gonna file a motion but, ultimately, a motion comes and I
3 rely on it because if he had told me you've got serious
4 service problems on the Defendant Toney we could of easily
5 have fixed that.

6 I don't think this is Mr. McLawhorn that I'm talking
7 with. I know him. He's not trying to sandbag me. He's not
8 trying to lure me past filing on the Statute of Limitations.
9 We're members of the same bar. We don't do that. He didn't
10 think that there was a statute problem. He's telling me
11 that and I relied on it and we went forward and, and filed a
12 motion and engaged in discovery within -- for over two
13 years.

14 So, it's either an estoppel problem and that the
15 statement turns out to be false and I rely on it -- and the
16 part that I didn't know -- I mean I, I could have figured
17 out and probably should have figured out that there wasn't
18 service on the defendant. But what I didn't know from him
19 was what their intentions ultimately would be. He's telling
20 me they're not filing a motion and ultimately they did.

21 So, I see this is either further waiver of you didn't
22 file a 12(b) motion. You, you engaged in robust discovery
23 for nearly two years. You got a 12(g) problem. You weren't
24 specific in your answers and you're telling me, as a member
25 of the bar, we're not filing a motion.

1 At this stage, and I know Mr. Hayes jumps on the, the
2 notion of this is the language of at this stage, well, you
3 know, to be frank, judge, I don't really know what that
4 means at this stage.

5 Does that mean the pretrial stage, before trial versus
6 at trial versus an appellate stage?

7 It's not really clear. What he's telling me is he's
8 not filing a motion and they didn't, and, instead, they
9 engaged, engaged in discovery. That's either part of waiver
10 or it's a part of estoppel and, judge, it's for those
11 reasons that I believe that you ultimately allow this case
12 to go forward on the merits.

13 Liberty Mutual is not hurt by this. They're not
14 prejudiced by this. They've been defending this case and
15 believing this case is a case that, that needs to -- that
16 they need to defend and they have been doing that. Mr., Mr.
17 Toney is not hurt by this. He's protected by the covenant.
18 He will never subject -- be subjected to anything further
19 than the \$25,000 State Farm paid on behalf of him.

20 We signed the covenant stating that -- in fact, we even
21 have to pay him if somehow a lien was asserted against him
22 and we have to indemnify him. And I think he has waived any
23 defect of service himself by participating in the deposition
24 where he's being grilled about his role in this wreck.

25 I mean if, if he believed that this wasn't a proper

1 lawsuit, file a motion to quash and he had lawyers right
2 there who are U -- the UIM lawyers who are stepping in the
3 shoes of Mr. Toney defending him at this deposition, and
4 they're not telling him you ought to not participate.
5 They're not telling him to file a motion. They both engage
6 in the deposition of the defendant and they both waive any
7 defects in service.

8 So, judge, we argue that both the motion that was
9 ultimately filed by Liberty Mutual and Horace Mann should be
10 dismissed and then allow this case to proceed to trial.

11 Thank you for your time.

12 THE COURT: Thank you, Mr. Kassel.

13 Mr. Hayes, I'll give you the chance to reply.

14 MR. HAYES: Thank you, Your Honor.

15 And I -- we did file a reply brief to the arguments
16 that Mr. Kassel just made on December 21, 2021. So, I
17 incorporate that for the record and I know we're running
18 short of time. So, I'll just hit some high points on, on my
19 way out in further support of the motion and reply to
20 Mr. Kassel.

21 I, I think it's significant for Your Honor to consider
22 that the -- this email exchange from January 16th, 2020,
23 that Mr. Kassel has provided to the Court. That took place
24 five months before the running of the Statute of Limitations
25 and everything represented by Liberty Mutual in that email

1 was factual. We specifically stated in the email that we
2 are pleading so that we are not waiving, and that was five
3 months before the Statute of Limitations ran.

4 The deposition of Mr. Toney, that occurred before the
5 running of the Statute of Limitations, Your Honor. The
6 motion to transfer venue pursuant to the statute and the
7 case law for inconvenient venue was before the running of
8 the Statute of Limitations and that was actually not a Rule
9 12 motion. We, we briefed that. I won't touch that any
10 further.

11 So, Your Honor, as, as far as the representations of
12 Liberty Mutual and Mr. Kassel, they were all timely and
13 accurate.

14 Now, what I do have to highlight for the Court in reply
15 to Mr. Kassel, and that perhaps explains how we got here,
16 are the representations that have come from plaintiffs to
17 Liberty Mutual. And we put this in our reply and I'll just
18 highlight it for the Court.

19 Your Honor has the covenant not to execute that you
20 requested by email. We got that in October of 2020. And
21 then Your Honor has an email ex -- in that same email
22 exchange where we got the covenant, we were told by Mr.
23 Kassel that plaintiffs were looking for the affidavit of
24 service on Mr. Toney because we had asked for it informally
25 in October of 2021. And the response that we received was

1 they're looking for it.

2 And, from our prospective, it, it might have come and
3 then we would not be here today. But when it did not come,
4 we had to pursue discovery and stipulation that there had
5 been no service so that we could file this motion. And I
6 think that's significant for Your Honor as Your Honor
7 considers the representations between the parties and who
8 has been told what and what the effect, if any, of those
9 representations are. And we cover that in our reply brief
10 and I'll, and I'll move on.

11 Your Honor, I think it's also significant for the Court
12 to consider that we do not represent Carlos Toney. We
13 represent Liberty Mutual Insurance Company and the case law
14 is very clear that the UIM attorney is not in privity with
15 the named defendant. We don't represent him. We don't have
16 an attorney/client relationship with him. He is a stranger
17 to us, and pursuant to a statutory mechanism, we have the
18 ability to participate in this lawsuit. That statutory
19 mechanism has been violated.

20 Mr. Kassel made the point that he feels he has complied
21 with the statute because he served the summons and complaint
22 on Liberty Mutual. Well, the statute requires service on
23 Liberty Mutual and Mr. Toney. And the reason for that is
24 what was expressed in the Louden case. It's much more
25 fundamental than the Rule 12 dispute that Mr. Kassel brings

1 in this ask.

2 This is actually not a Rule 12 dispute. The Louden
3 case and the UIM statute create a fundamental requirement
4 that a valid -- that the pathway for a valid judgment
5 against an at fault driver be created by a plaintiff seeking
6 UIM benefits. There can be no valid judgment against Carlos
7 Toney as a result of this wreck. He has never been served
8 with this lawsuit.

9 If this case were to go to trial, Mr. Toney is not on
10 notice that Mr. Kassel intends to call witnesses to a public
11 courtroom to talk about Mr. Con -- Mr. Toney's conduct on
12 the day in question. Mr. Toney is not on notice that one
13 day a judgment could be entered against him. Mr. Toney is
14 not on notice of all of these things and, therefore, there
15 is no valid judgment that can attach even if one is
16 rendered.

17 I think it's just -- it's, it's more fundamental than
18 Rule 12, Your Honor, and that's what the Louden case is
19 touching on. There must been an action that can generate a
20 valid judgment and I don't think a valid judgment can attach
21 in a setting where plaintiff calls witnesses in front of a
22 jury and there's never been a human being who has been told
23 that they have to come and sit in the defendant's chair.

24 That is completely contrary to any notion of, of
25 fairness, due process, and, and Mr. Kassel makes the point

1 that Liberty Mutual has not been harmed and Carlos Toney has
2 not been harmed. well, Your Honor, I, I do have to point
3 out, you, you solicited the covenant from us and we sent it
4 to you yesterday.

5 If you look through that covenant, that covenant leaves
6 Mr. Toney exposed were this case to go to trial. It does
7 not guarantee immediate satisfaction of judgment. It
8 guarantees that a judgment will not be pursued against Mr.
9 Toney to the extent that that's not an impediment to the
10 coverage.

11 It, it -- if you pour through that covenant, it
12 provides some protection to Mr. Toney. Does not provide
13 complete protection to Mr. Toney. And I think that's
14 significant, Your Honor, because I think that goes to the
15 due process of conducting a trial against somebody whose
16 never been given the lawsuit.

17 I think the, the violation of a service rule is, is
18 enough -- is prejudice alone. But if you want to actually
19 look at the covenant and what Mr. Toney's exposed to, I, I
20 think that's significant consideration. And then also in
21 the covenant promised by plaintiffs to Mr. Toney was notice.

22 I, I think that's significant too. Mr. Toney was told
23 by the plaintiffs that they would keep him up to date and I
24 think that failing to serve the lawsuit is quintessential
25 about being kept up to date on a -- the nature of the

1 action.

2 So, Your Honor, I'll, I'll commend the, the rest of the
3 briefs to you because I think that they, they hit all of the
4 points. Your Honor, there is a serious problem with this
5 case. A valid judgment can not attach to Mr. Toney because
6 he has never been served, and the requirement for a valid
7 judgment against the at fault driver, as a predicate to UIM
8 coverage, is absolute. It is absolute under our case law.

9 That is one of the strongest words that we have in law
10 for a particular requirement, and Your Honor can find it
11 throughout the UIM cases that we have cited in our brief.
12 It is an absolute requirement and the statute has been
13 violated and this case must be dismissed.

14 Every Appellate Court that has dealt with this issue
15 has reached the same conclusion, the Louden case, the
16 Williams versus Selective case. They're all cited in our
17 brief. The law compels that this be dismissed and we
18 appreciate the Court's consideration on it.

19 THE COURT: All right. Thank you, Mr. Hayes.

20 Before we conclude this morning, Mr. Hayes, I notice
21 that you had submitted proposed order for continuance based
22 upon an unavailability of an expert and, Mr. Kassel, I know
23 you don't want to consent to a continuance. But I think,
24 based upon that witness being unavailable -- and I don't --
25 I haven't made a decision on this matter yet.

1 So, I know this case is on the trial list for next
2 week. I think the best course of action is for me to take
3 this matter under advisement for a couple days. I continue
4 the case until no earlier than the February term of Common
5 Pleas Court in Sumter.

6 So, I will have a decision on this matter by next
7 Friday and I will continue, continue the case for trial next
8 week.

9 MR. BREHMER: Judge, before we end, could I say
10 something?

11 THE COURT: Sure.

12 MR. BREHMER: Your Honor, I, I -- I'm not gonna rehash
13 what Mr. Kassel or Mr. Hayes have said. But I represent
14 Horace Mann Insurance Company and Horace Mann Insurance
15 Company's role in this particular matter is similar to
16 Liberty Mutual's but it is not identical.

17 I am the second player of under insurance motorist
18 coverage and I have filed basically a (b)(2) motion to
19 Mr. Hayes. It's identical I think. But my circumstances
20 are slightly different that could possibly affect or impact
21 the Court's ruling and I would like to point those out to
22 the Court.

23 THE COURT: Yes, sir.

24 MR. BREHMER: Yes, sir.

25 The first thing that I want to point out to the Court

1 is, is that in the defense that I -- in the answer that I
2 filed on behalf of Horace Mann Insurance Company, which is
3 my second defense, my wording in my answer is slightly
4 different than that of Horace Mann's, which I think
5 addresses one of the issues that Mr. Kassel raised in his
6 recitation of the Unisun case.

7 My second defense specifically says the defendant would
8 show, upon information and belief, plaintiff has failed to
9 obtain service of process against this defendant. Not
10 against insurance carriers but against the defendant. And,
11 for that reason, the plaintiff's complaint should be
12 dismissed with prejudice.

13 I think that that cures all of the plaintiff's
14 allegations that well, you know, you waived this. No, we
15 didn't. We told you at the time that we filed this answer
16 that you had not retained service of process against the
17 defendant.

18 Okay. Now, the second thing is, is that plaintiff's
19 counsel never emailed me about the second defense. There
20 has been no correspondents between Mr. Kassel and I about
21 the second defense. There is no argument that Horace Mann
22 in any way has waived the service defense.

23 Okay. The third thing, which is basically for
24 (indiscernible), but Horace Mann has never actually
25 initiated any discovery. We have participated in the

1 discovery and the reason that that was was just for the
2 practical reason is, is that Mr. Hayes has initiated all
3 discovery on behalf of Liberty Mutual and that's nothing
4 unusual about that because I'm second in line behind him.

5 But I have participated in all of the discovery. But I
6 have not initiated any of the discovery, which is one of the
7 plaintiff's contentions, and I just wanted to make those
8 clarifications for the Court because those are -- while
9 several differences, they are still differences that
10 somewhat address some of the issues that the plaintiff has
11 used in reply that could impact, if I'm reading this case
12 authority that has been cited in the briefs, that could make
13 a difference in the Court's ruling between Liberty Mutual
14 and Horace Mann.

15 And I have filed this same motion and I wanted to point
16 those things out to the Court just so that the Court has a
17 record and those issues have been addressed, Your Honor, and
18 that's all I have to say. I do thank you for your time and
19 I appreciate you continuing the case because I wanted to go
20 quail hunting next Thursday.

21 THE COURT: Well, I, I think that's the, the best
22 course of action. This is a lot to digest. And so, I will
23 have a decision by the end of next week and I---

24 MR. KASSEL: Would you, would you permit me one moment?

25 THE COURT: Yes, sir.

1 MR. KASSEL: And, and let me start out by saying I --
2 ultimately I didn't consent and I appreciate the
3 continuance. I did email the lawyers that I consented given
4 their circumstances, and in light of your holding this
5 motion in abeyance, it makes a lot of sense.

6 I, I would just point out, judge, that after hearing my
7 friend Mr. Hayes argue to you, and even Mr. Brehmer's
8 argument to you, neither one ever addressed our waiver
9 argument, waiver through robust litigation, waiver through
10 12(g), waiver through failure to file a timely Rule 12
11 motion. Karl Brehmer didn't file a timely Rule 12 motion.
12 Karl Brehmer participated and his firm participated in the
13 venue motion.

14 They -- he had a better answer. I will give him that.
15 He's correct on that. But the underpinnings of our argument
16 on waiver really were never attacked that personal
17 jurisdiction for lack of service and (indiscernible).

18 MR. HAYES: And if, and if I may briefly reply to that,
19 Your Honor?

20 THE COURT: Yes, sir, just briefly.

21 MR. HAYES: Yes, Your Honor.

22 I, I commend Footnote 2 of our reply brief to you on
23 that point. We don't represent Mr. Toney. I don't believe
24 we can waive Mr. Toney's rights. I think that's very
25 significant.

1 And on the issue of, of rebutting Mr. Kassel's
2 arguments on Rule 12 and, and waiver, and Unisun, and
3 Maybank, we've handled those in our brief and I'll commend
4 our brief to you on that, Your Honor.

5 THE COURT: All right.

6 All right, gentleman. Thank you for participating via
7 video conference. And while it, it creates its own list of
8 challenges, I think it is an efficient way to handle these
9 things especially when you're trying to squeeze something
10 in, and with the rising COVID case numbers, I'm -- I think
11 this is probably the best way to get this done. But I'll
12 have an answer via a memorandum and I'll ask prevailing
13 party to draft an order by next Friday.

14 MR. KASSEL: Thank you, Your Honor.

15 THE COURT: Thank y'all very much.

16 MR. HAYES: Thank you, Your Honor.

17 THE COURT: All right.

18 MR. BREHMER: Thank you, judge.

19 THE COURT: Yes, sir.

20

21 * * *END OF REQUESTED TRANSCRIPT OF RECORD* * *

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C E R T I F I C A T E

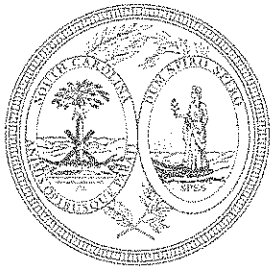
I, Pamela E. Green, Official Court Reporter for the State of South Carolina, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Court of Common Pleas Nonjury for Sumter County, South Carolina, on the 6th day of January, 2022.

I do further certify that I am neither of kin, counsel nor interest to any party hereto.

September 1st, 2022



PAMELA E. GREEN, Court Reporter



South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105
Telephone: (803) 737-6160

HENRY McMASTER
Governor

RAYMOND G. FARMER
Director

December 18, 2019

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
HORACE MANN PROPERTY & CASUALTY INSURANCE CO.
c/o CORPORATION SERVICE COMPANY
1703 Laurel Street
Columbia, SC 29201

Dear Sir:

On December 13, 2019, I accepted service of the attached Summons, Complaint, Interrogatories and Request for Production on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-5-70. By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to sdubois@doi.sc.gov. When replying, please refer to File Number 177367, Howell D. Thompson, et al. v. Carlos D. Toney, 2019-CP-43-02375.

By:

Sincerely Yours,

David E. Belton
Senior Associate General Counsel
(803)737-6200

Raymond G. Farmer
Director
State of South Carolina
Department of Insurance

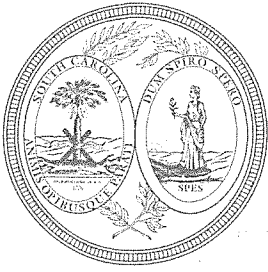
Attachment

CC: John D. Kassel
Post Office Box 1476
Columbia, SC 29202

RECEIVED DEC 19 2019

ROA 653

ELECTRONICALLY FILED - 2019 Dec 19 3:23 PM - SUMTER - COMMON PLEAS - CASE#2019CP4302375



South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

HENRY McMASTER
Governor

RAYMOND G. FARMER
Director

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105
Telephone: (803) 737-6160

December 19, 2019

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
LIBERTY MUTUAL INS CO
c/o Corporation Service Company
1703 Laurel Street
Columbia, SC 29201

Dear Sir:

On December 19, 2019, I accepted service of the attached Summons and Complaint, Plaintiffs' First Interrogatories and Plaintiffs' First Request to Produce on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-5-70. By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C. Code Ann. § 38-77-160. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to sdubois@doi.sc.gov. When replying, please refer to File Number 177383, Howell D. Thompson et al. v. Carlos D. Toney, 2019-CP-43-02375.

By:

Sincerely Yours,

David E. Belton
Senior Associate General Counsel
(803)737-6200

Raymond G. Farmer
Director
State of South Carolina
Department of Insurance

Attachment

CC: John D. Kassel
1330 Laurel Street
Columbia, SC 29202

RECEIVED
DEC 20 2019

ELECTRONICALLY FILED - 2019 Dec 20 4:12 PM - SUMTER - COMMON PLEAS - CASE#2019CP4302375

ROA 654

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November 2, 2021

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The Honorable James C. Campbell
Sumter County Clerk of Court
141 N. Main St., Rm 308
Sumter, South Carolina 29150-4965

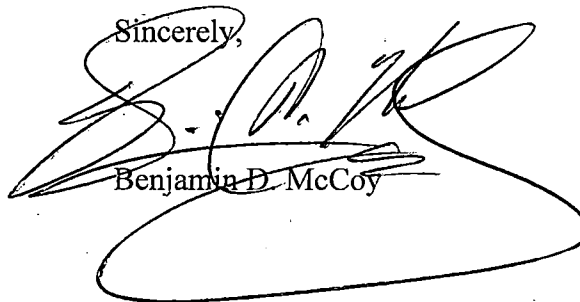
RE: Howell D. Thompson and Tara L. Thompson v. Carlos D. Toney
Civil Action No.: 2019-CP-43-02375
Our Matter No.: 256-1822

Dear Mr. Campbell:

Enclosed please find the Mediation Results Report to the Court in the above-referenced civil action. By copy of this letter, I am notifying counsel of record of this filing and providing them with a copy of the same.

If you have any questions concerning this matter, please do not hesitate to contact me.

Sincerely,



Benjamin D. McCoy

BDM/lad
Enclosures

cc: John D. Kassel, Esquire
Aaron Hayes, Esquire
Karl S. Brehmer, Esquire

ROA 655

ELECTRONICALLY FILED - 2021 NOV 08 10:15 AM - SUMTER - COMMON PLEAS - CASE#2019CP4302375

STATE OF SOUTH CAROLINA

COUNTY OF SUMTER

Howell D. Thompson and Tara L. Thompson,

Plaintiff,

v.

Carlos D. Toney,

Defendant.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2019-CP-43-02375**MEDIATION RESULTS REPORT****(THIS FORM TO BE COMPLETED BY THE MEDIATOR WITHIN 10 DAYS OF CONCLUSION OF THE CONFERENCE, WHETHER OR NOT AGREEMENT WAS REACHED BY THE PARTIES.)**

1. Mediated settlement conference commenced before me on Monday, October 25, 2021, and concluded on Tuesday, November 2, 2021, when an impasse was reached.

2. As a result of this conference, this case should be considered (*please check one*):☐ Fully Settled (*please check one*):☐ by Consent Judgment, to be filed by _____ or,
(Name of Designee)☐ by Voluntary Dismissal, to be filed by counsel of record for the parties.
(Name of Designee)☐ Partially Settled, with agreement of the parties on the following issues:*(attach separate sheet, if necessary):*☒ At an impasse. The mediation session was productive. There remains a possibility that further reflection by the parties and settlement discussions could lead to an agreement.☐ In need of further mediation. (I ☐ **am**/ ☐ **am not** willing to mediate this case further.)☐ Continued (Date) _____

ROA 656

3. Plaintiffs ☒ **were**/ ☐ **were not** present.

Defendant ☐ **was**/ ☒ **was not** present.

4. Other participants were:

- ☒ attorney for plaintiffs
- ☒ attorneys for UIM carriers
- ☒ representatives for insurance carriers
- ☐ guardian ad litem _____
- ☐ experts _____
- ☐ others _____

5. This case was co-mediated with: N/A.

6. Choice of the mediator was by:

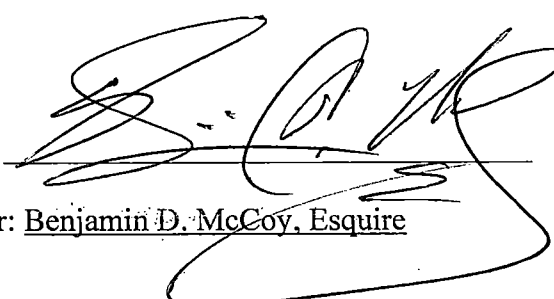
- ☒ Stipulation and Agreement
- ☐ Court Order.

7. The total number of hours spent in mediation was: 5.10 hours.

8. Further comments of the mediator:

Item # 7 above does not request and consequently does not reflect the preparation and work performed by the mediator before and after the actual mediation of this case. The mediator worked a total of 6.80 hours.

Date: November 2, 2021

Signature of Mediator: 

Print Name of Mediator: Benjamin D. McCoy, Esquire

RECEIVED

Jan 19 2023

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

Howell D. Thompson and Tara L. Thompson,

Appellants,

v.

Carlos D. Toney

Respondent,

NOTICE OF APPEAL

Howell D. Thompson and Tara L. Thompson (“Appellants”) timely appeal the circuit court’s August 29, 2022 Order dismissing the case and December 21, 2022 Order denying their Rule 59(e) motion. Copies of the written orders are attached hereto. Appellants received written notice of the entry of the December 21, 2022 Order on December 21, 2022.

Appellants state all necessary transcripts for this appeal have previously been ordered from and provided by the appropriate court reporters.

(Signature page follows)

ROA 658

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January 19, 2023.

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*Counsel for Horace Mann Property
and Casualty Insurance Company*

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.	)	
	)	
Carlos D. Toney,	)	
	)	
Defendant.	)	

RECEIVED**Jan 19 2023****SC Court of Appeals****ORDER OF DISMISSAL**

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

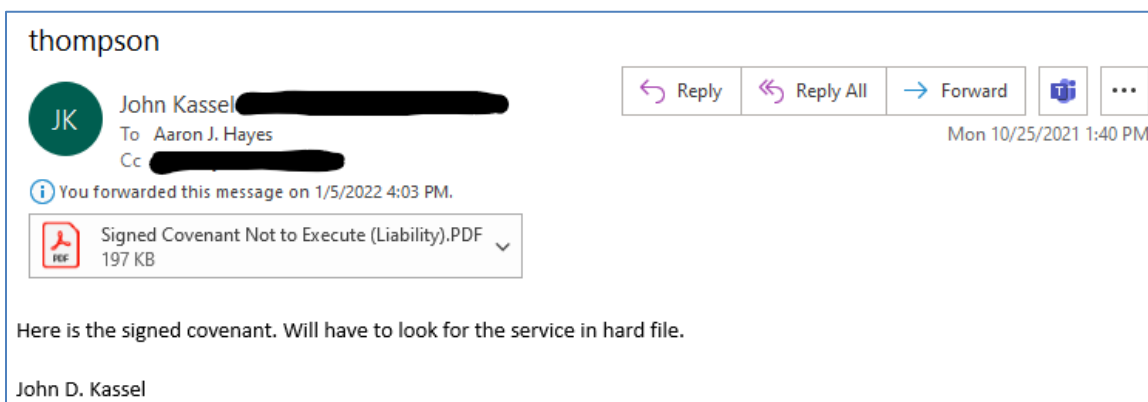
(found in original form at Ex. A to Pl's Resp. to LMU Mot. to Dismiss and Mot. for Summ. J.)

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.

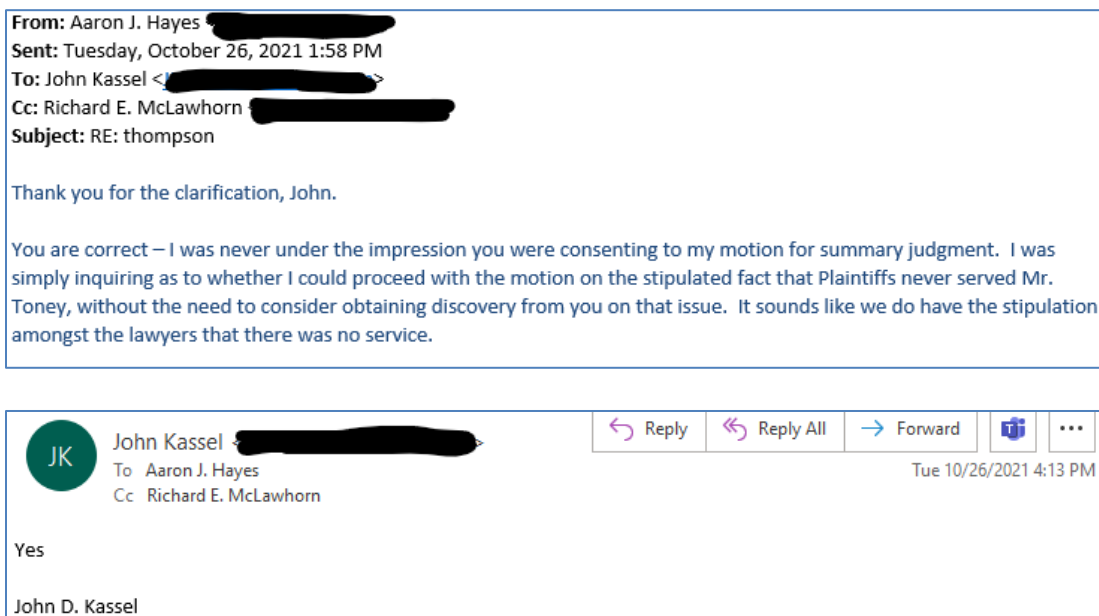
b) Plaintiffs fail to demonstrate true reliance on the complained-of representation.

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), SCRCF. 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

COUNTY OF SUMTER

)
) IN THE COURT OF COMMON PLEAS
) THIRD JUDICIAL CIRCUIT

Howell D. Thompson and Tara L.
Thompson

Plaintiffs,

V.

Carlos D. Toney,

Defendants

RECEIVED

Jan 19 2023

SC Court of Appeals

ORDER

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

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

Pursuant to Rule 59 (f) SCRCP, 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 680



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

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Jan 19 2023

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

Howell D. Thompson and Tara L. Thompson,

Appellants,

v.

Carlos D. Toney

Respondent,

PROOF OF SERVICE

I certify that a true copy of the Notice of Appeal in this case has been served on the following, this 19th day of January, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447).

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ROA 682

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Counsel for Appellants

Columbia, South Carolina
January 19, 2023.

From: [Shanon Peake](#)
To: rem@swblaw.com; [Aaron J. Hayes](#); ksb@brownandbrehmer.com
Cc: [Jon Robinson](#); jkassel@kassellaw.com; [Theile McVey](#); jrutkoski@kassellaw.com; msa6631@aol.com; [Dot Faulkenberry](#)
Subject: Thompson, et al. v. Toney - Notice of Appeal
Date: Thursday, January 19, 2023 9:57:00 AM
Attachments: [NOA with Orders, 1.pdf](#)
[POS NOA, 2.pdf](#)

Good Morning,

Please find attached for service on you the Notice of Appeal we are filing with the Court of Appeals today.

Thank you,
Shanon

SMITHROBINSON
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Smith Robinson Holler DuBose and Morgan, LLC
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ROA 684

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May 11 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000074

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

In Re:

Howell D. Thompson and Tara L. Thompson,
Appellants,

v.

Carlos D. Toney,
Defendant.

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

INTRODUCTION

Carlos D. Toney—the Defendant in this action—never has been served with any process whatsoever. In other words, he never was served with a summons to the court below or a notice of appeal to this Court. Accordingly, Respondent Liberty Mutual Insurance Company asserts that the instant appeal must be dismissed, as the South Carolina appellate courts lack jurisdiction over this matter. This Motion is made pursuant to Rule 240 of the *South Carolina Appellate Court Rules* and is supported by the embedded Memorandum.

ROA 685

FACTS BEARING UPON THE MOTION

On December 5, 2019, Appellants filed the underlying action and served it upon putative UIM carriers Liberty Mutual Insurance Company (“Liberty Mutual”) and Horace Mann Property & Casualty Insurance Company (“Horace Mann”). (Initial Br. of Appellants, at 2.) After a period of discovery, it was revealed that alleged at-fault Defendant Carlos D. Toney had never been served with the Summons and Complaint. (*See id.*, at 2-8.) The underlying action was then dismissed upon the motion of Liberty Mutual and Horace Mann. (*See id.*, at 8-9 (reciting the procedural history of the UIM carriers’ successful motion to dismiss/motion for summary judgment, which was granted via order dated August 28, 2022).) The motion was granted due to the circuit court’s application of the long-established rule from this Court’s opinion in *Louden v. Moragne*. (*See id.*; *see also Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) (holding that a UIM carrier is entitled to dismissal of the case when the at-fault driver is not served with process prior to the expiration of the statute of limitations).) Appellants’ motion to reconsider the order of dismissal was denied on December 21, 2022. (*See id.*, at 9.)

On January 19, 2023, Appellants filed and served the Notice of Appeal in the above-captioned case. (Not. Appeal.) Appellants served the Notice of Appeal upon the undersigned, as counsel for Liberty Mutual, and upon Karl S. Brehmer, Esq., as counsel for Horace Mann. (*Id.*, at Proof of Svc.) The Notice of Appeal is captioned as “Howell D. Thompson and Tara L. Thompson, Appellants v. Carlos D. Toney, Respondent.”¹ (*Id.*) There is no record in this Court that the Notice of Appeal was ever served upon Carlos Toney, nor is there any record in this Court of an appearance by Toney or counsel on his behalf.

¹ The caption was later amended by the Clerk of Court for the Court of Appeals into the version of the caption that appears above.

APPLICABLE LAW

“The notice of appeal in a case appealed from the Court of Common Pleas must be served on *all respondents* within thirty days after receipt of written notice of entry of the order or judgment.” *Elam v. S.C. Dep’t. of Transp.*, 361 S.C. 9, 14, 602 S.E.2d 772, 775 (2004) (citing Rule 203(b)(1), SCACR) (emphasis added). “The requirement of service of the notice of appeal is jurisdictional, i.e., if a party misses the deadline, the appellate court lacks jurisdiction to consider the appeal and has no authority or discretion to ‘rescue’ the delinquent party by extending or ignoring the deadline for service of the notice.” *Id.* at 14-15, 602 S.E.2d at 775 (citing *Mears v. Mears*, 287 S.C. 168, 337 S.E.2d 206 (1985)). “The time prescribed by these Rules for performing any act *except for the time for serving the notice of appeal* under Rules 203 and 243 may be extended or shortened by the appellate court...” Rule 263(b), SCACR.

ARGUMENT

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

Assuming for the sake of argument that Appellants' argument about voluntary appearance in the circuit court is correct,² then Toney would have been joined as a party in the action below and therefore it is inexcusable that Appellants did not serve Toney with the Notice of Appeal to this Court. The notice of appeal must be served on "all respondents," pursuant to Rule 203(b)(1), SCACR, otherwise the appellate court lacks jurisdiction. *See Elam, supra*. As discussed below, Toney is the true defendant in the court below. Thus, he is the adverse party to Appellants before this Court, making him a "respondent" as that term is defined in the *Appellate Court Rules*. *See* Rule 202(a), SCACR; *see also* S.C. Code Ann. § 18-1-120 (stating same). All respondents to an appeal must be served via one of the methods prescribed in Rule 262, SCACR, and none of those methods were used upon Toney in this appeal.

The fact that Liberty Mutual, a putative UIM carrier, has been served with the Notice of Appeal does not operate to excuse this deficiency. In a UIM case, the law is clear that even though the judgment might be collected ultimately from the UIM carrier, the case is still a traditional plaintiff-versus-defendant lawsuit that requires jurisdiction over the named defendant to render a valid judgment:

Louden argues that although Moragne is the named defendant, the underinsured motorist carrier is the real party in interest. We find this argument unpersuasive. The fact that any judgment rendered will not ultimately be collected from the named defendant but from the insurance company does not excuse the fundamental requirements of personal service. A court may not enter a valid judgment against an individual over whom the court lacks personal jurisdiction.

Louden, 327 S.C. at 468, 486 S.E.2d at 526. The *Louden* court also explained:

In the present case, the negligence action *is against the at-fault driver* and not directly against the insurance company. Service on the at-fault driver is an essential component of the negligence action. Thus, we hold that the named

² The circuit court held that Toney did not engage in a voluntary appearance in the court below. If that is correct, then the underlying action was never commenced as to Toney at all and Liberty Mutual should be entitled to prevail on the merits of this appeal. If necessary, Liberty Mutual will make this argument in a forthcoming initial brief.

defendant in an action for benefits under a plaintiff's underinsured motorist policy must be properly served with the summons and complaint prior to the running of the statute of limitations.

Id. at 469, 486 S.E.2d at 527 (emphasis added). The law is also clear that service of the Notice of Appeal upon Liberty Mutual's counsel cannot count as service of the Notice of Appeal upon Toney. See *Crawford v. Henderson*, 356 S.C. 389, 398, 589 S.E.2d 204, 209 (Ct. App. 2003) (holding that there is no attorney-client relationship between the named defendant and a UIM carrier).

CONCLUSION

Appellants seek to "have their cake and eat it too," by arguing that Toney was served in the court below but then ignoring the requirement that he be served in this Court. Appellants' failure to procure service of the Notice of Appeal upon Carlos Toney is fatal to this appeal because this Court is without jurisdiction over Toney. Toney is the party against whom this action is filed, and Appellants have failed to summon him to either the circuit court or this Court. Therefore, this appeal must be dismissed.

Respectfully submitted,

SWEENEY, WINGATE & BARROW, PA

s/ Aaron J. Hayes

Richard E. McLawhorn, Jr.

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**ATTORNEY FOR RESPONDENT LIBERTY
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**ATTORNEY FOR RESPONDENT HORACE
MANN PROPERTY & CASUALTY
INSURANCE COMPANY**

Columbia, South Carolina

May 11, 2023

ROA 690

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May 11 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Appellate Case No. 2023-000074

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

In Re:

Howell D. Thompson and Tara L. Thompson,
Appellants,

v.

Carlos D. Toney,
Defendant.

PROOF OF SERVICE

I certify that a true copy of the foregoing Respondent Liberty Mutual Insurance Company's Motion to Dismiss Appeal for Lack of Jurisdiction in this case has been served on the following, this 11th day of May, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447):

G. Murrell Smith, Jr., Esq., counsel for Appellants, at murrell@smithrobinsonlaw.com
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John D. Kassel, Esq., counsel for Appellants, at jkassel@kassellaw.com
Theile B. McVey, Esq., counsel for Appellants, at tmcvey@kassellaw.com

ROA 691

Jamie R. Rutkowski, counsel for Appellants, at jrutkowski@kassellaw.com
Andrew N. Safran, Esq., counsel for Appellants, at msa6631@aol.com
Karl S. Brehmer, Esq., counsel for Respondent Horace Mann, at ksb@brownandbrehmer.com

Respectfully submitted,

SWEENY, WINGATE & BARROW, PA

s/ Aaron J. Hayes

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**ATTORNEY FOR RESPONDENT LIBERTY
MUTUAL INSURANCE COMPANY**

Columbia, South Carolina

May 11, 2023

ROA 692

S·W·B

SWEENY WINGATE & BARROW

RECEIVED
May 11 2023
SC Court of Appeals

May 11, 2023

Reply to: Main Office

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VIA E-FILING AND HAND-DELIVERY:

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

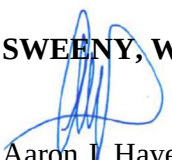
RE: Ex Parte: Liberty Mutual Insurance Company, et al., Respondents
 In Re: Howell & Tara Thompson, Appellants v. Carlos Toney, Defendant
 Appellate Case No.: 2023-000074
 Our File: 5590-12532

Dear Ms. Kitchings:

Please find attached for electronic filing a copy of Respondent Liberty Mutual Insurance Company's Motion to Dismiss Appeal in the above-referenced matter. Hand-delivered with a copy of this letter (without enclosures) is a check for the \$50.00 filing fee. Please let me know if anything further is required from Respondent Liberty Mutual concerning this motion.

Sincerely,

SWEENY, WINGATE & BARROW, P.A.


Aaron J. Hayes

AJH/tnn

cc (via hand-delivery): Clerk of Court, South Carolina Court of Appeals (filing fee only)
cc (via email): Richard E. McLawhorn, Jr., Esquire
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Jonathan M. Robinson, Esquire
Shanon N. Peake, Esquire

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May 22 2023

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.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPECTFULLY SUBMITTED,

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May 22, 2023

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

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v.

Carlos D. Toney

Defendant.

PROOF OF SERVICE

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

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May 30 2023

SC Court of Appeals

THE STATE OF SOUTH CAROLINA
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APPEAL FROM SUMTER COUNTY
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Appellate Case No. 2023-000074

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In Re:

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Carlos D. Toney,
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**RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY'S REPLY TO
APPELLANTS' RETURN TO MOTION TO DISMISS APPEAL FOR LACK OF
JURISDICTION**

INTRODUCTION

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

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

REPLY ARGUMENTS

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

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

Louden argues that although Moragne is the named defendant, the underinsured motorist carrier is the real party in interest. *We find this argument unpersuasive.* The fact that any judgment rendered will not ultimately be collected from the named defendant but from the insurance company does not excuse the fundamental requirements of personal service. A court may not enter a valid judgment against an individual over whom the court lacks personal jurisdiction.

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

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

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

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

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

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

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

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

Appellants’ third argument is that in a UIM case, “once the pleadings initiating the case are served on the at-fault driver and the UIM carrier steps into the shoes of the named defendant to defend the action, South Carolina law does not require continued service of every filing on the named defendant . . . instead, the filings must be served on the UIM carrier is defending the action.” (Ret. at 3 (citing to no authority for this proposition).) It appears that Appellants are attempting to contend that if a plaintiff obtains service of the summons and complaint upon the at-fault driver, then service of all documents afterwards—to include a notice of appeal—need not be accomplished upon the at-fault driver but can instead be accomplished by service upon a UIM carrier.

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

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

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

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

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

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

² But see n.1, *supra*.

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

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

Finally, Appellants contend that “Liberty really seeks to have this Court make rulings on the ultimate issues involved in this case without the benefit of full briefing and the record on appeal . . .” (Ret. at 6.) Appellants are incorrect. Liberty’s position on this Motion is simple: if Toney was served with process below—as Appellants contend in their Initial Brief—then he should have been served with process in this Court, as he would be the necessary respondent. This is a separate question from the merits of this appeal which concern, *inter alia*, whether Toney was served at all in the court below. If Appellants truly believe that Toney was served below, then they should not have ignored the requirement that he be served with the notice of appeal to this Court.

CONCLUSION

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

Respectfully submitted,

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Columbia, South Carolina

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v.

Carlos D. Toney,
Defendant.

PROOF OF SERVICE

I certify that a true copy of the foregoing Respondent Liberty Mutual Insurance Company's Reply to Appellants' Return to Motion to Dismiss Appeal for Lack of Jurisdiction in this case has been served on the following, this 30th day of May, 2023, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447):

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**ATTORNEY FOR RESPONDENT LIBERTY
MUTUAL INSURANCE COMPANY**

Columbia, South Carolina

May 30, 2023

The South Carolina Court of Appeals

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In Re:

Howell D. Thompson and Tara L. Thompson,
Appellants,

v.

Carlos D. Toney, Defendant.

Appellate Case No. 2023-000074

ORDER

On May 11, 2023, Respondent Liberty Mutual Insurance Company filed a motion to dismiss this appeal due to a lack of jurisdiction because Appellants did not serve Carlos D. Toney, the defendant in the underlying action, with the notice of appeal. After careful consideration, we deny Respondent's motion to dismiss. Nothing prevents Respondent from raising the question of jurisdiction as an issue in the appellate brief if desired.



FOR THE COURT

Columbia, South Carolina

FILED
Jun 16 2023

cc:

Shanon N. Peake, Esquire
G. Murrell Smith, Jr., Esquire

Jonathan M. Robinson, Esquire
John D. Kassel, Esquire
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Oct 09 2023

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed
to be included by any of the parties and not any other material.

s/Shanon N. Peake

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Counsel for Appellants

September 18, 2023

ROA 716