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.

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STATEMENT OF THE CASE AND FACTS[1]

This case arises out of a motor vehicle accident which occurred in Lexington County on June 2, 2017. (R. p. 407.) Carlos Toney ("Toney"), a Sumter County resident, disregarded a traffic control device and turned in front of a vehicle operated by the Appellant Howell Thompson ("Mr. Thompson"). (*Id.*) The impact was extensive, and Mr. Thompson sustained multiple injuries, including a forearm fracture that took nearly four years to heal and required surgical intervention four times. (R. p. 48.) As a result of the accident, Mr. Thompson has a permanent injury that limits the use of his left arm. (*Id*.)

Mr. Thompson and his wife, Tara L. Thompson ("Mrs. Thompson" and, collectively with Mr. Thompson, "Appellants") settled their claims against Toney and his liability carrier, State Farm, on September 9, 2019. (R. pp. 572–75.) To consummate the settlement, Appellants executed a covenant not to execute to preserve their ability to recover underinsured motorist

[1] Appellants combine the statement of the case and statement of the facts to eliminate repetition due to considerable overlap between the procedural history and the facts in this case.

coverage from their own insurance policies. (*Id.*)

Appellants filed a Summons and Complaint against Toney in Sumter County on December 5, 2019. (R. pp. 46–49.) Appellants served the Summons and Complaint on Respondent Liberty Mutual Insurance Company ("Liberty Mutual") on December 19, 2019, and Respondent Horace Mann Casualty and Property Insurance Company ("Horace Mann", and, together with Liberty Mutual, "Respondents") on December 18, 2019, pursuant to sections 38-5-70 and 38-77-160 of the South Carolina Code. (R. pp. 653–54.) On December 19 and 20, 2019, Appellants filed letters from the South Carolina Department of Insurance accepting service on behalf of Liberty Mutual and Horace Mann. (*Id.*) Appellants did not personally serve Toney with the Complaint at the time of filing and, therefore, did not file a proof of service showing service on Toney.

Liberty Mutual filed an Answer on January 2, 2020, and an Amended Answer on February 20, 2020.[2] (R. pp. 50–57, 59–61.) In the Answer and Amended Answer, Liberty Mutual set forth, in part, the following defenses:

FOR A TENTH DEFENSE
(Statute of Limitations)

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

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

FOR A FOURTEENTH DEFENSE
(Improper Service)

33. The allegations contained in the proceeding paragraphs, not

[2] As discussed further herein, Liberty Mutual's counsel sought consent from Appellants' counsel to amend its Answer to change the wording of the introductory paragraph from "uninsured" to "underinsured." (R. pp. 288–91.)

inconsistent herewith, are hereby realleged as if set forth verbatim.

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

(R. pp. 53, 55–56, 64, 66–67.) Horace Mann filed an Answer on January 7, 2020, and set forth, in part, the following defense:

FOR A THIRD DEFENSE
(Process of Service)

9. Defendant would show, upon information and belief, Plaintiff has failed to obtain Service of Process against this Defendant and for that reason, Plaintiff's Complaint should be dismissed with prejudice.

(R. p. 59.) In the Answer, Horace Mann stated the Answer was on behalf of Defendant, by and through the underinsured motorist carrier, Horace Mann Property and Casualty Insurance Company ("Defendant")." (R. p. 58.) Horace Mann did not raise a statute of limitations defense.[3] Both Liberty Mutual and Horace Mann raised defenses based on improper venue. (R. pp. 53, 59, 64.) Horace Mann alleged "the appropriate venue would be the Lexington County Court of Common Pleas," and Liberty Mutual simply stated it "pleads the defense of improper venue in the County of Sumter, State of South Carolina." (R. pp. 53, 59.)

On January 16, 2020, after reviewing Liberty Mutual's Answer, Appellants' counsel specifically inquired about certain defenses raised by Liberty Mutual's counsel, stating:

[3] Horace Mann raised the following defenses: improper venue, process of service, and punitive damages. (R. pp. 58–60.) Liberty Mutual raised the following defenses: failure to state a claim, comparative negligence, intervening and superseding negligence, sudden emergency, assumption of known risk, unavoidable accident, waiver and estoppel, improper venue, statute of limitations, spoliation, reservation and non-waiver of rights, punitive damages, improper service, bifurcation of punitive damages, and set off. (R. pp. 61–68.)

> [T]hanks 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?

(R. pp. 285–87.) Counsel for Liberty Mutual responded: "Boiler plate at this stage. Given the recent appellate court ruling in Garrison v. Target[4], I'm probably going to have to start pleading every defense available under Title 1 to 63 to be sure I haven't waived anything." (*Id.*)

Subsequently, on February 19, 2020, counsel for Liberty Mutual sought consent from Appellants' counsel to amend its Answer to change the wording in the introductory paragraph of its Answer from "uninsured" to "underinsured" and add defenses for setoff and a cap on punitive damages. (R. pp. 288–91.) Appellants consented to this amendment. (*Id.*) Despite assurances that Liberty Mutual was only filing an Amended Answer to change this wording to be more accurate and add defenses for setoff and a cap on punitive damages, Liberty Mutual changed its Answer in another respect—it changed the introductory paragraph of the Amended Answer to specifically reference section 38-77-160 of the South Carolina Code.[5] (R. pp. 50, 61.) The service and statute of limitations defenses Liberty Mutual raised in its Amended Answer were identical to

[4] *Garrison v. Target Corp.*, 429 S.C. 324, 838 S.E.2d 18 (Ct. App. 2020), *aff'd in part and rev'd in part*, 435 S.C. 566, 869 S.E.2d 797 (2022).

[5] In footnote 2 of the Order dismissing the case, the circuit court cited to Liberty Mutual's specific reference to section 38-77-160 to find that "the UIM carriers certainly have not waived their right to rely on the UIM statute[.]" (R. p. 32.) As discussed further herein, Appellants submit that this change in the Amended Answer to specifically reference section 38-77-160 despite Appellants only consenting to the amendment after assurances that Liberty Mutual made three changes—changing uninsured to underinsured and adding defenses for setoff and a cap on punitive damages—is further evidence of Liberty Mutual's gamesmanship tactics in this case and intent to keep an ace card up its sleeve to play once the time for service expired. The circuit court erred in failing to estop Liberty Mutual from raising these issues. Further, as discussed further herein, Appellants submit the circuit court erred in failing to differentiate the actions and inactions of Liberty Mutual with the actions and inactions of Horace Mann and instead focusing on the "UIM carriers" as a collective.

those "boiler plate" defenses it raised in its original Answer.

Robust litigation of this matter commenced from January 2020 to October 2021. The following timeline shows the active engagement in litigation and discovery by both Liberty Mutual and Horace Mann:

January 2, 2020	Liberty Mutual answers the complaint and serves interrogatories and requests to produce on Appellants
January 7, 2020	Horace Mann answers the complaint
January 8, 2020	Horace Mann serves interrogatories and requests to produce on Appellants
January 16, 2020	Email communication between Appellants' counsel and counsel for Liberty Mutual wherein Liberty Mutual counsel informs Appellants' counsel its defenses are "boiler plate" defenses
February 20, 2020	Liberty Mutual files an amended answer
March 5, 2020	Horace Mann responds to Appellants' discovery
March 10, 2020	Liberty Mutual subpoenas medical records from Lexington Radiology, Lexington Medical Center, Midlands Orthopaedics, Pain Specialists of Charleston, Palmetto Health Orthopaedics, Palmetto Imaging, Eye Center, Lexington Brain & Spine, Lexington County EMS, Lexington Family Practice, Lexington Orthopaedics
March 24, 2020	Liberty Mutual files Motion for Change of Venue
May 5, 2020	Liberty Mutual and Horace Mann take Appellants' depositions
May 15, 2020	Appellants' counsel takes deposition of Defendant Toney with participation by counsel for Liberty Mutual and Horace Mann
May 24, 2020	Liberty Mutual subpoenas Mr. Thompson's medical records from Prisma Health Plastic Surgery
June 15, 2020	Liberty Mutual subpoenas cell phone records from Verizon
July 22, 2020	Hearing on Liberty Mutual's Motion for Change of Venue

(R. pp. 590–604.)

August 7, 2020	Liberty Mutual and Horace Mann take deposition of Officer Bryan Shumpert
August 17, 2020	Liberty Mutual and Horace Mann take deposition of Dr. Earl McFadden
August 20, 2020	Liberty Mutual responds to Appellants' discovery
September 2, 2020	Liberty Mutual and Horace Mann take deposition of Dr. David Strickler
September 14, 2020	Liberty Mutual and Horace Mann take second deposition of Dr. Earl McFadden
September 21, 2020	Liberty Mutual and Horace Mann participate in drafting and presenting proposed Scheduling Order signed by the Court requiring the parties to mediate by March 31, 2021, and ordering trial on or after May 1, 2021 (R. pp. 6–8.)
September 30, 2020	**Deadline for Appellants to facilitate service pursuant to Rule 3(a) of the South Carolina Rules of Civil Procedure**
October 6, 2020	Liberty Mutual responds to Appellants' requests to admit
October 7, 2020	Liberty Mutual and Horace Mann take deposition of Dr. David Fulton
October 14, 2020	Horace Mann responds to Appellants' requests to admit
October 28, 2020	Liberty Mutual and Horace Mann take deposition of Dr. David Fulton
November 30, 2020	Liberty Mutual and Horace Mann reconvene deposition of Howell Thompson
December 7, 2020	Liberty Mutual and Horace Mann participate in deposition of Lori Campbell
March 4, 2021	Liberty Mutual/Horace Mann participate in drafting and presenting second Scheduling Order signed by the Court requiring the parties to mediate by June 1, 2021, and ordering trial on or after August 1, 2021 (R. pp. 9–11.)
March 17, 2021	Liberty Mutual counsel seeks order of protection
May 26, 2021	Liberty Mutual and Horace Mann participate in status

	conference with Court
June 1, 2021	Liberty Mutual/Horace Mann participate in drafting and presenting third Scheduling Order signed by the Court requiring the parties to mediate by October 1, 2021, and ordering trial on or after November 1, 2021 (R. pp. 12–14.)
July 1, 2021	Liberty Mutual identifies Dr. David DuPay as an orthopaedic expert
July 14, 2021	Liberty Mutual and Horace Mann participate in hearing on Appellants' motion for protection from discovery (R. pp. 605–20.)
August 9, 2021	Appellants take deposition of Dr. David DuPay
August 23, 2021	Liberty Mutual subpoenas records from Lindsay Moore, MSPAS
September 10, 2021	Liberty Mutual and Horace Mann participate in deposition of Dr. Mirsad Mujadzic
September 15, 2021	Liberty Mutual/Horace Mann participate in drafting and presenting fourth Scheduling Order signed by the Court requiring the parties to mediate by November 1, 2021 and ordering trial on or after January 10, 2022 (R. pp. 20–22.)
October 25, 2021	Liberty Mutual and Horace Mann participate in mediation but failed to resolve the case (R. pp. 655–57.)
October 26, 2021	Liberty Mutual files Motion to Dismiss
October 29, 2021	Horace Mann files Motion to Dismiss
November 18, 2021	Liberty Mutual serves supplemental answers to interrogatories producing documents from a private investigator

(R. pp. 292–462.)

After participating in discovery for nearly two years, Liberty Mutual filed a Motion to Dismiss or, in the alternative, Motion for Summary Judgment, alleging Appellants failed to serve the Complaint on Toney within the statute of limitations and, therefore, the action should be

dismissed. (R. pp. 127–28.) Three days later, Horace Mann filed a Motion to Dismiss for Failure to Obtain Service of Process which was substantively identical to Liberty Mutual's Motion. (R. pp. 129–30.) Appellants submitted Memoranda in Opposition to these motions on December 15, 2021, and January 27, 2022. (R. pp. 136–56, 183–238.)

The circuit court held a hearing on January 6, 2022. (R. pp. 621–52.) At the hearing, the UIM carriers argued the case was controlled by *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997). (R. pp. 625–27.) Liberty Mutual's counsel argued the timeline in *Louden* was nearly identical to the timeline in the instant case, and the *Louden* court granted the insurance carrier's motion for summary judgment due to failure of service on the at-fault driver. (*Id.*) Appellants' counsel argued *Louden* was not controlling because the facts of *Louden* were different than the facts of the instant case. (R. pp. 628–41.) Specifically, Appellants' counsel argued the UIM carriers here participated extensively in the case for nearly two years, including seeking relief from the circuit court and participating in hearings, without raising any issues with service and, therefore, waived any service-related issues. (R. pp. 628–37.) Appellants' counsel also argued Defendant Toney voluntarily appeared and testified in a deposition which amounted to a waiver of service. (R. pp. 630–31, 640–41.) Further, as to Liberty Mutual, Appellants' counsel argued it should be estopped from arguing service because it assured Appellants' counsel it was not raising lack of service and it was precluded from raising lack of service because it previously filed a motion without raising the service issue. (R. pp. 637–41.)

On August 28, 2022, the circuit court issued an Order granting the insurance carriers' motions and dismissing the case. The circuit court found that *Louden* was controlling and required dismissal. (R. pp. 28–31.) Specifically, the circuit court "conclude[d] that the facts of this case are on 'all fours' with the facts from *Louden*, and thus the *Louden* rule requires dismissal." (*Id.*)

The circuit court construed the motion as a motion for summary judgment under Rule 56 of the South Carolina Rules of Civil Procedure, not a motion to dismiss under Rule 12 of the South Carolina Rules of Civil Procedure. (R. p. 29.) The circuit court held the action had not been commenced against Toney, a valid judgment could not attach against Toney, and Toney would be prejudiced by allowing the case to move forward. (R. pp. 31, 34.) The circuit court found the UIM carriers did not waive service-related issues and found South Carolina waiver cases were not applicable because they did not involve the UIM benefits. (R. pp. 31–33, 35.) The circuit court further noted the UIM carriers' participation in the case for nearly two years did not amount to waiver because "the timing of [their motions were] nearly identical to the timing of the successful motion in *Louden*." (R. p. 34.) The circuit court found Liberty Mutual's previous venue motion was not pursuant to Rule 12 and Liberty Mutual's counsel's representations to Appellants' counsel did not meet the elements of estoppel. (R. pp. 36–41.) Finally, the circuit court held Toney's appearance at his deposition did not amount to a voluntary appearance in the case because it would "circumvent the UIM statute and *Louden* and *Williams*[,] all of which require timely service upon a putative at-fault driver as a necessary prerequisite to a UIM claim so that the UIM carriers' rights to defend (and right to insist on a valid judgment) are not compromised." (R. pp. 41–42.)

Appellants filed a timely motion pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure. (Mtn. to Alter/Amend.) The circuit court did not hold a hearing on Appellants' motion and, instead, summarily denied Appellants' motion on December 21, 2022. (R. pp. 44–45.)

Appellants filed a Notice of Appeal on January 19, 2022. (R. pp. 658–81.)

STANDARD OF REVIEW

"An appellate court applies the same standard of review as the trial court when reviewing the dismissal of an action." *Cap. City Ins. Co. v. BP Staff, Inc.*, 382 S.C. 92, 99, 674 S.E.2d 524, 528 (Ct. App. 2009). Rule 12(b) of the South Carolina rules of Civil Procedure, provides, in pertinent part:

> Every defense ... to a cause of action in any pleading ... shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (5) insufficiency of service of process . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted.

Rule 12(b)(5) is the proper vehicle for challenging both "the mode of delivery or the lack of delivery of the summons and complaint." *Unisun Ins. v. Hawkins*, 342 S.C. 537, 541, 537 S.E.2d 559, 561 (Ct. App. 2000) (quoting Rule 12(h)(1)) (quoting 5A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure Civil 2d § 1353 (1990) (emphasis added)). "Rule 12(h)(1) [of the South Carolina Rules of Civil Procedure] expressly provides that the defense of insufficiency of service of process is waived 'if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.'" *Id.* (quoting Rule 12(h)(1)).

"When reviewing the grant of a summary judgment motion, appellate courts apply the same standard that governs the trial court under Rule 56(c)[of the South Carolina Rules of Civil Procedure], which provides that summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008). "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and

inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.*

ARGUMENT

I. The circuit court erred in dismissing the case where the action was commenced against the at-fault driver within the statute of limitations.

The circuit court erred in dismissing the case because the action was commenced against the at-fault driver within the statute of limitations. Under prevailing South Carolina law, Defendant Toney was served in the action within the Statute of Limitations. Although Appellants admit they did not personally serve Defendant Toney with the Summons and Complaint upon filing, service was accomplished as of May 15, 2020, when Defendant Toney voluntarily appeared for his deposition and gave testimony in this case. This occurred prior to the expiration of the statute of limitations and well within the September 30, 2020 deadline for accomplishing service. Therefore, this Court should vacate the order dismissing the case and remand to the circuit court for the case to proceed to trial.

Pursuant to Rule 3 of the South Carolina Rules of Civil Procedure, an action is commenced when a summons and complaint are filed with the circuit court as long as "(1) the summons and complaint are served within the statute of limitations in any manner prescribed by law; or (2) if not served within the statute of limitations, actual service must be accomplished not later than one hundred twenty days after filing." The statute of limitations expired in this matter on June 2, 2020. However, because Appellants filed the Summons and Complaint prior to the expiration of the statute of limitations, they had until September 30, 2020, to serve the Complaint on Defendant Toney in any manner allowable under South Carolina law. Pursuant to Rule 4(d) of the South Carolina Rules of Civil Procedure, "[v]oluntary appearance by defendant is equivalent to personal service." *See also Stearns Bank Nat'l Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 337, 644 S.E.2d

793, 796 (Ct. App. 2007) ("Although a court commonly obtains personal jurisdiction by the service of the summons and complaint, it may also obtain personal jurisdiction if the defendant makes a voluntary appearance.").

South Carolina courts have repeatedly held that a party has voluntarily appeared in an action based on conduct taken in the action without contesting service. For example, in *South Carolina Department of Social Services v. Burris*, the Supreme Court held that, by testifying at a hearing, the defendant made a voluntary appearance as contemplated by Rule 4(d) and, therefore, "[h]is contention that this lack of service [failure to serve pleadings on him] deprived the Family Court of personal jurisdiction is without merit." 297 S.C. 537, 540, 377 S.E.2d 578, 579 (1989). Similarly, this Court held that a defendant had made a voluntary appearance when he participated in the defense of a case, including testifying, without raising any defense of lack of service. *Israel v. Carolina Bar-B-Que*, 292 S.C. 282, 366 S.E.2d 123 (Ct. App. 1987). More recently, in *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009), this Court again found that a defendant had made a voluntary appearance by, among other things, making himself available for testimony at a hearing without objection.

Defendant Toney voluntarily appeared at a deposition on May 15, 2020, as party-Defendant and gave testimony in this case without raising objections as to service. (R. pp. 466–518.) He was not served with or compelled to attend by subpoena. Instead, he was sent a Notice of Deposition and voluntarily appeared to testify. (R. pp. 463–65.) The Notice of Deposition included the case caption at the top, which put him on notice that he was a defendant in this suit that was filed in Sumter County and included the civil action number where he could access all pleadings in this matter. *See Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) (explaining service rules exist to ensure defendants receive "notice reasonably calculated

under all circumstances to apprise [them] of the pendency of [an] action and afford them and opportunity to present their objections"). At the deposition, he was placed under oath to give testimony, was told there was a lawsuit pending, and was questioned about the motor vehicle accident. (R. pp. 466–518.) Defendant Toney did not raise any objections to the deposition or service. Instead, he willingly participated in the defense of this action.

Importantly, counsel for Liberty Mutual and Horace Mann participated in the deposition of Defendant Toney. Neither counsel questioned Defendant Toney about whether he was served with the suit in this matter or raised any objections to his participation in the deposition. The only objections on the record made by Respondents' counsel were objections to the form of the question, including questions dealing with Defendant Toney's negligent conduct. (*Id.*)

The purpose behind requiring service is a simple one. The requirements of service do "not arise from an arcane or highly technical application of the rules. Rather, [the service requirements] serve[] an essential function—ensuring that notice is properly received by all entitled to it." *McCall v. IKON*, 363 S.C. 646, 655, 611 S.E.2d 315, 319 (Ct. App. 2005). "A suit at law is not a children's game, but a serious effort on the part of adult human beings to administer justice; and the purpose of process is to bring parties into court." *Id.* at 652, 611 S.E.2d at 318 (quoting *Griffin v. Capital Cash*, 310 S.C. 288, 292, 423 S.E.2d 143, 146 (Ct. App. 1992)). "Exacting compliance with the rules is not required to effect service of process." *Mull v. Ridgeland Realty, LLC*, 387 S.C. 479, 485, 693 S.E.2d 27, 30 (Ct. App. 2010). It is clear from his voluntary appearance at the deposition that Defendant Toney was on notice of this action and his role as a defendant in same and did not intend to contest service.

The circuit court ignored South Carolina law that a defendant voluntarily appearing in an action and giving testimony amounts to a waiver of service. Instead, the circuit court found

Defendant Toney did not voluntarily appear in the action simply because "[t]he court file for this case reveals no documents filed by Toney nor any notices of appearance by any counsel on behalf of Toney." (R. p. 41.) Filed documents or a filed notice of appearance reflecting the retention of counsel is not required under South Carolina law for a defendant to voluntarily appear in an action. Contrary to the circuit court's finding, this fact that Defendant Toney did not file any documents in this matter is indicative of a defendant who does not want to appear or spend money to hire counsel to defend himself in an action where he is already protected from judgment. Defendant Toney had appropriate notice of this case and every opportunity to retain his own counsel and appear in this action; however, he chose not to do so. He chose to voluntarily appear to give his testimony about the accident. The lack of filings by Defendant Toney does not obviate the well-settled law that parties may voluntarily appear, by means other than court filings, as Defendant Toney did in this case through his voluntary appearance and testimony without raising any objections as to service.

Thus, the circuit court erred in finding the action was not commenced by Defendant Toney's voluntary appearance at his deposition and participation in the defense of this case.[6] Because service was accomplished as of May 15, 2020, well within the timeframe allowed for service under Rule 3(a)(2), the Court should reverse the circuit court's orders granting the Respondents' motions to dismiss and allow this case to proceed to trial.[7]

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[6] Appellants further complied with section 38-77-160 of the South Carolina Code by serving copies of the Summons and Complaint in this action against Defendant Toney on Liberty Mutual and Horace Mann. Section 38-77-160 provides: "No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability *are served* in the manner provided by law *upon the insurer* writing the underinsured motorist provision."

[7] If the Court finds the action was commenced against Defendant Toney, the Court need not address the other issues raised herein due to the dispositive nature of this issue. *See Futch v. McAlister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (declining to rule on other issues in light of deciding an issue dispositive of the case).

II. The circuit court erred in relying on *Louden* to dismiss this case

The circuit court erred in relying solely on *Louden* and ignoring controlling South Carolina law. In the Order, the circuit court stated *Louden* was "entirely on point to the instant dispute" and discounted all other applicable and controlling authority simply because the cases did not specifically concern underinsured motorist coverage. (R. pp. 31–36.) Appellants respectfully request this Court reverse the circuit court's order dismissing the case and remand for trial.

Louden is not dispositive in this matter because the *Louden* Court did not consider or rule on the numerous foundational issues involved in the instant case, including whether lack of service was raised with specificity, whether the insurance carriers waived the service defense by participating in robust litigation for nearly two years, whether the insurance carriers waived the service defense by failing to timely raise it in a Rule 12(b) motion, whether Liberty Mutual waived the service defense by filing a venue motion and failing to raise the service defense, or whether an insurance carrier was estopped from raising the service defense after assuring Appellants its defense was merely boiler plate. *See Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 331, 730 S.E.2d 282, 286 (2012) ("[A]ppellate courts in this state, like well-behaved children, do not speak unless spoken to and do not answer questions they are not asked." (quoting *Langley v. Boyter*, 284 S.C. 162, 181, 325 S.E.2d 550, 561 (Ct. App. 1984), quashed on other grounds, 286 S.C. 85, 332 S.E.2d 100 (1985))).

The circuit court automatically discounted Appellants' waiver and estoppel arguments in this matter because it believed it was constrained by the *Louden* decision. However, a foundational tenant of South Carolina law is that "even though an appellate court has decided a case containing a certain issue, unless that issue was actually raised on appeal those cases are not dispositive." *Theisen v. Theisen*, 394 S.C. 434, 446, 716 S.E.2d 271, 276–77 (2011); *see also Breland v. Love*

Chevrolet Olds, Inc., 339 S.C. 89, 529 S.E.2d 11 (2000) (explaining the fact that an appellate court decided a case on its merits does not mean the order was appealable where there the issue of appealability was never raised to the appellate court). Thus, the *Louden* case is not dispositive of Appellants' waiver and estoppel arguments because issues of waiver and estoppel were not raised in the *Louden* case or considered by the *Louden* court. The case before the Court is an entirely separate and distinct case from the *Louden* case, and the circuit court erred in dismissing the instant case based entirely on the *Louden* decision.

The circuit court also erred in finding that the *Louden* decision was a "specific rule" that "must prevail over a general rule" of waiver. (R. p. 32.) The *Louden* decision is not in conflict with general waiver law. *Louden* and South Carolina cases concerning waiver work in concert in the same legal system. A review of the *Louden* decision shows that waiver by the UIM carrier was not raised in that case nor considered by this Court when it decided the *Louden* case because waiver and estoppel was not applicable to the facts of the *Louden* case. The fact that the *Louden* court did not address waiver or estoppel does not mean that waiver and estoppel do not apply in the UIM context. Instead, it simply means that waiver and estoppel were not relevant to the facts of the *Louden* case.

In the underlying *Louden* circuit court order, the only waiver argument that was raised to the circuit court was the plaintiff's argument that the defendant and underinsured motorist carrier waived the requirement of filing within the statute of limitations by virtue of the release executed as part of the settlement with the liability carrier. (R. p. 546.) The circuit court found this argument in *Louden* was "without merit" because the release was only signed by the plaintiff. (*Id.*) The circuit court went on to find: "There is nothing in the record before me to indicate that either the defendant or the underinsured motorist carrier waived the statute of limitations or is estopped to

assert it as a bar to the plaintiff's action." (*Id.*) Again, waiver as to the statute of limitations was only raised to the circuit court in the context of the release. There were no arguments regarding waiver of service or personal jurisdiction defenses or equitable estoppel arguments due to the insurer's conduct.

However, the waiver discussion in *Louden* is insightful to the instant case because it shows the circuit court would have considered waiver and estoppel by the UIM carrier if facts supporting the same were present in the *Louden* case. The *Louden* circuit court did not find waiver or estoppel inapplicable in the UIM context. Instead, the circuit court stated there were no facts in the record to support waiver or estoppel in *Louden*. Thus, contrary to the circuit court's ruling here, the underlying order in the *Louden* case explained that waiver and estoppel are applicable in the UIM context where the record supports waiver and estoppel, as it does here. The circuit court erred in construing the *Louden* case to hold that waiver and estoppel cannot apply in the UIM context where these issues were never raised to or ruled upon by this Court in *Louden* or even present in *Louden*.

Further, the *Louden* case is distinguishable in other respects. In the *Louden* case, the insurance carrier filed an answer without mentioning the UIM carrier anywhere in the answer. (R. pp. 552–53.) It was signed by "attorneys for the defendant" and only mentioned defendant within. (*Id.*) The *Louden* Answer had a service defense at the very top which read: "That there has been no proper service of process over the Defendant and the Court lacks in personam jurisdiction." (R. p. 552.) Further, the attorney representing the UIM carrier in *Louden* immediately took steps to investigate service. He sent a letter to the Clerk of Court and copied the plaintiff's attorney requesting "copies of the proofs of service in your file." (R. p. 555.) This is markedly different from the UIM carriers in this case who buried a general, nonspecific service defense in their

answers without raising personal jurisdiction, knew that a proof of service was not on file showing service on Defendant Toney, and took no steps to investigate service.[8]

An analysis of the *Williams* case and the unique nature of the UIM legal fiction is helpful to give further context to what led to the *Louden* decision. In *Williams*, the plaintiff was injured in a motor vehicle accident and settled with the at-fault driver's liability insurance carrier on a covenant not to execute. *Williams v. Selective Ins. Co. of Se.*, 315 S.C. 532, 533, 446 S.E.2d 402, 403 (1994). Subsequently, the plaintiff filed a claim for underinsured motorist benefits with her insurance company, claiming her medical bills exceeded the $25,000 she recovered from the liability insurance. *Id.* After the UIM carrier denied coverage, the plaintiff filed an action directly against the UIM carrier for breach of contract and bad faith. *Id.* at 533–34, 446 S.C. at 403. The UIM carrier moved for summary judgment, alleging section 38-77-160 required the plaintiff to file an action against the at-fault driver and the plaintiff could no longer do so because the statute of limitations had expired. *Id.* The circuit court granted summary judgment, and the *Williams* court agreed. *Id.* The *Williams* Court stated:

> We note that the intent of § 38–77–160 is to protect an insurance carrier's right to contest its liability for underinsured benefits. An insured must therefore preserve the right of action against an at-fault driver so long as the underinsured carrier has not agreed to the amount and payment of underinsured motorist benefits. In the event the insured chooses to settle with the at-fault party's liability carrier, the underinsured carrier has the option to assume control of the defense of the action as provided in § 38–77–160. In this case, Williams's failure to pursue an action against the at-fault driver resulted in a total waiver of Insurer's right to defend. The purpose of § 38–77–160 is to avoid such a result.

Id. at 534–35, 446 S.E.2d at 404.

[8] It is also important to note that the *Louden* case was filed in 1994, prior to the implementation of the e-filing system. Therefore, in *Louden*, counsel had to contact the clerk of court's office to determine whether a certificate of service was on file. Here, the parties could easily review the public index to see that there was no certificate of service filed related to Defendant Toney.

As explained in *Williams*, the purpose of section 38-77-160 is for a plaintiff to initiate an action against the at-fault driver and give notice to the UIM carrier instead of filing against the UIM carrier directly. This allows the UIM carrier to defend the action in the name of the at-fault driver to avoid any prejudice that might result from a jury knowing that an insurance company will be paying any judgment. This also allows the UIM carrier to raise defenses that the at-fault driver could have raised. *See, e.g.*, *Broome v. Watts*, 319 S.C. 337, 340, 461 S.E.2d 46, 48 (1995) ("*Williams* further held that the purpose of § 38-77-160 is to avoid the result of a total waiver of the UIM carrier's right to defend."). If the UIM carrier can take advantage of a defendant's defense, then it must also suffer the consequences of not adequately raising it or waiving it. *See Williams*, 315 S.C. at 534 n.1, 446 S.E.2d at 404 n.1 (explaining an UIM carrier can waive a defense if it takes actions inconsistent with an intention to rely on the defense). Otherwise, this Court would be giving UIM carriers a bulletproof shield to avoid their contractual duty to their insureds. Here, the UIM carriers' rights to contest liability were wholly persevered, and they, in fact, did exercise those rights for nearly two years through the participation in discovery and preparing the case for trial.

"The central purpose of the UIM statute is to provide coverage when the injured party's damages exceed the liability limits of the at-fault motorist." *Floyd v. Nationwide Mut. Ins. Co.*, 367 S.C. 253, 260, 626 S.E.2d 6, 10 (2005). UIM coverage is a

> type of automobile insurance which came into being by legislative enactment, as a result of public concern over the increasingly important problem arising from injuries inflicted by motorists who are uninsured and financially irresponsible. Its purpose was to provide financial recompense to innocent persons who receive bodily injuries, property damage and to the dependents of those who are killed through the wrongful conduct of uninsured motorists.

Laird v. Nationwide Ins. Co., 243 S.C. 388, 392, 134 S.E.2d 206, 208 (1964). South Carolinians, like Appellants, accept the offer of UIM coverage from their insurance companies, "pa[y] the

corresponding premiums for coverage[,] and are entitled to this contractual benefit." *O'Neill v. Smith*, 388 S.C. 246, 255, 695 S.E.2d 531, 535–36 (2010). "[T]o deny an injured party the benefit of the party's own UIM coverage would itself violate public policy because it would abrogate the purpose surrounding UIM coverage, which is to benefit the insured party[.]" *Id.* at 254, 695 S.E.2d at 535. Here, Liberty Mutual and Horace Mann accepted premiums for providing underinsured motorist coverage, and Liberty Mutual and Horace Mann are attempting to avoid their contractual obligations through gamesmanship tactics in this litigation. The insurers want to have their cake and eat it too. They want this Court to agree with the circuit court that they have standing to assert defenses on behalf of the defendant in this action but do not have standing to waive the defenses in this action. Here, Liberty Mutual and Horace Mann only want to act on behalf of the defendant when it is beneficial to them. This is a fallacy, and, if the Court were to affirm the circuit court's decision, the Court would be giving a windfall to insurance companies by giving them incentive to sandbag plaintiffs by withholding service defenses until the defect is no longer curable. This runs counter to the legislative intent of the UIM statute and other South Carolina law.

The circuit court erred in finding that waiver did not apply in the UIM context. The circuit court did not cite to any South Carolina law to support its finding that waiver did not apply to the "unique nature of UIM" or that the UIM context "transcends the traditional Rule 12 analysis." (Aug. Or. at 6.) Instead, the requirement to timely file a Rule 12(b) motion and the resulting waiver for failing to do so is a foundational tenant of South Carolina law that applies generally to all matters before the circuit court. It is clear that the purpose of serving a summons and complaint is to bring a litigant into the jurisdiction of the Court. *See BB&T v. Taylor*, 369 S.C. 548, 551, 633 S.E.2d 501, 503 (2006); *White Oak Manor, Inc. v. Lexington Ins. Co.*, 407 S.C. 1, 8–9, 753 S.E.2d 537, 541 (2014) ("The purpose of the summons is to acquire jurisdiction of the person of the

defendant and to give him notice of the action and an opportunity to appear and defend."). "Personal jurisdiction may be waived, but subject matter jurisdiction may not be waived." *Ex parte Cannon*, 385 S.C. 643, 654, 685 S.E.2d 814, 820 (Ct. App. 2009). "[A]llowing for the waiver of service is consistent with the principle that a defendant can waive personal jurisdiction." *White Oak Manor*, 407 S.C. at 9, 753 S.E.2d at 541. These principles apply in all cases, including UIM cases. Accordingly, the circuit court erred in finding *Louden* was dispositive and failing to consider controlling South Carolina law regarding waiver and estoppel.

III. The circuit court erred in finding Respondents did not waive service-related issues where they failed to timely file motions to dismiss, participated in robust litigation for nearly two years, and did not raise service-related issues to the circuit court until the eve of trial

The circuit court erred in failing to consider Appellants' waiver arguments because it believed waiver and estoppel did not apply in the context of a UIM case. Here, Respondents' waived any service-related defenses by (1) failing to adequately assert the defenses in their Answers; (2) failing to immediately raise any service-related issues in a Rule 12(b) motion and, instead, waiting until the eve of trial to attempt to raise the service; (3) participating in robust litigation for nearly three years. Accordingly, Appellants request the Court find Respondents waived any service-related defenses, vacate the circuit court's orders, and remand to allow the case to proceed to trial.

A. Respondents failed to adequately assert service-related defenses in their Answers

The circuit court erred in finding Respondents sufficiently raised lack of service on the at-fault driver in their Answers. (R. p. 32.) The circuit court found "the UIM carriers have complied with [the Rules], by filing appropriate Answers and by raising improper service in the first Rule

12 motion, which is the instant motion." (*Id*.) The circuit court failed to consider the actions and inactions of each insurance carrier separately and, instead, lumped "the UIM carriers" together.

A review of Answer filed by Horace Mann shows that Horace Mann did not specifically raise service of process issues as they related to Defendant Toney, section 38-77-160, or a statute of limitations defense. In its Answer, Horace Mann raised the following service of process defense: "Defendant would show, upon information and belief, Plaintiff has failed to obtain Service of Process *against this Defendant* and for that reason, Plaintiff's Complaint should be dismissed with prejudice." (R. p. 59.) It is unclear from Horace Mann's Answer whether it was raising service issues as it related to itself or Defendant Toney. In the introduction to its Answer, Horace Mann stated the Answer was filed on behalf of Defendant, by and through the underinsured motorist carrier, Horace Mann Property and Casualty Insurance Company ("Defendant")." (R. p. 58.) However, the caption of the Answer notes it is the Answer of "HORACE MANN PROPERTY AND CASUALTY INSURANCE COMPANY, THE UNDERINSURED MOTORIST CARRIER." (*Id.*) Thus, it is unclear whether the reference to "this Defendant" in Horace Mann's service of process defense is Horace Mann or Defendant Toney. This one-sentence, boiler plate defense was not sufficient to put Appellants on notice that Horace Mann was contending that they failed to serve the Complaint on Defendant Toney and therefore could not proceed with the instant action against Horace Mann because they never commenced an action against the at-fault driver.[9]

[9] This is especially true when considering the fact that Horace Mann and Liberty Mutual, participated in the litigation of this matter for nearly two years before filing the untimely motions to dismiss based on Appellants' purported failure to serve Toney. Thus, the circuit court should have found that the carriers further waived the defense of improper service when took extensive actions that were entirely inconsistent with any intent to rely on service as a defense.

A review of Liberty Mutual's Answer and Amended Answer shows that Liberty Mutual also failed to specifically plead lack of service on the at-fault driver. In its Answer and Amended Answer, Liberty Mutual set forth the following defense: "Insurer would show that Plaintiff's claims are barred because Insurer and Defendant have not been served in accordance with the South Carolina Rules of Civil Procedure." (R. pp. 50–57, 61–68.) Again, this one-sentence, boiler plate defense is not sufficient under South Carolina rules to specifically plead this defense and put Appellants on notice of the issues related to service. This is especially true where Appellants did serve Liberty Mutual in accordance with the South Carolina Rules of Civil Procedure, such that part of the defense was clearly a misstatement of fact, and Liberty Mutual's counsel informed Appellants' counsel he would not be raising service issues in a motion.

Unisun is controlling in this case, and the circuit court erred in not relying on it and misconstruing it. *Unisun* makes it clear that a party waives a defense by failing to plead it with specificity. *Unisun Ins. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000). The defenses pled in the instant case are nearly identical to those pled in *Unisun*. In *Unisun*, the defendant included a boiler plate defense that the plaintiff "failed to serve Bruce Hawkins within the three-year statute of limitations." *Id.* at 542, 537 S.E.2d at 562. The Court of Appeals found the defense "insufficient, standing alone, to raise the defense of insufficiency of service of process." *Id.* at 542–43, 537 S.E.2d at 562. As stated in *Unisun*, "objections to the sufficiency of service of process must be specific and must point out in what manner the plaintiff has failed to satisfy the rule relating to the service provisions." *Id.* at 542, 537 S.E.2d at 562.

In the order dismissing the case, the circuit court construed this statement as requiring the insurers to have pled both insufficiency of process in conjunction with the statute of limitations, stating "UIM carriers here have pled with specificity, and their defenses must be read in

conjunction and do not 'stand alone' like the imprecise pleading from *Unisun*." (R. p. 33.) This is a misstatement of *Unisun*'s ruling. Instead, the *Unisun* court found that a defendant must plead actual facts to support the defense, such as specifying the nature of the "defects in the service of process," as well as referencing the intent to move for dismissal under Rule 12(b). *Id.* Here, Respondents' attempts to plead insufficiency of process was not specific enough to put Appellants on notice of the nature of the alleged defects.

Further, even under the circuit court's interpretation of *Unisun*, the circuit court failed to recognize that Horace Mann did not raise any statute of limitations defense in its Answer. Horace Mann only raised the following defenses: improper venue, process of service as to Horace Mann, and punitive damages. (Horace Mann Ans.) It further did not seek to amend its Answer to raise the statute of limitations defense subsequently. *Cf. Louden*, 327 S.C. at 467, 486 S.E.2d at 526 (explaining State Farm subsequently amended its answer to assert an additional defense that the statute of limitations had expired). The circuit court stated in its order: "Further, to the extent the rule from *Unisun* may be fairly summarized as requiring pleading Rule 12(b)(5) and statute of limitations in conjunction with each other in order to preserve the defense of complete non-service, the Court finds that the UIM carriers have done so." (R. p. 33.) However, this finding was incorrect because Horace Mann failed to plead a 12(b)(5) defense with specificity as to Defendant Toney and also failed to plead a statute of limitations defense in its Answer. The circuit court should have found Horace Mann was unable to raise the service and statute of limitations issues in its motion to dismiss.

B. Respondents waived any service-related defenses by failing to timely file Rule 12(b) Motions

The circuit court erred in construing Respondents' motions as motions for summary judgment pursuant to Rule 56 of the South Carolina Rules of Civil Procedure instead of motions

to dismiss pursuant to Rule 12(b) of the South Carolina Rules of Civil Procedure. Had the circuit court appropriately construed the motions under Rule 12(b), it would have been clear that the motions were untimely. Respondents should have filed the motions immediately instead of waiting until the eve of trial, and the circuit court erred in granting the motions.

In the Order, the Court incorrectly found a motion for summary judgment "was the appropriate vehicle for the Court to rule on a statute of limitations issue of this type" and relied on *McMaster v. Dewitt*, 411 S.C. 138, 143, 767 S.E.2d 451, 452 (Ct. App. 2014) to make this determination. (R. p. 29.) However, *McMaster* is not applicable to this case. In *McMaster*, the plaintiff brought a medical malpractice action on June 16, 2011, against two defendants. 411 S.C. at 143, 767 S.E.2d at 453. In his deposition, the plaintiff testified that the basis for his claims was that his doctor prescribed him too much Adderall. *Id.* Subsequently, the defendants moved for summary judgment on the grounds that the plaintiff did not commence the action within the statute of limitations. *Id.* The Court agreed. *Id.* at 143–48, 767 S.E.2d at 453–56. Importantly, the Court found that the cause of action first arose in May 2008 when the plaintiff "was hospitalized for Adderall induced psychosis." *Id.* at 145, 767 S.E.2d at 454. Thus, the Court found the statute of limitations expired in May 2011, which was *prior to the plaintiff filing the action in June 2011*.

Because *McMaster* involved a medical malpractice claim where the discovery rule applied, the parties needed to participate in discovery in order to determine when the plaintiff was first put on notice of the cause of action so that the parties and the circuit court could determine whether the plaintiff filed the action within the statute of limitations. This is why the statute of limitations issue in *McMaster* was appropriate for summary judgment.[10] The plaintiff in *McMaster* would

[10] Similarly, the *McMaster* Court relied on *Kreutner v. David*, 320 S.C. 283, 465 S.E.2d 88 (1995) to note that summary judgment was appropriate when a plaintiff did not commence an action within the statute of limitations. *McMaster*, 411 S.C. at 143, 767 S.E.2d at 453. However,

have been on notice at the outset of the case that the defendants were raising a statute of limitation defense; however, the parties needed to participate in discovery to determine when the plaintiff was first on notice. Once the circuit court determined that the statute of limitations ran in May 2011, *prior to the plaintiff filing the action*, the issue was appropriate for summary judgment. In other words, the issue was appropriate for summary judgment in *McMaster* because (1) it was timely raised at the beginning of the litigation to put the plaintiff on notice and (2) there were no intervening actions that could have been taken at any point in the proceedings to remedy the statute of limitations deficiency.

Thus, the issue in *McMaster* was a strict statute of limitations issue which required the circuit court to determine whether a suit that was not filed until June 2011 was commenced within the statute of limitations that expired in May 2011. There were no service or waiver issues in *McMaster*. The circuit court erred in finding that the issues in this matter were of the same "type" as those in *McMaster*. (R. p. 29.)

Here, the issue is not a solely statute of limitations issue. Instead, it is a service issue. The statute of limitations issue in this case is predicated upon and may only be determined *after* the disposition of the service issue, which our rules require to be timely brought via a Rule 12(b) motion to dismiss. Appellants filed this action within the statute of limitations, and the question is whether they served it in accordance with Rule 3(a)(2) of the South Carolina Rules of Civil Procedure or whether some other provision of South Carolina law acts as a bar to the insurance carriers raising the service issue.[11] Put simply, in *McMaster*, the plaintiffs did not file the action

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Kreutner is also materially different than the instant case. In *Kreutner*, the plaintiff filed the action in October 1992 when the statute of limitations ran in May 1992. 320 S.C. at 285, 465 S.E.2d at 90.

[11] Appellants note the circuit court stated "the Statute of Limitations in this matter expired no later than June 2, 2020." (R. pp. 26, 38.) Although the statute of limitations was set to expire on June

within the statute of limitations and that fact alone foreclose the action without the circuit court having to consider service. However, here, Appellants filed the action within the statute of limitations and the question is whether they appropriately served the action within the appropriate timeframe under South Carolina Law. Unlike *McMaster*, the foundational question here requires the Court to consider *service*, not filing.

South Carolina courts have determined issues of service must be raised in a Rule 12(b)(5) motion. *Unisun Ins. v. Hawkins*, 342 S.C. 537, 537 S.E.2d 559 (Ct. App. 2000). As discussed in *Unisun*, even if the issues before the Court also include a statute of limitations defense, the issue of service must be timely raised by a Rule 12(b) motion because the "statute of limitations claim is inextricably tied to the" service claim. *Id.* at 541, 537 S.E.2d at 561. Thus, in order to preserve any statute of limitations claim, Respondents had to properly preserve the service claim by pleading the service issues properly and timely raising them in the case via a Rule 12 motion. In other words, had service not been at issue here, the motions could have been analyzed under Rule 56. But, because the statute of limitations defense stems from the failure of service, the circuit court should have analyzed purported failure of service in the motions under Rule 12. Under Rule 12, the motions are untimely.

The entire purpose of Rule 12 is to require parties to timely raise issues to the circuit court and other parties to prevent unfair surprise and preserve the resources of both the court and litigants. Had Respondents appropriately raised the lack of service issue timely, Appellants could have cured any defect. Appellants filed the action on December 5, 2019, and had until September

2, 2020, the circuit court failed to acknowledge that the time for service was extended until September 30, 2020, under South Carolina law. Because Appellants filed this action prior to the expiration of the statute of limitations on June 2, 2020, they had until September 30, 2020, to serve the action in accordance with Rule 3(a)(2).

30, 2020, to procure service on the at-fault driver.[12] Respondents could have filed a Rule 12(b) motion raising lack of service at any time in the almost nine months remaining for service after they first appeared in this action. Instead, Respondents chose to keep an ace card up their sleeve to play only after the statute of limitations and time for service had expired, wasting the resources of both our courts and Appellants.

This type of gamesmanship is exactly what Rule 12(b) and resulting waiver law seek to prevent, and it should not be tolerated by this Court. Respondents claim that service of the at-fault driver was fundamental and absolute; yet, they did not raise these issues to the circuit court immediately, as required by our rules. Had Respondents raised improper service by filing a timely Rule 12(b) motion, Appellants would have been able to cure the defect. Instead, Respondents chose to move forward with unnecessary discovery in order to run out of the clock and obtain a dismissal of this action. Respondents burdened the circuit court and Appellants by litigating this case for nearly two years, wasting valuable time and resources. Liberty Mutual falsely represented to Appellants numerous times that it would not be pursuing an improper service defense—once when it informed Appellants' counsel its improper service defense was only boiler plate and again when it responded to Appellants' interrogatories in August 2020 that Defendant Toney had "been served [and could] respond on his own." (R. pp. 285–87, 519–25.) *See* Rule 11(a), SCRCP ("The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support it; and that it is not interposed for delay."). Appellants relied on

[12] As discussed herein, Appellants assert service was accomplished as of May 15, 2020, when Defendant Toney voluntarily appeared in this case and gave testimony.

these representations as the rules so allow. This is the type of gamesmanship that our rules do not allow, and the Court should not reward Respondents with a dismissal for these actions.

South Carolina law is clear that where statute of limitations issued are inextricably tied to issues surrounding service, a litigant must appropriate and timely raise the issue to the circuit court and other litigants. Accordingly, the circuit court erred in construing the UIM carriers' claims as a statute of limitations issue under Rule 56 instead of a service issue under Rule 12(b).

C. Respondents further waived any service-related defenses by participating in protracted litigation for nearly two years

The circuit court erred in finding Respondents did not waive any service-related defenses by engaging in robust litigation for nearly two years without filing a Rule 12(b) motion. (R. pp. 292–462.) The circuit court itself characterized the litigation in this matter as "protracted." (R. p. 37.)

Despite noting the extensive and unusual amount of litigation in this case, the circuit court found Respondents' participation in robust discovery over a period of almost two years did not amount to waiver simply because "the timing of this Motion is nearly identical to the timing of the successful motion in *Louden*." (R. p. 34.) However, for the reasons discussed above, the *Louden* case is not dispositive in this matter because issues of waiver were not raised to or considered by the *Louden* court. This statement shows that the circuit court did not properly consider Appellants' arguments as to waiver, and instead made its ruling because it felt it was constrained by the *Louden* case. Further, although the *Louden* case indicates summary judgment was granted in June 1996, it does not indicate when the motion for summary judgment was filed. *Louden*, 327 S.C. at 466–67, 486 S.E.2d at 526. The *Louden* case also does not indicate the extent of the participation by the UIM carrier in the case, including the extent of discovery completed in the case, the participation by the UIM carrier in scheduling orders or mediation, etc.

In this case, Respondents waived the service issue by participating in the litigation and failing to timely file a Rule 12(b) motion. The circuit court erred in finding *Maybank v. BB&T Corporation*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016) did not apply to this case. In *Maybank*, the plaintiff argued the defendant waived its right to assert a personal jurisdiction defense when it actively participated in litigation and failed to file a Rule 12(b) motion. *Id.* The Supreme Court agreed, finding a party who "continues to participate in litigation after challenging personal jurisdiction in their initial responsive pleading to a court" waives the defense. *Id.* The *Maybank* Court noted the defendant "gambled that it could argue personal jurisdiction on the eve of trial after actively participating in litigation over the course of two and a half years," and the defendant lost. *Id.* at 566, 787 S.E.2d at 511.

Here, Respondents gambled that they could run the clock on the statute of limitations prior to raising a Rule 12(b) motion to dismiss based on insufficiency of service of process. Like in *Maybank*, Respondents participated in almost two years of protracted litigation. They participated in two motions hearings before the Court, the submission of four scheduling orders to the Court, and mediation. They participated in extensive discovery in the case, including 13 depositions and sending subpoenas for Appellants' medical records and other documents. (R. pp. 292–462.) They even hired an expert witness to contest Appellants' damages. Every action Respondents took was contrary to the intent to raise a service defense. These actions occurred even after the time for service ran in September 2020. According to the last Scheduling Order, trial was to occur on or after January 1, 2022. (R. pp. 20–22.) Like in *Maybank*, here, Liberty Mutual and Horace Mann waited until the eve of trial, at the end October 2021, to file their motions.

Liberty Mutual further made representations during litigation that directly contradicted any intent to raise improper service to the circuit court. For example, in its answers to Appellants' interrogatories, Liberty Mutual stated:

> These interrogatories were addressed to "Defendant", presumably Carolos D. Toney, as captioned above. Counsel for Liberty Mutual Insurance Company, an underinsured motorist carrier, does not represent Carlos D. Toney and is under no obligation to respond to requests directed to Defendant Toney, who has been served with this lawsuit and can respond on his own. However, and without waiving this general objection, please see below[.]

(R. p. 520.) This is further evidence that Liberty Mutual waived any service-related defenses. Liberty Mutual made this representation in August 2020. This was within the timeframe that Appellants could have still served Defendant Toney had they known Liberty Mutual was contesting service and jurisdiction of the Court. Instead, Liberty Mutual again led Appellants to believe service was not an issue in the case.

Despite Respondents' arguments to the contrary, the motions were not based on any fact learned over the resulting two years of litigation. Their motions were based on facts that existed at the time their filed their answers. Neither Liberty Mutual nor Horace Mann questioned Defendant Toney at his deposition as to whether he had been served with the Complaint. Instead, both Liberty Mutual and Horace Mann continued with the litigation of this matter for nearly two years.

Respondents are further guilty of laches because they did not raise the issues related to service of Defendant Toney until nearly two years into the protracted litigation. In fact, Respondents did not raise service until over a year after the deadline for serving Defendant Toney. This delay was unreasonable.

> Laches is the neglect for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done, or neglecting or omitting to do what in law should have been done for an unreasonable

> and unexplained length of time and in circumstances which afforded opportunity for diligence.

Byars v. Cherokee Cnty., 237 S.C. 548, 559, 118 S.E.2d 324, 330 (1961). Like the carrier in *Louden* did, Respondents here should have immediately undertaken an investigation into whether Defendant Toney had been served and timely raised the issue to the Court. Waiting two years to make this determination was unreasonable, especially considering Respondents' arguments to the circuit court that service on Defendant Toney was fundamental to this case. Neither Liberty Mutual nor Horace Mann have set forth any colorable reason why they waited nearly two years to raise any issues to the circuit court's attention. The carriers did not act diligently or reasonably in this case. As such, they have waived any improper service arguments. *See Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465, 470 (2007) ("The equitable doctrine of laches is equivalent to the legal doctrine of waiver . . . .").

D. The circuit court erred in relying on purported prejudice to Defendant Toney to grant Respondents' motions

The circuit court erred in granting the insurance carriers' motions based on any purported prejudice to Defendant Toney. In the Order, the circuit court stated:

> As an additional sustaining ground for the Court's ruling in this regard, the Court finds that the danger [of] unfair prejudice to *Defendant* should the instant case continue to trial (i.e., his name would be on a verdict form and he would be subject to entry of judgment, all without ever having been served a copy of the Summons and Complaint filed against him) mitigates in favor of this Motion being granted regardless of timing.

(R. p. 34.)

Appellants note this finding shows that this issue is really a jurisdictional issue that should have timely been raised by a Rule 12(b) motion to dismiss. However, Appellants submit that the circuit court erred in finding there would be prejudice to Defendant Toney in this matter.

First, Defendant Toney was aware that this action was pending because he voluntarily appeared for a deposition after being sent a Notice of Deposition which showed his name as a defendant in the caption. Thus, Defendant Toney knew of this action and the possibility of his name appearing on a verdict form.

Second, there is no prejudice to Defendant Toney here because he is protected by a Covenant Not to Execute. (R. pp. 571–75.) The Covenant specifically informs Defendant Toney that Appellants could file an action against him in order to pursue any underinsurance motorist coverage. The Covenant protects Defendant Toney from any judgment in this case. This is a red herring set forth by the insurers to persuade the Court to act based on imaginary prejudice to Defendant Toney in order to avoid their contractual obligations to Appellants.

Further, there is no prejudice to the UIM carriers in denying their motions to dismiss and requiring this case to move forward with the trial that was already scheduled. The parties have extensively litigated this case and unsuccessfully attended mediation. The UIM carriers have been on notice of these claims for over two years and have spent that time marshaling their defenses. They have hired an expert witness to context damages, hired a private investigator, taken numerous depositions, and subpoenaed Appellants' medical records. The case is ready for trial. *Cobb v. Maccaro*, 310 S.C. 303, 305, 423 S.E.2d 156, 157 (Ct. App. 1992) ("[A]voidance of trial is not a substantial right.").

Appellants, on the other hand, will suffer extreme prejudice if the Court allows this dismissal to stand. Accordingly, Appellants request the Court reverse the circuit court's orders and allow this case to proceed to trial.

IV. The circuit court erred refusing to estop Liberty Mutual from raising a service defense where it assured Appellants' counsel that no service issues existed within the timeframe remaining for serving the complaint and where it accepted the jurisdiction of the circuit court by requesting the circuit court change venue

The circuit court erred in failing to apply waiver and estoppel as to Liberty Mutual for its specific actions in this case. Specifically, Appellants contend the circuit court should have estopped Liberty Mutual from later raising a service defense when it assured Appellants it did not believe there were any serious omissions with service. Appellants also contend the circuit court should have found Liberty Mutual waived any service defense when it accepted the jurisdiction of the circuit court and sought relief from the circuit court without raising any service-related issues. Therefore, at the very least, the Court should reverse the circuit court's dismissal as to Liberty Mutual and allow Appellants to proceed to trial against Liberty Mutual.

A. The circuit court erred in refusing to apply equitable estoppel when Liberty Mutual's counsel assured Appellants' counsel its service defense was merely boilerplate

The circuit court erred in finding Liberty Mutual was not estopped from raising a service defense where it assured Appellants' counsel it did not believe any service issues existed and its service-related defense was merely boilerplate. The circuit court erred in finding Appellants' estoppel arguments failed because they did not meet three of the six elements of estoppel. (R. p. 37.)

"[E]quitable estoppel is a means of preventing a party from asserting a legal claim or defense that is contrary or inconsistent with his or her prior action or conduct." *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916 (2017) (quoting 28 Am. Jur. 2d Estoppel and Waiver § 27 (2011)). "The essential elements of equitable estoppel are divided between the estopped party and the party claiming estoppel." *Id.* (quoting *Strickland v. Strickland*, 375 S.C. 76, 84, 650 S.E.2d 465, 470 (2007)).

> The elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truth as to the facts in question; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of position in reliance on the conduct of the party being estopped.

Id. at 601, 799 S.E.2d at 916–17 (quoting *Strickland*, 375 S.C. at 84–85, 650 S.E.2d at 470).

As noted by the South Carolina Supreme Court,

> Waiver implies an intention to give up a known right, and generally rests in agreement, express or implied. But there may be a waiver by estoppel, in which case the conduct of one, inconsistent with a known fact and inducing a belief that such fact would not be asserted, precludes him from asserting that he has not intentionally relinquished the right founded on such fact.

Johnson v. Life & Cas. Ins. Co. of Tennessee, 191 S.C. 96, 3 S.E.2d 805, 807 (1939) (quoting *Gandy v. Insurance Co.*, 52 S.C. 224–29, 29 S.E. 655, 656 (1898)). In this connection, "the distinction between waiver and estoppel is close, and sometimes the doctrines merge into each other with almost imperceptible gradations." *Janasik v. Fairway Oaks Villas Horizontal Property Regime*, 307 S.C. 339, 344, 415 S.E. 2d 384, 388 (1994).

First, the Court incorrectly found that Liberty Mutual did not issue a false representation because it was truthful in stating that its service defense was boilerplate as of January 16, 2020, but did not make any representations about whether the defense would still be boilerplate later in the litigation. Liberty Mutual knew on January 16, 2020, that an affidavit of service had not been filed showing service on Defendant Toney. After reviewing Liberty Mutual's Answer, Appellants' counsel reached out to counsel for Liberty Mutual to determine whether the defenses for statute of limitations, spoliation, and improper service were "serious omissions" that Liberty Mutual would "be filing a motion upon" or whether they were boiler plate defenses. (R. pp. 285–87.) Liberty

Mutual's counsel responded that the defenses were "boiler plate this stage," meaning that it would not be filing a motion to contest improper service, spoliation, or statute of limitations. (*Id.*) As discussed above, when counsel had these discussions, it was the appropriate time for filing any motion related to service, if Liberty Mutual intended to. Liberty Mutual further represented there were no service issues in its interrogatory responses in August 2020. (R. pp. 520.) Despite these representations, Liberty Mutual filed a motion contesting service—making the representations false.

The circuit court focused on Liberty Mutual's caveat that the defense was only boilerplate "at this stage" in the litigation. However, as discussed above, the facts to support the improper service defense existed at the time Liberty Mutual's counsel made the representation and did not change in the nearly two years before Liberty Mutual filed its motion. Liberty Mutual was required to file its motion raising service at that time. It is not as if Appellants filed an affidavit showing service on Defendant Toney and then Liberty Mutual later discovered the affidavit was fraudulent. Instead, there was no affidavit filed showing service and Liberty Mutual knew of this when it informed Appellants' counsel it did not intend to contest service. The circuit court should have considered all facts reasonably known to Liberty Mutual at that stage of the litigation. The purported service issue existed and should have been known to Liberty Mutual's counsel at the time it made the representation that it did not intend to raise the issue to the circuit court.

Although Liberty Mutual's counsel did state it only included the defenses in an effort not to prematurely waive any issues, this does not save Liberty Mutual's representation from being false. Specifically, Liberty Mutual's counsel stated: "Given the recent appellate court ruling in Garrison v. Taget, I'm probably going to have to start pleading every defense available under Title 1 to 63 to be sure I haven't waived anything." (R. p. 286.) This statement merely gives insight as to the reasoning behind including the defenses in the first place. However, upon a specific inquiry by Appellants'

counsel of whether Liberty Mutual intended to raise the issues to the circuit court, Liberty Mutual's counsel said no. At that point, Liberty Mutual's counsel should have evaluated, and presumably did evaluate, the merits of the defenses raised and determined whether the defenses were viable. Therefore, the intent when first placing the defenses in the Answer was to not waive them, but counsel waived the defense as of January 16, 2020, when it represented to Appellants' counsel that it did not intend to file a motion regarding the defense. Had Liberty Mutual's counsel had any concerns regarding service, he could have requested more information from Appellants' counsel about whether service occurred, indicated that he needed to participate in discovery on the issue before deciding whether to raise the service issue, or simply told Appellants' counsel that he believed the defense was viable. In the nearly two years of litigation, Liberty Mutual did not attempt to determine whether service occurred and instead moved forward with litigating the case. Instead, Liberty Mutual knew at the outset that service had not been procured at the time of filing and wished to run out the clock on the statute of limitations.

Further, the fact that Liberty Mutual amended its Answer to include a specific reference to section 38-77-160 despite assuring Appellants' counsel there were only three changes to the amended answer—and Appellants' counsel only consenting to an Amended Answer with those narrow changes—also shows that Liberty Mutual's representation was false, and it intended to mislead Appellants' counsel until the statute of limitations had run and service was no longer curable. (R. pp. 288–91.)

Even if Liberty Mutual did not have a specific intention to relinquish its ability to raise improper service, this does not prevent the circuit court from estopping Liberty Mutual because of their false representation and actions in this matter. In *Janasik*, the Supreme Court noted: "Equitable estoppel is the inhibition to assert such right by reason of mischief following one's own fault and

may arise even though there was no intention on the part of the party estopped to relinquish or change any existing right." 307 S.C. at 344, 415 S.E.2d at 387. Thus, the circuit court erred in failing to estop Liberty Mutual solely because their counsel expressed an ambiguous intent to reserve "every defense available under Title 1 to 63." (R. p. 286.)

Despite this vague statement, every action Liberty Mutual took in this case was antithetical to any intention to raise an improper service defense in this action. Rather, Liberty Mutual's conduct in this matter supported its direct statement to Appellants' counsel that the improper service defense raised in its answer was merely boilerplate and it was not filing a motion on the same. Liberty Mutual participated in extensive discovery in this action, including thirteen depositions, subpoenaing medical records, hiring a private investigator, and hiring an expert witness to contest damages. (R. pp. 292–462.) It also led Appellants to believe that it was not questioning service in its answers to Appellants' interrogatories when it stated it was under no obligation to respond to requests propounded on Defendant Toney because he "has been served with this lawsuit and can respond on his own." (R. p. 520.) It further sought relief from the circuit court to change the venue of the action and participated in another hearing on Appellants' discovery motion. When asked specifically whether Liberty Mutual would be filing a motion on the purported improper service, its counsel said no. The circuit court should have estopped it from doing so.

Second, the circuit court erred in finding Appellants' counsel was in possession of the underlying information and therefore could not meet the lack of knowledge element. The circuit court misconstrued this element of equitable estoppel when it found that Appellants had knowledge that they had not personally served Defendant Toney with the Complaint. This is not the lack of knowledge required by this element. Appellants specifically asked if Liberty Mutual would be filing a motion to assert improper service, and Liberty Mutual's counsel responded that the improper

service defense was merely boilerplate such that it did not intend the file a motion to contest service. Thus, the lack of knowledge required by this element is that a lack of knowledge that the representation that Liberty Mutual's defense of improper service was merely boilerplate was false. Appellants met this element. They did not know that Liberty Mutual intended to file a motion to contest service. Even if Appellants should have known Defendant Toney had not been served, they did not know that Liberty Mutual intended to assert the service defense after being assured that Liberty Mutual did not intend to raise any serious omissions as to service. Further, even if Appellants should have known of an issue with service, a party can waive service issues. Appellants had a right to rely on the representation made by Liberty Mutual's counsel. *See Trustees of Cent. Laborers Welfare Fund v. Lowery*, 924 F.2d 731, 733 (7th Cir. 1991) ("Where a defendant leads a plaintiff to believe that service is adequate and that no such defense will be interposed, . . . courts have not hesitated to conclude that the defense is waived.").

Finally, the circuit court erred in finding Appellants did not rely on Liberty Mutual's representation. The circuit court based this finding on an email exchange between Liberty Mutual's counsel and Appellants' counsel in October 2021 wherein Liberty Mutual requested a copy of the affidavit of service and Appellants' counsel responded, "Will have to look for the service in the hard file." (R. p. 39.) The Court incorrectly found Appellants' "counsel's response to an informal request for the Affidavit of Service does not align with the response of a party who was under the impression that there would be no challenge to service; rather, it aligns with the response of a party who was under the impression that service was readily provable and who was prepared to represent as much to an opposing party." (*Id*.) This is not true. This is simply the response of a party that did not realize service was an issue because Respondents had litigated the case for nearly two years. Appellants' counsel did not see an affidavit of service in the electronic case file and informed Liberty Mutual's counsel that he

would have to check the hard file to see if an affidavit of service was there. This statement in no way means that Appellants' counsel did not rely on Liberty Mutual's representation nor is it dispositive of the waiver, voluntary appearance, estoppel, and other issues relating to service on Defendant Toney.

Accordingly, the Court erred in finding Appellants failed to meet the elements of equitable estoppel. Due to Liberty Mutual's representation that it did not intend to raise improper service to the circuit court, it should now be estopped from raising improper service.

B. The circuit court failed to find Liberty Mutual waived service issues when it accepted and took advantage of the jurisdiction of the circuit court

Liberty Mutual further waived the service defense by filing a motion related to venue without simultaneously raising insufficiency of service and lack of personal jurisdiction over Defendant Toney. Both Liberty Mutual and Horace Mann pled a defense of improper venue in their Answers. Subsequently, on March 24, 2020, Liberty Mutual filed a Motion to Change Venue without raising improper service or lack of personal jurisdiction over Defendant Toney. Rule 12(g) provides:

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

Rule 12(g) required Liberty Mutual to raise all available 12(b) defenses in the venue motion, including insufficient service of process and lack of personal jurisdiction over Defendant Toney.

The circuit court erred in finding that the Motion to Change Venue was not a Rule 12(b) motion, and, therefore, Liberty Mutual did not waive the defenses of insufficient service and lack of personal jurisdiction by not including them in the Motion. However, *Breland* makes it clear that motions to change venue stem from Rule 12(b)(3). *Breland v. Love Chevrolet Olds, Inc.*, 339

S.C. 89, 94, 529 S.E.2d 11, 13 (2000). In fact, the *Breland* court stated: "the analysis of the [change of venue] issue is identical to a Rule 12(b)(3), SCRCP motion." *Id.* Because the analysis of the different types of venue motions are identical, Liberty Mutual also needed to raise any other Rule 12(b) defenses it intended to rely on in March 2020. The circuit court erred in not considering *Breland.*

Further, even if the Court does not construe Liberty Mutual's motion to change venue as a 12(b) motion, Liberty Mutual still waived any jurisdictional arguments related to service by seeking relief from the circuit court without first raising lack of personal jurisdiction. "If the defendant wishes to preserve an objection to personal jurisdiction, he cannot request any relief which may be granted only if the court has jurisdiction." *Payne v. Holiday Towers, Inc.*, 283 S.C. 210, 213, 321 S.E.2d 179, 181 (Ct. App. 1984). As the UIM legal fiction gives the insurer the right to step into the shoes of the defendant to defend the action, every action that Liberty Mutual took in this case was on behalf of Defendant Toney. Liberty Mutual was required to raise insufficiency of service and lack of personal jurisdiction over Defendant Toney. Instead of doing so, Liberty Mutual sought relief from the circuit court which the circuit court only had the power to grant if personal jurisdiction existed.

Liberty Mutual took advantage of the circuit court's jurisdiction time and time again. It not only filed a motion to change venue asking the circuit court for relief, but it also used the power of the circuit court to subpoena medical records from Appellants' medical providers. (R. pp. 292–462.) If the circuit court did not have jurisdiction in this matter, then Liberty Mutual would not have the power to compel non-parties to produce documents. Liberty Mutual also obtained sworn testimony from numerous witnesses in this case and procured discovery from Appellants. (*Id.*) These actions are all inconsistent with any argument that the circuit court did not have jurisdiction

in this matter because an action was not properly commenced against the at-fault driver. Liberty Mutual cannot both take advantage of the circuit court's jurisdiction but also disclaim the circuit court's jurisdiction.

Accordingly, the circuit court erred in finding Liberty Mutual did not waive the service-related arguments by filing the venue motion on March 24, 2020, and submitting to the circuit court's jurisdiction.

CONCLUSION

For the reasons discussed herein, Appellants respectfully request the Court vacate the circuit court's August 28, 2022, and December 21, 2022 orders dismissing the case and allow this case to proceed to trial.

(Signature page follows)

RESPECTFULLY SUBMITTED,

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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.

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 211(a), SCACR, I certify that this brief complies with the provisions of Rule 211(b), SCACR.

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