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' REPLY BRIEF TO RESPONDENT HORACE MANN PROPERTY AND CASUALTY INSURANCE COMPANY

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ARGUMENT

I. Horace Mann conflates "proper service" and "timely service" with personal service by delivery

In their brief, Horace Mann cites to *Louden*'s holding that "the named defendant in an action for benefits under a plaintiff's underinsured motorist policy must be properly served with the summons and complaint prior to the running of the statute of limitations." *Louden v. Moragne*, 327 S.C. 465, 469, 486 S.E.2d 525, 527 (Ct. App. 1997). Horace Mann then states: "Here, the Appellants voluntarily admitted that they did not personally serve Defendant Toney with the Summons and Complaint upon filing nor at any point after, thereby directly conflicting with the findings of this Court in *Louden*."[1] (Resp. Br. P. 4.) Horace Mann also contends Appellants' position as to voluntary appearance "effectively circumvents South Carolina law requiring timely service upon a putative at-fault driver as an essential prerequisite to a UIM claim." (Resp. Br. P. 5.)

However, Appellants contend that they did properly and personally serve Toney in this case by virtue of his voluntary appearance. The requirement is not that the at-fault driver must be personally served with the Complaint by delivery, as Horace Mann seems to suggest. The UIM context is not wholly removed from normal service rules. Rule 4(d) of the South Carolina Rules

[1] Horace Mann relies extensively on *Louden* throughout its brief. However, as discussed in Appellants' brief, *Louden* is not dispositive in this case. (App. Br. pp. 15–21.) Horace Mann wishes to tout the alleged similarities between *Louden* and the instant case and ignore the many differences. In *Louden*, the UIM carrier immediately took steps to investigate service by requesting copies of the proofs of service in the court's file and filed an answer that only mentioned the named defendant, not the UIM carrier. (Ex. G to Mtn. to Alter/Amend at 26–27, 29.) Further, there were no arguments raised to the circuit court or present in the case on appeal about waiver of service or personal jurisdiction defenses, voluntary appearance by the at-fault driver, or equitable estoppel arguments due to the insurers' conduct. (App. Br. 16–17; R. p. 546.) Here, the insurance carriers waived any service defense by participating in protracted litigation for nearly two years. (App. Br. 29–32.) This case is factually different from *Louden*, and the circuit court erred in finding the two cases were factually on "all fours." (R. p. 28.)

of Civil Procedure provides that "[v]oluntary appearance by defendant *is equivalent to personal service*." (emphasis added); *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."). Further, despite Horace Mann's contention, this service occurred timely as it was within the statute of limitations and the service timeframe provided for in the South Carolina Rules of Civil Procedure.

Horace Mann admits the voluntary appearance doctrine is not a bright-line rule and must, instead, be applied by the Court based on an evaluation of the specific facts of a case. (Resp. Br. P. 5.) However, Horace Mann also tries to persuade the Court that the voluntary appearance doctrine does not apply to the instant case because it only applies in bright-line situations that involve "robust, extensive participation by a party," where the party opposes the assertion of their voluntary appearance, and where the party appears more than once. (*Id.*) However, this ignores the unique framework of a UIM case. Further, these are not requirements for a voluntary appearance. To the contrary, this Court has held that "a letter from one attorney to another may serve as a basis to find a voluntary appearance." *Stearns*, 373 S.C. at 340–41, 644 S.E.2d at 798. A voluntary appearance occurs where a defendant takes some action to consent to the jurisdiction of our courts. *Stephens v. Ringling*, 102 S.C. 333, 86 S.E.2d 683 (1915) (explaining any action can amount to a voluntary appearance); *Stearns*, 373 S.C. at 338, 644 S.E.2d at 796 (Ct. App. 2007) ("No specific act constitutes an appearance, as 'a defendant may choose to come into court with trumpets, or quietly by the back door.'" (quoting *Stephens*, 102 S.C. at 342, 86 S.E. at 685)). Here, Toney voluntarily appeared in this action by giving testimony at his deposition without

objecting to service or jurisdiction. This is enough under South Carolina law. Horace Mann has not cited to any case law finding otherwise.

The purpose of requiring service of the initial pleading on an at-fault driver is to provide notice of the case. *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"). Once notice is provided, in an underinsurance case, an at-fault driver rarely actively participates in the litigation of the matter because the at-fault driver usually has already settled the case through his insurance carrier, received a covenant not to execute, and is protected from judgment. In settling all liabilities arising from the motor vehicle accident, the at-fault driver agrees to allow the injured person to either maintain a suit or file a suit against the at-fault driver, knowing that they will not be liable for any resulting judgment. Here, Toney's liability was ended by settlement with protection of a covenant not to execute. He received the appropriate notice of the action when he voluntarily appeared at his deposition on May 15, 2020, and gave testimony in this case. The voluntary appearance doctrine does not require anything more. It is clear Toney knew of this case and his role as a named defendant prior to the expiration of the statute of limitations, consented to the jurisdiction of the court, and chose not to participate in the action.

Accordingly, the circuit court erred in finding this action was not properly commenced.

II. Horace Mann did not reference Defendant Toney in its Answer

Contrary to Horace Mann's assertion that it provided "a simple, concise, and direct" service defense, it later requests the Court read its fourth defense in conjunction with its third defense to show that it meant to raise service specifically as to Toney. (Resp. Br. P. 10.) Horace Mann states:

> In Respondent Horace Mann's Answer, Horace Mann not only referenced Defendant Toney in paragraph 9 but also in its fourth defense for punitive damages in paragraph 10. . . . When this defense is read in conjunction with paragraph 9 of Horace Mann's Answer, as instructed by the circuit court, it is readily apparent that Respondent Horace Mann used 'Defendant' in reference to Carlos Toney.

(*Id.*) This argument is far from simple, concise, and direct. A review of Horace Mann's Answer shows that Toney is not specifically mentioned in paragraph 9 or paragraph 10. Toney is not specifically mentioned anywhere in Horace Mann's pleading other than in the caption of the case. In fact, Horace Mann's contention that it only raised defenses three and four on behalf of Defendant Toney proves that its answer did not adequately raise service on behalf of Toney. Horace Mann does not allege it "referenced" Defendant Toney in its second defense, which reads "Defendant would show, upon information and belief, the appropriate venue would be the Lexington County Court of Common Pleas." (R. p. 59.) This defense, along with the third and fourth defenses and the rest of the answer, only generally references "Defendant." Thus, it is far from clear that Horace Mann intended to raise service as it related to Toney instead of Horace Mann.

Horace Mann failed to plead its insufficiency defense with the requisite specificity necessary under the case law. In its paragraph 9, Horace Mann pled, "Defendant would show, upon information and belief, Plaintiff has failed to obtain Service of Process against this defendant." In *Unisun Ins. v. Hawkins*, the Court of Appeals found "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." 342 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct. App. 2000). Here, Horace Mann failed to show in what manner Appellants failed to provide service.

Accordingly, the circuit court erred in finding Horace Mann's boilerplate answer was sufficient to put Appellants on notice that Horace Mann contended Appellants failed to serve the

Complaint on Toney and therefore could not proceed with the instant action against Horace Mann because they never commenced an action against the at-fault driver.

III. There is no prejudice to Toney

The circuit court erred in finding there would be prejudice to Toney. Horace Mann's attempt to distinguish between a covenant not to execute judgment and a covenant not to enter judgment is a distinction without a difference. In the Covenant, Toney agreed to allow Appellants to bring suit against him and prosecute the suit to a final judgment. (R. p. 573.) Toney has consented to the entry of a judgment in this case and would not be prejudiced by same. Appellants have agreed not to execute any judgment. (*Id.*) They agreed that execution of the covenant would "fully and forever prevent and bar the collection of any additional payments of any kind, nature or description against Carlos Demetius Toney." (R. p. 574.)

Further, Horace Mann's arguments that Appellants have failed to afford Toney any "basic right prescribed" in the covenant not to execute is a red herring. Horace Mann cites to the following language in the covenant:

> The Covenantors and the Covenantors' attorney, if represented, expressly agree to keep . . . 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 the trial, the amount of a verdict, status of the underinsured motorist claim and whether a settlement of the underinsured motorist benefits has been obtained.

(R. p. 574.) Horace Mann argues Appellants have not abided by this agreement, and that fact "should serve as a bar to disallow them from placing his name on a verdict form and entering judgment against him." (Resp. Br. P. 16.)

This argument was not before the circuit court, and there is no evidence in the record to support Horace Mann's assertion that Appellants have not abided by this agreement. Further, Horace Mann does not have standing to raise whether Appellants have abided by any agreements

between Appellants and Toney. Regardless, the record shows that Toney was aware of this action due to his voluntary appearance to give deposition testimony. A trial in this matter has not occurred yet as Respondents prevailed on motions to dismiss, which is currently the subject of this appeal. Appellants have not obtained a verdict or settlement. Thus, Appellants have abided by the language cited by Horace Mann.

As such, there is no prejudice to Toney and the circuit court erred in relying on perceived prejudice to Toney in granting Respondents' motions.

IV. Appellants properly served the notice of appeal on Respondents

In the brief, Respondent Horace Mann alleges the notice of appeal should have been served on Carlos Toney. As the Court is aware, Respondent Liberty Mutual filed a motion to dismiss the appeal on these grounds on May 11, 2023, and the Court denied Respondent Liberty Mutual's motion on June 16, 2023.

South Carolina law does not require service of the notice of appeal on 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 defendant in the case would be a respondent in an appeal filed by the plaintiff. 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 Toney, as South Carolina law allows. While the issue of whether Toney voluntarily appeared and waived service at the circuit court level is one of the issues on appeal, Toney did not file any pleadings in the case. Appellants have fully resolved their claims with 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 fictious party, constructed by the UIM legal fiction, not a respondent in this appeal. Appellants properly served the notice of appeal on the respondents in this case, Respondents Liberty Mutual and Horace Mann.

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.

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. at 469, 486 S.E.2d at 527. 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 Horace Mann'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 Horace Mann does not believe this is required. Following Horace Mann's argument, Horace Mann, 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 Horace Mann. However, Horace Mann 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 Horace Mann, as UIM carrier, entered an appearance and actively participated in the litigation. The question of whether the at-fault driver voluntarily appeared and/or waived service in the lower court is a different question. Should the Court determine 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**. 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. 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.

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*. 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**. 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." 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*. 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.** 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. March 17, 2023 Correspondence, Appellate Case No. 2023-000430. The named defendant is not a party to the appeal. *See* Appellate Case No. 2023-000430.

This matter has been settled by Toney, and he is protected with a covenant not to execute. He is not a respondent in the appeal. Despite his knowledge of the case and voluntary appearance at his deposition, Toney chose not to participate in this matter. Respondents filed the motions that are the subject of this appeal. As noted by the Court in the caption, Horace Mann and Liberty Mutual are the proper respondents here. Respondents were properly served with the notice of appeal in this matter. This appeal is proper.

CONCLUSION

For the reasons discussed herein, as well as those stated in their previous brief, 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.

RESPECTFULLY SUBMITTED,

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October 9, 2023

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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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