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 LIBERTY MUTUAL INSURANCE COMPANY

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ARGUMENT

I. This case is not similar to *New Hampsire Insurance Company v. Bey Corporation*

In its brief, Liberty Mutual argues Appellants ignore *New Hampsire Insurance Company v. Bey Corporation*, 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993) and that the instant case is "much more analogous" to *New Hampshire Insurance Company*. (Resp. Br. p. 7–8.) This case is not analogous. While it is true that this Court held a mortgagor's appearance at a foreclosure hearing did not constitute a voluntary appearance in *New Hampshire Insurance Company*, a review of the facts of *New Hampshire Insurance Company* show it is entirely irrelevant to the instant case. In analyzing whether the defendant corporation voluntarily appeared under Rule 4(d) of the South Carolina Rules of Civil Procedure by appearing at the foreclosure hearing, this Court stated:

> After hearing arguments at rehearing and a further review of the record, we are convinced Bey's appearance at the foreclosure hearing was *limited to setting aside the default* and was not a voluntary appearance as contemplated by Rule 4(d). At the foreclosure hearing, New Hampshire objected to Bey participating in the hearing because Bey was in default. Thereafter, *the thrust of Bey's presentation of evidence addressed the requirement of showing a basis for setting aside the default*.

Id. at 49, 435 S.E.2d at 378 (emphasis added). The Court further concluded: "We view the record as reflecting Bey's presentation was intended to demonstrate good cause for setting aside the default." *Id.* at 51, 435 S.E.2d at 379. The Court further noted "[i]t was inconsistent for the referee to hold [the defendant] in default and at the same time find it had made a voluntary appearance in the case." *Id.* at 49 n.1, 435 S.E.2d at 378 n.1. The Court remanded the case and directed the trial court to allow the corporation "to answer and plead in the case." *Id.*

It is clear that this Court's ruling that the defendant in *New Hampshire Insurance Company* did not voluntarily appear was based on the fact that the corporation's appearance at the hearing was solely limited to seeking relief from an entry of default. Although the plaintiff argued the defendant voluntarily appeared by "presenting evidence on the merits at the foreclosure hearing,"

this Court rejected that argument and found the only presentation was related to attempting to establish good cause to set aside the entry of default. *Id.* at 49, 435 S.E.2d at 378. *New Hampshire Insurance Company* is not at all similar to the instant case. Here, Toney was not in default and did not limit his appearance in this case in any manner. Instead, he, through his insurance carrier, settled his liability arising out of the motor vehicle accident and received protection from judgment, gave permission for Appellants to file a suit against him, and voluntarily appeared at a deposition pursuant to a deposition notice and gave testimony in this case. He received the appropriate notice of the action when he voluntarily appeared to give testimony at his deposition on May 15, 2020. 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.

As discussed in Appellants' Reply to Horace Mann's brief, the voluntary appearance doctrine does not require participation of the party against whom the doctrine is being asserted against. (Reply Br. p. 2–3.) Liberty Mutual's argument otherwise ignores the unique nature of UIM cases. (Resp. Br. p. 8.) In those cases, the parties who the voluntary appearance doctrine was being asserted against were not protected from judgment with a covenant not to execute.

Liberty Mutual also incorrectly argues "the notice of deposition is one of the many items not properly before this Court in this appeal." (Resp. Br. p. 9.) The circuit court fully considered Appellants' Motion to Reconsider, including all exhibits, when issued the orders on appeal. Therefore, this is properly before the Court. *See* Rule 210(c), SCACR (explaining the Record on Appeal may contain any matter presented to the lower court of tribunal). The fact that Toney's deposition occurred via Zoom during a pandemic also has no bearing upon whether he voluntarily appeared. (Resp. Br. pp. 3, 6–8, 10.) Toney was sworn in, just like any other deponent. (R. p.

469.) Liberty Mutual's insinuation that a Zoom deposition is any less valid than an in-person deposition is meritless.

Liberty Mutual misconstrues Appellants' arguments by stating that "Appellants' arguments are tantamount to stating that Toney's appearance at a short deposition means that the UIM carriers are forever barred from raising the issue of the total lack of service of process upon Toney." (Resp. Br. p. 10.) This is not true at all. Appellants' argument is not that UIM carriers may never raise service as it relates to the at-fault driver. Appellants' argument is that UIM carriers, like every other litigant in South Carolina, must properly and timely raise service issues and cannot hide behind the unique nature of UIM cases to withhold raising service issues until the defect is no longer curable. Further, Appellants' argument is that Toney, like every other litigant in South Carolina, can voluntarily appear in a case by taking some action to consent to the jurisdiction of our courts.

Liberty Mutual now attempts to argue, for the first time, that Appellants should be precluded from arguing that Toney voluntarily appeared in this action by virtue of his deposition testimony because Appellants admitted in requests to admit that they did not serve Toney with the Summons and Complaint. (Resp. Br. p. 11 n.5.) Appellants have candidly admitted that they did not personally serve Toney with the Summons and Complaint. However, the fact that Appellants have admitted they did not serve Toney with the Summons and Complaint does not preclude their arguments that Toney voluntarily appeared under Rule 4(d). If a plaintiff served the Summons and Complaint on a defendant, then a voluntary appearance under Rule 4(d) would not be needed. To borrow phrasing from Liberty Mutual, the Court should ignore this "legal sleight-of-hand." (Resp. Br. p. 8.)

II. *Louden* is not dispositive

In their brief, Liberty Mutual argues that this case fits squarely within the rule set forth in *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997). (Resp. Br. 12–16.) However, in doing do, Liberty Mutual recites the facts from *Louden* that are similar and ignores the facts from *Louden* that make it distinguishable. For example, as discussed in Appellants' brief, issues of waiver and estoppel were not raised in the *Louden* case or considered by the *Louden* court and the attorney representing the UIM carrier in *Louden* immediately took steps to investigate service. (App. Br. pp. 15–21.) Liberty cites to the following holding in *Louden*, "Thus, we hold that the named defendant in an action for benefits under a plaintiff's underinsured motorist policy *must be properly served with the summons and complaint prior to the running of the statute of limitations.*" (Resp. Br. p. 13 (emphasis in original).) Nothing in *Louden* prohibits the application of traditional waiver rules or the voluntary appearance doctrine, which is "equivalent to personal service." Rule 4(d). The *Louden* court did not consider these issues because they were not present in *Louden*. Liberty Mutual admits *Louden* did not "expressly consider" these issues. (Resp. Br. p. 14.) The *Louden* court did not implicitly consider these issues either. *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))).

Liberty Mutual next tries to argue that the *Louden* court did actually consider waiver issues. (Resp. Br. pp. 14–15.) Liberty Mutual posits the reference to a release in *Louden* "perhaps . . . was actually a covenant not to execute" and extrapolates that *Louden* concerned "an identical situation to the Covenant Not to Execute signed only by the Appellants in this case." (*Id.*) The underlying

circuit court order clearly states that arguments related to whether the UIM carriers waived the statute of limitations or were estopped from asserting a statute of limitations defendant were not before it. (R. p. 546; App. Br. pp. 16–17.)

Liberty Mutual argues its request to Appellants' counsel for a copy of the Affidavit of Service is "not substantively different from what the UIM counsel in *Louden* did to investigate service." (Resp. Br. p. 15.) This is not true. Here, Liberty Mutual asked Appellants' counsel for a copy of the affidavit of service in October 2021—a year and nine months after the initiation of this suit. This is after Liberty Mutual's counsel advised Appellants' counsel—soon after the initiation of the case—that a serious defect as to service did not exist and it did not intend to file a motion as to service. The October 2021 request was after nearly two years of protracted litigation and right before a trial in the matter could occur.[1] It was also after the statute of limitations had passed. In *Louden,* on the other hand, the UIM carrier immediately took steps to investigate service by sending a letter to the Clerk of Court with a copy to the plaintiff's attorney requesting "copies of the proofs of service in your file." (R. p. 555.) Immediately requesting a copy of the proof of service and waiting nearly two years to request a copy of the proof of service is substantially different.

III. The UIM Carriers' narrow interpretation of section 38-77-160 is untenable

Liberty Mutual argues that Appellants have failed to preserve the right of action against Toney under section 38-77-160. (Resp. Br. p. 23.) However, in making this argument, Liberty Mutual relies on an extremely narrow and untenable interpretation of section 38-77-160. Liberty

[1] Liberty Mutual argues it "had no way of knowing when a trial roster would be published." (Resp. Br. p. 25.) However, Liberty Mutual participated in and consented to four different scheduling orders in this case. The last one stated that trial could occur on or after January 10, 2022. (R. pp. 20–22.)

Mutual suggests the only way to preserve the action is to personally serve the at-fault driver with the Summons and Complaint. This is not what South Carolina law requires. The rules surrounding service in the UIM context are no different than the rules surrounding service in other contexts. The voluntary appearance doctrine and waiver work in concert in the same legal system and apply in the context of UIM cases as well. Liberty Mutual argues that a UIM carrier could never waive service on behalf of an at-fault driver because it is the at-fault driver's defense to raise. This interpretation would give UIM carriers an impenetrable shield to avoid their contractual duty to their insureds.

Liberty Mutual contends Appellants' "seek to attach a judgment to Toney without notice" and argue a Covenant Not to Execute Judgment "is not the same thing as a Covenant Not to Enter Judgment." (Rep. Br. p. 27.) This argument is a red herring. The entire point of a covenant not to execute is the signor consenting to the entry of a judgment. Here, 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.)

Liberty Mutual also argues the Covenant in the instant case allows Appellants to "withhold[] satisfaction in certain circumstances." (Resp. Br. p. 27.) The Covenant only allows Appellants to withhold satisfaction of the judgment is if there is additional liability or underinsured motorist coverage and a satisfaction would impede Appellants' ability to collect the additional coverage. Specifically, the Covenant states:

> Upon reduction to judgment of the aforementioned lawsuit that Covenantors, their subrogees, heirs, or assigns will immediately provide Carlos Demetius Toney with

> an executed Satisfaction of said Judgment in any case presented by Covenantors against them for the accident dated June 2, 2017, *unless such Satisfaction of Judgment will impede collection or pursuit of additional liability coverage or underinsured motorist coverage.* If Satisfaction of Judgment will impede collection or pursuit of additional liability coverage or underinsured motorist coverage, Covenantors, their subrogees, heirs, or assigns will provide Carlos Demetius Toney a Satisfaction of Judgment upon the earlier of the following events: (a) payment of said judgment by any other liability insurance carrier and/or underinsured motorist carrier or (b) final resolution of any additional liability coverage and/or underinsured motorist coverage claim.

(R. p. 573 (emphasis added).) The entire purpose of the Covenant is to allow Appellants to "pursu[e] and collect[] other liability coverage." (R. p. 572.) Arguing that the Covenant prejudices Toney because it allows Appellants to pursue any coverage before satisfying a judgment is a fallacy. Further, the Covenant states: "If immediate satisfaction of the Judgment is not file after either payment of the judgment or final resolution of any other liability or underinsured motorist claim, this Covenant may be recorded as a Satisfaction of Judgment." (R. p. 573.) There is no prejudice to Toney here.

Like Horace Mann, Liberty Mutual also argues that Appellants' failed to afford Toney "basic rights." (Resp. Br. p. 27.) The UIM carriers do 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 Covenant.

IV. Liberty Mutual should have been estopped from raising improper service

The circuit court erred in finding Liberty Mutual was not estopped from raising service as a defense based on the assurance from Liberty Mutual's counsel that there were no serious omissions related to service. On January 16, 2020, after reviewing Liberty Mutual's Answer,

Appellants' counsel specifically inquired about certain defenses raised by Liberty Mutual's counsel, stating:

> [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. p. 287.) Counsel for Liberty Mutual responded: "Boiler plate at this stage. Given the recent appellate court ruling in Garrison v. Target[2], 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.)

Liberty Mutual argues its counsel "made no representations about Liberty Mutual's *future* position with respect to affirmative defenses, and in fact, a fair reading of the email is that Liberty Mutual's counsel intended for there to be no waiver of the defenses itemized in the email by Appellants' counsel." (Resp. Br. 29.) Appellants' counsel specifically inquired as to Liberty Mutual's defenses for statute of limitations, spoliation, and improper service, asking whether Liberty intended to file a motion to dismiss based on these defenses. Liberty Mutual's counsel stated that it would not be filing a motion to dismiss based on these defenses. However, despite this assertion, Liberty Mutual filed a motion asserting these defenses nearly two years later. The facts supporting that motion—that Appellants failed to personally serve Toney with the Summons and Complaint at the time of filing—existed at the time Liberty Mutual's counsel assured Appellants' counsel there were no serious omissions related to service.

Although Liberty Mutual's counsel indicated in the email that he believed he needed to "start pleading every defense" to be sure he did not "waive[] anything" due to recent case law, this

[2] *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).

is a statement showing his state of mind for including the defenses into the answer in the first place. Counsel included the defenses in the answer to ensure that he did not waive any defenses at the time of filing. However, when specifically asked whether Liberty Mutual contended there was a serious issue with service, Liberty Mutual's counsel said no. At that time, counsel represented that there were no issues related to service. Although Liberty Mutual originally included the defense to preserve it, it later represented to Appellants' counsel that it did not intend to raise any service-related issues in a motion. 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 was able to out the clock on the statute of limitations by misrepresenting to Appellants' counsel that it did not intend to litigate service issues.

Liberty Mutual also argues that Appellants' counsel's statement in October 2021—a year and nine months after Liberty Mutual assured Appellants' counsel there were no serious omissions related to service—that he would have to "look for service in the hard file" does not "align with the response of a party who was under the impression that there would be no challenge to service" and "instead 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 opposing party." (Resp. Br. p. 30.) Liberty Mutual argues this statement shows Appellants' counsel did not rely on Liberty Mutual's previous misrepresentation because Appellants' counsel believed service was "readily provable."

To the contrary, this shows the opposite. Even if Liberty's tortured interpretation of Appellants' counsel's response were true, it shows that Appellants' counsel relied on Liberty's assurance nearly two years earlier that there were not any serious omissions related to service, did not believe any issues with service existed in the case, and would look for the affidavit of service. 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 and Liberty Mutual had assured Appellants' counsel it did not intend to raise service issues in a motion. 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. Therefore, the circuit court erred in refusing to estop Liberty Mutual from raising improper service.

V. Appellants properly served the notice of appeal on Respondents

In the brief, Respondent Liberty Mutual 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 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 Liberty Mutual's argument would rewrite South Carolina law to require that all filings be served on the at-fault driver, not just the initial pleadings, even though the at-fault driver is not involved in the litigation of the case and is protected from judgment. Even Liberty Mutual does not believe this is required. Following Liberty Mutual's argument, Liberty Mutual, and every other party to a civil action where the UIM carrier has assumed the defense, would have to serve the at-fault driver with copies of its filings, including the motion to dismiss the case filed by Liberty Mutual. However, Liberty Mutual did not file any proofs of service showing service of pleadings on the at-fault driver. *See* Civil Action No. 2019-CP-43-02375. This is because the UIM statute provides a unique statutory scheme that allows UIM carriers to act as the real adverse party when a settlement has occurred with the at-fault driver. It is undisputed that Liberty Mutual, 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.

(Signature page follows)

RESPECTFULLY SUBMITTED,

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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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