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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.

APPELLANTS' PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

Appellants Howell D. Thompson and Tara L. Thompson respectfully request rehearing, including *en banc* rehearing, of this Court's October 1, 2025 decision pursuant to Rules 221 and 240 of the South Carolina Appellate Court Rules. Rule 221(a), SCACR, provides that a petition for rehearing should be granted when the Court has "overlooked or misapprehended" relevant information or law, as is the case here.

In the concurrence, Judge Hewitt stated that if serving the at-fault driver "relates to a defense that the court lacks personal jurisdiction over the at-fault driver, . . . both insurance

companies failed to adequately object to personal jurisdiction." Respectfully, timely pursuit of this defense is required by South Carolina law. The Court's decision otherwise gives a windfall to insurance companies in the UIM context by allowing them to withhold service defenses on behalf of the at-fault driver until the defect is no longer curable. This Court's decision gives UIM carriers an impenetrable shield to avoid their contractual duty to their insureds by finding they can raise personal jurisdiction over the at-fault driver but can never waive it. This runs counter to the legislative intent of the UIM statute and other South Carolina law. While *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997) holds that an action must be commenced against an at-fault driver, it does not hold that the service defense must not be properly raised or pursued by the UIM carrier who steps into the case to defend in the name of the at-fault driver. *Louden* further does not negate the voluntary appearance doctrine.

Here, the UIM carriers, in the name of the at-fault driver, robustly participated 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, in the case of Liberty Mutual, assured Appellants' counsel its service-related defense was a boilerplate defense and it did not intend to file a motion. *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.

Louden and South Carolina cases concerning waiver, laches, and estoppel 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 were 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.

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.[1] The Court overlooked the differences between the *Louden* case and the instant case.

[1] 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.

The Court's decision misapprehends substantial issues in this litigation, permitting and encouraging Respondents' gamesmanship tactics. *See Palmetto Pointe at Peas Island Condo. Prop. Owners Ass'n, Inc. v. Island Pointe, LLC*, 445 S.C. 543, 555, 915 S.E.2d 501, 508 (2025) (Kittredge, CJ, concurring in part and dissenting in part) (warning South Carolina courts against inviting mischief and gamesmanship in litigation). In ruling that Respondents were not required to timely raise service in a 12(b) motion, the Court found nothing "precluded Carriers from raising such defense in their answer and then arguing" it in a motion for summary judgment. However, this contradicts *Maybank v. BB&T Corporation*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016), which held a 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, even after initially preserving the defense in its answer. The purpose of Rule 12(b) is to require early assertion of these defenses to allow for the curing of any defects or, if the defect cannot be cured, dismissing the case so that the parties and courts do not waste time and resources litigating cases that should not be litigated. The Court further overlooked the fact that Liberty Mutual specifically assured Appellants' counsel the service defense raised in the answer was boilerplate when Appellants' counsel inquired whether there was a serious omission with service. (R. pp. 285–87.) The Court also overlooked that Liberty Mutual 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.)

In the decision, the Court, citing *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996), stated that Appellants had the burden to establish the court has personal jurisdiction over the defendant. However, the Court overlooked the fact that personal jurisdiction must be timely raised *and* diligently pursued by that defendant. When timely raised and pursued, the plaintiff has the burden to establish the court has personal jurisdiction over the defendant. A

defendant must obtain a ruling from the court on personal jurisdiction before submitting itself to the jurisdiction of the court in order to properly preserve the defense. A defendant may not wait until the eve of trial—after litigating a case for two years, submitting to the court's jurisdiction, voluntarily providing testimony in the case without objection, and assuring the plaintiff there were no serious omissions with service—to raise a personal jurisdiction defense. *See Maybank*, 416 S.C. at 565, 787 S.E.2d at 510. That is waiver, and it applies in the UIM context too, not just to "the direct defendant," as the Court implied.

Further, in the decision, the Court held that Defendant Toney's appearance at his deposition did not constitute a voluntary appearance in the action because there was no indication he was informed during the deposition that he was a defendant in the lawsuit. The Court overlooked or misapprehended the fact that Toney was informed before the deposition that he was the defendant in the lawsuit. Appellants sent a notice of deposition that clearly listed Toney's name in the caption and identified that he was the defendant in the case. (R. p. 463.) The notice of deposition put him on notice before the deposition that he was a defendant in the suit that was filed in Sumter County and included the civil action number where he could access all pleadings in this matter. He was also told in the deposition that his testimony was in connection with the lawsuit brought by Appellants arising out of the June 2017 motor vehicle accident. (R. 189, 190, 195, 202.) The same lawsuit that he gave permission for Appellants to file against him as named defendant in the covenant not to execute. (R. pp. 571–75.) Toney voluntarily appeared at the deposition to give testimony. He was not compelled to attend and was not served with a subpoena. A defendant may not voluntarily appear to give testimony in a case and submit to the Court's jurisdiction without objecting to that jurisdiction or service. The act of giving testimony in a case as a named defendant is an overt act showing consent to the court's jurisdiction.

Further, the Court found that Toney did voluntarily appear because he did not make any arguments regarding the merits during the deposition or indicate he understood he was appearing for the purpose of defending himself in the lawsuit. The Court overlooked that each piece of testimony Toney gave was in defense of the case. *See Reid v. Kelly*, 274 S.C. 171, 175, 262 S.E.2d 24, 26 (1980) ("The admissibility of a deposition into evidence does not depend on the purpose for which it was taken. Nor is its use limited to the party who initiated it. Where a deposition is taken either party is entitled to its use in the trial of the case."). Respectfully, the voluntary appearance doctrine does not require such brightline, rigid application as the Court suggested in its decision, and the Court's decision overlooks the unique nature of UIM cases by requiring some further pronouncement or participation in the case by Toney who consented to the filing of the suit, was protected from judgment, had UIM counsel defending the case on his behalf, and appeared to give testimony in the case without coercion and without objecting to or limiting his appearance. A defendant who voluntarily appears in an action does not need to announce his intention on the record. Instead, a voluntary appearance may be "implied from some act done with the intention of appearing and submitting to the court's jurisdiction." *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007). The purpose of the voluntary appearance doctrine is to ensure notice. Toney had notice here. He had the opportunity to object to the jurisdiction of the court and service and did not do so. Instead, he provided testimony for use in the defense of the case. The Court incorrectly required "trumpets" instead of recognizing that Toney came "quietly by the back door." *See Stephens v. Ringling*, 102 S.C. 333, 342, 86 S.E. 683, 685 (1915).

The Court also overlooked the fact that the laches argument was properly preserved. Contrary to the decision by the Court, laches was not raised for the first time on appeal. Appellants

raised the doctrine of laches below to the circuit court in its motion to reconsider.[2] (R. pp. 273–74.) The circuit court fully considered all arguments in Appellants' motion to reconsider and denied them. (R. p. 44.) Specifically, the circuit court stated: "Having duly considered the motion to alter or amend of the [Appellants], this Court has determined that its original Order dated August 26, 2022 is fully supported by the evidence and is hereby ratified and reconfirmed. The motion to alter or amend the earlier Order is therefore DENIED." (R. p. 44.) Therefore, Appellants raised the doctrine of laches to the circuit court, the circuit court considered the doctrine of laches raised in Appellants' motion, and the circuit court ruled on the applicability of the doctrine of laches, finding it did not apply, by denying Appellants' motion. Because it was raised to and ruled on by the circuit court, this issue was properly preserved for appellate review. Therefore, the Court should grant rehearing, consider the merits, and rule on the applicability of the doctrine of laches. As discussed in Appellants' brief, the doctrine of laches requires reversal.

Appellants reincorporate their arguments in their briefs in this Petition. For the foregoing reasons, as well as the reasons set forth in their briefs, the Court should grant this petition and reverse the orders below.

(Signature page follows)

[2] Appellants have at all times raised and maintained waiver-related issues to the circuit court, and the circuit court has ruled on the waiver-related issues in both orders. (R. 136–53.) "The equitable doctrine of laches is equivalent to the legal doctrine of waiver . . . ." *Strickland v. Strickland*, 375 S.C. 76, 650 S.E.2d 465, 470 (2007). "[A] party is not required to use the exact name of a legal doctrine in order to preserve the issue." *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011). However, as discussed above, Appellants did use the specific name of the legal doctrine of laches in the motion to reconsider, which the circuit court considered in full and denied.

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