

RECEIVED

Dec 05 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SUMTER COUNTY

Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2023-000074

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

In Re:

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

v.

Carlos D. Toney,
Defendant.

**RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY'S RETURN TO
APPELLANTS' PETITION FOR REHEARING AND SUGGESTION OF REHEARING
*EN BANC***

INTRODUCTION

Respondent Liberty Mutual Insurance Company (“Liberty Mutual”) respectfully submits that this Court’s decision of October 1, 2025 (“the Opinion”) is correct. Contrary to Appellants’ contention, the Court did not “overlook[] or misapprehend[]” any relevant fact or point of law. The Court painstakingly considered each and every position set forth by Appellants, and Appellants’ October 16, 2025 Petition for Rehearing and Suggestion of Rehearing *En Banc* (“the

Petition”) represents nothing more than Appellants’ disagreement with the Court’s decision. The Petition is without merit and must be denied.

STANDARD OF REVIEW

A party desiring an appellate court rehear a matter must submit a petition for rehearing “stat[ing] with particularity the points supposed to have been overlooked or misapprehended by the court.” Rule 221(a), SCACR. Notably, “[t]he purpose of a petition for rehearing is not to present points which *lawyers* for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citing Jean H. Toal, et al., *APPELLATE PRACTICE IN SOUTH CAROLINA* 309 (1999)) (emphasis added). Moreover, “[t]he purpose of a petition for rehearing is not to present points that a lawyer did not present to the court in his briefs[.]” Jean H. Toal, et al., *APPELLATE PRACTICE IN SOUTH CAROLINA* 391 (3d ed. 2016) (citations omitted).

ARGUMENT

I. This Court was correct to reiterate that South Carolina law imposes a mandatory requirement that the action against the at-fault driver be preserved by a plaintiff pursuing a UIM claim.

Appellants’ Petition misapprehends the main portion of the Court’s ruling. The Petition completely glosses over the Court’s reiteration of the long-standing South Carolina rule that preservation of an action against an at-fault driver is a mandatory requirement for a plaintiff pursuing a claim for UIM coverage. *See* Opinion, at p. 14 (Hewitt, J., concurring) (“the best reading of the relevant authorities provides that there is a mandatory requirement that an action against the at-fault driver be preserved in order for an insured to maintain a claim for underinsured motorist coverage”). Instead, Appellants seek to reframe the discussion by

focusing on the secondary issues of waiver, estoppel, laches, pleading specificity, curability, etc., all of which ultimately pale in comparison to the main issue: did Appellants violate the UIM statute by failing to preserve the right of action against putative at-fault driver Carlos Toney?

This Court's answer is a clear and unequivocal "yes":

We read the foregoing authorities [S.C. Code Ann. § 38-77-160, *Louden v. Morange*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997), and *Williams v. Selective Ins. Co.*, 315 S.C. 532, 446 S.E.2d 402 (1994)] as containing a **mandatory requirement** that the insured preserve an action against the at-fault driver to maintain a claim for UIM coverage. *See* § 38-77-160 ("No action may be brought under the [UIM] provision unless copies of the pleadings in the action establishing liability are served in the manner provided by law upon the insurer writing the [UIM] provision."); *see also Williams*, 315 S.C. at 534-35, 446 S.E.2d at 404 ("An insured must . . . preserve the right of action against an at-fault driver so long as the [UIM] carrier has not agreed to the amount and payment of [UIM] benefits"); *Louden*, 327 S.C. at 468-69, 486 S.E.2d at 526-27 (finding section 38-77-160 requires an insured to preserve his right of action against an at-fault driver to be able to seek UIM benefits). Under such reading, we hold the Thompsons were **required** to commence this action against Toney—the at-fault driver and sole defendant in this case—prior to the expiration of the statute of limitations to be able to seek UIM benefits from Carriers. Because the Thompsons failed to serve Toney with process and Toney made no voluntary appearance sufficient to satisfy Rule 4(d), SCRCF, prior to the expiration of the statute of limitations, we conclude the circuit court did not err by dismissing the case on the ground that the Thompsons failed to preserve a right of action against Toney.

Opinion, at p. 7 (emphasis added). In short, there is a statute—and two precedential appellate decisions, *Louden* and *Williams*—that govern this case, and Appellants did not comply with any of them. This Court did not “overlook or misapprehend” the relevant rule, but rather the Court *applied* the relevant rule to render its decision.¹ Nothing in the Petition alters this straightforward conclusion.

¹ The rule that a plaintiff must preserve a right of action against a putative at-fault driver in order to pursue a claim for UIM benefits is not a mere technicality, but rather goes to the very heart of the validity of a court's judgments:

Service of the summons brings the defendant within the court's jurisdiction and gives the court the power to render a personal judgment against the person served... The fact that any judgment rendered will not ultimately be collected

II. Appellants improperly are attempting to relitigate the voluntary appearance issue.

Appellants’ argument against the Court’s conclusion that Toney’s presence at a videoconference deposition did not rise to the level of a voluntary appearance contravenes the purpose of a petition for rehearing. Importantly, “[n]o specific act constitutes an appearance . . . courts decide on a case-by-case basis whether a defendant’s act demonstrates an intent to submit 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). In the Petition, Appellants merely reassert their version of “specific acts” they contend constitute a voluntary appearance, and in so doing are attempting to re-try the case via petition for rehearing, *contra Kennedy, supra*.

Further, and contrary to the tone and tenor of the Petition, this Court (and the court below) did consider each of the “specific acts” that Appellants claim rise to the level of a voluntary appearance by Toney. Indeed, the Court compared them against the precedents relied upon by Appellants—*Burris*,² *Cannon*,³ and *Israel*⁴—and correctly found that this case does not match those cases:

Unlike *Burris*, *Cannon*, and *Israel*, here the record contains no indication that Toney was informed during the deposition that he was the defendant in the Thompsons’ lawsuit. Further, Toney made no arguments regarding the merits and did not indicate he understood that he was a defendant or that he was appearing for the purpose of defending himself in this lawsuit.

See Opinion, at p. 5. The foregoing portion of the decision, when juxtaposed with the bare assertions of Appellants’ Petition, highlights Appellants’ error. This Court focused upon what

from the named defendant but from the [UIM] insurance company does not excuse the fundamental requirements of personal service. A court may not enter a valid judgment against an individual over whom the court lacks personal jurisdiction.

Louden, 327 S.C. at 468, 486 S.E.2d at 526 (citation omitted).

² *S.C. Dep’t of Soc. Servs., ex rel. Roseboro v. Burris*, 297 S.C. 537, 377 S.E.2d 578 (1989).

³ *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009).

⁴ *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 356 S.E.2d 123 (Ct. App. 1987).

actually transpired during the deposition, while Appellants chose to focus on unsupported speculation.

III. Appellants received full and fair hearings on their waiver and estoppel claims. They simply do not like the result reached by the circuit court and this Court.

Appellants' Petition continues their oft-repeated refrain that *Louden* is not controlling because the *Louden* court did not address all the discrete issues raised by Appellants in this case. (*See* Pet., at 3.) Appellants ignore this Court's clear ruling that Appellants received fair consideration from the circuit court on each of these contentions, even if these contentions were not directly addressed by *Louden*:

As to the Thompsons' contention the circuit court erred in finding *Louden* was dispositive when they raised waiver and estoppel arguments against Carriers that the *Louden* court did not address, we find the Thompsons' argument is without merit. *The circuit court considered and rejected the Thompsons' waiver and estoppel arguments. We address these rulings below.*

Opinion, at p. 7 (emphasis added). This Court then spends the remainder of the decision carefully reviewing—and affirming—the circuit court's rulings concerning all of Appellants' arguments regarding 1) waiver via insufficiency of answer, *see* Opinion, at pp. 7-8 (§ II.A); 2) waiver via failure to file timely Rule 12(b) motions, *see id.*, at pp. 8-10 (§ II.B); 3) waiver by participation in litigation, *see id.*, at pp. 10-11 (§ II.C); 4) estoppel against Liberty Mutual, *see id.*, at pp. 11-13 (§ III); and 5) waiver via filing of a venue change motion, *see id.*, at p. 13 (§ III). In short, Appellants have had a full and fair hearing—multiple times—on all their waiver and estoppel contentions, and their arguments have been found wanting each time presented. Nothing about Appellants' arguments has gotten better since they were rejected by the circuit court (twice) and later this Court. This Court should reject them again.

Appellants also take issue with this Court's determination that their late-asserted laches argument is not preserved for appellate review. (*See* Pet., at 6-7; *see also* Opinion, at pp. 10-11.)

Liberty Mutual asserts that the Court was correct to conclude that the issue is not preserved. As an additional sustaining ground, Liberty Mutual notes that Appellants concede that they did not mention laches until they filed a motion to reconsider the circuit court's order of dismissal. (*See* Pet., at 6-7 (“Appellants raised the doctrine of laches below to the circuit court in its [sic] motion to reconsider.”).) This was improper. *See Poch v. Bayshore Concrete Products/South Carolina, Inc.*, 386 S.C. 13, 31, 686 S.E.2d 689, 699 (Ct. App. 2009) (“[a] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.”) (citation omitted).

IV. Appellants again resort to inaccurate characterizations of Liberty Mutual's conduct.

Throughout their Brief, oral argument, and now their Petition, Appellants repeatedly accuse Liberty Mutual of “gamesmanship” and the like. (*See, e.g.*, Apps.’ Brief, at 4 n. 5, 20, 28, 29; Pet., at 4.) Liberty Mutual would be remiss if it did not continue object to object to this inaccurate statement by Appellants.⁵ This unfounded claim was rejected by the circuit court and this Court: “the Thompsons failed to show Liberty Mutual made a false representation or otherwise engaged in conduct that was calculated to mislead the Thompsons.” Opinion, at p. 12; *see also* August 2022 Order, at p. 13 (R. p. 37) (“[t]he Court finds... Liberty Mutual’s counsel never represented anything false.”). Repetition of an inaccurate claim does not make it true, and thus Appellants’ “gamesmanship” argument should not serve as a basis for rehearing.

V. Appellants’ suggestion for rehearing *en banc* should be denied.

The Petition takes the additional step of suggesting this Court rehear this appeal *en banc*. (*See* Pet., at 1.) *En banc* rehearing is not warranted in this case. “[R]ehearing *en banc* is not favored and ordinarily will not be ordered except (1) when consideration by the full court is

⁵ *See also* Br. of Respondent Liberty Mutual, at 31-32.

necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.” Rule 219(a), SCACR. Liberty Mutual respectfully asserts that this case does not qualify for *en banc* rehearing for two reasons. First, there is no need to maintain uniformity of appellate decisions, because this Court’s decision *already* aligns with the existing on-point appellate precedents, *Louden* and *Williams*. Second, Liberty Mutual asserts that the questions presented in this case, while important to the parties involved, are not of “exceptional importance” as that term is used in Rule 219(a).

CONCLUSION

For the foregoing reasons, and for the reasons stated in Liberty Mutual’s Brief,⁶ the Court’s October 1, 2025 decision is correct in all its particulars and should stand as written. The Court did not “overlook or misapprehend” any relevant fact or legal authority; rather, Appellants simply do not like the Court’s decision and want a second bite at the apple. As described in *Kennedy, supra*, this is not the purpose of a petition for rehearing. Therefore, the Petition must be denied.

Respectfully submitted,

SWEENY, WINGATE & BARROW, PA

s/ Aaron J. Hayes

Richard E. McLawhorn, Jr.

Aaron J. Hayes, SC Bar No. 100114

Sweeny Wingate & Barrow, P.A.

Post Office Box 12129

Columbia, S.C. 29211

(803) 256-2233

**ATTORNEYS FOR RESPONDENT LIBERTY
MUTUAL INSURANCE COMPANY**

⁶ For the record, in opposition to the arguments raised in the Petition, Liberty Mutual hereby reincorporates the arguments raised in its Brief. Further, and to the extent applicable to Liberty Mutual’s position, and to the extent not argued herein already, Liberty Mutual adopts by reference Respondent Horace Mann’s Return. *See* Rule 208(b)(6), SCACR.

Columbia, South Carolina

December 5, 2025

RECEIVED
Dec 05 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM SUMTER COUNTY

Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

Appellate Case No. 2023-000074

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

In Re:

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

v.

Carlos D. Toney,
Defendant.

PROOF OF SERVICE

I certify that a true copy of Respondent Liberty Mutual Insurance Company's Return to Appellants' Petition for Rehearing and Suggestion of Rehearing *En Banc* in this case has been served on the following, this 5th day of December 2025, by emailing a copy to each attorney listed below using their primary email address listed in the Attorney Information System pursuant to Rule 262 of the South Carolina Appellate Court Rules and the May 6, 2022 Order of the South Carolina Supreme Court (Appellate Case No. 2020-000447):

Served email addresses to appear on following page.

G. Murrell Smith, Jr., Esq., counsel for Appellants, at murrell@smithrobinsonlaw.com
Jonathan M. Robinson, Esq., counsel for Appellants, at jon@smithrobinsonlaw.com
Shanon N. Peake, counsel for Appellants, at shanonp@smithrobinsonlaw.com
John D. Kassel, Esq., counsel for Appellants, at jkassel@kassellaw.com
Theile B. McVey, Esq., counsel for Appellants, at tmcvey@kassellaw.com
Jamie R. Rutkowski, counsel for Appellants, at jrutkowski@kassellaw.com
Andrew N. Safran, Esq., counsel for Appellants, at msa6631@aol.com
Karl S. Brehmer, Esq., counsel for Respondent Horace Mann, at ksb@brehmerlawfirm.com
Andrew C. Brehmer, Esq., counsel for Respdonent Horace Mann, at acb@brehmerlawfirm.com

s/Aaron J. Hayes
Attorney

Columbia, South Carolina

December 5, 2025