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 Partee: 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 HORACE MANN PROPERTY AND CASUALTY INSURANCE COMPANY'S RETURN TO APPELLANTS' PETITION FOR REHEARING AND SUGGESTION OF REHEARING EN BANC

As instructed by the Court of Appeals' November 10, 2025, letter, Respondent Horace Mann Property and Casualty Insurance Company (hereinafter "Horace Mann") hereby submits the following Return in response to Appellants' Petition for Rehearing and Suggestion of Rehearing En Banc (hereinafter the "Petition") of the Opinion of the Court of Appeals bearing Unpublished Opinion No. 2025-UP-335 (hereinafter the "Opinion") that was filed on October 1, 2025. This Opinion conducted a thorough and accurate analysis of the arguments raised by Appellants in their

Final Brief and at oral argument, as well as the law controlling issues in this matter. Based upon this review of the record and the law, the Court properly affirmed the trial court's order to find that Appellants failed to preserve an action against the at-fault driver and thereby were not entitled to underinsured motorist ("UIM") coverage. The Opinion does not contain any errors, and Appellants have not provided any valid basis for the Court to reconsider its Opinion. As a result, rehearing of the Court's decision is unnecessary, and Appellants' Petition must be respectfully denied.

ARGUMENT

I. APPELLANTS' PETITION SHOULD BE DENIED BECAUSE THE COURT'S DECISION, AND THE LEGAL AND FACTUAL BASES FOR THE DECISION, WERE SUPPORTED BY THE RECORD AND THE LAW.

The Court correctly framed the issues raised on appeal by Appellants, wherein the Court determined that Appellants never served the sole Defendant, Carlos D. Toney, to preserve an action against the at-fault driver within the statute of limitations, and that no voluntary appearance occurred to satisfy Rule 4(d), SCRCP. The Court correctly relied upon, outlined, analyzed, and applied the well-established precedents in *Louden v. Morange,* 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997), *Williams v. Selective Ins. Co.,* 315 S.C. 532, 446 S.E.2d 402 (1994) Rule 3(a), SCRCP, and S.C. Code Ann. § 38-77-160 (2015), and wholly addressed and rejected Appellants' theories of waiver, and estoppel. The Petition fails to demonstrate an "overlooked or misapprehended" point of law or fact under Rule 221(a), SCACR, and no exceptional circumstances exist to warrant en banc consideration under Rule 240, SCACR.

A. THE COURT CORRECTLY HELD THAT APPELLANTS FAILED TO PRESERVE AN ACTION AGAINST AT-FAULT DRIVER TONEY.

Under *Louden,* this Court specifically held 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,* 327 S.C. at

469, 486 S.E.2d at 527. The Court, in its Opinion, thoroughly outlined the procedural and statutory requirements for service and, coupled with Appellants' concession that they did not personally serve Toney, correctly held that the Appellants failed to preserve an action against the at-fault driver. (Op., pp. 4-5).

Appellants, in an attempt to bypass this critical requirement, argued that the at-fault driver, Toney, made a voluntary appearance in this matter by way of video deposition, thereby submitting to the trial court's personal jurisdiction; however, the Court correctly addressed this argument at length. This Court held, "[w]e hold Toney's appearance at this deposition, which was held by videoconference, did not constitute a voluntary appearance sufficient to satisfy Rule 4(d)." (Op., at p. 5). Despite such holding, the Appellants argue that this Court "overlooked that each piece of testimony Toney gave was in defense of the case" and that any appearance in a case, regardless of degree, is sufficient to constitute a voluntary appearance under Rule 4(d). (Pet., at p. 6). However, Appellants' support for this position throughout the course of this Appeal has hinged directly upon the Notice of Deposition for Toney, Toney's deposition transcript, and the precedential authority of *S.C. Dep't. of Soc. Servs., ex rel. Roseboro v. Burris,* 297 S.C. 537, 377 S.E.2d 578 (1989), *Ex parte Cannon,* 385 S.C. 643, 659-60, 685 S.E.2d 814, 823 (Ct. App. 2009), and *Israel v. Carolina Bar-B-Que, Inc.,* 292 S.C. 282, 287, 356 S.E.2d 123, 126-27 (Ct. App. 1987). (Pet., at pp. 5-6) (*See also* Appellants' Br., at pp. 11-13; 31; 33). The Court's holding in the instant case, and the legal and factual bases for its holding, were supported by the record and the law. In its Opinion, the Court correctly found that:

> 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.

(Op., at p. 5). As such, this Court carefully distinguished Appellants' authorities and explained that the record is not reflective of Appellants' respective position. This Court was well-equipped with a complete record to evaluate Appellants' arguments and to weigh the case authority presented by Appellants to make an informed and accurate decision in this matter regarding Toney's voluntary appearance.

Despite the same, Appellants again urge this Court to reconsider its Opinion, primarily due to the concurring opinion of The Honorable Judge Blake A. Hewitt. Judge Hewitt, while concurring with the majority, stated:

> I agree with the majority that 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. *See* S.C. Code Ann. § 38-77-160 (2015); *Williams v. Selective Ins. Co. of Se.,* 315 S.C. 532, 534-35, 446 S.E.2d 402, 404 (1994); *Louden v. Moragne,* 327 S.C. 465, 469, 486 S.E.2d 525, 527 (Ct. App. 1997). If, however, properly serving the at-fault driver is not an absolute requirement, but instead relates to a defense that the court lacks personal jurisdiction over the at-fault driver, I believe both insurance companies failed to adequately object to personal jurisdiction, and I would reverse on that basis.

(Op., at p. 14). This concurring opinion presents a hypothetical scenario in which the mandatory service requirement outlined in the Opinion does not exist. Alternatively, this concurring opinion provides that, standing alone, Judge Hewitt does not believe that the Respondents presented sufficient evidence to demonstrate an adequate objection to personal jurisdiction. Regardless, that is not the case in this matter; however, Appellants assert and reframe this hypothetical as a basis for rehearing. (Pet., at pp. 1-2). The majority opinion is clear and unequivocal: service on the at-fault driver is a mandatory prerequisite to a UIM claim under *Louden, Williams,* and S.C. Code Ann. § 38-77-160. Judge Hewitt's concurrence does not create ambiguity or conflict; it merely offers an alternative analysis in which service on the at-fault driver would not be mandatory, or simply a caveat to the majority's opinion, of which he shared. The controlling law in this matter

was thoroughly evaluated by the Court and further reinforced in its Opinion, thereby making Appellants' reliance on a hypothetical insufficient to warrant a rehearing or en banc review.

B. THE COURT CORRECTLY HELD THAT THE RESPONDENTS SUFFICIENTLY ASSERTED SERVICE-RELATED DEFENSES TO AVOID WAIVER.

The Appellants assert in the Petition that *Louden* is distinguishable from this matter, in that, "the [Respondents] in this case…buried a general, nonspecific service defense in their answers without raising personal jurisdiction…" instead of placing a service defense at the top of their respective Answers. (Pet., at p. 3). Before making such claims, Appellants relied on *Unison Insurance v. Hawkins,* 342 S.C. 537, 537, S.E.2d 599 (Ct. App. 2000), which held that the defendant "failed to properly plead the defense of insufficiency of service of process either by motion or in his answer" and thereby waived the defense, where "the averment that Unisun 'failed to serve [the defendant] within the three-year statute of limitations' [wa]s insufficient, *standing alone*, to raise the defense of insufficiency of service of process." *Unisun,* 342 S.C. at 542-43, 537 S.E.2d at 562. (emphasis added) (*See also* Op., at p. 8). In response these arguments here, this Court correctly determined that "the [Respondents] sufficiently pled defenses of improper service, because their pleadings contained more specificity than those at issue in *Unisun.*" (Op., at p. 8). Appellants' attempt to distinguish *Louden* from the present matter produced new arguments that were not previously presented to this Court and clearly demonstrate Appellants' attempts to relitigate this matter, which has already been thoroughly and correctly adjudicated. Appellants further argue that Respondents "knew that a proof of service was not on file showing service on Defendant Toney, and took no steps to investigate service." (Pet., at p. 3). However, this Court correctly reinforced its position in the Opinion and pointed out, "we reject the [Appellants'] additional argument that [Respondents] were responsible for disproving service." (Op., at p. 7) (citing *Moore v. Simpson,* 322 S.C. 518, 523, 473 S.E.d2d 64, 66 (Ct. App. 1996) ("The plaintiff

has the burden to establish that the court has personal jurisdiction over the defendant.") Furthermore, this Court, while evaluating the issue of estoppel, also noted that Appellants had several months "during which the [Appellants] could have served Toney within the statute of limitations," whereby this Court correctly highlights that the sufficiently asserted service-related defenses placed Appellants on notice and that Appellants took no action to investigate and correct any possible deficiencies associated with such defenses.[1] (Op., at 12).

C. THE COURT CORRECTLY HELD THAT RESPONDENTS' PARTICIPATION IN LITIGATION WAS NOT SUFFICIENT TO CONSTITUTE WAIVER.

Here, the Appellants relied and continue to rely upon the holding in *Maybank v. BB&T Corporation,* 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016). *Maybank* presented a case in which the named defendant was a corporate entity that waived its personal jurisdiction defense by actively participating in litigation over two and a half years. *Id.,* 416 S.C. at 566, 787 S.E.2d at 510. This Court drew a stark distinction between the *Maybank* defendant and the Respondents in this matter:

> We find the facts of *Maybank* are distinguishable. .... The corporate defendant in *Maybank* was the direct defendant in the action and it based its personal jurisdiction argument upon the grounds that it was an out-of-state business with insufficient ties with this state. [*Maybank,* 416 S.C.] at 564, 787 S.E.2d at 510. Unlike the corporate defendant in *Maybank,* however, [Respondents'] participation in this case is based upon their position as the UIM carriers pursuant to section 38-77-160. [Respondents'] actions demonstrate they were preparing for litigation under the assumption Toney had been served. Although two years is a lengthy period, we find [Respondents] did not waive these defenses by participating in litigation.

(Op., at p. 10). The distinction between the present matter and *Maybank* is premised on the class of the defendant, as the Respondents are not direct defendants, but entities implicated by the nature of

[1] Regarding Appellants' arguments relating to estoppel, Respondent Horace Mann respectfully offers to this Court that any such arguments are directed at the interparty communications between Appellants and Respondent Liberty Mutual, whereby such estoppel arguments are not within the issues on appeal between Appellants and Respondent Horace Mann. To the extent any such rebuttal may be necessary by Respondent Horace Mann to Appellants' estoppel arguments, this Court pointedly ruled that Appellants bear the burden to serve Defendant Toney and admitted they did not, whereby no reliance or prejudicial change in position may exist. Further, service (or lack thereof) resided within Appellants' control, whereby these independent failures foreclose estoppel as a matter of law. As such, this Court properly rejected Appellants' estoppel arguments, as Appellants failed to satisfy multiple required elements.

UIM statutory authority, where strict compliance with statutory requirements for the pursuit of a UIM claim is essential to prevent manipulation and ensure fairness to all parties. Respondents are not in privity with the at-fault driver, so their participation in this case should have been anticipated as entities duly served and assuming service was accomplished on the at-fault driver. Therefore, this Court has not overlooked or misapprehended any law or fact regarding the involvement and participation of Respondents in this matter and correctly determined that no such waiver occurred.

D. THE COURT CORRECTLY HELD THAT RESPONDENTS TIMELY RAISED AND ASSERTED RULE 12(b) MOTIONS THAT WERE APPROPRIATELY DECIDED AS RULE 56 MOTIONS FOR SUMMARY JUDGMENT.

In its Opinion, the Court points out that, "[a]lthough [Rule] 12(b) requires that a motion asserting insufficient service of process be made before pleading, this does not preclude [Respondents] from raising such defense in their answer and then arguing the issue along with a defense of expiration of the statute of limitations in a motion for summary judgment." (Op., at p. 9). As previously discussed herein, this Court added that "the [Appellants] had the burden of serving Toney and establishing personal jurisdiction," and they failed to do so, even after having several months to cure such deficiency. (Op., at 12). Under *McMaster v. Dewitt,* summary judgment is appropriate where a plaintiff fails to commence an action within the applicable statute of limitations. *McMaster,* 411 S.C. 138, 143, 767 S.E.2d 451, 453 (Ct. App. 2014). Here, Appellants argue that "[t]he purpose of Rule 12(b) is to require early assertion of these defenses to allow for the curing of any defects…" (Pet., at p. 4). Here, Respondent Horace Mann is not engaging in "gamesmanship tactics" as asserted by Appellants; rather, Respondent Horace Mann strictly complied with the purpose of Rule 12(b) and acted, as correctly noted by this Court, under the assumption that Toney had been served. (Op., at p. 10). Once such a deficiency was confirmed, Respondent Horace Mann took the appropriate procedural measures by filing its motion on service-related and statute-of-limitations issues. In support of its ruling, this Court correctly relied

upon the procedural rules governing Respondent Horace Mann's motion such that no oversight or misapprehension would exist and, therefore, correctly determined that Respondents timely raised service-related defenses and that the trial court did not err in adjudicating these motions as motions for summary judgment.

CONCLUSION

Based upon the arguments presented herein and throughout the course of this appeal, Appellants have not demonstrated that this Court overlooked or misapprehended any law or fact under Rule 221(a), and they identify no conflict or extraordinary issue warranting en banc review under Rule 240. This Court correctly applied *Louden, Williams,* Rule 3, SCRCP, Rule 4(d), SCRCP, S.C. Code Ann. § 38-77-160, and preservation doctrines to conclude that the action was never commenced against the at-fault driver and that Appellants' waiver, and estoppel theories fail. As such, Respondent Horace Mann respectfully submits that the Court must deny Appellants' Petition and conclude Appellants' appeal in this matter.

Respectfully submitted,

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Columbia, South Carolina
December 5, 2025

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PROOF OF SERVICE

I certify that a true copy of Respondent Horace Mann Property and Casualty 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. 2022-000447):

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