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**S.C. SUPREME COURT**

THE STATE OF SOUTH CAROLINA

In The Supreme Court

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APPEAL FROM SUMTER COUNTY

Court of Common Pleas

R. Kirk Griffin, Circuit Court Judge

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Appellate Case No. 2026-000377

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

In Re:

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

v.

Carlos D. Toney,  
Defendant.

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**RESPONDENT LIBERTY MUTUAL INSURANCE COMPANY'S RETURN TO  
PETITION FOR WRIT OF CERTIORARI**

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## **COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW**

1. Was the Court of Appeals correct to affirm the Circuit Court's grant of summary judgment to the UIM carriers, when the action was never commenced against the putative at-fault driver and there is no evidence to support Petitioners' late-asserted argument that the at-fault driver's attendance at a Zoom deposition amounted to a "voluntary appearance"?
2. Was the Court of Appeals correct to apply this Court's and the Court of Appeals' longstanding precedent, which holds that commencement of an action against a putative at-fault driver is a mandatory prerequisite for asserting a UIM claim?
3. Was the Court of Appeals correct to affirm the Circuit Court's refusal to estop Liberty Mutual from asserting service defenses, when Petitioners failed to present any evidence of several of the required elements of estoppel?
4. Was the Court of Appeals correct to conclude that Petitioners' laches argument is not preserved for appellate review, when Petitioners improperly raised laches for the first time in a motion to reconsider?
5. Should this Court grant certiorari, when there is no basis to do so under Rule 242(b), SCACR?

## **COUNTER-STATEMENT OF THE CASE**

This case stems from a June 2, 2017 motor vehicle collision at the intersection of 12<sup>th</sup> Street Extension and the I-77 ramp in Richland County, South Carolina. (R. p. 47.) Petitioner Howell Thompson alleged that Defendant Carlos D. Toney (alternatively, "Toney") turned left in front of him, failing to yield the right of way, thereby causing the collision and injuries to, *inter alia*, Howell Thompson's left arm. (See R. pp. 47-48.) Petitioner Tara Thompson, Howell Thompson's wife, alleged loss of consortium. (R. p. 48.) Petitioners filed suit in the Court of Common Pleas for Sumter County on December 5, 2019. (R. p. 47.)

On December 18, 2019, the South Carolina Department of Insurance accepted service of the Summons and Complaint upon UIM carrier Horace Mann Property & Casualty Insurance Company (alternatively, "Horace Mann"). (See R. p. 653.) On December 19, 2019, the South Carolina Department of Insurance accepted service of the Summons and Complaint upon UIM

carrier Liberty Mutual Insurance Company (alternatively, “Liberty Mutual”). (See R. p. 564.) On January 2, 2020, Liberty Mutual timely filed an Answer alleging, *inter alia*, defenses based upon improper service and the statute of limitations. (R. pp. 53, 55.) On January 7, 2020 Horace Mann timely filed an Answer alleging, *inter alia*, improper service. (R. p. 59.) On February 20, 2020, Liberty Mutual filed a consent Amended Answer alleging, *inter alia*, defenses based upon improper service and the statute of limitations. (R. pp. 64, 67.) The statute of limitations in this matter expired no later than June 2, 2020. *See* S.C. Code Ann. § 15-3-530.

During the discovery phase of this case, it was revealed that Petitioners never served the Summons and Complaint upon the sole named defendant, Toney. In an email between counsel, Petitioners’ counsel stipulated that there was no service upon Toney. (R. pp. 179-180.) Further, in Petitioners’ December 16, 2021 response to Liberty Mutual’s requests to admit, Petitioners explicitly stated that service was not procured upon Toney: “Admit that Plaintiffs never served the Summons and Complaint in the above-reference[d] [*sic*] matter upon Defendant Carlos D. Toney . . . Response: Plaintiffs’ Admit.” (R. p. 176.)

On October 26, 2021, Liberty Mutual filed a Motion to Dismiss/Motion for Summary Judgment based upon Petitioners’ failure to serve Toney, arguing that dismissal was required due to the rule from the Court of Appeals’ decision in *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997). (R. pp. 127-128.) Horace Mann filed a nearly identical motion three days later on October 29, 2021. (R. pp. 129-130.) After extensive briefing and a hearing on January 6, 2022, the underlying action was dismissed by the circuit court via written order filed on August 29, 2022 (the “August 2022 Order”). (R. pp. 25-43.) The motion was granted due to, *inter alia*, the circuit court’s application of the long-established rules from *Louden* and this

Court’s decision in *Williams v. Selective Ins. Co.*<sup>1</sup> (R. pp. 28-31.) The circuit court analyzed the motion under both the Rule 12, SCRCF standard and the Rule 56, SCRCF standard, and reached the same conclusion. (*See, e.g.*, R. pp. 29-32.) The circuit court held that the action had not been commenced as to Toney, a valid judgment could not attach to Toney, and that Toney would be prejudiced if the case moved forward. (R. pp. 31, 34.) The circuit court also rejected any arguments that the UIM carriers had waived service-related defenses, R. pp. 31-36, or that UIM carrier Liberty Mutual should be estopped to assert service-related defenses based on an email exchange between counsel at the outset of the case, R. pp. 36-41. Finally, the circuit court considered, and rejected, Petitioners’ late-stage argument that Toney’s appearance at a brief Zoom deposition in May 2020 amounted to an equivalent to service of process via “voluntary appearance.” (R. pp. 41-42.)

On September 7, 2022, Petitioners filed a motion to reconsider the August 2022 Order. (R. pp. 247-284.) Liberty Mutual opposed the motion to reconsider on the merits and issued numerous objections to new arguments raised by Petitioners in the motion to reconsider, including an objection to Petitioners’ laches argument. (R. pp. 576-78.) Petitioners’ motion to reconsider the order of dismissal was denied via written order on December 21, 2022. (R. pp. 44-45.)

On January 19, 2023, Petitioners filed and served a notice of appeal upon the Respondent UIM carriers. (R. pp. 658-660.) After briefing and oral argument, on October 1, 2025 the Court of Appeals issued an opinion affirming the circuit court because Petitioners never personally served Toney with the summons and complaint and Toney’s appearance at a Zoom deposition did not amount to a voluntary appearance, and therefore the action was never commenced as to

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<sup>1</sup> 315 S.C. 532, 446 S.E.2d 402 (1994).

Toney and summary judgment for the UIM carrier was proper because *Louden* and *Williams* contain a “mandatory requirement” that the right of action against an at-fault driver be preserved in order to pursue UIM benefits. *Ex Parte Liberty Mut. Ins. Co.*, Op. No. 2025-UP-335 at 4-7 (S.C. Ct. App. 2025). The Court of Appeals also affirmed the circuit court’s holding that the UIM carriers did not waive the service issue through allegedly defective pleading, untimely motions practice, or participation in the litigation. *Id.* at 7-11. The Court of Appeals rejected Petitioners’ laches argument as unreserved, *id.* at 10, and the Court of Appeals affirmed the circuit court’s conclusion that Petitioners failed to establish an equitable estoppel claim against Liberty Mutual, *id.* at 11-13. Petitioners petitioned the Court of Appeals for rehearing and suggested rehearing *en banc*, but that petition was denied on January 21, 2026. The instant Petition for Writ of Certiorari (“the Petition”) was filed in this Court and served on Respondents on February 20, 2026.

## ARGUMENT

### **I. The Court of Appeals was correct to affirm the circuit court’s grant of summary judgment because no voluntary appearance occurred.**

Petitioners assert that Toney’s attendance at a May 2020 Zoom deposition was equivalent to personal service of the summons and complaint prior to the expiration of the statute of limitations, and thus they believe the Court of Appeals erred in affirming the circuit court’s grant of summary judgment because Petitioners believe the action was “commenced” against Toney on time despite the fact that Toney was never served with process. (Pet., at 10.) However, Petitioners’ argument misses the mark because they misconstrue both the facts of this case and South Carolina case law surrounding the voluntary appearance doctrine.

The voluntary appearance doctrine is not a bright-line rule that can be applied mechanically but rather must be determined on a case-by-case basis. *See Stearns Bank Nat. Ass’n*

*v. Glenwood Falls, LP*, 373 S.C. 331, 338, 644 S.E.2d 793, 796 (Ct. App. 2007) (“[n]o specific act constitutes an appearance . . . courts decided on a case-by-case basis whether a defendant’s act demonstrates *an intent to submit to the court’s jurisdiction.*”) (citations omitted) (emphasis added). The circuit court—as the factfinder on this issue—was both correct and within its discretion to conclude that no voluntary appearance occurred and thus the action was never commenced as to Toney.

Petitioners rely on *S.C. Dept. of Social Svcs. v. Burris*, 297 S.C. 537, 377 S.E.2d 578 (1989) (“*Burris*”), *Israel v. Carolina Bar-B-Que*, 292 S.C. 282, 366 S.E.2d 123 (Ct. App. 1987), and *Ex Parte Cannon*, 385 S.C. 643, 685 S.E.2d 814 (Ct. App. 2009). (See Pet., at 11.) Tellingly, Petitioners do not substantively analyze the facts of these cases, which all indicate that a voluntary appearance is found only when there is robust, protracted participation (i.e. defense) of the case by the unserved party. In *Burris*, while not expressly stated in the opinion, it is clear that the paternity suit respondent “voluntarily appeared” by testifying *at the trial* and therefore had no right to complain about non-service of the petition that led to the trial. 297 S.C. at 540, 377 S.E.2d at 579-80. In *Israel*, a property trustee was sued originally in his capacity as trustee for an incorrect trust, but the complaint was later amended *mid-trial* to reflect correctly his trustee status over the relevant trust. 292 S.C. at 285-87, 356 S.E.2d at 125-127. Finally, in *Ex Parte Cannon*, an estate’s personal representative and trustee of a related trust had no right to complain of lack of service of a summons, where two statutes provide that a person in such a position is *subject to the jurisdiction of the court as a matter of law*. 385 S.C. at 658, 685 S.E.2d at 822 (citing S.C. Code Ann. §§ 62-3-602 (personal representatives) and 62-3-202(a) (trustees)). Further, the PR/trustee and his counsel participated *in multiple hearings over multiple days*, *id.* at 659, 585 S.E.2d at 823, including the hearing that generated the order on appeal. Each one of

these cases is distinguishable from this one, in which the party subject to the voluntary appearance argument, i.e. Toney, only sat for a brief Zoom deposition and did nothing else.

Also, Petitioners' position ignores the simple fact that in each voluntary appearance case discussed above, the party against whom the voluntary appearance doctrine was asserted was present in the action—whether in person or through counsel—such that the party was at least on notice that the voluntary appearance doctrine was being asserted against them. In other words, the “voluntary” parties in the above-listed cases engaged in the presentation of *their own argument* as to whether they had voluntarily appeared. In this case, Toney is not even on notice that Petitioners are arguing he has voluntarily appeared and thus should be subject to entry of judgment. For this reason alone, Petitioners' voluntary appearance should be disregarded, as it amounts to legal sleight-of-hand. In an apparent effort to bootstrap this flawed argument, Petitioners issue bold, unfounded comments about Toney's state of mind in their Petition, apparently attempting to argue that Toney's testimony at deposition amounted to an intent to appear and defend the case. For example, Petitioners state that “[i]t is clear from his voluntary appearance at the deposition that Defendant Toney was on notice of this action and his role as a defendant in same and did not intend to contest service.”<sup>2</sup> (Pet., at 12.) This conclusion about Toney's intent to submit to the circuit court's jurisdiction is not “clear” but rather is mere speculation. Indeed, as the Court of Appeals held, the evidence on this issue does not support a finding of voluntary appearance:

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<sup>2</sup> Throughout the Petition, Petitioners routinely attempt to shift the service issue burden of proof onto other parties. The Court of Appeals correctly rejected this argument. “[W]e reject [Petitioners'] additional argument that the Carriers were responsible for disproving service.” 2025-UP-335 at 7 (citing *Moore v. Simpson*, 322 S.C. 518, 523, 473 S.E.2d 64, 66 (Ct. App. 1996) (“The plaintiff has the burden to establish that the court has personal jurisdiction over the defendant.”).)

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. Because he was never served with the summons and complaint and made no voluntary appearance, we hold no action was commenced against Toney.

*Ex Parte Liberty Mut Ins. Co.*, 2025-UP-335 at 5. In other words, the Court of Appeals found no evidence in the record of any intent by Toney to submit to the circuit court's jurisdiction, as is required for a finding of voluntary appearance. *See Stearns Bank, supra*. Petitioners' factual support, such as it is, for their argument that Toney "voluntarily appeared" is the deposition transcript attached as an exhibit to a Supplemental Memorandum submitted to the circuit court *after* the original hearing on the underlying motion. (R. pp. 187-238.) On its face, this transcript falls well short of establishing a finding of voluntary appearance. *Cf. Ex Parte Cannon*, 385 S.C. at 659-660, 685 S.E.2d at 823 ("Cannon clearly had notice of *all* proceedings . . . [b]y appearing and arguing the merits of the action *multiple* times, we find Cannon consented to the circuit court's personal jurisdiction . . .") (emphasis added). Even a cursory review of this transcript reveals no evidence to support Petitioners' characterization of this deposition. Petitioners claim that Toney "was told there was a lawsuit pending." (Pet., at 11.) While it may be technically true that the word "lawsuit" was used during a deposition question, nowhere in the transcript is Toney advised that the lawsuit is pending *against him*. (R. p. 189.) Petitioners argue that the notice of deposition, containing a "case caption," was sent to Toney, Pet., at 11, and that he could use the case caption to "access all pleadings in this matter," Pet., at 13.<sup>3</sup> Petitioners neglect to mention that the notice of deposition was not made an exhibit to the deposition and thus there is no proof Toney ever saw it. Nor was the notice presented to the

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<sup>3</sup> See n. 2, *supra*.

circuit court until after the August 2022 Order was issued and Petitioners decided to file a motion to reconsider.<sup>4</sup> (R. pp. 463-465.) Petitioners claim that neither Toney nor UIM counsel raised objections to service at the deposition, Pet., at 12, however they ignore the fact that the two UIM carriers had interposed three Answers protesting lack of service of process prior to the deposition. (R. pp. 50-57; R. pp. 58-60; R. pp. 61-68.) The deposition transcript speaks for itself. The deposition was taken via Zoom at the beginning of a pandemic and lasted approximately one hour. (R. pp. 187, 231.) Nothing about this transcript rises to the level of the robust, continuing defense of the case as occurred in *Burriss*, *Israel*, and *Ex Parte Cannon*, all of which involved defendants who came *to the trial and/or dispositive hearing* of their own cases. As the Court of Appeals found, nothing about this transcript evidences an intent by Toney to submit to the circuit court’s jurisdiction. The circuit court was right to conclude that the deposition did not amount to a voluntary appearance by Toney, and the Court of Appeals was correct to affirm the circuit court’s holding in this regard.

**II. The Court of Appeals correctly concluded that § 38-77-160, *Louden* and *Williams* contain a mandatory requirement that the right of action against the putative at-fault driver be preserved, and the Court of Appeals correctly concluded that the UIM carriers committed no waiver of any sort.**

Petitioners contend that *Louden* is not controlling “because 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.” (Pet., at 14.) Petitioners rely on Judge Hewitt’s concurrence, in which Judge Hewitt provided an analysis of a hypothetical waiver of the service defense *if* there were not a mandatory requirement of preservation of the right of action. (Pet., at 15 (citing *Ex Parte Liberty Mut. Ins. Co.*, 2025-UP-335 at 14 (Hewitt, J.,

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<sup>4</sup> The notice of deposition is not properly before this Court in this appeal. *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).

concurring).) However, Judge Hewitt expressly *agreed* with the majority’s position that § 38-77-160, *Louden* and *Williams* contain a “mandatory” requirement that the right of action against the at-fault driver be preserved to maintain a claim for UIM benefits, and therefore Judge Hewitt joined the majority. 2025-UP-335 at 14. As such, the concurring opinion offers Petitioners no basis for stating the “special and important” reasons required for the granting of a petition for writ of certiorari. *See* Rule 242(b)(2), SCACR (requiring a *dissent* in the Court of Appeals, not a concurrence); *see also* Section V, *infra*.

Moreover, in an apparent attempt to forge a novel issue of law where none exists, Petitioners assert claims of procedural waiver against the UIM carriers. In doing so, Petitioners gloss over the Court of Appeals’ unanimous holding concerning the interplay between § 38-77-160, *Louden* and *Williams*:

We read the foregoing authorities 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), SCRCP, 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.

2025-UP-335 at 6 (emphasis added). The Court of Appeals focused—correctly—on the mandatory, absolute language used by the UIM statute, *Louden*, and *Williams*. For its part, the statute requires an “action” against the at-fault driver, which can be commenced only by

compliance with Rule 3, SCRPC and which was not done in this case. *Williams*, decided in 1994, unambiguously states that the right of action *must* be preserved to maintain a claim for UIM benefits. *Louden*, decided in 1997, unambiguously reiterates *Williams* in a factual scenario identical to the instant case (non-service of the at-fault driver within the statute of limitations).<sup>5</sup> The Court of Appeals was right to apply these long-established black-letter provisions of South Carolina law, and Petitioners’ claims of procedural waiver—each of which are incorrect and were rejected by the circuit court and Court of Appeals—are ineffective to overcome Petitioners’ violation of a mandatory requirement. For the record, Liberty Mutual will address Petitioners’ three claims of procedural waiver in turn.

First, Petitioners claim that the UIM carriers waived the service issue via inadequate pleading in their respective Answers. (Pet., at 17-18.) Petitioners cite to *Unisun Ins. v. Hawkins* for the proposition that “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.” (Pet., at 18 (quoting *Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559,

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<sup>5</sup> The requirement of preservation of the right of action against the putative at-fault driver is not a mere technicality. Rather, this requirement is essential to ensure a trial court’s ability to enter a valid judgment:

The fact that any judgment rendered will not ultimately be collected from the named defendant but from the insurance company does not excuse the *fundamental* requirements of personal service.

...

In the present case, *the negligence action is against the at-fault driver and not directly against the insurance company*. Service on the at-fault driver is an essential component of the negligence action. 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.

*Louden*, 327 S.C. at 468-69, 486 S.E.2d at 526-27 (emphasis added). Without the ability to attach a judgment to the at-fault driver, a UIM case tried to verdict would be nothing more than an advisory opinion.

562 (Ct. App. 2000).) However, Petitioners ignore the fact that the Court of Appeals reviewed Liberty Mutual’s Amended Answer and concluded that Liberty Mutual’s pleading of the service defense, coupled with its pleading of reliance upon § 38-77-160, rendered Liberty Mutual’s pleading “more specific[] that those at issue in *Unisun*.” *Ex Parte Liberty Mut. Ins. Co.*, 2025-UP-335, at 8. The defective pleading from *Unisun* was as follows: “[p]laintiffs have failed to serve Defendant Bruce Hawkins within the three-year statute of limitations.” 342 S.C. at 539, 537 S.E.2d at 560. Crucially, this court in *Unisun* issued a disclaimer when holding that this pleading was defective: “[w]e hold the averment that Unisun ‘failed to serve Bruce Hawkins within the three-year statute of limitations’ is insufficient, *standing alone*, to raise the defense of insufficiency of service of process.” 342 S.C. at 542-543, 537 S.E.2d at 562 (emphasis added). Contrary to the *Unisun* defendant’s answer, Liberty Mutual’s Amended Answer pled defenses of service of process, statute of limitations, and § 38-77-160 with specificity, and these defenses must be read in conjunction and do not “stand alone” like the imprecise pleading from *Unisun*.<sup>6</sup>

Second, Petitioners claim that the UIM carriers waived the service issue by failing to file Rule 12(b) motions in a timely manner. (Pet., at 19-20.) Petitioners ignore the fact that the UIM carriers were never required to file Rule 12(b) motions, which are permissive “at the option of the pleader.” Rule 12(b), SCRPC. The circuit court—and the Court of Appeals—treated the underlying dispositive motions as motions for summary judgment pursuant to Rule 56 and therefore these motions are not subject to the pre-pleading filing requirement imposed by Rule 12(b):

Although 12(b) requires that a motion asserting insufficient service of process be made before pleading, this does not preclude Carriers from raising such defense in

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<sup>6</sup> Liberty Mutual knows of no other proper construction of the phrase “Defendant [has] not been served” from its Amended Answer, which is embedded within a paragraph entitled “Improper Service.” (R. pp. 66-67.)

their answer and then arguing the issue along with a defense of expiration of the statute of limitations in a motion for summary judgment... Carriers raised the service defenses in their answers and then brought motions to dismiss, or in the alternative, for summary judgment. Because nothing precluded them from raising these arguments in a motion for summary judgment, we hold Carriers timely raised the defense of improper service, and the circuit court did not err by deciding Carriers' motion as a motion for summary judgment.

*Ex Parte Liberty Mut. Ins. Co.*, 2025-UP-335, at 9-10 (citations omitted). Indeed, this procedure of preserving a service defense in the answer and then filing a motion for summary judgment based upon said defense is provided for expressly by Rule 12(h)(1)(B), SCRCP. *Id.*; see also *Louden*, *supra* (an appeal from a grant of summary judgment). Reduced to its core, this Rule 12(b) waiver argument from Petitioners is nothing more than another instantiation of their attempt to morph their burden of procuring service into a burden for the UIM carriers to disprove service.<sup>7</sup>

Finally, Petitioners claim that the UIM carriers waived the service issue by participating in protracted litigation in the circuit court prior to filing the subject dispositive motions. (Pet., at 20-21.) Petitioners cite to the *Maybank* case for the proposition that “a party who ‘continues to participate in litigation after challenging personal jurisdiction in their initial responsive pleading’ waives the defense.” (*Id.*, at 20 (quoting *Maybank v. BB&T Corporation*, 416 S.C. 541, 565, 787 S.E.2d 498, 510 (2016)).) Petitioners believe that the UIM carriers in this case, like the *Maybank* defendant, “gambled” that they could argue personal jurisdiction “on the eve of trial.” (*Id.*) However, as discussed by the Court of Appeals, this case is distinguishable from *Maybank*. *Maybank* involved a direct defendant; this case involves UIM carriers participating in the case pursuant to § 38-77-160. See *Ex Parte Liberty Mut. Ins. Co.*, 2025-UP-335, at 10. The defense

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<sup>7</sup> See Pet., at 19 n.8 (“Had [the UIM carriers] appropriately raised the lack of service issue timely, Petitioners could have cured any defect.”). Moreover, this statement from Petitioners ignores the fact that the UIM carriers filed answers contesting service.

asserted in the *Maybank* case was the moving defendant's own (purportedly) insufficient contacts with the forum state. *Id.* Further, the *Maybank* defendant's actions must have created a clear impression of an intentional gamble, but in this case the "Carriers' actions demonstrate they were preparing for litigation under the assumption that Toney had been served." *Id.* The Court of Appeals was correct to conclude that *Maybank* is inapplicable to the present facts.

**III. The Court of Appeals correctly affirmed the circuit court's refusal to estop Liberty Mutual from raising service issues in its dispositive motion.**

Petitioners claim that Liberty Mutual should be estopped to assert the service issue based on an email exchange between the parties at the outset of the case, which occurred prior to the running of the statute of limitations. (Pet., at 21.) This email exchange stated:

[Petitioners' counsel to Liberty Mutual's counsel]: Richard, thanks for your answer and discovery requests in this UIM case. your [*sic*] 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? Many thanks. jk

[Liberty Mutual's counsel to Petitioners' counsel]: Boiler plate at this stage. Given the recent appellate court ruling in *Garrison v. Taget* [*sic*], 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. pp. 155-156.) However, as the Court of Appeals held: "[w]e find the [Petitioners] failed to demonstrate the elements required to establish estoppel."<sup>8</sup> *Ex Parte Liberty Mut. Ins. Co.*, 2025-UP-335 at 12. While a failure of proof on any *one* element would be sufficient to defeat the

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<sup>8</sup> Generally, the elements of equitable estoppel as related to the party being estopped are: (1) conduct which amounts to a false representation, or conduct which is calculated to convey the impression that the facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) the intention that such conduct shall be acted upon by the other party; and (3) actual or constructive knowledge of the real facts. The party asserting estoppel must show: (1) lack of knowledge, and the means of knowledge, of the truths as to the facts in question; and (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change of the position in reliance on the conduct of the party being estopped. *Rodarte v. Univ. of S.C.*, 419 S.C. 592, 601, 799 S.E.2d 912, 916-17 (2017).

estoppel claim, the Court of Appeals found *five* such failures. The Court of Appeals held: 1) that Liberty Mutual never represented anything false or engaged in misleading conduct; 2) that Liberty Mutual did not intend for Petitioners to act on the complained-of representation; 3) that Liberty Mutual had no actual or constructive knowledge of the real facts; 4) that Petitioners cannot show reliance upon the complained-of representation; and 5) that Petitioners cannot show a resulting prejudicial change of position. *Id.* As addressed in turn below, each of these holdings is correct.

First, the Court of Appeals was right to conclude that Liberty Mutual never stated anything false or misleading. In the email, Petitioners' counsel asks if the statute of limitations and improper service defenses asserted by Liberty Mutual are boilerplate "at this stage of the litigation." This question was posed on January 16, 2020, several months prior to the running of the statute of limitations on June 2, 2020. Liberty Mutual's response—also provided on January 16, 2020—was that Liberty Mutual's considered the statute of limitations and improper service issues to be boilerplate "at this stage," truthfully answering Petitioners' question, but then in the same email making sure to reiterate that the Answer was drafted "to be sure I haven't waived anything." Liberty Mutual made no representations about Liberty Mutual's *future* position with respect to affirmative defenses, and in fact, the only fair reading of the email is that Liberty Mutual intended for there to be no waiver of the defenses—including service—itemized in the email by Petitioners' counsel. Petitioners' argument that the UIM carriers' later filing of the underlying motion for summary judgment "[made] this representation false," Pet., at 22, is manifestly without merit.

Second, as the Court of Appeals noted, this statement from Liberty Mutual—leaving open the possibility of a service issue becoming litigable later in the case—undercuts any claim

that Liberty Mutual intended for Petitioners to act on the impression that Liberty Mutual would never pursue a service defense. Indeed, at the time of the email exchange, there were still over five months remaining prior to the expiration of the statute of limitations in which time Petitioners could have procured service in accordance with their legal obligation to do so.

Third, the Court of Appeals was correct to hold that there is no evidence in the record that Liberty Mutual, at the time of the complained-of email, had actual knowledge that Toney had not been served. Petitioners point to “lack of service documents” as a basis for “constructive knowledge.” (*See Pet.*, at 22.) Petitioners ignore the fact that affidavits of service are often filed late (if at all), because filing of proof of service does not affect validity of service.<sup>9</sup> *See* Rule 4(g), SCRCP. Also, as discussed further below, this is yet another attempt by Petitioners to shift the burden of proof and blame the UIM carriers for Petitioners’ failure to commence the action.

Lastly, the Court of Appeals was correct to hold that Petitioners cannot demonstrate reliance on any representation made by Liberty Mutual, or any resulting prejudicial change in position: “[r]egardless of Liberty Mutual’s representations regarding whether it would pursue a defense related to the issue of service, [Petitioners] had the burden of serving Toney and establishing personal jurisdiction.” *Ex Parte Liberty Mut. Ins. Co.*, 2025-UP-335 at 12 (citing *Moore, supra*). It was Petitioners’ responsibility to commence the action, and commencement does not occur without service. *See id.* (citing Rule 3(a), SCRCP). This foundational principle of law was true then and is true now. Petitioners cite *Trustees of Cent. Laborers Welfare Fund v. Lowery*, 924 F.2d. 731 (7<sup>th</sup> Cir. 1991), for the proposition that a defendant can mislead a plaintiff about sufficiency of service and thereby waive a service defense. While that proposition may be

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<sup>9</sup> In October 2021, Liberty Mutual asked for an affidavit of service from Petitioners and was told that Petitioners would “look for” it. (R. p. 178.)

true in the abstract, it is not applicable here because the complained-of representation was issued with the qualifier “at this stage,” presupposing that the defense may be relevant at a later stage.

**IV. The Court of Appeals was correct to conclude that Petitioners’ laches argument is not preserved.**

Petitioners also take issue with the Court of Appeals’ determination that their late-asserted laches argument is not preserved for appellate review. (*See* Pet., at 23-24.) Liberty Mutual asserts that the Court of Appeals was correct to conclude that the issue is not preserved. Petitioners concede that they did not mention laches until they filed a motion to reconsider the circuit court’s order of dismissal. (*See* Pet., at 23 (“Petitioners raised the doctrine of laches below to the circuit court in its [sic] motion to reconsider.”).) This was not sufficient. “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.” *Poch, supra*.

**V. There is no basis for certiorari pursuant to Rule 242(b), SCACR.**

Though not purporting to be an exhaustive list, Rule 242(b), SCACR nevertheless provides instruction as to the type of “special and important” reasons that warrant certiorari review by the Supreme Court: “(1) [w]here there are novel questions of law[;] (2) [w]here there is a dissent in the decision of the Court of Appeals[;] (3) [w]here the decision of the Court of Appeals is in conflict with a prior decision of the Supreme Court [;] (4) [w]here substantial constitutional issues are directly involved[; or] (5) [w]here a federal question is included and the decision of the Court of Appeals conflicts with a decision of the United States Supreme Court.” In this case, none of these factors are present. Notably, and with respect to factors (1) and (3) in particular, Liberty Mutual asserts that there is no “novel questions of law” or “conflict” between the Court of Appeals’ decision and this Court’s precedent. In fact, the Court of Appeals’ decision

applies the longstanding law of South Carolina, and is in complete accord with this Court's decision in *Williams*.

### CONCLUSION

For the foregoing reasons, and for the reasons stated in Liberty Mutual's briefs in the courts below, Liberty Mutual asserts that the Court of Appeals' decision is correct in all its holdings.<sup>10</sup> Therefore, the petition for writ of certiorari is without merit and must be denied.

Respectfully submitted,

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<sup>10</sup> To the extent not stated herein already, Liberty Mutual incorporates Co-Respondent Horace Mann's Return's Statement of the Case and Argument.