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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM SUMTER COUNTY
Court of Common Pleas
R. Kirk Griffin, Circuit Court Judge

Civil Action No. 2019-CP-43-02375

Appellate Case No. 2026-000377

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 Toney,

Defendant.

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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CASES

Petitioners Howell D. Thompson and Tara L. Thompson submit this reply in further support of their petition for writ of certiorari and in response to the returns submitted by Respondents Liberty Mutual Insurance Company ("Liberty") and Horace Mann Property and Casualty Insurance Company ("Horace Mann").

ARGUMENT

I. There are special and important reasons to grant certiorari in this case.

Contrary to Liberty's and Horace Mann's arguments, there are special and important reasons to grant certiorari in this case pursuant to Rule 242, SCACR. In the nearly three decades since the Court of Appeals decided *Louden v. Moragne*, 327 S.C. 465, 486 S.E.2d 525 (Ct. App. 1997), this Court has not considered whether the rule addressed in *Louden* exists in concert with traditional rules relating to properly preserving and raising defenses or whether, as the Court of Appeals' opinion suggests, the rule pronounced in *Louden* gives UIM carriers an impenetrable shield to avoid their contractual obligations. As discussed in the concurrence by Judge Hewitt, 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."

While *Louden* 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* 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 Petitioners its defense was merely boiler plate. *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))).

The *Louden* decision is not in conflict with general waiver law. *Louden* and South Carolina cases concerning waiver 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 the Court of Appeals when it decided the *Louden* case because waiver and estoppel was 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.

In the underlying *Louden* circuit court order, the only waiver argument that was raised to the circuit court was the plaintiff's argument that the defendant and underinsured motorist carrier waived the requirement of filing within the statute of limitations by virtue of the release executed as part of the settlement with the liability carrier. (R. p. 546.) The *Louden* circuit court found this argument was "without merit" because the release was only signed by the plaintiff. (*Id.*) The *Louden* circuit court went on to find: "There is nothing in the record before me to indicate that either the defendant or the underinsured motorist carrier waived the statute of limitations or is estopped to assert it as a bar to the plaintiff's action." (*Id.*) Again, waiver as to the statute of limitations was only raised to the *Louden* circuit court in the context of the release. There were no

arguments regarding waiver of service or personal jurisdiction defenses or equitable estoppel arguments due to the insurer's conduct.

However, the waiver discussion in *Louden* is insightful to the instant case because it shows the circuit court would have considered waiver and estoppel by the UIM carrier if facts supporting the same were present in the *Louden* case. The *Louden* circuit court did not find waiver or estoppel inapplicable in the UIM context. Instead, the circuit court stated there were no facts in the record to support waiver or estoppel in *Louden*. Thus, the underlying order in the *Louden* case explained that waiver and estoppel are applicable in the UIM context where the record supports waiver and estoppel, as it does here.

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] Here, Liberty Mutual asked

[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.

Petitioners' 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. It was also after the statute of limitations had passed. 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.[2]

Therefore, the Court should grant certiorari here as *Louden* does not foreclose the application of traditional preservation rules.

II. The voluntary appearance doctrine does not apply in such bright-line situations as urged by Respondents.

While Respondents note that the voluntary appearance doctrine is not a bright-line rule and must, instead, be applied by the Court based on an evaluation of the specific facts of a case, they argue that the voluntary appearance doctrine does not apply to the instant case because it only applies in bright-line situations that involve "robust, extensive participation by a party," where the party opposes the assertion of their voluntary appearance, and where the party appears more than once. Liberty seems to suggest that the voluntary appearance doctrine could never occur in the context of a UIM case, arguing that it cannot be applied here because "the party against whom the voluntary appearance doctrine was asserted was present in the action—whether in person or

[2] Petitioners are not attempting to shift the burden to Respondents. Instead, Petitioners argue Respondents, like other litigants in South Carolina, have a burden to timely and appropriately raise defenses and are not absolved from that burden by virtue of being an unnamed insurance carrier that gets the benefit of sheltering behind the named defendant. Respondents argue 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.

through counsel—such that the party was at least on notice that the voluntary appearance doctrine was being asserted against them." (Liberty Resp. Br. at 6).

These arguments ignore the unique framework of a UIM case. The voluntary appearance doctrine must be evaluated on a case-by-case basis, and the legal fiction of this UIM case must be considered when determining whether the voluntary appearance doctrine applies here. The fact that Toney did not continue to appear in the case after the deposition does not foreclose the application of the voluntary appearance doctrine. Instead, it's indicative of his interests being protected by the UIM carriers who are defending in his name in the lawsuit he gave permission for Petitioners to file against him as named defendant in the covenant not to execute.

Robust participation, or even continued participation after a voluntary appearance, is not a requirement for the voluntary appearance doctrine. To the contrary, the Court of Appeals has held that "a letter from one attorney to another may serve as a basis to find a voluntary appearance." *Stearns Bank Nat. Ass'n v. Glenwood Falls, LP*, 373 S.C. 331, 340–41, 644 S.E.2d 793, 798 (Ct. App. 2007). A voluntary appearance occurs where a defendant takes some action to consent to the jurisdiction of our courts. *Stephens v. Ringling*, 102 S.C. 333, 86 S.E.2d 683 (1915) (explaining any action can amount to a voluntary appearance); *Stearns*, 373 S.C. at 338, 644 S.E.2d at 796 (Ct. App. 2007) ("No specific act constitutes an appearance, as 'a defendant may choose to come into court with trumpets, or quietly by the back door.'" (quoting *Stephens*, 102 S.C. at 342, 86 S.E. at 685)). The action that the defendant takes must be considered on a case-by-case basis. Here, Toney voluntarily appeared in this action by giving testimony at his deposition without objecting to service or jurisdiction. This is enough under South Carolina law.

Horace Mann's reliance on *New Hampshire Insurance Company v. Bey Corporation*, 312 S.C. 47, 435 S.E.2d 377 (Ct. App. 1993) is misplaced. (Horace Mann Resp. Br. at 8). That case is

not analogous. While it is true that the Court of Appeals 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, the Court of Appeals 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 the Court of Appeals' 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," the Court of Appeals 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 Petitioners to file a suit against him, and voluntarily appeared at a deposition pursuant to a deposition notice and gave testimony in this case.[3] 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. 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.

The purpose of requiring service of the initial pleading on an at-fault driver is to provide notice of the case. *See Blanton v. Stathos*, 351 S.C. 534, 542, 570 S.E.2d 565, 569 (Ct. App. 2002) (explaining service rules exist to ensure defendants receive "notice reasonably calculated under all circumstances to apprise [them] of the pendency of [an] action and afford them and opportunity to present their objections"). Once notice is provided, in an underinsurance case, an at-fault driver rarely actively participates in the litigation of the matter because the at-fault driver usually has already settled the case through his insurance carrier, received a covenant not to execute, and is protected from judgment. In settling all liabilities arising from the motor vehicle accident, the at-fault driver agrees to allow the injured person to either maintain a suit or file a suit against the at-fault driver, knowing that they will not be liable for any resulting judgment. Here, Toney's liability was ended by settlement with protection of a covenant not to execute. He received the appropriate notice of the action when he voluntarily appeared at his deposition on May 15, 2020, and gave

[3] Horace Mann argues this court should discount the deposition notice because it was "sent to counsel for Respondent Liberty Mutual." (Horace Mann Resp. Br. at 7). Counsel, who stepped into the shoes of Defendant Toney to defend this case, procured Defendant Toney's voluntary appearance at the deposition to give testimony in defense of the case.

testimony in this case. 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.

CONCLUSION

For the reasons discussed herein and in Petitioners' prior briefing, the Court should grant certiorari, reverse, and remand to the circuit court to allow this case to proceed to trial.

RESPECTFULLY SUBMITTED,

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