IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No.: 2011-CP-07-0001

Arthur Washington, ... Appellant,

-v-

Resort Services, Inc. and John Doe, ... Respondents.

APPELLANT'S PETITION FOR REHEARING AND SUGGESTION FOR REHEARING *EN BANC*

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, the Appellant, Arthur Washington ("Washington") moves the Court for Rehearing and/or to Alter its Unpublished Opinion number 2016-UP-028 of January 20, 2016, which affirms the trial court's order granting Respondent, John Doe's ("Doe") motion to dismiss and denying Washington's motion for entry of default judgment. Washington also petitions and suggests the desirability of rehearing by the Court *en banc* because this case involves questions of exceptional importance as it relates to who is the real party in interest in an uninsured motorist ("UM") claim.

First, the opinion overlooks and does not address Washington's central argument of who is the real party in interest for John Doe for the purposes of an UM claim against

Washington's own automobile insurance company. The two possibilities are the UM carrier – 21st Century or the fictitious party, John Doe.[1] If 21st Century is the real party in interest then it appeared, engaged in discovery, and questioned Washington at his deposition. The UM claim against it should relate back to the date of the original complaint or the date 21st Century served its Notice of Appearance - March 15, 2011. 21st Century cannot dispute that it filed a Notice of Appearance prior to the expiration of the statute of limitations as the Notice of Appearance plainly states "the undersigned attorneys hereby appear on behalf of 21st Century Insurance, in the above-entitled action . . . ." (R. pp. 32-33).

If 21st Century is not the real party in interest, and instead it is the fictitious party, John Doe, then the trial court erred in denying Washington's motion for entry of default. Doe/21st Century cannot have it both ways. In this scenario, § 38-77-180 authorizes service on John Doe by delivery of the summons and complaint on the clerk of court as follows:

> If the owner or operator of any vehicle causing injury or damages by physical contact is unknown, an action may be instituted against the unknown defendant as "John Doe" and ***service of process may be made by delivery of a copy of the summons and complaint or other pleadings to the clerk of the court in which the action is brought.***

S.C. Code Ann. § 38-77-180 (emphasis added). The plain language of § 38-77-180, standing alone, does not require service on 21st Century to assert a claim against John Doe.

[1] Washington argued in his Brief that 21st Century is the real party in interest for John Doe since a judgment cannot be collected against John Doe except through the UM coverage on Washington's insurance policy. (App. Br. p. 7).

By failing to address Washington's central argument of who is the real party in interest for John Doe in an UM claim, the Court expressly allows Washington's own insurance carrier, 21st Century, to be served before the expiration of the statute of limitation, engage in discovery, and question Washington during his deposition but be dismissed because for any potential UM claim.

All of the authorities cited by the Court in its unpublished opinion are either not applicable or distinguishable. While S.C. Code Ann. § 15-3-535 mandates that personal injury actions must be filed within three years after the person knew or had by the exercise of reasonable diligence should have known about a cause of action, 21st Century was served, appeared, and engaged in discovery before the expiration of the three-year statute of limitation. On the other hand, if John Doe is the real party in interest, then he is in default and admitted the allegations in the Amended Complaint about jurisdiction and venue. (R. p. 20). Simply put, Washington served 21st Century, it appeared, and engaged in discovery before the expiration of the statute of limitation.

The Court also overlooked Washington's arguments that Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000), is not applicable as it involves the inverse of the facts presented here. Jackson is distinguishable from this case because 21st Century filed a notice of appearance, engaged in discovery, questioned Washington during his deposition prior to any expiration of the statute of limitation. Therefore, 21st Century cannot assert any prejudice as to the UM claim against John Doe, unlike Defendant Milligan in Jackson that was named and served after the expiration of the statute of limitation.

In Jackson, Laurie Jackson appealed the trial court's grant of summary judgment in favor of Costello Milligan on the basis that the statute of limitation expired. Id. at 553, 537 S.E.2d at 568. Jackson was injured on April 1, 1994, as she stood by the open door of a vehicle parked beside a gas pump when another vehicle struck the car and then drove away. Id. at 553-54. On March 17, 1997, Jackson filed a complaint against the unknown driver pursuant to the statutory scheme for uninsured motorist coverage. Id. at 554. On September 15, 1998, well after the three year statute of limitation expired, Jackson amended her complaint to add Milligan as a defendant on the basis that he was the one driving the vehicle that struck her. Id. Milligan answered and contended that the action was barred by the applicable statute of limitation. Id. The trial court ruled in favor of Milligan, concluding that the relation back provision of Rule 15(c) did not apply and the statute of limitation expired. Based on the fact that Milligan was added as a party after the expiration of the statute of limitation, the Court of Appeals affirmed the trial court's decision to grant summary judgment. Id. at 559, 537 S.E.2d at 570.

In Jackson, the plaintiff filed suit against Doe within the three year statute of limitation and added Milligan four-and-a-half years after the accident. During this time, neither Milligan, nor anyone on his behalf, made an appearance in the case, engaged in discovery, or questioned any witness. Here, on the other hand, Washington filed suit against Resort Services then asserted an uninsured motorist claim against John Doe three-and-a-half years after February 26, 2009. After filing the initial complaint on January 3, 2011, Washington's insurance carrier, 21st Century, was served with the pleadings and appeared in this action on March 15, 2011, within the statute of limitation (R. pp. 32-33),

engaged in discovery (R. pp. 51-52), and questioned Washington during his deposition (R. pp. 88-154). Jackson is not applicable to the facts of this case.

The Court, without any explanation of its applicability, cites Nationwide Mut. Ins. Co. v. Erwood, 373 S.C. 88, 644 S.E.2d 62 (2007), for the proposition that UM coverage is mandatory unlike voluntary UIM coverage. Erwood, like Jackson, is not applicable to this case because there is no issue that impacts the mandatory nature of UM coverage.

Lastly, in affirming the trial court on Doe's motion to dismiss, the Court cites Fireman's Ins. Co. of Newark, New Jersey v. State Farm Mut. Auto. Ins. Co., 295 S.C. 538, 543, 370 S.E.2d 85, 88 (1988) and State Farm Mut. Auto. Ins. Co. v. James, 337 S.C. 86, 95, 522 S.E.2d 345, 349-50 (Ct. App. 1999) for the proposition that UM and UIM coverage are mutually exclusive and both cannot be recovered. Fireman's Ins. Co. and James are not applicable here and were not a basis for the trial court granting the motion to dismiss or denying the motion for entry of default. In this case, Washington does not concede at this time that UM and UIM coverages are mutually exclusive as there may be certain factual scenarios[2] involving multiple tortfeasors that would give rise to both coverages. At trial, a jury may award a verdict against Resort Services that exceeds its liability coverage, which invokes Washington's UIM coverage. On the other hand, if a jury accepts Resort Services argument that the truck was stolen and caused by an unknown motorist, then Washington's UM coverage would be applicable. Simply because both claims are asserted does not result in one being dismissed merely because both coverages are mutually exclusive. Otherwise, 21st Century, as UIM carrier, could

[2] Washington contends that such a factual scenario would require two tortfeasors, one at-fault motorist being underinsured and the other at-fault motorist being uninsured.

argue that the truck was stolen and the accident caused by an unknown, uninsured motorist, which it would not be responsible for if Doe is dismissed.

In affirming the trial court's denial of Washington's motion for entry of default, the Court summarily cites certain authorities that support Washington's arguments. Rule 55(a), SCRCP is clear that "[w]hen a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, ***the clerk shall enter his default upon the calendar . . . .***" (emphasis added).[3] If John Doe is the real party in interest and not 21st Century, then Doe was in default after more than thirty-days elapsed after service on the clerk of court in accordance with S.C. Code Ann. § 38-77-180. After thirty-days expired upon service of the clerk, and once supported by affidavit, the clerk does not have discretion to not enter default as Rule 55(a) is mandatory – "***the clerk shall enter his default.***" By failing to enter default against Doe, the trial court erred in denying Washington's motion for entry of default.

Next, the Court cites S.C. Code Ann. § 38-77-150(B) in support of the proposition that no action may be brought against the uninsured motorist provision unless copies of the pleadings are served upon the insurance company. Section 38-5-70 provides that every insurance company shall appoint the director of the South Carolina Department of Insurance. Service on insurance companies is mandated by S.C. Code Ann. § 15-9-270

[3] The Court also cites Rule 12(a), SCRCP, as requiring a defendant to serve an answer within thirty-days after service of the summons and complaint. If 21st Century is the real party in interest then the UM claim should relate back as it appeared, engaged in discovery, and questioned Washington at his deposition. If Doe, as a fictitious party, is the real party in interest then he failed to comply with Rule 12(a), SCRCP, following service on the clerk of court in accordance with S.C. Code Ann. § 38-77-180.

governs service on an insurance company through the Department of Insurance. Section 15-9-270 provides, in part:

> The summons and any other legal process in any action or proceeding against it must be served on an insurance company as defined . . . by delivering two copies of the summons or any other legal process to the Director of the Department of Insurance, as attorney of the company . . . . A company shall appoint the director as its attorney pursuant to the provisions of Section 38-5-70. ***This service is considered sufficient service upon the company.***

S.C. Code Ann. § 15-9-270 (emphasis added). Therefore, once 21st Century was served in early 2011[4] for purposes of the underinsured claim, § 15-9-270 mandates that service was "sufficient upon the company". These arguments support Washington's position that 21st Century is the real party in interest and any claim against it should relate back as it engaged in discovery and questioned Washington during his deposition.

CONCLUSION

The Court's opinion should be altered and/or amended to address who is the real party in interest in a UM claim against John Doe. Depending on who is the real party in interest, either the granting of the motion to dismiss or denial of the motion for entry of default should be reversed. For these and all other reasons previously put forth by Washington at the trial court and in the Briefs, the Court should rehear and/or rehear this case *en banc*.

[SIGNATURE PAGE TO FOLLOW]

[4] 21st Century Insurance's Notice of Appearance and Conditional Answer is dated March 15, 2011. (R. pp. 32-33).

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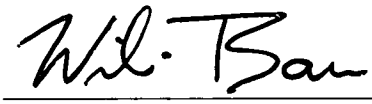

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February 3, 2016
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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Case No.: 2014-001409

Arthur Washington, ... Appellant,

-v-

Resort Services, Inc. and John Doe, ... Respondents.

CERTIFICATE OF SERVICE

This is to certify that I, ***Megan C. Davis***, Paralegal with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Counsel for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within ***Appellant's Petition for Rehearing and Suggestion for Rehearing EN BANC*** to:

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Re: ***Washington v. Resort Services, Inc., et al.***
Civil Action No.: 2011-CP-07-0001
Appellate Case No. 2014-001409

Dear Ms. Kitchings:

Please find enclosed the original and seven (7) copies of Appellant's Petition for Rehearing and Suggestion for Rehearing EN BANC and Proof of Service in the above referenced matter. Please file the original and return a clocked copy of same in the self-addressed stamped envelope provided. Also enclosed is our firm's check in the amount of $25.00 for the filing fee.

By copy of this letter, Appellant's Petition for Rehearing is being served on all counsel of record.

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: Helen F. Hiser, Esquire
Alice P. Adams, Esquire
Charles E. Houston, Esquire