

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY  
Court of Common Pleas

Honorable J. Ernest Kinard, Jr., Circuit Court Judge

**RECEIVED**  
FEB 16 2016  
SC Court of Appeals

Case No.: 2011-CP-07-0001

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Arthur Washington, .....Appellant,

v.

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

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**RETURN IN OPPOSITION TO  
APPELLANT'S PETITION FOR REHEARING AND  
SUGGESTION FOR REHEARING *EN BANC***

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Pursuant to Rules 221(a) and 240(e), SCACR, Respondent John Doe opposes Appellant Arthur Washington's Petition for Rehearing and Suggestion for Rehearing *en banc* ("Petition"). Appellant has not identified any points that were overlooked or misapprehended by this Court; instead, his Petition merely restates arguments that this Court has already considered and rejected. Furthermore, this case does not present any question of exceptional importance that justifies rehearing Appellant's Petition *en banc*, as is discussed in more detail below.

Contrary to Appellant's assertions, this Court did not overlook or misapprehend Appellant's argument that the central and driving issue in this case is "who is the real party in interest for John Doe for the purposes of an UM claim." Appellant made that argument no fewer than six times in his Brief. In denying Appellant's appeal, this Court

clearly rejected the circular and self-serving “who is the real party in interest” argument presented by Appellant.

**1. This Court properly upheld the grant of Respondent’s Motion to Dismiss.**

Appellant’s attempt to reframe the question here as “who is the real party in interest,” is nothing more than an effort to divert attention from the fact that he failed to amend his complaint to add John Doe within the applicable statute of limitations. Appellant first attempted to side-step his limitations problem by arguing that the addition of John Doe should relate back to his original Complaint. However, the Circuit Court correctly held that Appellant was attempting to add a party, not substitute one party for another and that this case is controlled by Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000).

Appellant’s attempt to distinguish Jackson merely recycles arguments he already made to this Court and which should continue to be rejected. The determinative facts in the two cases are similar. In Jackson the UM Carrier appeared and argued that the identity of the driver of the vehicle that caused Jackson’s injuries was known, evidencing awareness of the existence of the defendant’s true identity. 342 S.C. at 554, 537 S.E.2d at 568. There, as is the case here, both the named party (John Doe there/Resort Services here) and the later named defendant (Milligan there/John Doe here) were insured by the same automobile insurer. 342 S.C. at 559 n.4, 537 S.E.2d at 571 n.4. The fact that, in Jackson, John Doe was named within the limitations period and the individual defendant was added after the limitations period had run does not distinguish that case from the instant case in any meaningful way. Instead, the point of Jackson that is directly applicable to this case is that Rule 15(c) does not allow a plaintiff to add an entirely new

party after the statute of limitations has run and have those claims relate back to the original complaint. 342 S.C. at 558, 537 S.E.2d at 570. This is true even when the interests of the two named defendants are represented by the same insurer.

Appellant then attempted to ameliorate his failure to timely add and serve John Doe and the UM Carrier by characterizing 21st Century Insurance Company as the true “party in interest,” pointing to 21st Century’s limited appearance as a potential UIM Carrier based on the only named defendant at the time, Resort Services, in an effort to portray this as a claim that relates back to his original Complaint. Under Appellant’s theory, once 21st Century participated in any manner in this proceeding as a UIM Carrier, it was a party/defendant in this case for all purposes. Appellant is wrong.

As this Court recognized, UM and UIM insurance are fundamentally different. *See Nationwide Mut. Ins. Co. v. Erwood*, 373 S.C. 88, 91, 644 S.E.2d 62, 63 (2007) (UM coverage is mandatory, whereas UIM coverage is entirely voluntary). In fact, one of the key reasons why Appellant’s “true party in interest” argument fails is that UM and UIM coverages attach based on the identity of the named defendant in a case. Because the interests of the UM Carrier and the UIM Carrier attach based on the nature and facts surrounding two different defendants with potentially and very likely opposing interests, they cannot be represented by the same attorney. For example, with regard to causation in the underlying action, the UIM Carrier likely would argue that the driver was John Doe, whereas the UM Carrier likely would argue the driver was a Resort Services employee. For this reason, the limited participation of the UIM Carrier<sup>1</sup> did not and could not constitute service on the UM Carrier of the claims against John Doe.

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<sup>1</sup> The UIM Carrier’s limited appearance and participation in this case was specifically “pursuant to S.C. Code §38-77-160,” (R. pp. 33, 52), which is the UIM provision.

Furthermore, for this reason, the limited participation of 21st Century based on Resort Services being a defendant does not, as Appellant suggests, constitute any existing party acting on John Doe's or the UM Carrier's behalf.

It is the law of South Carolina that, where there is a single tortfeasor, UM and UIM coverages are mutually exclusive. Fireman's Ins. Co. of Newark, N.J. v. State Farm Mut. Auto. Ins. Co., 294 S.C. 538, 542-543, 370 S.E.2d 85, 87-88 (1988); *see also* State Farm Mut. Auto. Ins. Co. v. James, 337 S.C. 86, 95, 522 S.E.2d 345, 349-350 (Ct. App. 1999).<sup>2</sup> A defendant is either uninsured or underinsured but cannot be both for purposes of recovery under Sections 38-77-150 or 38-77-160. There have been no allegations and is no evidence that more than one tortfeasor caused Appellant's injuries. Thus, the point that UM and UIM coverages are mutually exclusive affirms that 21st Century's limited appearance pursuant to the UIM provisions of Section 38-77-160 did not somehow covert it into either another named defendant or constitute service on either John Doe or the UM Carrier.<sup>3</sup>

In short, Resort Services and John Doe are two different defendants and each triggers different, mutually exclusive coverages under Appellant's own automobile policy. Appellant's automobile insurance carrier, 21st Century, is not and has never been

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<sup>2</sup> Regardless of whether the Circuit Court relied on the mutually exclusive nature of UM and UIM coverage as a basis for its ruling, this Court can affirm a lower court on any basis that is found in and supported by the record. *See Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 150, 442 S.E.2d 186, 191 (Ct. App. 1994) (an appellate court may affirm on any ground appearing in the record); Rule 220(c), SCACR (same).

<sup>3</sup> Nor did it serve to toll the statute of limitations on Appellant's claim against John Doe. *See Holmes v. Haynsworth, Sinkler & Boyd, P.A.*, 408 S.C. 620, 634, 760 S.E.2d 399, 406 (2014) (finding claims filed after the statute of limitations ran were barred and explaining "[w]e have never tolled the statute of limitations by the date on which a party subjects himself to the personal jurisdiction of the court, and we decline to do so here").

named a defendant in this action, although it potentially could be called on to pay claims under certain circumstances.

Here, Appellant's original Complaint named one defendant, Resort Services, and alleged claims only against that entity. Mere knowledge of a pending lawsuit against one defendant does not constitute legal notice or service of an actual claim against a different defendant. As is discussed in more detail below, Appellant continually fails to acknowledge that, to the extent Appellant is seeking to recover from the UM Carrier on the basis of the alleged actions of John Doe, Appellant had to comply with the notice provisions of S.C. Code Ann. § 38-77-150(B).

At the time 21st Century filed its limited appearance, Resort Services was the only named defendant in this case. (R pp. 32-33). Therefore, at the time the statute of limitations ran, there was only one named defendant and that entity had automobile insurance, thus precluding any possibility of UM coverage. Service on the UIM Carrier is not the same as service on the UM Carrier, each representing interests arising out of two different defendants whose interests are at odds with each other.

At the end of the day, Appellant is the architect of his own predicament. All he had to have done, in order to preserve the claims he now asserts, was to have amended his Complaint before the statute of limitations ran to add John Doe pursuant to Section 38-77-180, and to timely serve notice on the UM Carrier pursuant to Section 38-77-150. Having failed to do so, Appellant's entire argument is nothing more than an unsuccessful attempt to circumvent the operation of the applicable statute of limitations and statutory requirements for serving UM Carriers.

**2. This Court properly upheld the denial of Appellant's Motion for a Default Judgment.**

The Circuit Court properly denied Appellant's motion for a default judgment because, at the time Appellant filed his Amended Complaint in which he named John Doe as a defendant for the first time, the statute of limitations had run. Therefore, any default judgment Appellant might have obtained would have been void as a matter of law. Courts are not required to perform meaningless functions. *See Miller v. State*, 269 S.C. 113, 115, 236 S.E.2d 422, 423 (1977).

Appellant criticizes this Court's citation of various statutory provisions in support of the Circuit Court's ruling, asserting that they actually support his position. What he fails to address is that, regardless of whether he "served" John Doe by delivering a copy of his Amended Complaint with the clerk of court, Section 38-77-150(B) explicitly provides that:

No action may be brought under the uninsured motorist provision unless copies of the pleadings ... are served in the manner provided by law upon the insurer writing the uninsured motorist provision. The insurer has the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear.

S.C. Code Ann. § 38-77-150(B). Nothing in Section 38-77-150(B) provides that service on a John Doe by way of the clerk of court suffices as service on the UM Carrier. In addition, contrary to Appellant's suggestion, there is no authority for Appellant's position that service on an insurer pursuant to Section 15-9-270 for one claim based on one defendant constitutes service on the company for purposes of a claim against an entirely different defendant. Simply put, if Appellant wanted to recover from the UM Carrier, as opposed to John Doe himself, Appellant was required to serve the UM Carrier with the

Amended Complaint. That is what S.C. Code Ann. § 38-77-150(B) plainly and unambiguously requires. While service on the clerk of court may have been sufficient for perfecting service on John Doe, it was not sufficient to serve the UM Carrier. Once it was properly served, the UM Carrier served its Answer within the 30 days required under Rule 12(a), SCRPC.

The “John Doe” provisions support Respondent’s position. Section 38-77-180 provides, in pertinent part, that “the insurer has the right to defend in the name of John Doe.” S.C. Code Ann. § 38-77-180. Section 38-77-150(B) also provides the UM Carrier with “the right to appear and defend in the name of the uninsured motorist in any action which may affect its liability ...” S.C. Code Ann. § 38-77-150(B). How can a UM insurer possibly exercise its right to defend a John Doe claim unless it is properly served? This is not a case where Appellant only learned of the existence of a John Doe after the statute of limitations had run. Nor is this a case where the identity of the UM Carrier was a mystery to Appellant. There were no obstacles to him timely naming John Doe and timely serving the UM Carrier with notice of that claim. He simply waited too long – slept on his rights, City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231-232, 599 S.E.2d 462, 465 (Ct. App. 2004) – and now concocts an elaborate Catch-22 argument in the hope of avoiding the consequences of his own delay.

In reality, what Appellant is asking this Court to do is to sanction a series of steps by which a plaintiff, after the statute of limitations has run, files an amended complaint naming for the first time a John Doe, “serves” John Doe by filing a copy of the amended complaint with the clerk of court, waits until John Doe’s 30 days to file an answer has run

(and, in this case, substantially longer)<sup>4</sup> before serving the UM Carrier, and then moves for a default judgment, effectively denying the UM Carrier proper notice and any chance to answer and/or defend itself. This result, in which judgment is rendered against a party without notice and an opportunity to appear, would violate the basic guarantees of due process. *See, e.g., Tobias v. Rice*, 386 S.C. 306, 311, 688 S.E.2d 552, 554 (2010) (“procedural due process requires (1) adequate notice; (2) adequate opportunity for a hearing; (3) the right to introduce evidence; and (4) the right to confront and cross-examine witnesses”).

**3. There is no need to rehear this matter *en banc*.**

As explained above, Appellant has tried to create an issue out of circular reasoning in order to obfuscate the fact that he failed to add John Doe within the applicable statute of limitations. The issue on appeal here is not “who is the real party in interest,” John Doe or the UM Carrier. Rather, the issues are:

- whether Appellant was attempting, after the statute of limitations had run, to add a new claim against an existing party or substitute a party for an existing party, or, as the Circuit Court held and this Court properly affirmed, to add an entirely new party; and
- whether the denial of Appellant’s motion for a default judgment was proper where the Amended Answer first naming John Doe was filed after the statute of limitations had run, Appellant failed to properly serve 21st

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<sup>4</sup> Appellant completely fails to address the fact that his Motion for Default Judgment was filed a full year and a half after John Doe’s answer was due. *See Harvey v. United States*, 685 F.3d 939 (10<sup>th</sup> Cir. 2012) (upholding denial of default judgment motion in part because the movant forfeited his default judgment argument by waiting for two and a half years to file his motion).

Century as the UM carrier for a year and a half and, once served, 21st Century as the UM carrier filed a timely Answer.

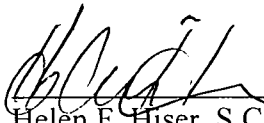
Appellant asserts that “the real party in interest is 21st Century.” (Motion p. 2 n.1) (App. Br. p. 7). However, 21st Century has never been named a party, and appeared on a limited basis only in order to defend its position as Appellant’s UIM Carrier in case the only party named within the applicable limitations period – Resort Services – was found to have insufficient insurance coverage. Even if he was not faced with a statute of limitations problem, the only way Appellant could have recovered from 21st Century as a UM Carrier based on John Doe being the tortfeasor was to have complied with the service provision of Section 38-77-150(B), which he failed to do for a year and a half after filing his Amended Complaint. His attempt to frame a question of “exceptional importance” is nothing more than an attempt to hide the fact that he failed to name John Doe within the statute of limitations and failed to comply with Section 38-77-150(B).

**CONCLUSION**

For all the reasons set forth herein and in the Final Brief of Respondent John Doe, this Court should deny Appellant’s Petition for Rehearing. In addition, Appellant has presented no valid reasons why this Court should rehear this matter *en banc*.

Respectfully submitted,  
MCANGUS GOUDELOCK & COURIE

February 12, 2016

  
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FEB 16 2016

The Honorable J. Ernest Kinard, Jr., Circuit Court Judge

**SC Court of Appeals**

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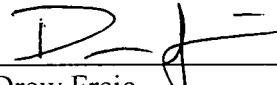
**PROOF OF SERVICE**

I certify that I have served Respondent John Doe's Return in Opposition to Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc* on Arthur Washington, by depositing a copy of it in the United States Mail, postage prepaid, on the 12th day of February, 2016, addressed to his attorney and to other counsel of record as follows:

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February 12, 2016

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SC Court of Appeals

**Via U.S. Mail**

The Honorable Jenny Abbott Kitchings  
South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, South Carolina 29211

RE: Arthur Washington v. Resort Services, Inc. and John Doe  
Civil Action No.: 2011-CP-07-0001 (Beaufort)  
Date of Incident: February 26, 2009  
Carrier Claim No.: 8003223803-1-3  
MGC File No.: 20192.14002  
Appeal No.: 2014-001409

Dear Ms. Kitchings:

Enclosed please find the original and seven (7) copies of Respondent John Doe's Return in Opposition to Appellant's Petition for Rehearing and Suggestion for Rehearing *en banc*, and the original and one copy of the Proof of Service in the above-referenced matter. Please file the originals and return a clocked-in copy in the self-addressed, stamped envelope.

If you have any questions, please do not hesitate to contact me.

Very truly yours,



Helen F. Hiser

Enclosures

cc: Charles E. Houston, Jr., Esq.  
William F. Barnes, III, Esq.  
Alice P. Adams, Esq.  
Gregory Hutto, 21st Century Centennial Insurance Company