IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

J. Ernest Kinard, Jr., Circuit Court Judge

Opinion No.: 2016-UP-028 (S.C. Ct. App. filed January 20, 2016)

Arthur Washington, ... Petitioner,

-v-

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

of whom Joe Doe is .....Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX

CERTIFICATE OF COUNSEL

Counsel for the Petitioner, Arthur Washington, certifies that the Petition for Rehearing was denied by the original panel of the South Carolina Court of Appeals on October 8, 2015.

QUESTIONS PRESENTED

I. Did the Court of Appeals err in affirming the trial court's grant of John Doe's motion to dismiss based on the statute of limitation when Washington's own automobile insurance carrier filed a notice of appearance and engaged in discovery prior to the expiration of the statute of limitation?

II. Did the Court of Appeals err in affirming the trial court's denial of Washington's motion for entry of default against John Doe when more than thirty (30) days elapsed without service of an answer or other responsive pleading?

Pursuant to Rule 242, SCACR, Petitioner, Arthur Washington ("Washington") requests the South Carolina Supreme Court grant a Writ of Certiorari to review and reverse the South Carolina Court of Appeals' unpublished opinion number 2016-UP-028 of January 20, 2016, which affirms the trial court's order granting Respondent, John Doe's ("Doe") motion to dismiss based on the statute of limitation and denying Washington's motion for entry of default judgment as it relates to a party that appeared and engaged in discovery in an uninsured motorist ("UM") claim. Washington relies upon the Appendix filed contemporaneously with the Petition. This Petition should be granted as the case presents a novel question of law for which there is no directly applicable authority.

STATEMENT OF THE CASE

This appeal arises from a lower court order granting John Doe's Motion to Dismiss based on the statute of limitation and denying Washington's Motion for Entry of Default against John Doe. (R. pp. 4-10). This action arises out of a collision between Washington and a Resort Services, Inc. ("Resort Services") truck that occurred at approximately 6:00 a.m. on February 26, 2009, on Buck Island Road in Bluffton. On that morning, Washington was on his way to Belfair Plantation where he worked as the men's locker room attendant. (R. p. 98). As he was traveling on Buck Island Road, a Resort Services box truck attempted to turn around in a driveway, became disabled, and was partially extending into Washington's lane of travel. After the collision, there were no occupants of the Resort Services truck, and the driver of the truck presumably fled the scene at some point either before or after the collision. The collision occurred in relatively close proximity to the Resort Services facility on Buck Island Road.

Washington filed a Summons and Complaint against Resort Services on January 3, 2011. (R. pp. 13-16). Resort Services served a copy of its Answer on January 25, 2011. (R. pp. 23-26).

Thereafter, on April 14, 2011, Resort Services served an Amended Answer. (R. pp. 34-38). Between Resort Services' original Answer in January 2011 and Amended Answer in April 2011, Washington's own automobile insurance carrier, 21st Century Insurance Company ("21st Century"), was served and filed a Notice of Appearance and Conditional Answer on March 15, 2011. (R. pp. 32-33). 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). Following its appearance in April 2011, 21st Century, through its counsel, engaged in discovery, filed a motion to compel (R. pp. 51-52), and questioned Washington during his deposition. (R. pp. 91-107).

Washington moved to amend his Complaint on March 12, 2012, to assert an uninsured motorist claim through his 21st Century policy against John Doe. (R. pp. 47-48). On August 2, 2012, Washington filed an Amended Summons and Amended Complaint against John Doe for the purposes of asserting an uninsured motorist claim against 21st Century. (R. pp. 17-22).

On February 12, 2014, Doe filed a Motion to Dismiss based on the statute of limitation. (R. pp. 49-50). Doe asserted that the action should be dismissed against him because the action was not commenced within three years from February 26, 2009. (R. pp. 49-50). On March 28, 2014, Washington filed a Motion for Entry of Default against John Doe on the basis that Doe was served in accordance with S.C. Code Ann. § 38-77-180 by delivery of the Amended Summons and Complaint to the Beaufort County Clerk of Court and no responsive pleading or motion was served within thirty days as required by Rule 12, SCRCP. (R. pp. 42-46).

The Honorable J. Ernest Kinard, Jr., held a hearing on these motions on April 8, 2014, at the Beaufort County Courthouse. (R. p. 81). On May 2, 2014, the lower court filed an Order

granting Doe's Motion to Dismiss based on the statute of limitation and denying Washington's Motion for Entry of Default. (R. pp. 4-10).

After receipt of the lower court's Order granting Doe's motion to dismiss and denying Washington's motion for entry of default, Washington filed a motion to alter or amend pursuant to Rule 59(e), SCRCP. (R. pp. 39-41). Specifically, the motion sought to correct the Order which states "21st Century Insurance . . . served a Notice of Appearance and Conditional Answer on behalf of Defendant, Resort Services, Inc. on March 14, 2011. . . ." (R. p. 5). At the time 21st Century Insurance filed its Notice of Appearance, counsel for Resort Services had already filed an answer on Resort Services' behalf. Furthermore, the Order was contrary to the plain language of the Notice of Appearance which states it was filed only on "behalf of 21st Century Insurance." (R. pp. 32-33).

Additionally, the Order held 21st Century should be not be found in default without prior notice of this lawsuit asserting an uninsured motorist claim against John Doe because it would violate the Due Process Clause under the United States Constitution and South Carolina Constitution. (R. p. 9). Washington also sought to have this finding amended and/or corrected because 21st Century appeared, engaged in discovery, and had knowledge of the motion to amend and filing of the amended complaint that asserted an uninsured motorist claim against 21st Century. Washington also sought to have the Order amended regarding the suspension of Attorney Charles Houston's law license in late 2012. The Order states "Plaintiff's argument that the law license suspension of Plaintiff's previous attorney, Charles Houston, should equitably toll the Statute of Limitations is also without merit." (R. pp. 7-8). At no time did Washington assert the statute of limitation should be equitably tolled. The lower court denied Washington's motion to alter or amend in an Order filed June 4, 2014. (R. p. 11).

Upon receiving the lower court's Order, Washington filed a timely Notice of Appeal on June 30, 2014 with the South Carolina Court of Appeals. (R. pp. 114-115). In an unpublished opinion decided without oral argument on January 20, 2016, the Court of Appeals affirmed the lower court's denial of Washington's motion for entry of default and granting of Doe's motion to dismiss. Washington timely filed a Petition for Rehearing and Suggestion for Rehearing *En Banc*. On August 19, 2016, the Court of Appeals denied Washington's Petition for Rehearing.

ARGUMENT

By summarily deciding this appeal pursuant to Rule 220(b), SCACR, the Court of Appeals failed to address and rule upon the central issue posed by Washington: 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, questioned Washington at his deposition, and cannot claim lack of notice about the UM claim. 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). 21st Century is one party regardless of the coverage it provides.

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

[1] Washington argued in his Brief to the Court of Appeals 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).

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.

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 of Appeals expressly allows 21st Century to be served before the expiration of the statute of limitation, engage in discovery, and question Washington during his deposition but permit dismissal for any any potential UM claim.

I. THE COURT OF APPEALS FAILED TO ADDRESS WASHINGTON'S ARGUMENTS REGARDING THE ORDER GRANTING OF DOE'S MOTION TO DISMISS

The authorities cited by the Court of Appeals in its unpublished opinion are either not applicable or distinguishable. The Court of Appeals also failed to address the central arguments put forward by Washington 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'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.

Despite not addressing Washington's arguments regarding Jackson, the Court of Appeals 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 in this case involving the mandatory nature of UM coverage.

Lastly, in affirming the trial court as to Doe's motion to dismiss, the Court of Appeals cited 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's order 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.

The Court of Appeals overlooked Washington's central argument, and the lower court's basis for granting Doe's motion to dismiss, that Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000) is inapplicable to these facts. As a result, this Petition should be granted as it presents a novel question of law with no applicable authority.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE LOWER COURT'S DENIAL OF WASHINGTON'S MOTION FOR ENTRY OF DEFAULT.

[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 or unknown.

Having not addressed the central issue of who is the real party in interest, and despite affirming the lower court's order granting Doe's motion to dismiss, the Court of Appeals affirmed the lower court's order denying Washington's motion for entry of default.

In affirming the trial court's denial of Washington's motion for entry of default, the Court of Appeals cited 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). If John Doe is the real party in interest and not 21st Century, then it is not necessary to serve 21st Century. Doe was in default when 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 should have entered default pursuant to the mandatory language of Rule 55(a), SCRCP. By failing to enter default against Doe, the trial court erred in denying Washington's motion for entry of default.

Next, the Court of Appeals cited 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, which 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). Once 21st Century was served in early 2011[3] for purposes of the underinsured claim, the plain language of § 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. If not, the Court of Appeals' decision affirming the lower court's denial of Washington's motion for entry of default should be reversed.

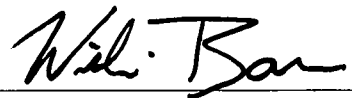
CONCLUSION

This case presents a novel question of law when Washington's own insurance company, 21st Century, files an appearance, engages in discovery, and questions Washington during his deposition before the expiration of the statute of limitation. Any amendment asserting a UM claim against 21st Century should relate back pursuant to Rule 15(c), SCRCP. In the event 21st Century is not the real party in interest, then the Court of Appeals' decision to affirm the lower court's denial of Washington's motion for entry of default should be reversed. For these reasons, Washington's Petition should be granted and the Court should review and reverse the Court of Appeals unpublished opinion.

[SIGNITURE TO FOLLOW ON NEXT PAGE]

[3] 21st Century Insurance's Notice of Appearance and Conditional Answer is dated March 15, 2011. (R. pp. 32-33).

PETERS, MURDAUGH, PARKER,
ELTZROTH & DETRICK, P. A.



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September 16, 2016
Hampton, South Carolina

IN THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM BEAUFORT COUNTY
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J. Ernest Kinard, Jr., Circuit Court Judge

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Arthur Washington, ... Petitioner,

-v-

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

CERTIFICATE OF SERVICE

This is to certify that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant/Petitioner, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within the ***Petition for Writ of Certiorari and Appendix*** to:

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This is to certify further that I, ***Megan C. Davis***, with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant/Petitioner, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within the ***Petition for Writ of Certiorari*** to:

The Honorable Jenny Abbott Kitchings
S.C. Court of Appeals Clerk of Court
P.O. Box 11629
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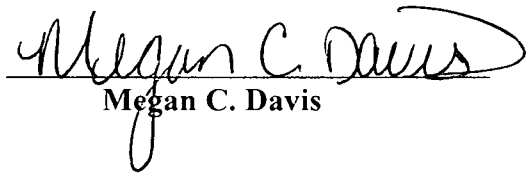

Megan C. Davis

September 16th, 2016
Hampton, South Carolina