THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-212686

Marsha Temples, Appellant,

v.

Neil O. Plush, Respondent.

FINAL BRIEF OF RESPONDENT

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October 7, 2013

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STATEMENT OF THE CASE

Appellant was involved in an automobile accident on August 18, 2003. She filed her Complaint against Respondent Neil Plush on August 2, 2006, sixteen days before the expiration of the three-year limitations period on August 18, 2006, pursuant to S.C. Code Ann. § 15-3-530 (2005). This 2006 action was voluntarily dismissed pursuant to Rule 40(j) of the South Carolina Rules of Civil Procedure on August 24, 2007.

Appellant entered into a Covenant Not to Execute (the Covenant) on September 12, 2007. The Covenant provided that in exchange for payment of the limits of Plush's liability policy with Southern United Fire Insurance Company (hereinafter "Southern"), Appellant agreed not to enforce any judgment against Plush or Southern. Although Appellant specifically reserved the right to pursue a claim against Plush in order to seek underinsured motorist (UIM) benefits from Plaintiff's UIM carrier, GEICO Indemnity Co. (hereinafter "GEICO"), the Covenant specifically reserved Plush's right to deny liability, and Plush made no representations as to the availability of UIM coverage.

Less than a year after the case was dismissed, Appellant attempted to serve GEICO with the 2006 action on July 28, 2008. GEICO filed its Notice of Appearance within 30 days, on August 27, 2008, and reserved its right to assume defense of the case pursuant to the UIM statute, S.C. Code Ann. § 38-77-160 (2002). Written discovery proceeded until GEICO discovered the 2006 case had not been restored and notified Appellants of that fact in 2009.

Appellant took no further action in the case until February 14, 2012. On February 14, 2012, Appellant simultaneously filed both her Motion to Restore the case pursuant to Rule 40 of the South Carolina Rules of Civil Procedure, and an Order granting the

motion. However, the Motion and Order were not served on opposing counsel until two days later on February 16, 2012. Counsel for GEICO was substituted as counsel for Plush and the subject Motion to Dismiss was filed on March 13, 2012—less than a month after service of both the Motion to Restore and the trial court's executed Order restoring the case. A hearing was held April 9, 2012, and an Order granting the Appellee's Motion to Dismiss was entered on June 19, 2012.

Appellant's Notice of Appeal was served on August 8, 2012, and the transcript was received on September 13, 2012. On October 11, 2012, Appellant served her first Request for Extension of Time in which to File Initial Brief of Appellant, noting that she had inquired of Counsel for Respondent and there was no objection. That Request was granted and the time extended until November 13, 2012. On November 9, Appellant served her second Request for Extension of Time in which to File Initial Brief of Appellant, which request was granted and the time was extended until December 13, 2012. On December 12, 2012, Appellant filed her third Request for Extension of Time in which to File Initial Brief of Appellant, to which Respondent objected. Subsequently, Appellant served her Initial Brief on March 1, 2013.

STANDARD OF REVIEW

The trial court entered a pre-trial dismissal of Appellant's claims on statute of limitations grounds. This Court reviews the trial court's Order of dismissal de novo, applying the same standard as the trial court undertook below. See Flateau v. Harrelson, 355 S.C. 197, 201-09, 584 S.E.2d 413 (Ct. App. 2003) (applying de novo review to a trial court's Rule 12(b)(6) dismissal on statute of limitations grounds); Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 114, 687 S.E.2d 29 (2009) (applying de novo review to a trial court's Rule 56(c) dismissal on statute of limitations grounds).

ARGUMENT

1. Appellant's Claim is Barred by the Statute of Limitations as She Failed to File Her Motion to Restore the Case to the Docket Within One Year of the Order of Dismissal and She Therefore Cannot Take Advantage of the Tolling Provisions of S.C. Rule Civ. Pro. 40(j).

Appellant's cause of action for personal injury arose on August 18, 2003. Applying the three-year statute of limitations found in S.C. Code Ann. § 15-3-530, the limitations period would have run on August 18, 2006, but for the application of Rule 40(j) of the South Carolina Rules of Civil Procedure. Rule 40(j) states that if a plaintiff strikes a claim from the docket under the rule and the "claim is restored upon motion made within 1 year of the date stricken, the statute of limitations shall be tolled as to all consenting parties during the time the case is stricken, and any unexpired portion of the statute of limitations on the date the case was stricken shall remain and begin to run on the date that the claim is restored." Rule 40(j), SCRCP. However, Appellant failed to timely restore her claim to the docket and is now consequently barred from continuing to pursue her claim against Respondent.

The Supreme Court of South Carolina has interpreted Rule 40(j) to allow a party to move to restore a claim more than one year after it was stricken, but if it does so, "the party simply cannot take advantage of the one year tolling period provided by the Rule." Maxwell v. Genez, 356 S.C. 617, 621, 591 S.E.2d 26 (2003) (reversing decision which held a party was required to move to restore within one year); see also Graham v. Dorchester County Sch. Dist., 339 S.C. 121, 125, 528 S.E.2d 80 (Ct. App. 2000) (Rule 40(j) requires a party to move to restore within a year of the case being stricken in order "to take advantage of the tolling").

The Notes to the Rule suggest the consent to dismissal operates to toll the statute for a year and the remainder of the limitations period begins to run a year after the claim is stricken. Consent to a Rule 40(j) dismissal "operates to toll the statute of limitations for one year after the case is stricken from the docket as to each consenting party." Notes, 40(j), SCRCP. "Any remaining portion of the statute of limitations begins to run one year after the case was stricken unless the case has previously been restored to the General Docket." Id.

This interpretation is supported by the Supreme Court's opinion in Maxwell. In Maxwell, the plaintiff argued that because the defendants agreed to the Rule 40(j) dismissal after the statute of limitations had expired, the defendants waived their right to oppose the motion to restore on statute of limitations grounds. 356 S.C. at 622 n.2, 591 S.E.2d 617. The Supreme Court disagreed. Id. Relying on the plain and unambiguous language of the cited Rule, the South Carolina Supreme Court explained that "[p]arties who consent to strike a claim pursuant to Rule 40(j) agree not to challenge the statute of limitations for one year." Id. "One year after the [plaintiffs'] complaint was stricken from the docket pursuant to Rule 40(j), [the defendants] were no longer bound by their agreement not to challenge the [plaintiffs'] action on statute of limitations grounds." Id.

Applying the interpretation of Rule 40(j) most favorable to Appellant, Plush's consent to the dismissal on August 24, 2007, operated to toll the statute for one year after the case was dismissed. See Graham, 339 S.C. at 123-25, 528 S.E.2d 80. While Respondent agreed not to challenge the statute of limitations for one year by consenting to the dismissal, he was no longer bound by that agreement as of August 24, 2008, one year after Appellant's complaint was dismissed. See Maxwell, 356 S.C. at 621-22, 591

S.E.2d 617. The original complaint was filed 16 days prior to the running of the three-year limitations period. Therefore, what remained of the limitations period resumed running on August 24, 2008, a year after the case was dismissed, and expired 16 days later, on September 9, 2008.

"It is well settled in South Carolina that when an action is dismissed without prejudice, the statute of limitations will bar a subsequent suit if the statute runs in the interim." Rink v. Richland Mem'l Hosp., 310 S.C. 193, 197, 422 S.E.2d 747 (1992); City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232, 599 S.E.2d 462 (Ct. App. 2004). A plaintiff has the burden of prosecuting its action, and an action may properly be dismissed where the plaintiff unreasonably neglects to proceed and fails to meet the minimum standards for proper prosecution of an action. Don Shevey & Spires, Inc. v. American Motors Realty Corp., 279 S.C. 58, 60, 301 S.E.2d 757 (1983) (affirming dismissal without prejudice where the plaintiff would be barred by the statute of limitations from subsequently reinstating its action). Further, "[t]he party claiming the statute of limitations should be tolled bears the burden of establishing sufficient facts to justify its use." Hooper v. Ebenezer Senior Servs. & Rehab. Ctr., 386 S.C. 108, 115, 687 S.E.2d 29 (2009).

This case falls squarely within the "well-settled general rule"—the limitations period expired in the interim period between the dismissal without prejudice in August 2007 and Plaintiff's attempt to revive the suit in February 2012. Appellant had the burden of timely prosecuting her action on the underlying accident, which occurred almost ten years ago. While Appellant initially satisfied that burden by filing her Complaint in August 2006, she had no less of a burden after obtaining a dismissal

without prejudice of her claim in August 2007. Nevertheless, Appellant inexplicably took no action to restore the case to the docket for nearly five more years. Appellant did not meet her burden to timely pursue her claim, even within the extended (and temporarily tolled) statute of limitations period provided by the Rule 40(j) dismissal. The statute of limitations thus bars the subsequent suit.

2. Because Appellant Had Notice of and an Opportunity to Respond to Respondent's Statute of Limitations Defense, the Trial Court Was Authorized to Adjudicate the Timeliness of Appellant's Claim Where the Pleadings of Record Showed Appellant's Claims Were Time Barred.

It is undisputed that Respondent was given no notice of Appellant's Motion to Restore until after the trial court had executed an Order restoring the case—in contravention of Rule 40(j), SCRCP. See 40(j), SCRCP ("A party moving to restore a case stricken from the docket shall provide all parties notice of the motion to restore at least 10 days before it is heard."). There exists no argument that Respondent was dilatory in raising the statute of limitations defense as soon as it became applicable. In this regard, the record confirms that Respondent raised and sought a ruling on the timeliness of Appellant's claims less than a month from Appellant's service of the Motion to Restore and the trial court's executed Order restoring the case. (R. p. 54, line 13—p. 55, line 1). Moreover, Appellant has never asserted—either below or on appeal—that she lacked notice of the filing of Respondent's motion seeking dismissal of the case on statute of limitations grounds, or an opportunity to be heard and contest Respondent's claims; the record shows that Plaintiff vigorously opposed Respondent's timeliness argument on multiple grounds, orally at hearing as well as in her written brief. (R. p. 61, line 24—p. 63, line 24; R. p. 64, line 11—p. 66, line 3; R. pp. 85-88).

Notwithstanding these undisputed facts, Appellant strenuously argues that the trial court erred in allowing Respondent to assert a statute of limitations defense on the basis that Respondent's omission of a statute of limitations defense in the 2006 Answer precludes for all time a challenge to the timeliness of Appellant's claims. Elevating form over substance, Appellant's position finds no support in logic or in precedent.

As an initial matter, it warrants observation that the statute of limitations was not available during the pleading stage of the 2006 action and thus could not have been properly raised in the initially filed Answer. Appellant's brief argues at length that a party "is required to plead the statute of limitations as a defense in order to assert it" and then faults Respondent because it "never properly pleaded" the statute as a defense. (Appellant's Final Brief at 5, 7.) Appellant never confronts the fact that the limitations defense ripened as a bar to her claims many years after Respondent's Answer had been filed; consequently, Appellant's reliance on the axiom that a party cannot rely on an affirmative defense if it omits the defense from its answer is misplaced on the facts at bar. Appellant moved to restore in February 2012, nearly 10 years after the underlying accident, nearly six years after the original statute of limitations ran, nearly four years after attempting to serve GEICO with the no-longer-pending 2006 case, and nearly four years after the extended limitations period expired under Rule 40(j). Respondent promptly filed its Motion to Dismiss when the case was restored. The statute of limitations defense was timely raised to the court without resulting in unfair surprise to Appellant, see Plyler v. Burns, 373 S.C. 637, 648, 647 S.E.2d 188 (2007) (explaining that the aim of Rule 8(c), SCRCP, is avoid unfair surprise), and none of the cases on which Appellant relies support the proposition that the trial court erred by adjudicating the

statute of limitations defense under the peculiar circumstances under which it arose in this case.

Similarly, Appellant's suggestion that a party waives—absolutely and for all time—a statute of limitations defense by failing to include it in the party's answer is without basis. While it is true that Rule 12(h)(1), SCRCP, mandates that certain defenses are lost if not raised in the party's initial pleading or pre-answer motion—such as lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service of process—the statute of limitations is not one of those threshold defenses. See Rule 12(h)(1), SCRCP; see also Simmons v. Justice, 196 F.R.D. 296, 298 (W.D.N.C. 2000) (allowing defendant to raise statute of limitations defense although it was not raised in its answer, and observing: "Review of relevant case law reveals that a statute of limitations defense is not *automatically* subject to waiver for failure to assert under Rule 8(c)"); Roberts v. Peterson, 292 S.C. 149, 152, 355 S.E.2d 280 (Ct. App. 1987) (noting that where the state rule has adopted the language of a federal rule, federal cases interpreting the federal rule are persuasive). Here, Respondent asserted the statute of limitations defense and pressed for a ruling on its merits as soon as he received notice of the trial court's Order restoring the case to the docket. In sum, Respondent promptly and properly raised the defense, Appellant had notice of the defense and the opportunity to contest it below, and the trial court was correct to adjudicate the defense on its merits prior to the expenditure of additional, preciously scarce judicial resources on Appellant's claims.

In this regard, the South Carolina Supreme Court has explained that a defendant's failure to assert an affirmative defense in its answer or pre-answer motion does not necessarily preclude the trial court from ruling on the merits of the defense. See Plyler v. Burns, 373 S.C. 637, 648-49, 647 S.E.2d 188 (2007). As the Supreme Court explained in Plyler, "because the aim of this pleading requirement is to avoid surprise defenses, see Rule 8(c), SCRCP note, many courts allow the assertion of affirmative defenses despite a technical failure to comply with the initial pleading requirements where the defense is timely raised to the trial court without resulting in unfair surprise to the opposing party." Id. at 648, 647 S.E.2d 188. This sensible application of the Rules of Civil Procedure finds unwavering support in decisional law of the federal courts applying materially identical provisions to South Carolina's Rules of Civil Procedure. See, e.g., Sanders v. Department of the Army, 981 F.2d 990, 991 (8th Cir. 1992) ("[E]ven if the government's answer did not properly preserve the limitations defense, the district court had the discretion, which it expressly exercised, to grant the government leave to amend its answer to include this omitted Rule 8(c) defense. It was not necessary for the district court to require the meaningless formality of an amended answer because the government's motion to dismiss, which expressly raised the limitations issue, provided [plaintiff] with sufficient notice.") (internal citation omitted); Grant v. Preferred Research, Inc., 885 F.2d 795, 797-98 (11th Cir. 1989) (holding district court did not err in ruling on defendant's statute of limitations defense, which was omitted from the defendant's answer but raised by motion prior to trial, and reasoning that "if a plaintiff receives notice of an affirmative defense by some means other than pleadings, the defendant's failure to comply with Rule 8(c) does not cause the plaintiff any prejudice.")

(internal quotation marks and citation omitted); Grunley Walsh U.S., LLC v. Raap, 386 Fed. Appx. 455, 459 (4th Cir. 2010) (similar, concerning the affirmative defense of release); Simmons, 196 F.R.D. at 298.

Presumably, appellant would have this Court vacate the Order of dismissal and remand so that the statute of limitations could be raised in an amended answer and then ruled upon by the trial court. There is no serious argument that the trial court would not (or could not) permit an amendment pursuant to Rule 15(a), SCRCP, and the only thing this circuitous route to judgment would accomplish is further delay in the resolution of a case which the pleadings of record clearly indicate is time-barred. See City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 232-33, 599 S.E.2d 462 (Ct. App. 2004) (explaining liberal standard for amending the pleadings under Rule 15(a) and emphasizing that the party opposing a motion to amend bears the burden of showing prejudice). In short, "[j]udicial economy supports dismissing a complaint for failure to satisfy the statute of limitations rather than requiring the defendant to file an amended answer asserting the defense." Waldner v. North Am. Truck & Trailer, Inc., 277 F.R.D. 401, 408 (D.S.D. 2011). Appellant was given every opportunity to contest the statute of limitations defense on the merits, and she would have gained nothing by the empty formality of an amended pleading raising the defense. Contrary to Appellant's position, the law does not require parties to undertake futile acts, and Appellant's wish for this Court to send the case back to the trial court for further development of the pleadings is mistaken. See Ward v. State, 343 S.C. 14, 19, 538 S.E.2d 245 (2000).

Finally, independent of the arguments set forth above, the trial court was authorized to adjudicate the statute of limitations defense on a motion urging the dismissal of the Complaint for failure to state a viable claim for relief. In this regard, the Respondent's 2006 Answer urged the dismissal of the case on the basis that the Complaint "fails to sate facts sufficient to constitute a cause of action"—echoing the familiar language of Rule 12(b)(6). (Answer, p. 2; R. p. 8, lines 11-12). Further, Rule 12(h)(2) preserves a party's right to raise the defense of failure to state a claim "by motion for judgment on the pleadings, or at the trial on the merits." Rule 12(h)(2), SCRCP. Of note, most courts permit affirmative defenses to be raised in a motion to dismiss under Rule 12(b)(6) "when there is no disputed issue of fact raised by an affirmative defense, or the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense." Spence v. Spence, 368 S.C. 106, 124, 628 S.E.2d 869 (2006); see also Haley v. Josey, 2010 U.S. Dist. LEXIS 16620, 5-6 (D.S.C. Feb. 3, 2010) (applying similar Federal Rule of Civil Procedure and holding that where the face of the complaint shows that a claim is time barred, it may be dismissed by a Rule 12(b)(6) motion); Farley v. CSX Transp., Inc., 144 Fed. Appx. 962 (4th Cir. 2005) (similar). In this case, as in Spence, "there is no disputed issue of fact raised by" the defense, "the facts are completely disclosed on the face of the pleadings, and realistically nothing further can be developed by pretrial discovery or a trial on the issue raised by the defense." 368 S.C. at 124, 628 S.E.2d 869. The trial court thus possessed authority to rule on the merits of Respondent's

statute of limitations defense.[1]

3. Respondent is Not Estopped From Asserting the Statute of Limitations by the Covenant Not to Execute

A. Appellant Did Not Reasonably Rely On Any Unambiguous Promise of Respondent to Waive the Statute of Limitations

As an initial matter, Appellant did not argue promissory estoppel in the trial court and is therefore barred from doing so now. All of Appellant's prior arguments regarding the Covenant Not to Execute are based on contract law. "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." Wilder Corp. v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Even should the Court entertain the promissory estoppel argument, Appellant's arguments must fail. The Covenant in no way prevents Respondent from now raising the statute of limitations. To the contrary, the Covenant confirms Respondent's right to do so.

> The elements of promissory estoppel are: (1) the presence of a promise unambiguous in its terms; (2) reasonable reliance upon the promise by the party to whom the promise is made; (3) the reliance is

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[1] In her appellate brief, Appellant asserts in conclusory fashion that third-party subpoenas Respondent's counsel's served in or about early 2009—years before Appellant moved to restore the case—waives the statute of limitations defense. (Appellant's Final Brief, p. 7.) Appellant failed to present this argument to the trial court, and it consequently is not before this Court. See Wilder Corp v. Wilke, 330 S.C. 71, 76, 497 S.E.2d 731 (1998). Regardless, Appellant cites no authority that actually supports her position, and it fails on the merits.

expected and foreseeable by the party who makes the promise; and (4) the party to whom the promise is made must sustain injury in reliance on the promise.

Woods v. State, 314 S.C. 501, 505, 431 S.E.2d 260, 263 (Ct. App. 1993). Reviewing the Covenant, Appellant's promissory estoppel argument fails at the outset as the Respondent in no way unambiguously promised to waive the statute of limitations. Moreover, Appellant did not and could not have reasonably relied on such a promise in light of the case law confirming Appellant's continued duty to pursue her claim against Plush and in light of the clear language preserving Plush's right to contest liability and expressly disclaiming any opinion or representation with regard to the availability of UIM coverage.

Notably, South Carolina has established that a release agreement between an insured and a named defendant does not grant the insured a new right of action for the purpose of establishing an entitlement to UIM benefits and does not impliedly waive the statute of limitations for the underlying claim. See Louden v. Moragne, 327 S.C. 465, 467, 486 S.E.2d 525 (Ct. App. 1997). In Louden, as in this case, the clear language of the release indicated that the plaintiff insured "merely preserved her right to pursue a tort action against [the named defendant driver] to establish her entitlement to underinsured motorist benefits." Id. The Court of Appeals held that the right exists from the date of the accident and is not created by the release. Id. (holding three-year statute of limitations was correctly applied to bar plaintiff's action against named defendant for UIM benefits, where the insurer was properly served but the named defendant was not served within the limitations period).

The clear language of the Covenant indicates that Appellant "merely preserved her right to pursue a tort action against" Plush for the purpose of UIM benefits. It permitted Appellant the right to bring suit against Plush if she was unable to resolve her UIM claim. Memorandum in Opposition to Defendant's Motion to Dismiss, Covenant, ¶ 1; R. p. 119, lines 29-31. There is no specific mention of the statute of limitations in the Covenant, and there is no indication it was ever considered by any of the parties. On the contrary, the Covenant specifically stated that Plush made no representation as to the effect of the Covenant on Appellant's claim for UIM benefits, and Appellant "expressly acknowledge[d] this disclaimer." Memorandum in Opposition to Defendant's Motion to Dismiss, Covenant, ¶ 7; R. p. 120, lines 21-27. Pursuant to the Covenant's plain terms, the parties also "expressly recognize[d]" that the claim against Plush was "doubtful and disputed," that Plush denied liability to Appellant, and that the Covenant was not to be construed as an admission of liability. Memorandum in Opposition to Defendant's Motion to Dismiss, Covenant, ¶ 10; R. p. 120, lines 39-42. Finally, Appellant in the Covenant expressly "acknowledge[d] that [Plush] made no representations on the availability of underinsured motorist coverage should this Covenant be executed." Memorandum in Opposition to Defendant's Motion to Dismiss, Covenant, ¶ 14; R. p. 121, lines 9-12. Appellant merely reserved a right to pursue her claim against Plush, not an absolute right to succeed on her UIM claim—and certainly not an absolute right to pursue a claim for UIM benefits in perpetuity.

Moreover, Appellant had ample opportunity, nearly a year after the execution of the Covenant Not to Execute, to pursue her case against Plush. See Graham v. Dorchester County Sch. Dist., 339 S.C. 121, 125, 528 S.E.2d 80 (Ct. App. 2000) (stating

the "one year period provided for in Rule 40(j) constituted a reasonable time for [plaintiff] to move to restore her case to the active roster" and holding application of Rule 40(j) did not deprive the plaintiff of an opportunity to proceed with her case). Her arguments to the contrary, that the statute of limitations had already run at the execution of the Covenant, and that consequently the Covenant impliedly waived the statute of limitations defense, are simply baseless.

B. The Reservation of a Right to Pursue an Action for Underinsured Motorist Benefits Does Not Diminish Appellant's Duty to Preserve Her Claim Against Respondent

Under the UIM statute, Appellant was required to preserve her claim against Plush in order to pursue UIM benefits. The statute provides in pertinent part,

> The insurer has the right to appear and defend in the name of the underinsured motorist in any action which may affect its liability and has thirty days after service of process on it in which to appear. . . . In the event the automobile insurance insurer for the putative at-fault insured chooses to settle in part the claims against its insured by payment of its applicable liability limits on behalf of its insured, the underinsured motorist insurer may assume control of the defense of action for its own benefit.

S.C. Code Ann. § 38-77-160 (2002). The Supreme Court of South Carolina has interpreted the UIM statute to require the insured to "preserve the right of action against an at-fault driver so long as the underinsured carrier has not agreed to the amount and payment of underinsured motorist benefits." Williams v. Selective Ins. Co., 315 S.C. 532, 534–35, 446 S.E.2d 402 (1994). In Williams, the insured

settled with the driver's liability carrier and, although an action was filed against the UIM carrier, the insured failed to pursue an action against the driver within the limitations period. Id. The Court found that the insured's failure to pursue an action against the driver resulted in a total waiver of the UIM carrier's right to defend, a result that runs contrary to the purpose of the UIM statute. Id. at 534. "The purpose of § 38-77-160 is to avoid such a result." Id. (affirming summary judgment for carrier against insured).

Appellant attempts to distinguish the instant case from Williams by arguing that the UIM carrier was served as required within the statute of limitations. However, Appellant's purported "service" of the 2006 pleadings on GEICO in July 2008 was a nullity because there was no pending action at that time. Further, regardless of the status of service on GEICO as the UIM carrier, the Appellant was required to preserve her claim against the Respondent.

The UIM statute requires copies of the pleadings in the liability action to be "served in the manner provided by law" on the UIM carrier, see S.C. Code Ann. § 38-77-160 (2002), and requires that the insured serve the UIM carrier as provided by statute and the Rules of Civil Procedure. See Ex parte S.C. Farm Bureau, 314 S.C. 487, 489–90, 431 S.E.2d 252 (1993); Franklin v. Devore, 327 S.C. 418, 423, 489 S.E.2d 651 (Ct. App. 1997) (applying uninsured motorist (UM) statute, S.C. Code Ann. § 38-77-150, which contains language identical to the UIM statute). Under Rule 3 of the South Carolina Rules of Civil Procedure, both filing and service are required to institute an action. Kiriakides v. School Dist. Of Greenville County, 382 S.C. 8, 675 S.E.2d 439 (2009). Until an action is

commenced, there is no proceeding. Chabek v. Nationwide Mutual Fire Ins. Co., 303 S.C. 26, 397 S.E.2d 786 (Ct. App. 1990).

Appellant's case had been dismissed without prejudice in 2007 and was not pending when she attempted to serve GEICO in July 2008. Because the action had been dismissed and no subsequent action had commenced, there was simply no proceeding in which GEICO could have been served. Furthermore, regardless of whether Appellant attempted to serve GEICO, the fact remains she failed to preserve her claim against the Respondent. Under Williams and the UIM statute, Appellant was required to preserve her claim against Plush so long as GEICO did not agree to the amount and payment of UIM benefits. S.C. Code Ann. § 38-77-160 (2002); 315 S.C. at 534–35. The statute of limitations on Appellant's claim expired, at the latest, in September 2008. As she did not preserve her claim against Respondent, she may not pursue UIM benefits against GEICO. To allow otherwise would run contrary to the purpose of the statute.

4. Important Public Policy Concerns Embodied by the Statute of Limitations Mandate the Affirmance of the Trial Court's Order of Dismissal.

The plain language and purposes of the statute of limitations, S.C. Code Ann. § 15-3-530 (2005), as well as established case law, require the dismissal of Appellant's claims. In essence, Appellant argues that the statute of limitations cannot be applied to her claim—ever. The effect of this position renders the right to pursue her claim absolute and permanent, superior to any application of the statute of limitations. Under this interpretation, Appellant would retain the right to restore her suit against Respondent forever and could exercise it at any time from now until eternity.

Such a result runs contrary to the plain language of statutes codifying South Carolina's limitations periods, as well as the important purposes underlying them. See S.C. Code Ann. § 15-3-20(A) (2005) ("Civil actions may only be commenced within the periods prescribed in this title after the cause of action has accrued, except when, in special cases, a different limitation is prescribed by statute"); Kelly v. Logan, Jolley, & Smith, L.L.P., 383 S.C. 626, 632, 682 S.E.2d 1 (Ct. App. 2009) ("Statutes of limitations embody important public policy concerns as they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs"; "One purpose of a statute of limitations is 'to relieve the courts of the burden of trying stale claims when a plaintiff has slept on his [or her] rights'"; "Another purpose of a statute of limitations is to protect potential defendants from protracted fear of litigation") (internal citations omitted); see also City of N. Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231, 599 S.E.2d 462 (Ct. App. 2004) ("Statutes are designed to promote justice by forcing parties to pursue a case in a timely manner"; "Parties should act before memories dim, evidence grows stale or becomes nonexistent, or other people act in reliance on what they believe is a settled state of public affairs"; "They protect people from being forced to defend themselves against stale claims"; "[They] recognize that with the passage of time, evidence becomes more difficult to obtain and is less reliable"; "With passing time, a defendant faces an increasingly difficult task in formulating and mounting an effective defense"; "[They] encourage plaintiffs to initiate actions promptly while evidence is fresh and a court will be able to judge more accurately").

Appellant's position in this case would contradict the "important public policy concerns" underlying those statutes. In short, Appellant's claim must be subject to *some*

statute of limitations, and Appellant's argument to the contrary lacks basis in law or in fact. Neither society nor its citizenry can sanction a system of civil justice that would allow a party to restore a case whenever he or she may choose in the never-too-distant future and thus subject defendants to a claim in perpetuity. The statute of limitations expired years ago, and Appellant did not timely pursue her claim within those limitations. Appellant's efforts to blame the trial court and Respondent for her own dilatory conduct are unavailing.

CONCLUSION

A system of justice in which claims can be made at any time, until the end of time, is untenable. As such, the three-year statute of limitation found in S.C. Code Ann. § 15-3-530 (2005) is critical to the just and efficient resolution of disputes. Unfortunately for her position, although Appellant initially filed her claim in a timely manner, she failed to take advantage of the tolling available under South Carolina Rule of Civil Procedure 40(j), and therefore the trial court was correct in dismissing the restored claim as barred by the statute of limitations.

Neither the execution of a Covenant Not to Execute, nor the fact that the statute of limitations was not raised in the Answer initially filed on behalf of the Respondent changes this analysis. The Covenant could not and did not guarantee Appellant an indefinite and absolute right to UIM benefits. The most it could confer in that regard was the right to pursue a judgment against Respondent in order to make a claim for UIM benefits until the statute of limitations ran in September 2008. Appellant failed to take advantage of this opportunity. Once the claim was restored to the docket in February of 2012, the statute of limitations defense was promptly, and timely, raised. There was no

unfair surprise to the Appellant, and the inevitable conclusion that the case is time barred is apparent from the face of the pleadings of record.

Based on the foregoing, Respondent respectfully submits the trial court correctly granted Respondent's Motion to Dismiss on statute of limitations grounds and requests that the trial court's Order be affirmed.

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October 7, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

Doyet A. Early, III, Circuit Court Judge

Case No. 2012-212686

Marsha Temples, Appellant,

v.

Neil O. Plush, Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

October 7, 2013

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PROOF OF SERVICE

I certify that I have served the Final Brief of the Respondent on the above-listed Appellant by depositing a copy of it in the United States Mail, postage prepaid, on October 7, 2013, addressed to Appellant's attorney of record as detailed below

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