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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC 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.

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STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR IN DENYING WASHINGTON'S MOTION FOR ENTRY OF DEFAULT AGAINST JOHN DOE WHEN MORE THAN THIRTY DAYS ELAPSED WITHOUT SERVICE OF AN ANSWER OR OTHER RESPONSIVE PLEADING?

II. DID THE LOWER COURT ERR IN GRANTING 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?

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 Appellant, Arthur Washington's ("Washington") Motion for Entry of Default against John Doe. (R. pp. 4-10). This action arises out of a collision that occurred between Washington's vehicle and a Resort Services, Inc. ("Resort Services") delivery truck on February 26, 2009 in Bluffton, South Carolina. (R. p. 14, ¶ 3). 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). 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. 88-154).

Washington moved to amend his Complaint on March 12, 2012, to assert an uninsured motorist claim against his 21st Century policy. (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, John Doe filed a Motion to Dismiss based on the statute of limitation. (R. pp. 49-50). On March 28, 2014, Washington filed a Motion for Entry of

Default against John Doe for failing to file an answer or other responsive pleading 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. 80). 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).

Upon receipt of the lower court's order, Washington filed a Motion to Alter or Amend on May 9, 2014, pursuant to Rules 52(b) and 59(e), SCRCP. (R. pp. 39-41). In an Order filed June 4, 2014, the lower court denied Washington's Motion to Alter or Amend. (R. p. 11). Upon receiving the lower court's Order, Washington filed a timely Notice of Appeal on June 30, 2014. (R. pp. 161-162).

FACTS

This action arises out of a collision between Washington and a 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. 117). 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.

Due to the nature of this appeal, the facts surrounding the procedural history and discovery process are relevant. The remainder of the fact section will focus on these events.

After service of its original Answer, Resort Services filed an Amended Answer that added two new affirmative defenses – (1) acts or omissions causing Washington's damages were acts of others not employed by Resort Services, and (2) Washington's damages were the result of a criminal act of a third person. (R. p. 37, ¶¶ 7-8). Prior to Resort Services filing its Amended Answer, 21st Century was served and filed a Notice of Appearance which states that "the undersigned attorneys hereby appear on behalf of 21st Century Insurance, in the above-entitled action . . . ." (R. pp. 32-33). 21st Century was therefore on notice that Resort Services alleged the accident was caused by an unknown driver.

During the pendency of this action, counsel that appeared for 21st Century served interrogatories and requests to produce, filed a motion to compel, (R. pp. 51-52), and attended and questioned Washington during his deposition. (R. pp. 143-147). Following Washington's deposition, he moved to amend the complaint to assert an uninsured motorist claim against John Doe since Resort Services alleged someone stole the truck involved in the collision with Washington. (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, John 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. 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. (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 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 language amended and/or corrected because 21st Century filed a notice of appearance, engaged in discovery, and had knowledge of the Amended Complaint that asserted an uninsured motorist claim against John Doe. 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). As Washington's insurance carrier, 21st Century, filed a notice of appearance, engaged in discovery, and questioned Washington during his deposition, the Amended

Summons and Complaint should relate back under Rule 15(c), SCRCP and the lower court's order should be reversed.

STANDARD OF REVIEW

I. DENIAL OF ENTRY OF DEFAULT

A defendant must serve his answer or other responsive motion within thirty days "after the service of the complaint upon him" unless an extension is granted. Rule 12(a), SCRCP. If a party fails 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." Rule 55(a), SCRCP (emphasis added). Under Rule 55(a), SCRCP, there is no discretion as the "[e]ntry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party." Stark Truss Co. v. Superior Constr. Corp., 360 S.C. 503, 509, 602 S.E.2d 99, 102 (Ct. App. 2004).

II. MOTION TO DISMISS BASED ON THE STATUTE OF LIMITATIONS

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Id. If the facts and inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper. Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006); Clearwater Trust v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006).

Furthermore, the complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. Spence, 368 S.C. at 116-17, 628 S.E.2d at 874.

ARGUMENT

This appeal presents the question of who is the real party in interest for John Doe for the purposes of an uninsured motorist (UM) claim against Washington's own automobile insurance company. For the purposes of this appeal, Washington contends the real party in interest for John Doe is 21st Century. John Doe is a fictitious party for the purposes of asserting a claim for uninsured motorist coverage. A judgment cannot be collected against John Doe except through the uninsured motorist coverage on Washington's insurance policy. Since a new claim was asserted against 21st Century – a party that had already appeared and engaged in discovery – the Amended Complaint should relate back to the date of the original complaint as 21st Century filed a Notice of Appearance, engaged in discovery, and questioned Washington during his deposition prior to the filing of the Amended Complaint. Alternatively, in the event 21st Century is not the real party in interest for John Doe, then John Doe is in default since more than thirty-days elapsed after service on the Beaufort County Clerk of Court pursuant to S.C. Code Ann. § 38-77-180.

The lower court erred in granting Doe's Motion to Dismiss based on the statute of limitation and denying Washington's Motion for Entry of Default since more than thirty days elapsed after service of the Amended Summons and Complaint on the Beaufort County Clerk of Court as authorized by § 38-77-180. As a result, the Amended Complaint asserting an uninsured motorist claim against John Doe should relate back pursuant to Rule 15(c), SCRCP, when the real party in interest, 21st Century, filed an

appearance, engaged in discovery, and questioned Washington during his deposition before the filing of the amended complaint. The lower court's Order should be reversed.

I. THE LOWER COURT ERRED IN DENYING PLAINTIFF'S MOTION FOR ENTRY OF DEFAULT AGAINST JOHN DOE WHEN MORE THAN THIRTY DAYS ELAPSED WITHOUT SERVICE OF AN ANSWER OR OTHER RESPONSIVE PLEADING AFTER BEING SERVED PURSUANT TO S.C. CODE ANN. § 38-77-180

In the event 21st Century Insurance is not the real party in interest representing John Doe, then the lower court's Order should be reversed on this ground and Doe should be in default as he was served in accordance with S.C. Code Ann. § 38-77-180 by delivering a copy of the Amended Summons and Complaint to the Beaufort County Clerk of Court. After receipt by the Beaufort County Clerk of Court, Doe did not serve an Answer or other responsive pleading as required by Rule 12, SCRCP. Section 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 does not require service on 21st Century to assert an uninsured motorist claim.

Once the Amended Summons and Amended Complaint were delivered to the Beaufort County Clerk of Court pursuant to § 38-77-180 on August 2, 2012, John Doe had thirty days in which to file an answer or other responsive pleading as required by Rule 12, SCRCP. Rule 12(a) provides, in part, "[a] defendant shall serve his answer within 30 days after the service of the complaint upon him, unless the Court directs otherwise when service

of process is made pursuant to Rule 4(e) . . . ." After thirty days elapsed without an answer or other responsive pleading, an entry of default was proper as Doe failed to answer or otherwise appear as required by Rule 55, SCRCP. Rule 55(a) provides: "[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 (file book)." As a result of failing to answer or otherwise appear within thirty days from August 2, 2012, the lower court should have granted Washington's Motion for Entry of Default. Stark Truss Co. makes clear that an "[e]ntry of default is a ministerial act which a clerk is required to perform once default is made to appear by the affidavit of the moving party." 360 S.C. at 509, 602 S.E.2d at 102; see also Thynes v. Lloyd, 294 S.C. 152, 153-54, 363 S.E.2d 122, 123 (Ct. App. 1987) ("whether default was actually entered is of no consequence since the entry of default is a purely ministerial act which the clerk was required to perform once the default was made to appear by affidavit"). Washington's Motion for Entry of Default was accompanied by an Affidavit of Default as required by Rule 55(a), SCRCP, setting forth the service on the Beaufort County Clerk of Court pursuant to § 38-77-180. (R. pp. 44-46).

In denying Washington's Motion for Entry of Default, however, the lower court relies on S.C. Code Ann. § 38-77-150 for the proposition that the uninsured motorist carrier – 21st Century – must be served as well for John Doe to be in default. Section 38-77-150(b) provides:

> No action may be brought under the uninsured motorist provision unless copies of the pleadings in the action establishing liability 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. The evidence of service upon the insurer may not be made a part of the record.

S.C. Code Ann. § 38-77-150(b).

The lower court notes that § 38-77-150(b) "makes clear that **no action** can be brought binding a UM carrier in a John Doe case unless the pleadings are served on the UM carrier in a manner prescribed by law, which in South Carolina is through the Department of Insurance." (R. p. 9) (emphasis in original). In denying Washington's Motion for Entry of Default, the lower court ignores that the UM carrier – 21st Century – had already been served through the Department of Insurance, filed a Notice of Appearance, engaged in discovery, questioned Washington during his deposition, and was aware of the motion to amend the complaint to assert an uninsured motorist claim against John Doe.

Section 15-9-270 of the South Carolina Code of Laws 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[1] for purposes of the underinsured claim, § 15-9-270 mandates that service was "sufficient upon the company."

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[1] 21st Century Insurance's Notice of Appearance and Conditional Answer is dated March 15, 2011. (R. pp. 32-33).

Irrespective of whether it was served for the purposes of an UIM[2] or UM claim, Washington's own automobile insurance carrier, 21st Century was served, filed a notice of appearance, and engaged in discovery prior to the expiration of any purported statute of limitation. If it is necessary to serve 21st Century again, as the lower court holds, for the purposes of starting the thirty day time period to file an answer or other responsive pleading, then 21st Century is the real party in interest for John Doe. Under the facts of this appeal, 21st Century cannot have it both ways. It cannot be necessary to serve 21st Century through the Department of Insurance to trigger the time to file an answer for John Doe all while 21st Century distances itself from the notice of appearance and discovery it engaged in prior to any purported expiration of the statute of limitation.

The lower court's order also incorrectly holds that the UM carrier – 21st Century – should not be found in default without any prior notice of this lawsuit naming John Doe because it violates the Due Process Clause under the United States Constitution and South Carolina Constitution. (R. p. 9). Washington's Motion to Alter or Amend sought to correct this finding because 21st Century was served, filed a notice of appearance, engaged in discovery, and questioned Washington during his deposition – all of which occurred before the amended summons and complaint were filed naming John Doe. (R. p. 58). To state that 21st Century did not have prior notice of this lawsuit is incorrect and contrary to the

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[2] Claims for underinsured motorist coverage are governed by S.C. Code Ann. § 38-77-160, which provides, in part:

> No action may be brought under the underinsured motorist provision unless copies of the pleadings in the action establishing liability ***are served in the manner provided by law upon the insurer*** writing the underinsured motorist provision.

S.C. Code Ann. § 38-77-160 (emphasis added).

evidence. The lower court's order denying Washington's Motion for Entry of Default should be reversed.

II. THE TRIAL COURT ERRED IN GRANTING JOHN DOE'S MOTION TO DISMISS BASED ON THE STATUTE OF LIMITATION WHEN WASHINGTON'S OWN INSURANCE CARRIER, 21ST CENTURY, FILED A NOTICE OF APPEARANCE AND ENGAGED IN DISCOVERY PRIOR TO THE FILING OF THE AMENDED COMPLAINT THAT ASSERTED AN UNINSURED MOTORIST CLAIM

A. The Claim for Uninsured Motorist Coverage in the Amended Complaint Was Against a Party – 21st Century – that had Already Been Served, Appeared, and Engaged in Discovery

The Amended Complaint relates back to the original Complaint that was filed on January 3, 2011, as a new claim – one for uninsured motorist coverage – was asserted against a party – 21st Century – that had already appeared, engaged in discovery, and questioned Washington during his deposition. For the purposes of this appeal, Washington contends that the uninsured motorist claim asserted in the Amended Complaint is a new claim asserted against an already existing party but that can only be maintained by statute against John Doe.[3] S.C. Code Ann. § 38-77-180. The lower court, in granting Doe's Motion to Dismiss, mischaracterizes Washington's argument that this is a new claim asserted against a party that has already appeared as one of adding a party (John Doe) after the expiration of the statute of limitation. The Order states that "the Plaintiff argues that the *addition* of John Doe as a party after the Statute of Limitations should be permitted . . . ." (R. p. 6). However, at the hearing, Washington argued that "it's our contention that really

[3] An uninsured motorist claim against John Doe where the owner or operator is unknown is required by S.C. Code Ann. § 38-77-180. It is possible, however, to have an uninsured motorist claim when the identity of the at-fault driver is known but uninsured. In that instance, an action would be based on S.C. Code Ann. § 38-77-150 and the at-fault driver would be the defendant.

what you have here is a change from the claim of an insurance company as the UIM counsel compared to the uninsured or John Doe action." (R. p. 83).

In Stanley v. Kirkpatrick, the Supreme Court makes clear that new claims against existing parties relate back pursuant to Rule 15(c), SCRCP. Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004). In that case, Wanda Stanley filed and served her original complaint asserting a § 1983 claim against the City of Columbia and Kevin Kilpatrick in February 1997 out of events that occurred in July 1996. Id. at 172-74, 592 S.E.2d at 297-98. In July 1998, the City moved for summary judgment. Id. at 174, 592 S.E.2d at 298. Subsequently, Stanley moved to amend her complaint to add the tort claims of trespass and conversion. Id. The trial court "issued an order denying [Stanley's] motion to amend on the basis it was made more than two years after the incident and that the applicable statute of limitations had passed on the causes of action against the City under the South Carolina Tort Claims Act." Id. On appeal, the Supreme Court held the trial court erred by not allowing the amendment. Id. at 175, 592 S.E.2d at 298. In so holding the Court noted that "given the facts of the case, i.e. the events giving rise to the claims, are not different from the facts that gave rise to the § 1983 claim . . . ." Id. The Supreme Court also held the City's argument that it was prejudiced because the statute of limitations had passed was without merit and the claim related back under Rule 15(c): "Respondent's tort claims arose out of the conduct previously set forth in the original complaint. The factual circumstances of the tort claims of trespass and conversion have already been set out in the original complaint asserting a § 1983 claim." Id. at 175, 592 S.E.2d at 299.

In this case, the Amended Complaint asserted a new claim – one for UM coverage – against 21st Century, a party that had already appeared and engaged in discovery before the

filing of the Amended Complaint. Rule 15(c) provides: "[w]henever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading." As set forth in Stanley, the Amended Summons and Complaint filed August 2, 2012 should relate back pursuant to Rule 15(c), SCRCP, and the lower court's Order should be reversed.

B. Jackson v. Doe is Distinguishable from the Facts Here as 21st Century Insurance Appeared in March 2011, Engaged in Discovery, and Questioned Washington During His Deposition Before the UM Claim Was Asserted

Even if the uninsured motorist claim is not a new claim against a party that already appeared, then the allegations against John Doe arose out of the conduct set forth in the original complaint and relate back pursuant to Rule 15(c), SCRCP. Washington's uninsured carrier, 21st Century, received notice, appeared, engaged in discovery, questioned Washington during his deposition, and therefore cannot assert any prejudice in maintaining its defense. Based on Resort Services' Amended Answer 21st Century was on notice that the action may involve a claim against John Doe if a dispute arose as to whether the Resort Services truck was stolen.

The lower court incorrectly holds that the Amended Complaint asserting a UM claim against John Doe does not relate back pursuant to Rule 15(c), SCRCP, in granting Doe's Motion to Dismiss despite 21st Century's appearance, engaging in discovery, and questioning of Washington during his deposition. In granting Doe's motion to dismiss based on the statute of limitation, the Court incorrectly relies on the holding in Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000). Jackson is distinguishable from this case because here 21st Century filed a notice of appearance, engaged in discovery,

questioned Washington during his deposition prior to any expiration of the statute of limitations. Therefore 21st Century cannot assert any prejudice as to the UM claim against John Doe.

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, 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. Rule 15(c), SCRCP, provides:

> Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction or occurrence set forth or attempted to be set forth in the original pleadings, the amendment relates back to the date of the original pleading.
>
> An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

In Jackson, the Court of Appeals used a four-part test to determine when Rule 15(c) applies:

> (1) the basic claim must have arisen out of the conduct set forth in the original pleading; (2) the party to be brought in must have received such notice that it will not be prejudiced in maintaining its defense; (3) that party must or should have known that, but for a mistake concerning the identity, the action would have been brought against it; and (4) the second and third requirements must have been fulfilled within the prescribed limitations period.

Id. at 558, 537 S.E.2d at 570 (quoting Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 214, 442 S.E.2d 584 586 (1994)). Based on the fact that Milligan was added as a party, the Court of Appeals affirmed the trial court's decision to grant summary judgment based on the statute of limitation. Id. at 559, 537 S.E.2d at 570.

Then Chief Judge Hearn dissented in Jackson because she "believe[d] Jackson's amended complaint relates back to the original cause of action under Rule 15(c), SCRCP. . . ." Id. at 559, 537 S.E.2d at 571. "Allowing the amended pleading to relate back will work substantial justice to all parties and is consistent with the liberal construction of Rule 15(c) adopted by our Supreme Court in Hughes." Id. at 561, 537 S.E.2d at 572.

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 limitations. (R. pp. 32-33), engaged in discovery (R. pp. 51-52), and questioned Washington during his deposition (R. pp. 88-154).

Moreover, based on the evidence in this all four factors of the Rule 15(c) analysis are satisfied and warrant the Amended Complaint filed on August 2, 2012, asserting an uninsured motorist claim against John Doe relating back to the date of the original complaint, January 3, 2011. The allegations against John Doe arose out of the conduct set forth in the original complaint. Washington's uninsured carrier, 21st Century, was served, appeared, engaged in discovery, questioned Washington during his deposition, and therefore cannot assert any prejudice in maintaining its defense. 21st Century should have known that the action would have been brought against John Doe if a dispute arose as to whether the Resort Services truck was stolen. (R. p. 132). Finally, these factors occurred within the prescribed limitations period.

Jackson also supports Washington's position that the filing date of the Amended Summons and Complaint against John Doe should relate back to the date of the original filing date of the summons and complaint pursuant to Rule 15(c). "Rule 15(c) clearly speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant." Id. at 558, 537 S.E.2d at 570. Washington's insurance carrier, 21st Century, had already appeared and engaged in discovery and was therefore already a party to this action. With the inclusion of an UM claim, 21st Century, the real party in interest for John Doe, is merely changed from a potential UIM carrier to that of UM. As a result, 21st Century is not added as a new party and the amended complaint asserting an UM claim against John Doe should relate back pursuant to Rule 15(c), SCRCP. The lower court's order on this ground should be reversed.

C. 21st Century Insurance (i.e. John Doe) Appeared in This Action in March 2011

In granting Doe's motion to dismiss the lower court also incorrectly concludes that 21st Century's appearance for the purposes of UIM claim is not the equivalent of an appearance on behalf 21st Century – the same insurance carrier with the same insurance policy – for the purposes asserting an UM claim. Although 21st Century may like to limit its appearance in this action, the first sentence of the Notice of Appearance and Conditional Answer on behalf of 21st Century specifically states otherwise: "the undersigned attorneys hereby appear on behalf of 21st Century Insurance, in the above-entitled action . . . ." (R. pp. 32-33). Moreover, the lower court's Order incorrectly states that "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). Contrary to the lower court's Order, the Notice of Appearance provides that "[t]he undersigned further states that he and his law firm at this time do not represent the defendant and are not at this time undertaking such representation. . . ." (R. pp. 32-33). The attorney for 21st Century, Ravi C. Sanyal, signed the Notice of Appearance and Conditional Answer as "Attorney for 21st Century Insurance Company appearing pursuant to S.C. Code Ann. § 38-77-160 on behalf of 21st Century Insurance Company." (R. pp. 32-33).

After receipt of the lower court's Order granting Doe's Motion to Dismiss, Washington moved to alter or amend given that the Notice of Appearance and Conditional Answer unequivocally state the contrary that counsel is not appearing on behalf of Resort Services. (R. pp. 39-41; pp. 53-61). At the time counsel appeared on behalf of 21st Century, Resort Services retained separate counsel who filed an Answer. (R. pp. 23-26). Despite the evidence regarding the appearance on behalf of 21st Century, the lower court denied Washington's motion to alter or amend the Order. (R. p. 11). As

21st Century filed a notice of appearance and conditional answer in March 2011, engaged in discovery, and questioned Washington during his deposition, the filing of the Amended Complaint asserting an uninsured motorist claim against John Doe should relate back pursuant to Rule 15(c), SCRCP. For these reasons[4], the lower court's order granting Doe's Motion to Dismiss based on the statute of limitation should be reversed.

CONCLUSION

In this case, Washington's own automobile insurance company, 21st Century, filed a notice of appearance, engaged in discovery, and questioned Washington during his deposition prior to the filing of the Amended Complaint that asserted an uninsured motorist claim. If it is necessary to serve 21st Century through the Department of Insurance for the purpose of maintaining an uninsured motorist claim against John Doe, then 21st Century is the real party interest. If 21st Century is the real party in interest for John Doe, then the Amended Summons and Complaint should relate back pursuant to Rule 15(c), SCRCP. However, if 21st Century is not the real party in interest for John Doe, then John Doe should be in default by not filing an answer or other responsive pleading required by Rule 12, SCRCP, within thirty days. For either of these reasons, the

[4] Washington's Motion to Alter or Amend also sought to alter the lower court's order regarding equitable tolling of the statute of limitation based on Washington's attorney, Charles Houston's suspension from the practice of law. (R. pp. 7-8). At no point during the hearing did the undersigned counsel for Washington assert that the statute of limitation should be equitably tolled due to Mr. Houston's suspension because Mr. Houston was not suspended until after the amended summons and complaint were filed. (R. pp. 78-86). At the hearing, the trial judge stated: "I'm not really interested in anything about Houston in your Order, because he was not suspended at the time the statute ran." (R. p. 85). Washington, in his motion to alter or amend, requested this be corrected since it was not a basis put forth to deny Doe's motion to dismiss based on the statute of limitations (R. pp. 39-41). Washington also appeals reference in the lower court's Order but the finding is not dispositive of this appeal. Washington merely includes this footnote to properly preserve all issues arising from the lower court's Order.

lower court's order granting Doe's motion to dismiss based on the statute of limitations and denying Washington's motion for entry of default should be reversed.

Respectfully submitted,

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February 18, 2015
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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

RECEIVED
FEB 26 2015
SC Court of Appeals

J. Ernest Kinard, Jr., Circuit Court Judge

Case No.: 2011-CP-07-0001

Arthur Washington, ... Appellant,

-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, 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 Brief with Certificate of Counsel*** to:

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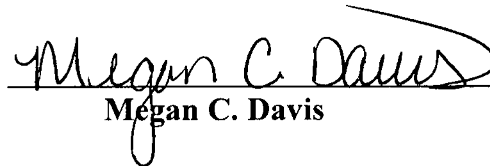

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February 23rd, 2015
Hampton, South Carolina

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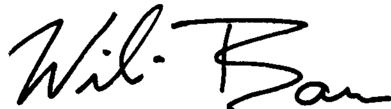
CERTIFICATE OF COUNSEL

The Undersigned hereby certifies that the Final Brief complies with Rule 211(b), SCACR.



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