THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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Case No.: 2011-CP-07-0001

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Arthur Washington,.....Appellant,

v.

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

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# FINAL BRIEF OF RESPONDENT JOHN DOE

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## STATEMENT OF THE CASE

On February 26, 2009, Appellant Arthur Washington, plaintiff below, was involved in a motor vehicle accident when the car he was driving collided with a Resort Services, Inc. 1998 GMC truck that was protruding into Buck Island Road, in Bluffton, South Carolina. (Summons and Complaint, filed January 3, 2011, R. 13-16) ("Complaint"). Appellant testified at his deposition that, at the time the collision occurred, the truck did not have its lights on. (Washington Depo. R. 122, lines 3-4). Appellant testified that he did not see the driver, did not know who the driver was, and did not see anyone leave the scene after the accident. (Id., R. 127, lines 8-11) (Id., R. 131, lines 19-25) (Id., R. 133, lines 13-17). Appellant also testified had been told that the truck was stolen and the driver may have fled. (Id., R. 134, line 2-18).

On January 3, 2011, within the statute of limitations, Appellant filed suit against Resort Services only. (Complaint, R. 13-16). Resort Services, the only defendant named, filed an Answer on January 27, 2011 (Answer of Resort Services Inc., filed January 27, 2011, R. 23-26), and an Amended Answer on April 18, 2011 (Amended Answer of Resort Services, filed April 18, 2011, R. 34-38) ("Amended Answer"). In its Amended Answer, Resort Services asserted, among other things, the affirmative defense that Appellant's damages were caused by the intervening willful, malicious and criminal act of a third person beyond Resort Services' control. (Amended Answer, R. 37).

On March 14, 2011, Counsel for 21st Century Insurance Company ("UIM Carrier") filed a Notice of Appearance and Conditional Answer on behalf of the underinsured motorist carrier. (Notice of Appearance and Conditional Answer (Jury Trial Demanded), date d March 14, 2011, R. 32-33) ("Notice of Appearance and

Conditional Answer"). The appearance was "made pursuant to S.C. Code §38-77-160 (1976, as amended)," South Carolina's Underinsured ("UIM") statute. The Notice of Appearance and Conditional Answer stated that, "upon settlement of the automobile liability insurer for the putative at-fault defendant with the plaintiff herein, this underinsured motorist carrier may join with the automobile liability insurer for the defendant in providing a defense." As the UIM Carrier, 21st Century made it clear that it reserved the right to undertake representation of the named Defendant, Resort Services, "pursuant to the underinsured motorist statute should the carrier choose to exercise that option." Furthermore, the UIM Carrier contested service[1] and reserved the right to file a full Answer if and when it assumed the defense of the case. (R. 32-33). At the time the UIM Carrier entered its Notice of Appearance and Conditional Answer, the **only** defendant was Resort Services. (Complaint, R. 13-16).

As the accident occurred on February 26, 2009, the applicable 3-year statute of limitations ran on February 26, 2012. *See* S.C. Code Ann. § 15-3-535 (three-year statute of limitations applies to personal injury claims).

After the statute of limitations had run, Appellant filed a motion to amend his Complaint. (Motion to Amend Complaint, filed March 12, 2012, R. 47-48) ("Motion to Amend"). In his Motion to Amend, Appellant asserted that "[t]he grounds for the Motion are to join 'John Doe' **as a party defendant** pursuant to 38-77-180 and 38-77-150 of the Code of Laws of South Carolina **as an additional Defendant** for uninsured-motorist coverage." (Motion to Amend, R. 47) (emphasis added). Nowhere in this Motion to Amend did Appellant indicate he was attempting to substitute a party.

[1] Despite the reference to a "Conditional Answer" in the Notice of Appearance, Respondent is unaware of any evidence that Appellant formally served the UIM Carrier with his Complaint. As noted, the UIM Carrier reserved the right to contest service.

Over four months later, Appellant filed his Amended Complaint, (Amended Complaint, filed August 2, 2012, R. 17-22), naming Defendant John Doe as an additional party. The Amended Complaint stated that the action was brought against John Doe pursuant to S.C. Code Ann. §§ 38-77-180 and 38-77-150, respectively, South Carolina's John Doe and Uninsured Motorist ("UM") statutes. (Amended Complaint, R. 20-22). Appellant claimed bodily injury and damages to his automobile. However, the Uninsured Motorist Carrier ("UM Carrier") was not served until January 31, 2014 (letter from Raymond G. Farmer, Director, Department of Insurance, to 21st Century Insurance Company, dated January 31, 2014, R. 155) ("Service Letter"), a year and a half after the Amended Complaint first named John Doe as a party.

Despite the fact that both the Amended Complaint and service on the UM Carrier were untimely, the UM Carrier timely filed an Answer on behalf of John Doe, 12 days after receipt of service, on February 11, 2014 (Answer to Amended Complaint on Behalf of John Doe, filed February 11, 2014, R. 27-31) ("UM Carrier Answer"). The UM Carrier raised several affirmative defenses, including that Appellant failed to state a claim upon which relief could be granted, failed to comply with the requirements of Sections 38-77-180, 38-77-170 and relevant case law, as well as that the claim is barred by the statute of limitations and failure to prosecute. (UM Carrier Answer, R. 29-30).

On February 12, 2014, John Doe moved to dismiss the claims against him based on the statute of limitations. (Defendant John Doe's Notice of Motion and Motion to Dismiss Based on the Statute of Limitations, filed February 12, 2014, R. 49-50). In his memorandum in support, John Doe argued that the Amended Complaint, adding him as a named Defendant, was barred by the applicable statute of limitations. (Memorandum in

Support of Defendant John Doe's Motion to Dismiss Based on the Statute of Limitations, filed April 8, 2014, R. 62-65). John Doe also argued that, to the extent Plaintiff argued that he is entitled to equitable tolling, based on the fact that Plaintiff's original counsel was suspended from the practice of law, that suspension occurred after the applicable statute of limitations had expired.

Subsequently, on March 28, 2014, Plaintiff moved for entry of default judgment against John Doe. (Motion for Entry of Default, Rule 55, SCRCP, filed March 28, 2014, R. 42-43). Plaintiff asserted that, by filing his Amended Complaint with the Beaufort County Clerk of Court, service had been perfected on John Doe. Defendant John Doe filed a Memorandum in opposition to the default motion, alleging that service was not perfected on the UM Carrier until January 31, 2014, that the UM Carrier timely filed an Answer within 30 days of service, that the Amended Complaint was barred by the statute of limitations, any default judgment would be void as a matter of law, and that any attempt to bind the UM Carrier in default without notice violates the Due Process clauses of the United States Constitution and the South Carolina Constitution. (Defendant John Doe's Memorandum in Opposition to Plaintiff's Motion for Default Judgment, filed March 14, 2014, R. 66-71).

The Circuit Court heard oral argument on April 8, 2014, (Transcript of Hearing before the Honorable Ernest Kinard on April 8, 2014, R. 78-87) ("Hr'g Tr."), and issued an Order granting Defendant John Doe's motion to dismiss and denying Plaintiff's motion for a default judgment. (Order Granting Defendant John Doe's Motion to Dismiss and Denying Plaintiff's Motion for Default Judgment, filed May 2, 2014, R. 4-10) ("Order"). The Circuit Court noted that Plaintiff's Amended Complaint did not

attempt to substitute a party, which sometimes may be allowable under Rule 15, SCRCP, but, instead, attempted to add an entirely new party, John Doe. As such, this case is controlled by Jackson v. Doe, 342 S.C. 552, 537 S.E.2d 567 (Ct. App. 2000), which held that Rule 15(c) applies to substitution of a party but not to the addition of a new party. The Circuit Court rejected Plaintiff's argument that 21st Century's Notice of Appearance and Conditional Answer as UIM Carrier, prior to the filing of the Amended Complaint, constituted appearance on behalf of John Doe. The Circuit Court also denied Plaintiff's motion for default judgment based on lack of timely service on the UM Carrier and failure to amend the complaint to add John Doe within the statute of limitations. To hold otherwise would violate the UM Carrier's due process rights.

Plaintiff filed a motion to alter or amend the Order, (Plaintiff's Motion to Alter or Amend Pursuant to Rules 52(b) and 59(e), SCRCP, dated May 7, 2014, R. 39-41), which Defendant John Doe opposed. (Email from Robert Sansbury to Judge Kinard, *et al.*, dated May 9, 2014, R. 156). In an order dated June 4, 2014, the Circuit Court denied Plaintiff's motion to alter or amend, finding Jackson v. Doe, controlling. (Order Denying Plaintiff's Motion to Alter or Amend Order, filed June 4, 2014, R. 11) ("Order Denying Plaintiff's Motion to Alter or Amend").

Plaintiff timely appealed to this Court.

## STANDARD OF REVIEW

On appeal of a dismissal under Rule 12(b)(6), the appellate court applies the same standard as the trial court, which "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.'" Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433 (2009). The ruling on a Rule 12(b)(6) motion to dismiss must be based solely upon the allegations set forth in the complaint. Clearwater Trust v. Bunting, 367 S.C. 340, 343, 626 S.E.2d 334, 335 (2006).

"A motion to vacate or set aside a default judgment is addressed to the sound discretion of the trial judge" and will not be disturbed absent an abuse of discretion. McCall v. IKON, 363 S.C. 646, 651, 611 S.E.2d 315, 317 (Ct. App. 2005). In other words, a "trial court's decision as to a default judgment will not be reversed absent an abuse of discretion, which occurs when the judgment is controlled by some error of law or is without evidentiary support." Mull v. Ridgeland Realty, LLC, 387 S.C. 479, 489, 693 S.E.2d 27, 32 (Ct. App. 2010).

## ARGUMENTS

In his attempt to convince this Court to reverse the Circuit Court, Appellant sets up various circular and conflated arguments that completely ignore the key facts that: 1) his Amended Complaint attempting to add John Doe as a defendant was filed after the statute of limitations had run, and 2) he failed to serve the UM Carrier with the claim against John Doe until January 31, 2014. Apparently, Appellant hopes this Court will accept his contorted logic and not examine the facts and law that support the Circuit Court Order. Instead of acknowledging his statute of limitations problem, Appellant attempts to distract this Court by asking it to examine, "who is the real party in interest for John Doe ..." Appellant also asks this Court to accept that alleged awareness of an inchoate potential claim equates to proper legal service on a UM Carrier, despite the mandatory requirements of Sections 38-77-150 and 15-9-270. S.C. Code Ann. §§ 38-77-

150 & 15-9-270. All of Appellant's arguments should be rejected and his appeal dismissed.

**1. The Circuit Court properly granted Respondent's Motion to Dismiss.**

Without ever specifically acknowledging that his Amended Complaint first adding John Doe as a defendant was filed after the applicable 3-year statute of limitations had run,[2] Appellant presents various arguments as to why this fact should not completely bar his claims against John Doe and/or the UM Carrier. First, Appellant argues that the addition of John Doe should relate back to the original Complaint because Appellant's own insurance company, 21st Century, had entered an appearance and participated in discovery as a UIM carrier. Next, Appellant attempts to distinguish Jackson v. Doe. Both arguments, which Respondent addresses in reverse order below, are without merit.

A. The Circuit Court properly held that Jackson v. Doe is controlling.

In both the Order and the Order Denying Plaintiff's Motion to Alter or Amend, the Circuit Court relied on Jackson v. Doe. In that case, the plaintiff was injured when her vehicle was struck by a car driven by an unknown driver. Within the statute of limitations, she filed a complaint against John Doe. John Doe answered, claiming that the parties knew who the at-fault driver was and sought to have the complaint dismissed. An amended complaint attempting to add and name Milligan as the at-fault driver was filed after the statute of limitations had run. Milligan denied he was the alleged John Doe and that, in any event, the claim against him was barred by the statute of limitations. This Court rejected the plaintiff's argument that Rule 15(c), SCRCP, allowed her to add a new defendant after the statute of limitations had run. "The language of Rule 15(c) clearly

[2] Appellant did not challenge that S.C. Code Ann. § 15-3-530 applies to his claim, which is now the law of the case. Richland County v. Palmetto Cablevision, 261 S.C. 222, 225, 199 S.E.2d 168, 169 (1973) (unchallenged ruling is and becomes the law of the case).

speaks to a *change* in party, not the *addition* of a defendant to an already existing defendant. In our view, the addition of a party is not the same as a substitution or change of party." 342 S.C. at 558, 537 S.E.2d at 570. Here, as was the case in Jackson v. Doe, Appellant "did not simply correct the defendant's name or substitute one defendant for another." 342 S.C. at 558, 537 S.E.2d at 570. There was no attempt to substitute John Doe for Resort Services; in fact, Resort Services remains a defendant. (*See* Amended Complaint, R. 17-22). Instead, after the statute of limitations had run, Appellant attempted to add John Doe as an additional defendant based on information Appellant learned following the accident.

The facts in this case are even stronger than those in Jackson v. Doe, where the plaintiff filed a complaint naming John Doe within the statute of limitations, and later attempted to more particularly identify him as Milligan. Here, Appellant initially identified only Resort Services as a defendant, apparently believing that the at-fault driver was an employee of Resort Services. Appellant learned soon after the accident occurred that the at-fault driver may in fact be a John Doe. (Washington Depo. R. 132, lines 1-24). In his Amended Complaint, Appellant attempted to name an additional defendant who may well have no relation whatsoever to Resort Services if, in fact, the truck had been stolen as is believed.

The operative facts of this case are quite similar to those in Gause v. Smithers, 384 S.C. 130, 681 S.E.2d 607 (Ct. App. 2009). In Gause, the plaintiff, a police officer, was injured during a DUI traffic stop involving a car driven the vehicle owner's son ("Son"). The plaintiff's original complaint mistakenly named the Owner as the driver of the car at the time of the traffic stop. The Owner answered that he was not the driver.

After the statute of limitations had run, the plaintiff filed an amended complaint naming Son as another defendant but retaining claims against the Owner for negligent entrustment. This Court rejected the plaintiff's arguments that he was merely attempting to substitute a party and held that "the addition of a party is not contemplated by Rule 15(c)." 384 S.C. at 133, 681 S.E.2d at 609.

Appellant's analysis of the elements of Rule 15(c) conveniently omits the facts that: 1) his Amended Complaint is barred by the statute of limitations, 2) he never attempted to substitute a named defendant but, instead, attempted to add an entirely new defendant. It is of no import that Appellant may be able to meet some of the prongs of the requirements for relation back of claims, which Respondent does not necessarily concede, since he is adding instead of "changing" or substituting the party against whom he is asserting claims. Rule 15(c), SCRCP.

Furthermore, Appellant's arguments that 21st Century was already a party to the action because it had filed a limited appearance such that it tolled the statute of limitations is incorrect. "We have never tolled the statute of limitations by the date on which a party subjects himself to the personal jurisdiction of the court, and we decline to do so here." Holmes v. Haynsworth, Sinkler & Boyd, P.A., 760 S.C. 399, 634, 760 S.E.2d 399, 406 (2014). In Holmes, the plaintiff filed her complaint within the statute of limitations but did not serve it on two individually-named defendants until after the limitations period had run. After the complaint was filed but before they were formally served, the two defendants responded to her complaint, moved to dismiss and successfully moved to have venue transferred from Charleston County to Richland County. As does Appellant here, Holmes argued that these actions tolled the statute of

limitations. This Court should follow Holmes and hold that the claims against both John Doe and the UM Carrier are barred by the statute of limitations.

Appellant's attempt to add John Doe is barred by the statute of limitations.[3] "Statutes of limitation are not simply technicalities. On the contrary, they have long been respected as fundamental to a well-ordered judicial system. 54 C.J.S. Limitations of Actions § 2, at 16-17 (1989). Statutes of limitations embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." Moates v. Bobb, 322 S.C. 172, 176, 470 S.E.2d 402, 404 (Ct. App. 1996). Statutes of limitations relieve courts of "the burden of trying stale claims when a plaintiff has slept on his rights," and protect potential defendants from a "protracted fear of litigation." Id. (citations omitted).

B. The Circuit Court properly rejected Appellant's arguments the UIM Carrier's participation absolves Appellant of his statute of limitations problem.

Appellant erroneously argues that Jackson v. Doe is distinguishable on the basis that, in this case, 21st Century entered an appearance and engaged in limited discovery prior to the time Appellant filed his Amended Complaint. Appellant argues that, as a result, the Amended Complaint "relates back to the original Complaint." (App. Brief p. 12). Appellant is incorrect on both fronts.

First, Respondent notes that, in Jackson v. Doe, the UM Carrier also insured Milligan, so the insurer had similar "notice" of the claim that Appellant alleges here. 342 S.C. at 559 n.5, 537 S.E.2d at 571 n.5. Second, here, 21st Century participated under a conditional Notice of Appearance as the UIM Carrier in the event Resort Services' insurance was insufficient to cover Appellant's damages. At no time until Appellant filed

[3] Section 38-77-180 does not toll the statute of limitations for claims involving John Does. Jackson v. Doe, 342 S.C. at 555-556, 537 S.E.2d at 568-569.

his Motion to Amend and then his Amended Complaint, both filed **after** the statute of limitations had run,[4] was 21st Century put on notice that Appellant was making claims against an unknown, possibly uninsured driver. Thus, there is no evidence that the UIM Carrier knew or should have known that "but for a mistake concerning the identify of the proper party, the action would have been brought against" an uninsured John Doe. The fact that Resort Services alleged in its Amended Answer that a third party was responsible cannot serve as adequate notice to either John Doe or the UM Carrier of Appellant's eventual claim against them. To hold otherwise would allow named defendants to extend statutes of limitations and plaintiffs' litigation rights by simply alleging an injury was not their fault but that of an unknown, unnamed third party.

Justice Hearn's dissent in Jackson v. Doe does not support the result Appellant seeks. Justice Hearn argued that the Schiavone factors, adopted in Hughes v. Water World Water Slide, Inc., 314 S.C. 211, 442 S.E.2d 584 (1994), were fulfilled in Jackson v. Doe because Milligan, if he was indeed the John Doe, had notice of the claim because he caused the accident, and knew or should have known that, but for his actions in leaving the scene, the lawsuit would have been brought against him. Here, there is no evidence that either John Doe or the UM Carrier had any indication that a claim would be filed naming John Doe until after the statute of limitations had run. Participating in discovery as the UIM Carrier in the event Resort Services' insurance would not cover all of Appellant's damages simply does not constitute the type of notice required by Hughes and argued by Justice Hearn in Jackson v. Doe, as described above. In Hughes, the

[4] Appellant also asserts that the UIM Carrier was "aware of the motion to amend the complaint to assert an uninsured motorist claim against John Doe." (App. Brief, p. 10). However, as noted above, Appellant's Motion to Amend was filed after the statute of limitations had run and, therefore, suffers from the same limitations problem as his Amended Complaint.

president of the company that was inadvertently mis-named on the complaint was present when the plaintiff's injuries occurred, and was served with the complaint. 314 S.C. at 212, 215, 442 S.E.2d at 585, 586. Thus, there was no question that he was fully aware of the injury and of the complaint. Here, Appellant simply cannot meet the four Hughes factors.

At a minimum, there is no evidence that either John Doe or the UM Carrier had evidence that a claim would be brought against John Doe prior to the late-filed Motion to Amend and/or Amended Complaint. The Complaint alleged the truck was "illegally parked on Browns Way ..." (Complaint, R. 14). There is evidence that the truck had been abandoned in the roadway, in which case John Doe may not know yet that any accident occurred. It was not until the Amended Complaint, filed after the statute of limitations had run, that Appellant formally alleged his injuries occurred while the truck "was being backed out of Browns Way" by an unidentified driver. (Amended Complaint, R. 18, 20). At his deposition, Appellant testified that he did not know who was driving the truck, never saw the driver, and had been told the truck had been stolen. (Washington Depo. R. 132, line 2-18). Still, he sat on his rights and failed to amend his complaint to add John Doe until after the statute of limitations expired.

Under Appellant's reasoning, a party always can name a John or Jane Doe[5] in an automobile accident case after the running of the statute of limitations, so long as they have notified their own insurer of the claim under their UIM coverage. In other words, under Appellant's view, there really is no statute of limitations for John or Jane Does in

[5] Appellant asserts that "[a]n uninsured motorist claim against John Doe where the owner or operator is unknown is **required**" by Section 38-77-180. (App. Brief, p. 12, n.3) (emphasis added). However, Section 38-77-180 is permissive, providing that in such cases, "an action **may** be instituted against the unknown defendant as 'John Doe'..." S.C. Code Ann. § 38-77-180.

an automobile case, so long as the injured party carried UIM coverage, and notified their UIM insurer of the claim. Since all automobile insurance policies are required to carry UM coverage up to the limits of the policy, S.C. Code Ann. § 38-77-150(A), Appellant's positon would completely abrogate the statue of limitations in all cases where there is also UIM coverage. This result cannot have been what Rule 15(c) intends. *See* Catawba Indian Tribe of South Carolina v. South Carolina, 372 S.C. 519, 527, 642 S.E.2d 751, 755 (2007) (courts will reject an interpretation that produces absurd results).

This Court recognized in Jackson v. Doe that a later identified John Doe may be insured or uninsured. 342 S.C. at 556, 537 S.E.2d at 569. Thus, at the time a John Doe is named as a defendant, it is unknown: 1) whether his or her identity will be discovered and, 2) if it is, whether he or she has automobile insurance, and 3) if he or she has automobile insurance, whether that insurance is sufficient to cover the damages. To the extent Appellant is suggesting that the provisions of Section 38-77-150 are limited to situations where the driver is known but uninsured, his position is unsupported by the statutory language and incorrect. Section 38-77-150 applies equally to identified but uninsured motorists and unidentified motorists, or John Does. *See* S.C. Code Ann. § 38-77-150.

This Court should hold that Jackson v. Doe controls the outcome of this case and affirm the Circuit Court.

**2. Circuit Court properly denied Appellant's Motion for a Default Judgment.**

First, the Court need not reach this issue because Appellant's claims are barred by the statute of limitations, as discussed both above and in more detail below. Martin v. Companion HealthCare Corp., 357 S.C. 570, 577 n.4, 593 S.E.2d 624, 628 n.4 (Ct. App.

2004) (where a court properly finds that an action is barred by the statute of limitations, it need not address a party's other arguments). In addition, Appellant's arguments regarding a default judgment are misplaced precisely because his Amended Complaint was filed after the statute of limitations had run and, therefore, was ineffective to raise an enforceable claim against either John Doe or the UM Carrier.

Second, even if, for the sake of argument, John Doe failed to file a timely Answer, that would make no difference precisely because the Amended Complaint naming John Doe was filed after the statute of limitations had run. Because any claim against John Doe is barred by the statute of limitations, *see, e.g.*, Lever v. Lighting Galleries, Inc., 374 S.C. 30, 35, 647 S.E.2d 214, 217 (2007), *quoting* Nichols v. Briggs, 18 S.C. 473, 1883 S.C. LEXIS 18 (1883) (noting that it is well established that "the effect of a statute of limitations is to take away the remedy"); Garner v. Houck, 312 S.C. 481, 483, 435 S.E.2d 847, 848 (1993) (affirming lower court's ruling that the claim was barred by statute of limitations); Webb v. Greenwood County, 229 S.C. 267, 92 S.E.2d 688 (1956) (statute of limitations acts as complete bar), any failure to file a timely Answer is of no effect whatsoever.

Although they are not identical, statutes of limitations have often been described as statutes of repose, "'founded on motives of public policy' and 'after the lapse of a prescribed time, *fixed arbitrarily*, ... the doors of the court are no longer open to him for the enforcement of a claim which he has neglected to assert within the prescribed time.'" Whitfield Constr. Co. v. Bank of Tokyo Trust Co., 338 S.C. 207, 225 n.27, 525 S.E.2d 888, 898 n.27 (Ct. App. 1999), *quoting* Amaker v. New, 33 S.E. 28, 34, 11 S.E. 386, 387 (1890); *see also* Webb, 229 S.C. at 283, 92 S.E.2d at 694-95 (adopting trial court order,

which was based, in part, on the conclusion that the statute of limitations is a statute of repose that affects the remedy). Regardless of whether the UM Carrier or John Doe "is the real party in interest," the Amended Complaint, which is the first time any claim was brought against John Doe and/or the UM Carrier, is of no effect because it was filed and served on both John Doe and the UM Carrier well after the applicable statute of limitations had run.

Appellant's reliance on Stark Trust Co., Inc. v. Superior Constr. Corp., 360 S.C. 503, 602 S.E.2d 99 (Ct. App. 2004) is misplaced for the very reason that the complaint filed in that case was well within the statute of limitations. The case does not discuss in any way what the outcome would have been in that case or should be in a case where an amended complaint adding new parties is barred by the statute of limitations.

Third, to the extent an Answer on behalf of the UM Carrier to the Amended Complaint was required, the UM Carrier's duty to respond was not triggered until it was properly served, which was January 31, 2014. The UM Carrier timely filed its Answer on February 11, 2014, 12 days after it was properly served.

Fourth, a grant of default judgment against the UM Carrier would violate its right to procedural due process under both the Fourteenth Amendment to the United States Constitution and under Article 1, Section 3 of the South Carolina Constitution. At a minimum, due process requires adequate notice and opportunity for hearing. *See, e.g.*, Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "The principle object of service of process is to give notice to the defendant corporation of the proceedings against it." Mull, 387 S.C. at 485, 693 S.E.2d at 30. Appellant attempts to side-step due process concerns by conflating knowledge that a lawsuit and possible

claims may exist with proper and timely service of a claim. They simply are not the same. Here, the UIM Carrier filed a conditional appearance in the event the named defendant under the original Complaint, Resort Services, may not have carried sufficient insurance to cover Appellant's damages. Such limited appearance is insufficient either to serve as knowledge that a separate claim is or will be made for John Doe UM coverage, or to toll the statute of limitations. Holmes, 760 S.C. at 634, 760 S.E.2d at 406.

The purpose and rationale underlying UIM and UM coverages are different. Although it must be offered to insureds, UIM coverage "is entirely voluntary, and permits the insureds, at their option, to purchase insurance coverage for situations where they are injured by an at-fault driver who does not carry sufficient liability insurance to cover the insureds' damages." Burgess v. Nationwide Mut. Ins. Co., 373 S.C. 37, 42, 644 S.E.2d 40, 43 (2007). In contrast, UM coverage is not optional, but is mandatory, which "distinguishes it from ... voluntary UIM coverage ..." Nationwide Mut. Ins. Co. v. Erwood, 373 S.C. 88, 91, 644 S.E.2d 62, 63 (2007). UM coverage provides "benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist ..." Nationwide Mut. Ins. Co. v. Smith, 376 S.C. 60, 69, 654 S.E.2d 837, 842 (Ct. App. 2007).

In this case, UIM coverage was available to Appellant in the event Resort Services was found to be liable and its automobile insurance policy was insufficient to cover Appellant's injuries and losses. In contrast, UM coverage was available in the event Appellant's losses were caused by an uninsured driver. An unknown or unidentified driver would always be an uninsured driver, at least until and if the identity of the John Doe becomes known. The position and potential fault of Resort Services vis-

à-vis that of an unknown, John Doe driver are fundamentally different. Similarly, the position and potential liability of a UIM carrier and a UM carrier are fundamentally different, as UIM kicks in after the at-fault driver's insurance pays its limits, whereas a UM carrier is on the hook for "dollar one."

Furthermore, Appellant's proposed outcome would produce absurd results. Under Appellant's theory of "notice," if three cars were involved in an accident, two of which were insured by Insurance Company A, the plaintiff could bring suit against Insured #1 during the limitations period and wait until after the statute of limitations had run to amend his complaint against Insured #2, so long as Insurance Company A filed an answer on behalf of Insured #1 and participated in discovery. According to Appellant's logic, Insurance Company A would be unable to assert the statute of limitations as a defense against Insured #2 because it knew about the accident from the claims filed against Insured #1, even though no claim was brought against Insured #2 during the limitations period.

In short, Appellant is arguing that he can avoid his statute of limitations problem by filing an Amended Complaint, failing to perfect service on the UM Carrier until after the time for John Doe to file an Answer has expired, and then file for default which he asserts must be automatically granted. His attempt at an end-run around the statute of limitations should be soundly rejected. *See, e.g.*, Moates, 322 S.C. at 176, 470 S.E.2d at 404 (statutes of limitations embody important policy concerns); Whitfield Constr., 338 S.C. at 225 n.27, 525 S.E.2d at 898 n.27 (courts will not contemplate actions filed after the statute of limitations has run).

South Carolina courts have repeatedly held that failure to file a claim within the applicable statute of limitations bars the action. *See, e.g.*, Martin, 357 S.C. at 577, 593 S.E.2d at 628; Rumpf v. Massachusetts Mut. Life Ins. Co., 357 S.C. 386, 593 S.E.2d 183 (Ct. App. 2004). And, as noted above, "[s]tatutes of limitations are not simply technicalities," but instead "embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs." In addition, they bar claims where "a plaintiff has slept on his rights.'" City of North Myrtle Beach v. Lewis-Davis, 360 S.C. 225, 231-32, 599 S.E.2d 426, 465 (Ct. App. 2004).

The applicable statute of limitations begins to run "when the facts and circumstances of an injury would put a person of common knowledge and experience on notice that some claim might exist." Cline v. J.E. Faulkner Homes, Inc., 359 S.C. 367, 371, 597 S.E.2d 27, 29 (Ct. App. 2004). Here, Appellant knew soon after the accident that the truck may have been stolen and left in the roadway by an unidentified driver. Furthermore, "under South Carolina law, the date when a plaintiff learns of a potential new defendant has absolutely no bearing on the timing of the statute of limitations ... The focus is upon the date of discovery of the injury, not the date of discovery of the wrongdoer ... " Id.

In Cline, the plaintiff argued that the addition of a defendant after the statute of limitations had run "should relate back to his original pleading under Rule 15(c), SCRCP." 359 S.C. at 372 n.2, 597 S.E.2d at 29 n.2. This Court rejected that argument holding that "relation back applies only when an existing party is changed, not when a new party is added to a complaint." Id. Here, to the extent Appellant is arguing that his

Amended Complaint relates back to his original Complaint as merely a "new claim" against a party that had already appeared and engaged in discovery, (App. Brief. p. 12), the critical fact that he fails to acknowledge is that that "new claim" is based and completely dependent on his attempt to add a new party, John Doe, to the proceeding. And that attempt is barred by the statute of limitations. Without John Doe, an admittedly new party, there is no uninsured motorist claim. Despite Appellant's creative arguments, he cannot avoid the fact that, here, the only claims filed within the applicable statute of limitations were against Resort Services.

Stanley v. Kirkpatrick, 357 S.C. 169, 592 S.E.2d 296 (2004), relied on by Appellant, does not compel a different result for the simple reason that, in Stanley, the plaintiff only attempted to add additional tort claims (trespass and conversion) to her existing section 1983 claim against the City of Columbia. She did not attempt to add an entirely new party, which is what Appellant has attempted to do via his Amended Complaint.

Setting aside the statute of limitations bar, solely for the sake of argument, according to Appellant's argument that he properly served John Doe pursuant to S.C. Code Ann. § 38-77-180, John Doe's Answer to the Amended Complaint was due on or before September 3, 2012. Appellant's Motion for Default Judgment was not filed until March 28, 2014, a year and a half after John Doe's Answer purportedly was due. As such, Appellant's Motion for Default Judgment was untimely, even if it was otherwise viable, which Respondent does not concede. *See* Harvey v. United States, 685 F.3d 939 (10th Cir. 2012) (upholding denial of default judgment motion in part because the movant

forfeited his default judgment argument by waiting for two and a half years to file his motion).[6]

Even if, for the sake of argument, Appellant could overcome his statute of limitations problem and wanted to pursue recovery against John Doe as an individual, he is free to assert and pursue those claims. He may do whatever is necessary to identify and track down John Doe to recover his default judgment from whomever John Doe turns out to be. However, clearly, that is not Appellant's aim in this case. In reality, his goal is to recover from the UM Carrier on John Doe's behalf. In order to do that, Appellant had to timely serve his claims against the UM Carrier, which he did not do in this case. In any event, once he did serve the UM Carrier with his Amended Complaint, the UM Carrier filed and served a timely Answer. (Answer to Amended Complaint on Behalf of John Doe, R. 27-31).

Appellant makes the erroneous and illogical assertion that Section 38-77-180 allows him to assert an uninsured motorist claim without serving the UM Carrier. Accepting Appellant's argument would render Section 38-77-180 in direct conflict with Sections 38-77-150(B) and 15-9-270, which clearly require service on the UM Carrier via the Director of Insurance. "No action may be brought under the uninsured motorist provision unless copies of the pleadings ... are served in the manner provided by law upon the insurer writing the uninsured motorist provision." S.C. Code Ann. § 38-77-150(B). "The summons and any other legal process in any action or proceeding against it must be served on an insurance company ... by delivering two copies of the summons or any other legal process to the Director of the Department of Insurance ..." S.C. Code

[6] South Carolina Rule 55(a) is drawn from the Federal Rules of Civil Procedure, Rule 55, and is substantively the same. Rule 55(a), SCRCP, *Notes*.

Ann. § 15-9-270. Statutes should be read to give every part meaning and to not render any portion meaningless. *See, e.g.,* Florence County Dem. Party v. Florence County Rep. Party, 398 S.C. 124, 128, 727 S.E.2d 418, 420 (2012).

Service by depositing a copy of the Amended Compliant with the Beaufort County Clerk of Court, while perhaps sufficient for the person John Doe, should Appellant successfully identify and track him or her down, was not sufficient to bring a claim against the UM Carrier for uninsured motorist coverage. As noted above, once identified, it may well turn out that the John Doe involved in Appellant's February 26, 2009 accident has automobile insurance of his or her own. In that case, no UM coverage would be implicated. However, to the extent Appellant wants and intends to recover from his UM Carrier, he had to provide timely and proper service of the Amended Complaint. Again, setting aside his statute of limitations problem solely for the sake of argument, Appellant served the UM Carrier on January 31, 2014 and the UM Carrier timely filed its Answer to Amended Complaint on Behalf of John Doe on February 11, 2014. (R. 27-31). Thus, while Appellant may or may not be entitled to a default judgment against John Doe, whoever he or she may be (setting aside the statute of limitations problems),[7] Appellant has not and cannot make out the case that the UM Carrier failed to file a timely Answer after it was properly served with the Amended Complaint.

Finally, Appellant objects to the inclusion in the Circuit Court's Order of language addressing Appellant's prior counsel's suspension from the practice of law. (App. Brief, pp. 5-6, 19 n.4). Appellant's counsel raised the issue of his prior counsel's

[7] As explained above, even if John Doe is technically in default by failing to respond to the Amended Complaint, that fact carries no legal consequence since the Amended Complaint was filed after the statute of limitations had run.

suspension in his opening argument to the Circuit Court. (Hr'g Tr., R. 81, lines 12-17). However, if the reference to Appellant's prior counsel is error, which Respondent does not concede, it is, at most, harmless error, which Appellant basically concedes (stating that "the finding is not dispositive of this appeal").

## CONCLUSION

For all the reasons stated herein, this Court should affirm the Circuit Court Order and Order on Rehearing, and dismiss Appellant's appeal.

Respectfully submitted,

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February 24, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

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Case No.: 2011-CP-07-0001

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Arthur Washington, ..... Appellant,

v.

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

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**CERTIFICATE OF COUNSEL**

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The undersigned certifies that this Final Brief of Respondent John Doe complies with Rule 211(b), SCACR. The undersigned also certifies that this Final Brief of Respondent John Doe complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

February 24, 2015

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals



APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

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

Case No. 2011-CP-70-0001

Arthur Washington, ..... Appellant,

v.

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

**PROOF OF SERVICE**

I certify that I have served the Final Brief of Respondent John Doe on Arthur Washington, by depositing a copy of it in the United States Mail, postage prepaid, on the 24th day of February, 2015, addressed to his attorney and to other counsel of record as follows:

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