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S.C. SUPREME COURT

IN THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

APPEAL FROM FAIRFIELD COUNTY

Court of Common Pleas

Honorable Daniel D. Hall, Presiding Judge, Sixth Judicial Circuit

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Case No. 2016-CP-20-0011

Appellate Case No. 2021-000894

Opinion No. 2021-UP-229 (S.C. Ct. App. filed June 23, 2021)

Peter Rice — Respondent,

v.

John Doe — Petitioner.

BRIEF OF PETITIONER

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STATEMENT OF THE CASE

This appeal arises from the trial judge's dismissal of Respondent's negligence action against John Doe for failure to contemporaneously provide a "John Doe affidavit" at or before the lawsuit was filed pursuant to section 38-77-170 of the South Carolina Code of Laws (2015).

On January 12, 2016, Respondent Peter Rice sued Petitioner John Doe and Defendant Bobby Rae Dye seeking damages for injuries he sustained as a passenger in Dye's vehicle on April 17, 2015.[1] (App. 25-27). Specifically, Respondent asserted a claim for uninsured motorists benefits pursuant to Dye's policy of insurance, alleging a phantom oncoming vehicle crossed the center line causing Dye to drive off the roadway and strike a tree. (App. 25). Because there was no contact between Dye's vehicle and the alleged Doe vehicle, the action is governed by section 38-77-170 entitled, "Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown." S.C. Code Ann. § 38-77-160 (2015). The statute (also known as the "John Doe statute"), reads as follows:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, *there is no right of action or recovery* under the uninsured motorist provision,

[1] Defendant Bobby Rae Dye settled with Respondent and was dismissed from the case with prejudice in 2017.

> unless:
>
> . . .
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, *or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit*;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.
>
> The following statement must be prominently displayed on the face of the affidavit provided in item (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

Id. (emphasis added). Respondent did not execute, deliver, or file an affidavit attesting to the truth of the facts of the accident prior to filing and serving his Summons and Complaint. (App. 34).

Doe served an answer on November 16, 2016, which was filed by the Fairfield County Clerk of Court on November 21, 2016. (App. 28-33). Doe's Answer reserved as a first defense a motion to dismiss for failure to comply with section 38-77-170. (App. 29). The next day, Respondent filed his first John Doe affidavit which was executed on November 18, 2016 – ten months after suit had been filed. (App. 34-35). The affidavit did not contain information about efforts to determine John Doe's identity and it failed to include the required "false statement" attestation. *Id*. On January 4, 2017, John Doe withdrew the motion to dismiss from the motions roster without comment as to its resolution. (App. 97). The reasons for the motion's withdrawal from the motion roster at that time are unknown.

On October 19, 2017, Doe moved for summary judgment and filed a Memorandum of Law in Support of Unnamed Defendant's Motion for Summary Judgment citing three grounds. (App.

41-42; 101-104). Doe argued 1) that Respondent did not have a cause of action at the time of filing his Complaint because he failed to provide a John Doe affidavit, as required by section 38-77-170(2), until ten months after suit was filed; 2) Respondent's November 2016 affidavit was insufficient because it failed to include the required false statement attestation required by the statute; and 3) Respondent's subsequently filed affidavit contradicted his own deposition testimony and was therefore insufficient. (App. 101-104). On February 5, 2018, Respondent filed a second affidavit, executed September 26, 2017, containing identical information as the November 2016 affidavit, with the addition of two paragraphs and the required attestation. (App. 38-39). A hearing was held before The Honorable Judge Roger Henderson on March 14, 2018.[2]

Judge Henderson denied Doe's motion for summary judgment and ruled that Respondent's second affidavit, executed September 26, 2017 and filed February 5, 2018, satisfied the language and content requirements set forth by section 38-77-170(2). (App. 4-9). Judge Henderson further ruled that a genuine question of material fact existed as to any contradictory testimony provided by Respondent in his two depositions and the second affidavit. (App. 8). The Order denying summary judgment, prepared by Respondent's counsel, was filed on April 13, 2018. *Id.*

The Honorable Daniel Hall called the case for trial on June 20, 2018. (App. 52). During the Rule 16(a), SCRCP, pre-trial hearing, Doe sought a determination on the motion to dismiss reserved in her Answer. (App. 57, ll. 15-18). Respondent argued, in part, that Judge Henderson's order denying summary judgment precluded Judge Hall from hearing Doe's motion to dismiss. (App. 57, l. 22 – 58, l. 3).

After hearing arguments from counsel and reviewing the Order Denying Summary Judgment, Judge Hall concluded Judge Henderson's order solely addressed whether the affidavit's

[2] A transcript of this hearing was not included in the Record on Appeal.

content was sufficient in the context of section 38-77-170(2). (App. 68, l. 22 – 69, l. 23; App. 90, ll. 10-22). Judge Hall agreed that Judge Henderson had not examined or ruled upon whether Respondent had submitted an affidavit meeting the *timing* requirement of section 38-77-170. *Id*. Judge Hall found that, despite Judge Henderson's ruling that the second affidavit fulfilled the substantive requirements, it nonetheless did not satisfy the timing requirement. *Id*. Therefore, Judge Hall dismissed Respondent's case for failure to provide an affidavit as required by section 38-77-170(2) prior to initiating this lawsuit. (App. 15-17; 55-90). Respondent's Motion for Reconsideration was denied on July 17, 2018. (App. 18-20).

Respondent filed a Notice of Appeal on August 16, 2018. (App. 51). On appeal, Respondent first argued Judge Hall erred in ruling the John Doe affidavit is a condition precedent to filing a lawsuit pursuant to section 38-77-170. (App. 124-28). Second, Respondent argued Judge Hall erred in hearing Doe's Motion to Dismiss pre-trial for lack of proper notice (App. 128-29) and because the motion had been ruled on by Judge Henderson's April 13, 2018 order denying summary judgment. (App. 129-31).

In an unpublished *per curiam* opinion filed June 23, 2021, the Court of Appeals reversed the trial court's dismissal and remanded the case for trial, holding Judge Hall's order dismissing the lawsuit improperly overruled Judge Henderson's prior order denying summary judgment. (App. 152-56). It found Judge Henderson's order constituted a "general ruling" as to the timing requirement, despite the fact that the order itself did not address the issue. (App. 155).

The Court of Appeals did not examine whether the subject action, or any John Doe action, may be instituted in the absence of an affidavit compliant with section 38-77-170 at or before the time of filing a lawsuit. The court declined to address Respondent's remaining issues concerning the withdrawal of a motion and equitable tolling. Doe filed a Petition for Rehearing on July 8,

2021, requesting reconsideration. (App. 157). The Court of Appeals denied rehearing by order filed July 20, 2021. (App. 165).

Doe subsequently filed a Petition for Writ of Certiorari in the Supreme Court. Doe sought review of the Court of Appeals' opinion reversing Judge Hall's Order dismissing Respondent's case at trial. Additionally, Doe requested a determination by this Court of issues left unanswered by the Court of Appeals regarding Respondent's failure to timely provide an affidavit prior to initiating the lawsuit, as well as the sufficiency of the affidavits that were delinquently filed. (App. 166). Respondent submitted a Return to Petition for Writ of Certiorari (App. 181), after which this Court filed an Order granting the petition for a writ of certiorari on Petitioner's Questions I and II. (App. 199).

This appeal follows.

STANDARD OF REVIEW

As a general rule in reviewing a trial court's order on pre-trial motions, appellate courts are bound by the lower court's factual findings made during preliminary options where there is conflicting evidence or where the findings are supported by the evidence and are not clearly erroneous or controlled by an error of law. *City of Chester v. Addison*, 277 S.C. 179, 284 S.E.2d 579 (1981).

ARGUMENT

The trial judge correctly applied the language of the John Doe statute, properly considered the precedent of this Court, and determined the John Doe affidavit is a condition precedent to Respondent's right to sue Petition John Doe.

I. THE COURT OF APPEALS ERRED IN FINDING THE TRIAL JUDGE'S DISMISSAL IMPROPERLY OVERRULED A PRIOR TRIAL COURT ORDER DENYING SUMMARY JUDGMENT.

The Court of Appeals committed reversible error in determining that Judge Hall improperly overruled Judge Henderson's order when he found Respondent failed to comply with the contemporaneous filing requirement of section 38-77-170. Judge Henderson had not ruled upon the sufficiency of Rice's affidavits with regard to the contemporaneous filing requirement. The Court of Appeals additionally erred in holding Judge Hall lacked authority to hear Doe's Motion to Dismiss.

A. Judge Henderson did not rule on whether Respondent satisfied the contemporaneous filing requirement of section 38-77-170.

The Court of Appeals relied exclusively on the following single phrase to determine Judge Henderson "ruled" on the contemporaneous filing requirement: "After reviewing the written submissions and hearing oral argument . . . ." (App. 155). However, "factual statements of counsel, whether made during oral argument or in written briefs or memoranda ordinarily may not be considered" in determining whether a genuine issue of material fact exists. *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986) (internal citation omitted). There is no evidence in the Record that Judge Henderson reviewed any materials by which he could have considered the contemporaneous filing requirement issue.

Judge Henderson's order was not intended to address the contemporaneous filing requirement. To the contrary, the Record provides ample evidence from which to conclude Judge Henderson's order was not ruling on the contemporaneous filing requirement. There is no reference made that an affidavit had not been produced prior to November 18, 2016. There is no reference to *Collins v. Doe* or *Wynn v. Doe* – the only two cases cited in Doe's memorandum. There exists no transcript to determine whether the issue was examined at the hearing. Even in

quoting the John Doe statute, Judge Henderson's order omits the preamble's key language, "there is no right of action or recovery under the uninsured motorist provision, unless. . . ."

As both the Court of Appeals and Respondent have acknowledged, the order was devoid of any finding relevant to the affidavits' timing. When Judge Hall asked whether Respondent agreed that Judge Henderson's order did not address the contemporaneous filing requirement, he was unable to identify any such finding. (App. 72, l. 20 – 73, l. 14). Judge Henderson's order reads, "Defense counsel's oral argument in support their (sic) Motion alleged *two deficiencies* . . . that Mr. Rice's affidavit of November 18, 2016 did not contain the required statutory language . . . [and] Rice's affidavit contradicts his deposition testimony." (App. 110-11) (emphasis added). Such a summary suggests Judge Henderson declined to hear the third deficiency, or was not asked to contemplate the issue. Alternatively, it suggests that the trial judge or trial counsel chose to withdraw the issue as a basis for summary judgment.

The Court of Appeals correctly stated that the contemporaneous filing requirement involves the interpretation of a statute and is a question of law. (App. 155). Respondent's ability to present his case to a jury relied upon a ruling by the lower court with regard to whether the affidavits were a condition precedent to instituting this action – a purely legal question. A review of Judge Henderson's order reveals plainly that no such legal determination was made. Indeed, the order made a specific finding that summary judgment was improper because "a genuine question of material fact exists that must be determined by a jury." (App. 8). There is no dispute Respondent failed to produce an affidavit before filing suit or before Doe filed her answer and motion to dismiss. (App. 70, l.22 – 71, l.1). Had Judge Henderson's order ruled on the contemporaneous filing requirement, the existence of the material facts referenced in his order would be irrelevant.

The Court of Appeals cited *Spence v. Wingate* for the proposition that Judge Henderson's Order was a "general ruling" that included a determination on Doe's theory that the affidavits were untimely. *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009). *Spence* is inapposite to the issue facing the court. In *Spence*, the trial judge's ruling focused on a single *legal* issue – whether a duty existed. The Supreme Court found that the losing party's alternative theory that she was owed a duty *as a prior client* involved the precise issue raised by respondent's motion for summary judgment. The theory was encompassed within the ruling. *Id*. In this case, Judge Henderson's ruling that Rice's second affidavit included sufficient content to create a jury question is wholly distinct from the issue of whether Rice was required to submit an affidavit at the time the Complaint was filed. As a result, the Court of Appeals erred in finding a "general ruling" finally determined the contemporaneous filing requirement.

B. Judge Hall possessed the authority to hear and decide Petitioner's Motion to Dismiss.

The Court of Appeals erred in ruling Judge Hall did not have the authority to dismiss the action. Assuming, *arguendo*, Judge Henderson's Order denied summary judgment as to the contemporaneous affidavit issue, such a denial did not preclude Doe from raising her motion to dismiss or divest Judge Hall of the authority to consider the same at trial. A denial of a motion for summary judgment is not the law of the case. As stated by this Court in *Ballenger v. Bowen*, "the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994); *see also McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 (1994) ("Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later

stage of the proceedings."). Regardless of the language Judge Henderson utilized in his Order, John Doe was not foreclosed from seeking a ruling on the Motion to Dismiss at trial.

Additionally, the motion was properly raised and heard at the trial pursuant to Rule 12(h)(2), SCRCP, which permits a party to raise a defense of failure to state a claim upon which relief can be granted or otherwise state a legal defense to a claim at trial. *See Inman v. Kenn Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 363 S.E.2d 691 (1988) (holding trial judge erred in denying as untimely defendant's motion to dismiss raised at trial as permitted by Rule 12(h)(2), SCRCP).

The Supreme Court has also found that issues left unresolved by one judge are properly considered by another. *See, e.g., Brandt v. Gooding*, 368 S.C. 618, 626, 630 S.E.2d 259, 263 (2006) (finding the trial court had authority to determine an issue present to and left unresolved by a prior judge.). In this case, Judge Hall deferred to Judge Henderson's clear rulings related to the affidavit's compliance with 38-77-170(2) and the conflicting deposition testimony. Whether the affidavit complied with the contemporaneous filing requirement was left unaddressed, allowing Judge Hall to consider the same.

The Court of Appeals opinion appears to conflict with this Court's opinion in *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978). Respondent initially referred to the case for the proposition that Judge Hall could not hear or decide whether Respondent failed to fulfill the affidavit requirement before filing this cause of action because Judge Henderson considered John Doe's Memorandum in Support of Summary Judgment and made a blanket denial of the motion. However, the *Graham* court affirmed the ability of one judge to overrule the findings of another in a narrow context. The court's reasoning was that the second judge was ruling on a different issue than the first judge – namely, the factors set forth by statute that would support vacating the prior order for summary judgment. *Id.*

II. THE TRIAL JUDGE CORRECTLY DETERMINED THAT APPELLANT FAILED TO SATISFTY THE AFFIDAVIT REQUIREMENT OF S.C. CODE § 38-77-170(2) AS A CONDITION PRECEDENT TO FILING HIS LAWSUIT AGAINST JOHN DOE

To recover uninsured motorist benefits where there is no contact between vehicles, one must first comply with every condition set forth in S.C. Code § 38-77-170 – notably entitled "*Conditions to sue or recover* under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown." (emphasis added). The statute reads as follows:

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, *there is no right of action or recovery* under the uninsured motorist provision, unless:
>
> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.
>
> The following statement must be prominently displayed on the face of the affidavit provided in item (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

S.C. Code Ann. § 38-77-170 (2015) (emphasis added).

Courts have repeatedly interpreted the law to require strict compliance with the statute's terms as a condition precedent for creating a right of action for a plaintiff seeking uninsured motorist benefits. *See, e.g., Wynn v. Doe*, 255 S.C. 509, 180 S.E.2d 95 (1971) (holding that a

previous version of the statute required proof of physical contact as a condition precedent to a right to recover uninsured motorist benefits); *Morehead v. Doe*, 324 S.C. 559, 479 S.E.2d 817 (Ct. App. 1996) (holding timely reporting of an accident to law enforcement was a condition precedent to recover uninsured motorist benefits).

In *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 290, 188 S.E.2d 459, 462 (1972), this Court construed a prior version of the subject statute and explained that an insured's "right to sue and collect" from uninsured motorist benefits "is a creature of the legislature." The Court continued its analysis, stating: "[o]ne must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of the law." *Id*. The Court reasoned that "[i]t is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier." *Id*. The statute sets forth "the procedural obligations that the insured must discharge in order to recover . . ., [and] are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover." *Id*.

As it pertains to the affidavit requirement, courts have repeatedly analyzed the language of the statute and applied the rule that "where a statute is clear and unambiguous, courts do not apply rules of statutory construction." *See, e.g., Enos v. Doe*, 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008) (wherein the Court of Appeals strictly construed the affidavit requirement of § 38-77-170 stating there was "no room for statutory construction" where its terms were clear and unambiguous); *Chestnut v. S.C. Farm Bureau Mut. Ins. Co.*, 298 S.C. 151, 378 S.E.2d 613 (Ct. App. 1989) (wherein the Court of Appeals applied the plain-meaning rule to a prior version of § 38-77-170); *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994) (wherein the Supreme Court strictly construed the language of the affidavit requirement to allow an injured passenger to

provide the affidavit); *Silva v. Allstate Prop. & Cas. Ins. Co.*, 424 S.C. 512, 818 S.E.2d 753 (2018) (wherein the Supreme Court held the rules of statutory interpretation were not needed because the statute was unambiguous in requiring an affidavit from a witness who observed the accident).

The South Carolina Supreme Court held in *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002), that strict compliance with S.C. Code § 38-77-170(2) is required as a prerequisite to maintaining a cause of action under the statute. In *Collins*, the plaintiff failed to produce a witness affidavit at any time prior to trial. Although a witness at trial testified that an unknown vehicle caused the accident, the Supreme Court affirmed the trial court's grant of John Doe's motion for a directed verdict on grounds that the plaintiff had failed to satisfy the statute's requirement that he produce a witness affidavit and therefore, no right to sue existed. *Id*.

The plaintiff in *Collins* argued that a witness's testimony at trial was sufficient to satisfy the statute's purpose to prevent false statements, and that to strictly construe the statute would, as Respondent argued, "lead to a result so plainly absurd that it could not possibly have been intended by the Legislature . . . ." The Court of Appeals agreed with the plaintiff and stated that affirming the directed verdict would "elevate form over substance" and reasoned that the purpose of the statute should "prevail over the literal import of the words." *Collins v. Doe*, 343 S.C. 119, 124, 539 S.E.2d 62, 64 (Ct. App. 2000) (citing S.C. Second Injury Fund v. Am. Yard Prods., 330 S.C. 20, 496 S.E.2d 862 (1998), citing Liberty Mut. Ins. Co. v. S.C. Second Injury Fund, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995)), rev'd 352 S.C. 462, 574 S.E.2d 739 (2002).

The Supreme Court disagreed. It found the language of this statute conveys a "clear and definite meaning" such that the court has "no right to look for or impose another meaning." *Collins*, 352 S.C. at 465-66, 574 S.E.2d at 740-41. The Court held that according to the plain

language of the statute, "without the affidavit, [plaintiff] has no right to bring her case to court," and that "strict compliance with § 38-77-170 is a *prerequisite* to maintaining a cause of action under the statute." *Collins*, 352 S.C. at 467, 471, 574 S.E.2d at 741, 743 (emphases added). It is, therefore, clear that the Court considers a witness affidavit as a condition precedent to filing suit and that no suit may be initiated without first fulfilling the statutory requirement.

Throughout this case, Respondent has muddied the water in an attempt to obscure facts fatal to his cause of action by arguing that there is no "filing" requirement set forth in the statute and that an affidavit was eventually provided "upon request". Regardless of whether an affidavit must be filed or simply provided, the fact remains: no affidavit existed before Respondent brought this case to court. Respondent failed to fulfill the prerequisites required by § 38-77-170(2) and had no right of action when filing and serving his Summons and Complaint.

Respondent has argued *Collins* is distinguishable from this case because he did, eventually, file an affidavit with the court, and therefore there can be no concerns of fraud prevention or lack of notice. However, this Court has made clear that the conditions set forth in S.C. Code § 38-77-170 are absolute and must be fulfilled as a prerequisite to filing. Indeed, allowing an affidavit to be filed after serving the summons and complaint defeats the statute's purpose for providing notice to the insurer. *See Collins*, 352 S.C. at 470, 574 S.E.2d at 743 ("Without the affidavit, and without the opportunity to interview the witness, the insurer is deprived of valuable factual information with which to assess and evaluate the claim."; "The majority reasons that a sworn affidavit accomplishes three objectives: fraud prevention, meaningful cross-examination, and prior notice to the insurer for purposes of claim evaluation.").

Respondent's further argument that there would be no prejudice to the insurer in allowing affidavits after initiating a law suit and would produce an "absurd result" is misplaced and aligns

with the plaintiff's failed argument in *Collins*. In practice, it would be illogical for the statute to be interpreted liberally and allow a claimant to withhold providing a witness affidavit – which the legislature requires for purposes of notice and fraud prevention – until after commencement of an action. Under Respondent's line of reasoning, a plaintiff could theoretically appear on the day of trial with an affidavit – a scenario clearly not envisioned or intended by the legislature, as such would not serve the purposes of the statute. *See Shealy v. Doe*, 370 S.C. 194, 201, 634 S.E.2d 45, 49 (Ct. App. 2006) (the statute "demonstrates a policy decision by the legislature which balances the interest of the parties injured in accidents with unknown drivers, with the interest of insurance companies in preventing fraudulent claims. Where the legislature determines policy and promulgates a clear rule of law, there is no room for courts to alter that decision."); *Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (it is presumed the legislature did not intend a futile act).

Had the legislature intended to create a right of action provided an insured produces a witness affidavit at any time, the statute would say as much. Instead, the legislature explicitly provided, and the *Collins* court confirmed, that no right of action exists until the insured fulfills all "conditions to sue".

Finally, Respondent has sought throughout this case to apply a prejudice analysis to this matter and seeks a relaxed statutory interpretation as discussed in *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004). However, *Gilliland* is not applicable to the case at hand, as the Court was tasked with analyzing the *sufficiency* of the affiant's statements, not the *existence* of the affidavit at the time the case was brought. *Id*. at 201, 628 (discussing the fair interpretation of "the ambiguous fact requirement of § 38-77-170(2)" as opposed to the unambiguous affidavit requirement) (emphasis added); *see also Shealy*, 370 S.C. at 204, 634 S.E.2d at 50 (wherein the

court discussed the holding of *Gilliland*, stating "[t]he linchpin of the court's ruling was its determination that the witness affidavit contained circumstantial evidence corroborating Gilliland's testimony that an unknown vehicle contributed to her accident.").

Respondent's argument that the resulting prejudice he has incurred as a result of the trial court's order is so severe that it could not have been intended by the legislature is, likewise, misplaced. The statute does not provide a prejudice element such that claimants can escape the affidavit requirement. *See Collins*, 352 S.C. at 467, 574 S.E.2d at 741 ("Without the affidavit, [plaintiff] has no right to bring her case to court."). The court in *Collins* did not evaluate the plaintiff's prejudice in having her case dismissed mid-trial for failing to abide by the affidavit requirement, and this Court should not evaluate prejudice to Respondent. As stated in *Shealy*, "the result is lamentable to the injured party, but mandated by the statute." *Shealy*, 370 S.C. at 201, 634 S.E.2d at 49.

Respondent failed to comply with the explicit statutory requirements outlined by S.C. Code § 38-77-170(2). Therefore, his suit was rightfully and correctly dismissed by the Honorable Daniel D. Hall.

CONCLUSION

This Court should uphold the dismissal of Respondent's action, thereby ensuring the requirements of the John Doe statute are not misconstrued to allow late production of a John Doe affidavit after suit is filed. Such a precedent directly conflicts with the well-established case law developed by this Court requiring strict compliance with the John Doe statute. This Court should reverse the opinion of the Court of Appeals, and either modify the opinion or remand to the Court of Appeals for a determination on the insufficiency of Respondent's affidavits to comply with the John Doe statute.

Respectfully submitted.

The 12th day of September, 2022.

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