

IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

RECEIVED

Sep 13 2022

S.C. SUPREME COURT

APPEAL FROM FAIRFIELD COUNTY

Court of Common Pleas

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

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.

APPENDIX

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY

Daniel Dewitt Hall, Circuit Court Judge

Case No. 2018-001508

Peter Rice, ...Appellant,

v.

John Doe, ...Respondent.

RECORD ON APPEAL

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Columbia, SC 29211

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SC Court of Appeals

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ORDERS

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

2018 APR 13 AM 11:18
FAIRFIELD COUNTY
CLERK OF COURT
JUDY M BONDS

IN THE COURT OF COMMON PLEAS

Peter Rice,

Plaintiff(s),

Civil Action No. 2016CP20011

vs.

John Doe,

Defendant(s).

**ORDER DENYING JOHN DOE'S
MOTION FOR SUMMARY JUDGMENT**

This matter came before the Court upon a Motion for Summary Judgment filed by Defendant John Doe ("Doe"). The Court heard arguments from counsel on March 14, 2018, at the Fairfield County Courthouse. Plaintiff was represented by S. Hampton Eadon III. Defendant Doe was represented by Carrie H. O'Brien. After reviewing the written submissions and hearing oral argument, this Court denies Defendant Doe's Motion.

FACTUAL BACKGROUND

This action arises out of a motor vehicle collision that occurred on April 17, 2015 in Fairfield County, SC. Plaintiff Peter Rice ("Rice") was a passenger in a vehicle driven by Bobby Rae Dye. Non-party Derrick McCrorey was also a passenger in the vehicle driven by Mr. Dye. While traveling south on Hwy 901, Plaintiff alleges that an unknown vehicle traveling north on Hwy 901 came across the center line, causing Mr. Dye to leave the highway and strike a tree, thereby injuring Plaintiff Rice. The owner and operator of the John Doe vehicle remains unknown. It is undisputed that there was no contact between the John Doe vehicle and the vehicle driven by Bobby Rae Dye.

Plaintiff filed this action against Defendant Doe and Bobby Rae Day on January 12, 2016. During the pendency of the case, Plaintiff's claim against Mr. Dye has been resolved and he has been dismissed from the lawsuit. Written discovery has been exchanged and Plaintiff Rice has been deposed twice and Bobby Rae Dye has been deposed once.

REDA
#1

ROA 003

App. 004

STANDARD

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330 (2009). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." B&B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270 (Ct. App. 2004). "Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Id.

DISCUSSION

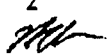
Defendant Doe's motion is based upon the grounds that the Plaintiff has failed to satisfy the terms of S.C. Code §38-77-170, namely due to alleged defects with the affidavit requirement. Defense counsel's oral argument in support of their Motion alleged two deficiencies in the affidavit requirement. The Court will address each argument in turn.

In a situation where there is no physical contact with the unknown vehicle, S.C. Code §38-77-170 (2) requires that "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." There is also an endorsement that must be displayed on the affidavit stating, "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".

Mr. Dye was the owner/operator of the insured vehicle and as such, would not be qualified to sign an affidavit pursuant to S.C. Code §38-77-170 (2). Plaintiff Rice qualifies as a witness able to provide the statutorily required affidavit, as he was not an owner or operator of the insured vehicle. Plaintiff Rice executed an Affidavit on November 18, 2016 based upon his personal observations from the night of the wreck. On September 26, 2017, Plaintiff Rice executed a second affidavit, which contained the identical language from the first affidavit along with two additional paragraphs stating that there was no contact

2


language from the first affidavit along with two additional paragraphs stating that there was no contact

2


between Mr. Dye's vehicle and the John Doe vehicle and that the wreck was reported to law enforcement. The September 2017 affidavit also contained the required statement of S.C. Code §38-77-170 concerning the implications of making a false statement.

I.

Defense counsel argued that Mr. Rice's affidavit of November 18, 2016 did not contain the required statutory language of S.C. Code §38-77-170 (2) and the suit must therefore be dismissed.

In Tucker v. Doe, 413 S.C. 389, 776 S.E.2d 121 (S.C. App., 2015), the Court dealt with a similar challenge to the sufficiency of the witness affidavit, where the witness executed two affidavits. In Tucker, the John Doe action was filed on May 14, 2010. On July 14, 2010, the Plaintiff (Tucker) filed a witness affidavit from Anthony Bernardo that did not include the statutorily required language. On March 3, 2011, Plaintiff (Tucker) filed a second affidavit from Bernardo that included the required statutory language. The Court disagreed with Doe's contention that the affidavit did not satisfy the statute because it failed to suggest the driver of the unknown vehicle proximately caused the accident and held that the statutory affidavit requirement was met. The Court further reasoned that in applying the analysis of Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d. 626 (S.C. 2004), we hold the affidavit complied with section 38-77-170. (Id. at 399)

I find that the September 26, 2017 affidavit submitted by Mr. Rice satisfies the affidavit requirements of S.C. Code §38-77-170 (2).

II.

Defendant Doe next contends that Plaintiff Rice's affidavit contradicts his deposition testimony. At issue in this contention is paragraph 5 of the affidavit. The Rice affidavit states, "As we approached a slight curve of the roadway, I observed two headlights traveling in the oncoming lane of travel" (Rice Affidavit ¶ 5). In his deposition taken on August 17, 2017, Mr. Rice testified (p. 48, L17):

Q: And did you see the truck coming at you?

A: I'd seen the headlights.

3


Q: All right. Where were the headlights?

A: Coming towards us.

Q: Okay. Were they in front of you, to the left of you, to the right of you?

A: Well they would be to the left of me.

During his first deposition taken on September 12, 2016, Plaintiff Rice testified as follows to a similar line of questioning (p. 20, L13):

Q: Okay. Do you have any information as to the identity of that other vehicle that came into your lane?

A: No, sir. I was in the back so I couldn't—all I seen was —

Q: What kind of truck was it? Was it like a semi truck or a—

A: It was headlights. I couldn't — I was in the back so I...

The owner/operator of the vehicle, Bobby Rae Dye was deposed on March 7, 2018. Mr. Dye testified as to the existence of the John Doe vehicle as well as its location on the roadway. Mr. Dye testified (p.10, L.13):

Q: When you first saw the other vehicle who you are saying his, was he in your lane or was he in his own lane?

A: He was in my lane. Two—about—I'd say about two of his tires were over in my lane.

(P.11, L.4) Q: Were you able to determine that other vehicle, whether it was a truck or a car or an 18 wheeler or anything like that?

A: It was — it was a truck, a four wheel truck. It was a truck.

Q: Like a pick up truck?

A: Yes, sir.

(P.14, L.13) Q: If you would have stayed in your lane of travel, based on your observation, would you have hit that other vehicle?

A: Yeah. He would have hit the driver's side.

Q: Okay. So you—did you feel like you had any—any option other than to do what you did?

A: That, yes, what I had to do. Get out of the road. Get out of his way.

ROA 006

App. 007

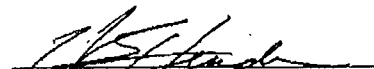
Our Supreme Court dealt with a similar factual scenario in the case of Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d. 626 (S.C. 2004). In Gilliland, the witness, Gayle Norris, testified that she saw the lights of two cars as the cars came around the curve. She also testified that after the accident, she saw the lights of the car behind the Petitioner/Plaintiff "arc through a field" as if it were making a U-turn. The witness never saw the unknown vehicle, other than its headlights. In reversing the Court of Appeals, the Supreme Court held the witness's testimony "contained circumstantial evidence that supports Petitioner's testimony that an unknown driver contributed to her accident. Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates Petitioner's testimony creating a question of fact as to causation for the jury." Id. at 202.

The Court of Appeals in Tucker addressed an alleged insufficiency of the witness's testimony (Bernardo) relative to the issue of proximate cause. The Court stated, "Bernardo described how Tucker 'suddenly veered to the left as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass.'" While this statement did not provide direct evidence as to the involvement of an unknown driver, it amounted to sufficient circumstantial evidence that supported Tucker's testimony and the other evidence in the record suggesting an unknown driver contributed to the accident." Tucker at. 401.

In applying the Supreme Court's reasoned decision in Gilliland and the Court of Appeal's decision in Tucker, I find that the Rice affidavit creates circumstantial evidence of the John Doe vehicle's involvement in the wreck and is supported and corroborated by Mr. Dye's testimony such that a genuine question of material fact exists that must be determined by a jury.

CONCLUSION

Based upon the foregoing, this Court DENIES Defendant John Doe's Motion for Summary Judgment.


The Honorable Roger E. Henderson
Presiding Circuit Court Judge

Chesterfield, South Carolina

April 6, 2018

JUDGMENTS

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD
IN THE COURT OF COMMON PLEASJUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2000011

Peter Rice

2017 NOV 16 PM 3:46
FAIRFIELD COUNTY
CLERK OF COURT

Bobby Rae Dye

John Doe

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.
Additional information for the Clerk: motion dismissed FTP

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge

2168
Judge Code

11/16/2017

Date

For Clerk of Court Office Use Only

This judgment was entered on November 16, 2017, and a copy mailed first class or placed in the appropriate attorney's box on November 16, 2017, to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

ROA 010

Sherod Hampton Eadon III PO Box 11566 Columbia, SC
29211

Michael T. Coulter PO Box 6728 Greenville, SC 29606
Carrie H. O'Brien 11440 Carmel Commons Blvd Suite 206
Charlotte, NC 28226

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Judy M. Bonds

Court Reporter

Judy M. Bonds - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2000011

Peter Rice

2018 MAR 14 PM 3:50

Bobby Rae Dye

John Doe

FAIRFIELD COUNTY
CLERK OF COURT
JUDY M BONDS

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ **ACTION DISMISSED (CHECK REASON):** ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit);
☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

This order ☐ ends ☐ does not end the case.

Additional information for the Clerk:

Motion for Summary Judgment denied
Ray Eadon to prepare order

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

[Signature]
Circuit Court Judge

2754
Judge Code

[Signature] 3-14-18
Date

For Clerk of Court Office Use Only

This judgment was entered on March 14, 2018 and a copy mailed first class or placed in the appropriate attorney's box on March 14, 2018 to attorneys of record or to parties (when appearing pro se) as follows:

CPFORM4Cm
SCCA SCRPC Form 4C (Revised 2/17)

ROA 012

App. 013

Sherod Hampton Eadon III PO Box 11566 Columbia, SC
29211

Michael T. Coulter PO Box 6728 Greenville, SC 29606
Carrie H. O'Brien 11440 Carmel Commons Blvd Suite 206
Charlotte, NC 28226

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Judy M. Bonds

Court Reporter

Judy M. Bonds - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRPC.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA
COUNTY OF Fairfield
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP2000011

Peter Rice
PLAINTIFF(S)

Bobby Rae Dye et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☒ **ACTION DISMISSED (CHECK REASON):** ☒ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other
- ☐ **STAYED DUE TO BANKRUPTCY**
- ☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

Formal order not required.

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/20/2018.

Kevin Bruner Sandifer

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.



Fairfield Common Pleas

Case Caption: Peter Rice VS Bobby Rae Dye , defendant, et al

Case Number: 2016CP2000011

Type: Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2018-06-20 15:00:14 page 3 of 3

ROA 016

App. 017

STATE OF SOUTH CAROLINA
COUNTY OF Fairfield
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2016CP2000011

Peter Rice
PLAINTIFF(S)

Bobby Rae Dye et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled);
☐ Other
- ☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j), SCRPC; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other
- ☐ STAYED DUE TO BANKRUPTCY
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (*CHECK APPLICABLE BOX*):
☐ Affirmed; ☐ Reversed; ☐ Remanded;
☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☒ Statement of Judgment by the Court:

Denying Motion To Reconsider

ORDER INFORMATION

This order ☒ ends ☐ does not end the case.

☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 07/17/2018 .

Kevin Bruner Sandifer

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.



Fairfield Common Pleas

Case Caption: Peter Rice VS Bobby Rae Dye , defendant, et al
Case Number: 2016CP2000011
Type: Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2018-07-17 10:38:38 page 3 of 3

ELECTRONICALLY FILED - 2018 Jul 17 10:59 AM - FAIRFIELD - COMMON PLEAS - CASE#2016CP2000011

PLEADINGS

LAW OFFICES
HARRIS AND GRAVES, P.A.

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MITCHELL J. WILLIAMS
STEVEN D. HAYMOND
ROBERT F. McMAHAN, JR.
MICHAEL S. SWINDELL
EDWIN L. TURNAGE
S. HAMPTON EADON, III*

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COLUMBIA
GREENVILLE
CONWAY
FLORENCE
ROCK HILL
SPARTANBURG

OF COUNSEL
E. WESLEY GRAVES, III

RETIRED
SHIPP D. HARRIS

January 7, 2016

Fairfield County Clerk of Court
P.O. Drawer 299
Winnsboro, SC 29180

RE: *Peter Rice vs. Bobby Rae Dye and John Doe*
Our File #: 201548015

Dear Sir/Madam:

Enclosed please find the original and copies of a Summons and Complaint regarding the above-referenced matter which I would appreciate your having appropriately filed. I would also appreciate your returning to us clocked copies of these pleadings in the envelope provided for your convenience. Our check in the amount of \$150.00 is enclosed as filing fee.

We appreciate your cooperation.

Very truly yours,

Connie Gause

Connie I. Gause
Litigation Paralegal

Enclosures

2016 JAN 12 PM 9
FAIRFIELD COUNTY
CLERK OF COURT
RECEIVED

ROA 021

App. 022

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF FAIRFIELD

CIVIL ACTION COVER SHEET

Peter Rice,

2016 JAN 12 AM 9 32
 Plaintiff(s), 2016 - CP - 20 - 011
 COUNTY OF FAIRFIELD
 CLERK OF COURT
 CIVIL ACTION COVER SHEET

vs.

Bobby Rae Dye and John Doe,

Defendant(s)

(Please print)

Submitted By: S. Hampton Eadon, III

Address:

P.O. Box 11566

Columbia, SC 29211

SC Bar #: 76158

Telephone #: (803) 799-2911

Fax #:

Other:

E-mail: she@harrisgraves.com

NOTE: The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete



JURY TRIAL demanded in complaint.

☐ NON-JURY TRIAL demanded in complaint.

This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- Contracts**
- ☐ Constructions (100)
 - ☐ Debt Collection (110)
 - ☐ Employment (120)
 - ☐ General (130)
 - ☐ Breach of Contract (140)
 - ☐ Other (199)

- Torts - Professional Malpractice**
- ☐ Dental Malpractice (200)
 - ☐ Legal Malpractice (210)
 - ☐ Medical Malpractice (220)
 - ☐ Notice/ File Med. Mal. (230)
 - Previous Notice of Intent Case # _____
 - 20 -CP- _____
 - ☐ Notice/File Med Mal (230)
 - ☐ Other (299)

- Torts - Personal Injury**
- ☐ Assault/Slander/Libel (300)
 - ☐ Conversion (310)
 - ☒ Motor Vehicle Accident (320)
 - ☐ Premises Liability (330)
 - ☐ Products Liability (340)
 - ☐ Personal Injury (350)
 - ☐ Wrongful Death (360)
 - ☐ Other (399)

- Real Property**
- ☐ Claim & Delivery (400)
 - ☐ Condemnation (410)
 - ☐ Foreclosure (420)
 - ☐ Mechanic's Lien (430)
 - ☐ Partition (440)
 - ☐ Possession (450)
 - ☐ Building Code Violation (460)
 - ☐ Other (499)

- Inmate Petitions**
- ☐ PCR (500)
 - ☐ Mandamus (520)
 - ☐ Habeas Corpus (530)
 - ☐ Other (599)

- Judgments/Settlements**
- ☐ Reinstate Drv. License (800)
 - ☐ Judicial Review (810)
 - ☐ Relief (820)
 - ☐ Permanent Injunction (830)
 - ☐ Forfeiture - Petition (840)
 - ☐ Forfeiture - Consent Order (850)
 - ☐ Other (899)

- Administrative Law/Relief**
- ☐ Death Settlement (700)
 - ☐ Foreign Judgment (710)
 - ☐ Magistrate's Judgment (720)
 - ☐ Minor Settlement (730)
 - ☐ Transcript Judgment (740)
 - ☐ Lis Pendens (750)

- Appeals**
- ☐ Arbitration (900)
 - ☐ Magistrate - Civil (910)
 - ☐ Magistrate - Criminal (920)
 - ☐ Municipal (930)
 - ☐ Probate Court (940)
 - ☐ SCDOT (950)

Special/Complex/Other

- ☐ Environmental (600)
- ☐ Automobile Arb. (610)
- ☐ Medical (620)
- ☐ Other (699)

- ☐ Pharmaceuticals (630)
- ☐ Unfair Trade Practices (640)
- ☐ Out-of State Depositions (650)
- ☐ Motion to Quash Subpoena in an Out-of-County Action (660)
- ☐ Sexual Predation (510)

- ☐ Transfer of Structured Settlement Payment Rights
- ☐ Confession of Judgment
- ☐ Petition for Workers Compensation Settlement Approval (780)
- ☐ Other (799)

- ☐ Workers' Comp (960)
- ☐ Zoning Board (970)
- ☐ Employment Security Comm. (991)
- ☐ Other (999)

Submitting Party Signature: S. Hampton EadonDate: 1-5-16

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et. seq.

SCCA / 234 (10/2014)

Page 1 of 2

ROA 022

App. 023

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

2016 JAN 12 AM 9 32

Peter Rice,

FAIRFIELD COUNTY
CLERK OF COURT
Plaintiff(s)

Civil Action No. 2016-CP-20-011

vs.

Bobby Rae Dye and John Doe,

Defendant(s).

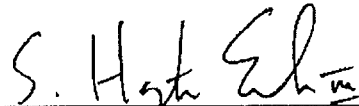
SUMMONS

Jury Trial Requested

TO: THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their office, Columbia, SC, within thirty (30) days after service thereof exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

HARRIS AND GRAVES, P.A.



S. HAMPTON EADON, III
Attorney for Plaintiff
SC Bar No. 76158
P.O. Box 11566
Columbia, SC 29211
(803) 799-2911
sha@harrisgraves.com

Columbia, South Carolina

Dated: 1-5-16

ROA 023

App. 024

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

Peter Rice,

2016 JAN 12 AM 9 32
FAIRFIELD COUNTY
CLERK OF COURT
RECEIVED
Plaintiff(s),

IN THE COURT OF COMMON PLEAS

Civil Action No. 2016-CP-20-011

vs.

Bobby Rae Dye and John Doe,

Defendant(s).

COMPLAINT

Jury Trial Requested

The Plaintiff would respectfully show unto the Court that:

1. The Plaintiff is a citizen and resident of Chester County, South Carolina.
2. The Plaintiff is informed and believes that Defendant Bobby Rae Dye (Hereinafter "Dye") is a citizen and resident of Chester County, South Carolina.
3. The Plaintiff is unaware at this time of the identity of the driver of the vehicle who crossed the center line causing Defendant Dye to lose control, swerve and hit a tree. Thus, this Defendant shall be named as John Doe at this time pursuant to §33-77-180 of the SC Code of Laws.
4. On or about April 17, 2015, Plaintiff was a passenger in vehicle being driven by Defendant Dye traveling South on Hwy. 901 in Fairfield County, SC, when Defendant Dye swerved and lost control of his vehicle when Defendant John Doe, who was traveling north on Hwy 901 crossed the center line into the path of Defendant Dye. Defendant John Doe left the scene. As a result of Defendant Dye's vehicle leaving the roadway and striking a tree, Plaintiff suffered severe and painful injuries and damages.
5. Venue is proper in Fairfield County pursuant to S.C. Code §15-7-30 (B), S.C. Code §15-7-30 (C)(2) and S.C. Code §15-7-30 (D)(1) as the most substantial part of the alleged acts and/or omission giving rise to the cause of action occurred in Fairfield County.
6. As a result of the collision, the Plaintiff sustained the following injuries and damages:
 - a. extensive pain, mental anguish and discomfort;

- b. total disability for a period of time;
- c. money spent for medical care and treatment;
- d. inability to carry on normal activities;
- e. loss of enjoyment of life; and
- f. time and wages from Plaintiff's job .

FIRST CAUSE OF ACTION
(NEGLIGENCE OF DEFENDANT DYE)

7. Plaintiff repeats and realleges paragraphs one through six above as if each were set forth here again in their entirety.

8. The injuries and damages incurred by the Plaintiff were directly and proximately caused by the careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts of Defendant Dye in one or more of the following particulars:

- a. In failing to keep the vehicle he was operating under control;
- b. In failing to apply the brakes and/or maintain them in working order;
- c. In failing to keep a proper lookout;
- d. In failing to use a degree of care that a prudent person should use under the existing conditions and circumstances;
- e. In operating the vehicle in such a manner as to indicate either unlawful or wanton disregard for the safety of other personal or property.

SECOND CAUSE OF ACTION
(NEGLIGENCE OF DEFENDANT DOE)

9. Plaintiff repeats and realleges paragraphs one through eight above as if each were set forth here again in their entirety.

10. The injuries and damages incurred by the Plaintiff were directly and proximately caused by the careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts of Defendant John Doe in one or more of the following particulars:

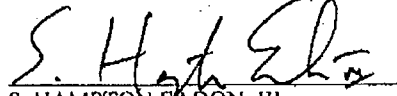
- a. In failing to stop at the scene of a collision involving bodily injury in violation of S.C. Code §56-5-1210;
- b. In failing to keep the vehicle he was operating under control;
- c. In failing to apply the brakes and/or maintain them in working order;
- d. In failing to keep a proper lookout;
- e. In operating the vehicle left of the center line, in direct violation of S.C. Code §56-5-1810 and S.C. Code §56-5-1830, constituting negligence *per se*;
- f. In failing to use the degree of care that a reasonable and prudent person should have exercised under the existing conditions and circumstances;
- g. In operating the vehicle in such a manner as to indicate either unlawful or wanton disregard for the safety of other personal or property.

11. The acts and omissions of Defendant Dye combining and concurring with the acts and omissions of Defendant John Doe were the direct and proximate cause of the accident and resulting injuries and damages suffered by Plaintiff.

12. The Plaintiff is informed and believes that he is entitled to judgment against the Defendants, jointly and severally, for actual and punitive damages in an appropriate amount.

WHEREFORE, the Plaintiff prays judgment against the Defendants, jointly and severally, for actual and punitive damages in an appropriate amount, the costs of this action, and for such other and further relief as the Court may deem just and proper.

HARRIS AND GRAVES, P.A.



S. HAMPTON BADON, III

Attorney for Plaintiff

SC Bar No. 76158

P.O. Box 11566

Columbia, SC 29211

(803) 799-2911

she@harrisgraves.com

Columbia, South Carolina

Dated: 1-6-15

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH ATLANTA

Carrie Hallman O'Brien
Direct (704) 247-9679
Fax (704) 544-1719
chohrien@wjlaw.net

6701 Carmel Road, Suite 475
Charlotte, NC 28226
www.wjclaw.net

November 16, 2016

Betty Jo Beckham
Fairfield County Clerk of Court
P.O. Drawer 299
Winnsboro, SC 29180

Re: Peter Rice vs. Bobby Rae Dye and John Doe
Case No.: 2016-CP-20-011
Claim No.: 16-5250933

2016 NOV 21 AM 11 45
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

Dear Clerk:

Enclosed are the original and one copy of Unnamed Defendant's Answer and Motion to Dismiss in the above-captioned matter. Please file the original with the Court, and return the copy, stamped "filed", in the enclosed self-addressed, stamped envelope.

Thank you for your time and attention to this matter.

WILLSON JONES CARTER & BAXLEY, P.A.

/s/ Carrie Hallman O'Brien

Carrie Hallman O'Brien

CHO/abg

Enclosures

cc: Peter Majewski, The Progressive Group of Insurance Companies
Hampton Eadon, Attorney for Plaintiff
Michael Coulter, Attorney for Defendant Dye

ROA 027

App. 028

IN THE COURT OF COMMON PLEAS

C/A No.: 2016-CP-20-011

Peter Rice

Plaintiff,

vs.

Bobby Rae Dye and John Doc

Defendants.

UNNAMED DEFENDANT'S ANSWER
(JURY TRIAL DEMANDED)

2016 NOV 21 AM 11 45
FRIEVELD COUNTY
CLERK OF COURT
BETTY JO DEGNAN
follows:

The Unnamed Defendant answers the Complaint of the Plaintiff as follows:

MOTION TO DISMISS

Defendant moves the Court to Dismiss this action as it pertains to the Uninsured Carrier, Progressive Insurance Company, because the Plaintiff has failed to comply with SC Gen. Stat. §38-77-170.

FOR A FIRST DEFENSE

1. Admitted upon information and belief.
2. The answering Defendant is without sufficient information to form a belief as to truth or veracity of said allegations; therefore said allegations are denied.
3. Denied.
4. Denied.
5. Denied.
6. Denied.

FIRST CAUSE OF ACTION
(Negligence Defendant Dye)

7. This answering Defendant incorporates Paragraphs 1-6 as if fully set forth herein.
8. The answering Defendant is without sufficient information to form a belief as to truth or veracity of said allegations; therefore said allegations are denied.

SECOND CAUSE OF ACTION
(Negligence Defendant Doe)

9. This answering Defendant incorporates Paragraphs 1-8 as if fully set forth herein.
10. Denied.
11. Denied.
12. Denied.

FOR A SECOND DEFENSE

Any injuries and damages sustained by the Plaintiff as set forth in the Complaint were due to and caused by the sole negligence, recklessness, willfulness and wantonness of the Plaintiff in one or more of the following particulars:

- a) In failing to apply the brakes;
- b) In traveling too fast for conditions;
- c) In over correcting;
- d) In failing to keep a proper lookout and observe conditions existing at the time; and
- e) In such other particulars as may be shown by the evidence at trial.

FOR A THIRD DEFENSE

The Summons and Complaint fail to state facts sufficient to state a cause of action.

FOR A FOURTH DEFENSE

The Defendant would allege that upon information and belief that the claims of the Plaintiff are barred or partially barred by virtue of the Plaintiff's failure to mitigate Plaintiff's alleged damages.

FOR A FIFTH DEFENSE

Such injuries and damages as were allegedly sustained by the Plaintiff at the time and place alleged in the Complaint, if any, upon information and belief, were due to, directly and proximately caused by the gross negligence, recklessness, willfulness, and wantonness of the Plaintiffs in one or more of the particulars heretofore set forth in the Second Defense herein, which allegations are realleged and incorporated herein by reference, which negligence, recklessness, willfulness, and wantonness, combining and concurring with that of the Defendant, if any, contributed to Plaintiff's alleged injuries and damages as a proximate cause thereof and without which the same would not have occurred, and therefore this Defendant pleads the contributory negligence and contributory willfulness of the Plaintiff as a complete bar and defense to this action.

FOR A SIXTH DEFENSE

Plaintiffs' claims, if any, are barred or should be reduced by Plaintiffs' comparative negligence.

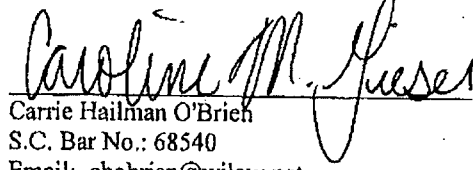
FOR AN SEVENTH DEFENSE

Punitive damages are unconstitutional fifth (5th), eighth (8th) and fourteenth (14th) amendments of the United States Constitution and some of the provisions of the South Carolina Constitution.

WHEREFORE, having truly answered the Complaint of the Plaintiff, Unnamed Defendant prays that the complaint be dismissed, with costs assessed to Plaintiff, and for such and further relief as the Court may deem proper.

THIS THE 16TH DAY OF NOVEMBER, 2016.

Willson Jones Carter & Baxley, P.A.



for
CHO

Carrie Hailman O'Brien

S.C. Bar No.: 68540

Email: chobrien@wjlaw.net

6701 Carmel Road, Suite 475

Charlotte, NC 28226

(704) 247-9679 (phone)

(704) 544-1719 (fax)

ATTORNEYS FOR UNNAMED DEFENDANT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Unnamed Defendant's Answer to Plaintiff's Complaint was served upon all counsel of Record as follows:

- ☐ as an attachment to an electronic correspondence
- ☒ by depositing a copy of the same in an official depository of the United States mail in a postage-paid envelope
- ☐ via facsimile, or
- ☐ by hand delivery

addressed as follows:

S. Hampton Eadon, III, Esquire
Harris & Graves, P.A.
P.O. Box 11566
Columbia, SC 29211
(803) 799-2911
Attorney for Plaintiff
Peter Rice

Michael T. Coulter, Esquire
Clarkson, Walsh, Terrell & Coulter, P.A.
P.O. Box 6728
Greenville, SC 29606-6728
(864) 232-4400/(864) 235-4399 (F)
Attorney for Defendant
Bobby Rae Dye

2016 NOV 21 AM 11 45
FIELD COURT
CLERK OF COURT
BETTY JO BECKHAM

This the 16th day of November, 2016.

Caroline M. Graves for
Carrie Hailman O'Brien CHO

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

2016 NOV 22 AM 10 11
FAIRFIELD COUNTY
CLERK OF COURT
GETTY JO BECKHAM

IN THE COURT OF COMMON PLEAS

Peter Rice,

Plaintiff,

Civil Action No. 2016CP20011

vs.

AFFIDAVIT OF PETER RICE

Bobby Rae Dye and John Doe,

Defendant.

PERSONALLY APPEARED before me, Peter Rice, who, being first duly sworn, deposes and says that:

1. I am over the age of 18 and otherwise qualified to give sworn testimony;
2. I am a citizen and resident of Chester County, South Carolina;
3. I am the Plaintiff in the above-referenced legal action;
4. I was a passenger in a vehicle being driven by Bobby Rae Dye, traveling on Highway 901 in Fairfield County, South Carolina on April 17, 2015;
5. As we approached a slight curve of the roadway, I observed two headlights traveling in the oncoming lane of travel;
6. I was able to determine that the headlights were those of a pick-up truck;
7. As the vehicle driven by Mr. Dye approached the truck, Mr. Dye steered his vehicle to the right in what I believe to be an effort to avoid colliding into the pick-up truck;
8. In making this maneuver, Mr. Dye lost control of the vehicle I was riding in and went off of the roadway, striking a tree.
9. The truck that was traveling in the oncoming lane never stopped and I was unable to determine the identity of the truck or it's driver.

FURTHER AFFIANT SAYETH NOT

(Signature page to follow)

ROA 033

App. 034

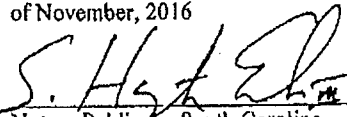
Date: November 18, 2016



PETER RICE

Sworn To Before me this 18th day

of November, 2016



Notary Public for South Carolina
My Commission Expires: 1-13-2021

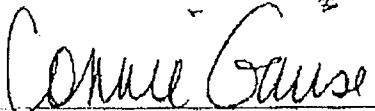
CERTIFICATE OF SERVICE

Connie Gause says that (s)he is the Paralegal for the Attorney for the Plaintiff, with offices at 1518 Richland Street, Columbia, SC, and that on November 21, 2016, (s)he mailed in a sealed envelope, postage prepaid, a copy of Affidavit of Peter Rice to:

Michael T. Coulter, Esq.
CLARKSON, WALSH & TERRELL, P.A.
PO Box 6728
Greenville, SC 29606

Carrie H. O'Brien, Esq.
Willson Jones Carter & Baxley, PA
6701 Carmel Road, Ste. 475
Charlotte, NC 28226

FILED
CLERK OF COURT
BETTY JO BECKWITH
NOV 22 AM 10:11
RICHLAND COUNTY


Connie I. Gause

MITCHELL J. WILLIAMS
STEVEN D. HAYMOND
ROBERT F. McMAHAN, JR.
MICHAEL S. SWINDELL
EDWIN L. TURNAGE
S. HAMPTON EADON, III*

*Also Licensed in North Carolina

LAW OFFICES
HARRIS AND GRAVES, P.A.
"Our mission is to provide exceptional personal and professional service to our clients"

THE MAXCY GREGG HOUSE
1518 RICHLAND STREET
P.O. BOX 11566
COLUMBIA, SC 29211
TELEPHONE: 803-799-2911
FAX: 803-252-4838

OFFICES
COLUMBIA
GREENVILLE
CONWAY
FLORENCE
ROCK HILL
SPARTANBURG

OF COUNSEL
E. W. GRAY, III

RETIRED
W. D. HARRIS

November 21, 2016

Honorable Betty Jo Beckham
Fairfield County Clerk of Court
P.O. Drawer 299
Winnsboro, SC 29180

RE: *Peter Rice vs. Bobby Rae Dye and John Doe*
Civil Action #: 2016CP20011
Our File #: 201548015

Dear Mrs. Beckham:

I am enclosing Affidavit of Peter Rice which I would appreciate your filing in this case. So that our files might be complete, please stamp the enclosed copy with the date and time of filing and return it to me in the envelope provided for your convenience.

Thank you for your time and assistance in this matter.

Very truly yours,

Connie Gause

Connie Gause
Litigation Paralegal
cgause@harrisgraves.com

Enclosures

CC: Carrie O'Brien, Esq.
Michael Coulter, Esq.

NOV 22 AM 10 11
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

ROA 036

App. 037

STATE OF SOUTH CAROLINA 2018 FEB -5 AM 9:39 IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD

Peter Rice,

Plaintiff,

vs.

Bobby Rae Dye and John Doe,

Defendant.

Civil Action No. 2016CP20011

AFFIDAVIT OF PETER RICE

PERSONALLY APPEARED before me, Peter Rice, who, being first duly sworn, deposes and
says that:

1. I am over the age of 18 and otherwise qualified to give sworn testimony;
2. I am a citizen and resident of Chester County, South Carolina;
3. I am the Plaintiff in the above-referenced legal action;
4. I was a passenger in a vehicle being driven by Bobby Rae Dye, traveling on Highway 901 in Fairfield County, South Carolina on April 17, 2015;
5. As we approached a slight curve of the roadway, I observed two headlights traveling in the oncoming lane of travel;
6. I was able to determine that the headlights were those of a pick-up truck;
7. As the vehicle driven by Mr. Dye approached the truck, Mr. Dye steered his vehicle to the right in what I believe to be an effort to avoid colliding into the pick-up truck;
8. In making this maneuver, Mr. Dye lost control of the vehicle I was riding in and went off the roadway, striking a tree.
9. The truck that was traveling in the oncoming lane never stopped and I was unable to determine the identity of the truck or it's driver.
10. There was no physical contact between Mr. Dye's vehicle and the pick-up truck.

ROA 037

App. 038

11. The collision was reported to law enforcement authorities and Trooper T.M. McNeece with the South Carolina Highway Patrol responded to the scene of the collision to investigate.

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.

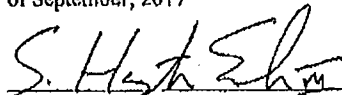
FURTHER AFFIANT SAYETH NOT.

Date: 9/26/17



PETER RICE

Sworn To Before me this 26th day
of September, 2017



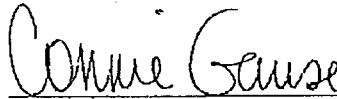
Notary Public for South Carolina
My Commission Expires: 1-13-2021

CERTIFICATE OF SERVICE

Connie I. Gause says that (s)he is the Paralegal for the Attorney for the Plaintiff, with offices at Columbia, South Carolina, and that on January 30, 2018, (s)he mailed in a sealed envelope, postage prepaid, a copy of Affidavit of Peter Rlce to:

Carrie O'Brien, Esquire
Willson Jones Carter & Baxley, P.A.
6701 Carmel Road, Ste. 475
Charlotte, NC 28226

the name and address of counsel for the defendant(s).



Connie Gause

2018 FEB -5 AM 9:39
FBI
FBI
FBI

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD) JUDICIAL DISTRICT

2017 OCT 19 AM 10:28
FAIRFIELD COUNTY
CLERK OF COURT

C/A No.: 2016-CP-20-011

Peter Rice,

Plaintiff,

vs.

Bobby Rae Dye and John Doe,

Defendants.

UNNAMED DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

NOW COMES the Unnamed Defendant, Progressive Insurance Company, by and through undersigned counsel, pursuant to South Carolina Rule of Civil Procedure 56, and hereby moves for summary judgment on the grounds that the Plaintiff has failed to satisfy the terms of SC Gen. Stat. §38-77-170. In support of this motion, the Unnamed Defendant relies upon the pleadings, discovery responses, relevant statutes and all depositions taken in this litigation.

WHEREFORE, the Unnamed Defendant hereby prays the Court for an Order finding that there are no genuine issues of material fact and that the Unnamed Defendant is entitled to judgment in its favor as a matter of law.

THIS THE 13TH DAY OF OCTOBER, 2017.

Willson Jones Carter & Baxley, P.A.



Carrie Hailman O'Brien
S.C. Bar No.: 68540
Email: chobrien@wjlaw.net
6701 Carmel Road, Suite 475
Charlotte, NC 28226
(704) 247-9679 (phone)
(704) 544-1719 (fax)

ATTORNEYS FOR UNNAMED DEFENDANT

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

Peter Rice,
Plaintiff(s),

Civil Action No. 2016 CP 20-011

vs.

MOTION FOR RECONSIDERATION

John Doe,
Defendant(s).

TO: **THE HONORABLE DANIEL DEWITT HALL, CIRCUIT COURT JUDGE**, Sixteenth Judicial Circuit, Moss Justice Center, 1675-1J York Highway, York, South Carolina 29745; and

CARRIE H. O'BRIEN, ESQ., WALKER ALLEN, 225 E. Worthington Avenue, Charlotte, North Carolina 28203;

COMES NOW the Plaintiff, Peter Rice, and, pursuant to the South Carolina Rules of Civil Procedure, Rule 59, make his Motion to Reconsider as follows:

PROCEDURAL HISTORY

This matter came before this Honorable Court on June 20, 2018 pursuant to a Complaint filed by this Plaintiff on or about January 12, 2016 against Defendants Bobby Rae Dye and John Doe. Defendant John Doe was served through the Department of Insurance on September 15, 2016 with the filing of an Affidavit of Service received by this Court on September 22, 2016. Plaintiff's counsel agreed to a 30-day extension for John Doe to file his Answer. On November 18, 2016, Plaintiff executed an Affidavit pursuant to the requirements of S.C. Code §38-77-170 (Exhibit A) which was emailed by Plaintiff's counsel to John Doe's counsel with a hard copy sent by mail on November 21, 2016. On November 21, 2016, Defendant John Doe filed an Answer which included a motion to dismiss alleging that Plaintiff failed to comply with S.C. Code §38-77-170.

A hearing on John Doe's Motion to Dismiss was scheduled for a hearing on January 5, 2017 at 9:30 a.m. On January 4, 2017, counsel for John Doe sent an email indicating that the motion to dismiss was

being removed (Exhibit B) and counsel would be advising the clerk's office of this the following morning. The morning of January 5, 2017, a paralegal from the office of John Doe's counsel sent an email following up with the clerk that the motion hearing was being removed. (Exhibit C). The clerk's office marked the official hearing roster that the motion was "resolved" (Exhibit D).

On September 26, 2017, Plaintiff signed an Affidavit which included the same sworn testimony as the November 18, 2016 Affidavit with the addition of two paragraphs (#9 and #10) and a statement at the bottom of the affidavit indicating the affiant's understanding of the ramifications of making a false statement. This September 26, 2017 Affidavit was mailed to John Doe's counsel on October 9, 2017. On October 19, 2017, Defendant John Doe filed a Motion for Summary Judgment alleging that Plaintiff failed to satisfy the terms of S.C. Code §38-77-170. During the pendency of the case, Defendant Bobby Rae Dye settled with Plaintiff and a Stipulation of Dismissal With Prejudice was filed on November 8, 2017. On March 14, 2018, John Doe filed a Memorandum of Law in Support of its Motion for Summary Judgment. (Exhibit E).

On March 14, 2018, John Doe's Motion for Summary Judgment was heard before the Honorable Roger E. Henderson. Judge Henderson denied Doe's Motion for Summary Judgment from the bench. On April 13, 2018, the Order Denying John Doe's Motion for Summary Judgment was filed with the clerk. This matter was set for trial the week of June 18, 2018 and was called for trial on June 20, 2018. During the SCRC 16(a) Pre-trial Conference, both parties' Motions in Limine were heard. John Doe requested that her Motion to Dismiss be heard at this time prior to striking a jury. John Doe's motion to dismiss was heard and granted on a Form 4. The Plaintiff hereby files their Motion for Reconsideration within ten (10) days from the date of receipt of the Order in this matter.

QUESTIONS PRESENTED

- I. Did the Court err in determining John Doe's Motion to Dismiss during the SCRC 16(a) Pre-Trial Conference was properly ripe for adjudication?
- II. Did the Court err in finding that, the affidavit requirement of S.C. Code §38-77-170(2) is a condition precedent to filing a lawsuit involving a John Doe vehicle where there was no contact?

FACTUAL STATEMENT OF THE CASE

This action arises out of a motor vehicle collision that occurred on April 17, 2015 in Fairfield County, SC. Plaintiff Peter Rice ("Rice") was a passenger in a vehicle driven by Bobby Rae Dye. Non-party, Derrick McCrorey, was also a passenger in the vehicle driven by Mr. Dye. While traveling South on Hwy 901, Plaintiff alleges that an unknown vehicle traveling North on Hwy 901 came across the center line, causing Mr. Dye to leave the highway and strike a tree, thereby injuring Plaintiff Rice. The owner and operator of the John Doe vehicle remains unknown. It is undisputed that there was no contact between the John Doe vehicle and the vehicle driven by Bobby Rae Dye.

During the pendency of the case, Plaintiff's claim against Mr. Dye was resolved and he has been dismissed with prejudice from the lawsuit. Written discovery has been exchanged between the parties, Plaintiff Rice has been deposed twice and Bobby Rae Dye has been deposed once.

ARGUMENT

I. Did the Court err in hearing and ultimately granting John Doe's Motion to Dismiss?

Defendant John Doe raised a Motion to Dismiss in his Answer filed on November 21, 2016 alleging that Plaintiff failed to comply with S.C. Code §38-77-170. A hearing on this motion was scheduled for January 5, 2017. The day before the scheduled hearing, counsel for John Doe sent counsel for all parties involved in the lawsuit an email indicating that the motion to dismiss was being removed. (Exhibit B). The morning of January 5, 2017, a paralegal from the office of John Doe's counsel sent an email following up with the clerk that the motion hearing was being removed. (Exhibit C). The clerk's office marked the official hearing roster that the motion was "resolved" (Exhibit D).

On June 20, 2018, during the SCRCP 16(a) Pre-Trial Conference, counsel for John Doe requested that the Motion to Dismiss be heard. Plaintiff's counsel argued against this motion being heard claiming that it was not properly before the Court due to it being withdrawn and never having been re-filed or noticed. Plaintiff counsel's contention that the Motion to Dismiss was not properly before the Court was disputed by counsel for John Doe. South Carolina Rules of Civil Procedure Rule 7(b)(1) provides that "an

application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.” Plaintiff submits that the Motion to Dismiss was never re-filed or re-noticed after being removed in early 2017.

The Court of Appeals encountered a similar situation in Summer Place of Myrtle Beach Homeowner's Ass'n, Inc. v. Knight et al., 379 S.E.2d 724, 298 S.C. 241 (S.C. App., 1989). In that case, the trial court granted a summary judgment motion during a SCRCP 16(a) Pre-Trial Conference that was not pending. In reversing the trial court, the Court of Appeals held, “because there were no motions for summary judgment pending at the time of the pre-trial hearing, there was no motion before the court to grant.” (Id. at 729). While South Carolina Rules of Civil Procedure Rule 16(a)(7) allows for the disposition of pending motions during the Pre-Trial Conference, since Doe’s Motion to Dismiss was not filed or noticed after being removed on January 5, 2017, it was not pending before this Court on June 20, 2018 and was not ripe for adjudication.

Plaintiff further asserts that the issue ultimately ruled upon in Defendant’s Motion to Dismiss had already been determined in Doe’s Summary Judgment Motion. On March 14, 2018, Circuit Court Judge Roger Henderson denied Defendant Doe’s Motion for Summary Judgment from the bench and entered a Form 4 Order. The formal Order denying Defendant Doe’s Motion for Summary Judgment was filed on April 13, 2018. (Exhibit F). Following the denial of the summary judgment, there was no motion for reconsideration filed by Defendant.

The Order specifically states, “after reviewing the written submissions and hearing oral argument, this Court denies Defendant Doe’s Motion.” (Exhibit F, p.1)(emphasis added). The only written submission from the parties during the hearing was Defendant’s Memorandum (Exhibit E). The first argument contained in the Defendant’s memorandum, under Section I.A. is that there was no affidavit prior to filing suit. The memorandum cites the Collins v. Doe, 352 S.C. 462 (2002) case to advance their argument that the filing of an affidavit is a condition precedent to filing suit.

During the June 20, 2018, hearing on Defendant Doe's Motion to Dismiss, Plaintiff's counsel raised the issue that the argument being advanced by Defendant Doe had already been heard and decided at the summary judgment stage by Judge Henderson. The arguments made during Defendant Doe's Motion to Dismiss considered matters outside of the pleadings, namely the Affidavits submitted by Plaintiff, deposition testimony of Plaintiff and Bobby Rae Dye, prior Defendant Dye's acknowledgment of liability via deposition testimony and his denial of liability in the settlement agreement he entered into with Plaintiff. South Carolina courts have long held that a Motion to Dismiss under SCRCP Rule 12 converts into a Motion for Summary Judgment under SCRCP 56 when matters outside of the pleadings are considered.

This Court ultimately granted Defendant Doe's Motion to Dismiss on the ground that the filing of an affidavit was a condition precedent under S.C. Code §38-77-170. Plaintiff respectfully requests this Court to reconsider its position on its granting Defendant Doe's Motion to Dismiss in that: 1) the motion was not properly pending before the Court and therefore not ripe for adjudication; and 2) the motion to dismiss was ultimately turned into a summary judgment motion due to the introduction of matters outside of the pleadings. The procedural avenue to re-hear this singular issue initially raised and ruled upon by Judge Henderson at the summary judgment hearing and again at the June 20, 2018 motion to dismiss is either by way of reconsideration of the summary judgment ruling or at the directed verdict stage of the case.

II. Did the Court err in finding that, the affidavit requirement of S.C. Code §38-77-170(2) is a condition precedent to filing a lawsuit involving a John Doe vehicle where there was no contact?

Defendant Doe's motion is based upon the grounds that the Plaintiff has failed to satisfy the terms of S.C. Code §38-77-170(2), namely due to alleged defects with the timeliness of the filing of his affidavit.

In a situation where there is no physical contact with an unknown vehicle, S.C. Code §38-77-170 (2) requires that "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." There is also an endorsement that must be displayed on the

affidavit stating, "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".

From the plain reading of S.C. Code §38-77-170, there is no requirement that the affidavit be filed with the Court. In Collins v. Doe, 352 S.C. 462 (2002), our Supreme Court noted that "the sworn affidavit requirement fulfills a notice function; providing, upon request, the defendant-insurer with information relating to the validity of Plaintiff's case." (Collins at 470). Upon request via email on November 7, 2016, counsel for Defendant Doe requested the affidavit be provided to her. Exhibit A confirms that counsel for Defendant Doe was provided with Plaintiff's Affidavit on November 18, 2016 via email, which email was responded to, prior to the filing of Doe's Answer on November 21, 2016. Plaintiff's first affidavit was filed with the clerk's office on November 22, 2016. This Court based its granting of Defendant Doe's Motion to Dismiss on the grounds that the Affidavit was not filed prior to Defendant Doe filing his Answer, where no such statutory requirement exists.

The Collins case is factually distinguishable from the instant case. In Collins, there was no affidavit filed by a witness and the court determined that witness testimony could not act as the functional equivalent of the affidavit requirement of S.C. Code §38-77-170(2). Two years after the Supreme Court decided Collins, it heard Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (S.C., 2004), another no-contact John Doe case which dealt with challenges to the requirements of S.C. Code §38-77-170(2). In reversing the Court of Appeals, the Supreme Court stated:

In Collins, this Court strictly interpreted § 38-77-170(2). This Court held that while the purpose of the affidavit requirement of § 38-77-170(2) could have been met by witness testimony, the statute specifically required that the plaintiff provide an affidavit of an independent witness.

Here, § 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, Collins suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to Collins, is not); therefore, a strict interpretation of § 38-77-170(2) would undermine the

statute's purpose. See *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")

The net result of this interpretation results in Plaintiff losing his ability to have his claim against John Doe heard by the jury. Both affidavits were executed by Plaintiff, well in advance of the expiration of the statute of limitations. If an affidavit were found to be a condition precedent to filing a John Doe action, that result could have been attained by Plaintiff dismissing his case without prejudice and simply re-filing it at any point from when Defendant Doe's initial Motion to Dismiss was raised on November 22, 2016 until the statute of limitations expired on April 17, 2018. Defendant Doe was afforded the opportunity to depose the Plaintiff and the driver of the Plaintiff's vehicle, Mr. Dye. The concerns of fraud prevention of the legislature involving single-vehicle accidents have been met. Defendant Doe and his insurer have not been prejudiced due to a lack of notice or an opportunity to further investigation this claim, as this litigation has spanned nearly two years. In sum, the resulting prejudice to Plaintiff rises to the level that is so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intent.

Finally, due to the delay of the determination of John Doe's hearing on his Motion to Dismiss from when it was initially filed in November of 2016 until it's hearing in June of 2018, the Plaintiff respectfully requests that the Court consider the equitable remedy of equitable tolling of the statute of limitations due to these exceptional circumstances.

WHEREFORE, the Plaintiffs pray that the Court reconsider its judgment in the above matter as requested above and amend and reissue the Order in this matter accordingly.

[signatures on next page]

Respectfully Submitted,

/s/ S. Hampton Eadon, III

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Columbia, South Carolina
Dated: June 29, 2018

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Daniel D. Hall, Presiding Judge, Sixth Judicial Circuit

Case No. 2016-CP-20-011

2018 AUG 11 AM 11:05
FAIRFIELD COUNTY
CLERK OF COURT
JUDITH BORDS

Peter Rice

Appellant,

v.

John Doe

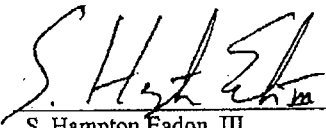
Respondent.

NOTICE OF APPEAL

Peter Rice appeals the order of the Honorable Daniel D. Hall dated July 17, 2018 on Appellant's Motion to Reconsider. Appellant received written notice of entry of this order on July 18, 2018.

Date

8/16/18


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ROA 050

App. 051

TRANSCRIPT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD) SIXTH JUDICIAL CIRCUIT
2016-CP-20-00011

PETER RICE)

vs.)

TRANSCRIPT OF RECORD

BOBBY RAE DYE AND JOHN)
DOE)

JUNE 20, 2018
WINNSBORO, SOUTH CAROLINA

BEFORE THE HONORABLE DANIEL D. HALL

APPEARANCES:

S. HAMPTON EADON, III, ESQUIRE
COLUMBIA, SOUTH CAROLINA

ATTORNEY FOR THE PLAINTIFF

ALSO PRESENT: PETER RICE

CARRIE O'BRIEN, ESQUIRE
COLUMBIA, SOUTH CAROLINA

ATTORNEY FOR THE DEFENDANT

ALSO PRESENT: LAURA MASEL

* * * * *

ORIGINAL TRANSCRIPT OF PROCEEDINGS PROVIDED TO S. HAMPTON
EADON, III

ALL FEES PURSUANT TO RULE 607 (h)(i), SCACR -
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SHIRLEY BROOM
16TH Circuit Court Reporter

ROA 051

App. 053

I-N-D-E-X

WITNESSES:

(NO TESTIMONY TAKEN)

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
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NO EXHIBITS

1 (WHEREUPON, THE FOLLOWING MATTERS ARE HEARD IN
2 THE JURY ROOM OUTSIDE THE PRESENCE OF THE JURY POOL.)

3 THE COURT - All right, we're on the record in the
4 matter of Peter Rice vs. Bobby Dye. This is a Fairfield
5 County civil case, 2016-CP-20-00011. We are in -- in a
6 jury room outside the main courtroom with the court
7 reporter present, the parties all present. We are set to
8 begin this trial. The courtroom's being -- is full of
9 potential jurors in this case. We have some motions that
10 we need to take up outside their presence and trying to
11 make this as efficient as we can. We have -- I think
12 everybody's agreed to be back here as far taking care of
13 these pre-trial motions.

14 Is that correct, attorneys?

15 MS. O'BRIEN - Yes, sir, Your Honor.

16 MR. EADON - Yes, sir.

17 THE COURT - All right, let me do this. Would the
18 attorneys for the record just introduce themselves and your
19 clients.

20 MR. EADON - My name is Hampton Eadon and I
21 represent Peter Rice, and just -- Judge, just for
22 clarification, the case going forward is Rice v. Doe. Mr.
23 Dye has been dismissed with prejudice.

1 THE COURT - All right, and Mr. Doe is an unnamed
2 defendant or an unknown unnamed defendant in the case.

3 All right, and ---

4 MR. GOODE - I'm Jonathan Goode, also represent
5 Mr. Rice.

6 MS. O'BRIEN - Carrie O'Brien representing John
7 Doe.

8 THE COURT - And also present in the room with us
9 is Ms. ---

10 MS. MASEL - Masel.

11 THE COURT - --- Masel, an adjuster for
12 Progressive Insurance.

13 So let's do this, we had discussed in chambers a
14 couple of pending motions I believe the defense had. So,
15 Ms. O'Brien, we'll start with you.

16 MS. O'BRIEN - Thank you, Your Honor. I have a
17 motion to dismiss that was filed at the time the complaint
18 was filed that I would like to have heard initially.

19 THE COURT - All right, and from the defense, is
20 there any basis by which the Court should not hear the
21 motion to dismiss?

22 MR. EADON - Your Honor, our position is the
23 motion to dismiss as indicated and the answer is based on
24 the failure to comply, the alleged failure to comply with
25 the plaintiff with South Carolina Statute 38-77-170. It's

1 our position, Judge, that this is the same argument that
2 was made in summary judgment that has already been heard by
3 Judge Henderson and denied.

4 THE COURT - All right, well, let's do this, then
5 let me hear from Ms. O'Brien, her basis for a motion and
6 what she's asking for the Court to do, the legal basis for
7 that, and then I'll be glad to hear from you, y'all and
8 your responses.

9 MS. O'BRIEN - Your Honor, the motion to dismiss
10 is based upon the fact that the plaintiff in this case has
11 failed to comply with statute 38-77-170. Specifically,
12 Your Honor, in 2012 the Chapter 77 Subsection 170 is
13 entitled Condition to sue or recover under uninsured
14 motorist provision when the owner or operator of a motor
15 vehicle causing injury or damage is unknown. In this case
16 the plaintiff has alleged that there is a phantom vehicle
17 that contributed to the accident, and with respect to the
18 statute, it specifically says that a condition to sue is
19 that the statute has to -- that the -- that the plaintiff
20 or some witness has to fill out an affidavit and there are
21 three different specific criteria that has to be met with
22 respect to the affidavit, and then there also has to be a
23 statement that is displayed on the affidavit that says that
24 a false statement concerning the facts contained in this
25 affidavit may be subject to the person making the false

1 statement to criminal penalties is provided by law.
2 Specifically, Your Honor, the Collins v. Doe case which is
3 a 2002 Supreme Court case actually dealt with whether the
4 statute has to be strictly complied with or whether it can
5 be interpreted. And, Your Honor, under Collins v. Doe, the
6 Supreme Court held -- and I'm quoting -- is written,
7 section 38-77-170 contains requirements necessary to
8 support a plaintiff's, quote, right of action, and then the
9 Supreme Court went on to define what a right of action is
10 and says that's the right to bring a specific case to
11 Court, a right that can be enforced by legal action, and it
12 says that without a sworn affidavit a plaintiff has no
13 right of action. Supreme Court said, in other words,
14 without the affidavit that in this case, the plaintiff, Ms.
15 Collins, had no right to bring her case to Court. This
16 case was filed in January of 2016. When the case was filed
17 in January of 2016, no affidavit was filed with the summons
18 and complaint. And if you read the Collins v. Doe case,
19 the Court said that -- it defined what right of action is,
20 defined that without an affidavit that you cannot bring
21 your case to Court. And in this situation, no affidavit
22 was filed in January, therefore, there is a condition
23 precedent to bringing the action to Court; that was not
24 met. The case then goes on to further state that the
25 statute must be strictly complied with and that an

1 affidavit is -- affidavit requirement is mandatory. In
2 this case I filed my answer, and after my answer was filed
3 and the motion to dismiss was filed, then the plaintiff
4 filed an affidavit, and in this case, Your Honor, if you
5 look at the affidavit on its face, which is part of the
6 Court record, the affidavit when it was initially filed
7 there are three specific conditions that must be met,
8 number one ---

9 THE COURT - When was that affidavit filed?

10 MS. O'BRIEN - Can you look in the Court file,
11 Hampton, and see the actual date that it was filed? ---

12 THE COURT - I -- I can ---

13 MS. O'BRIEN - --- because I was never provided
14 with a filed copy of the affidavit. All I know is ---

15 MR. EADON - There's one on November the 18th of
16 2016, Judge.

17 MS. O'BRIEN - Is that --

18 MR. EADON - That's the first one.

19 THE COURT - I think -- is that the date that the
20 affidavit was signed or was that the date it was filed?

21 MS. O'BRIEN - That's the date it was signed.

22 That's not the date it was filed.

23 THE COURT - That was my question is when was it
24 filed:

25 MS. O'BRIEN - Yeah.

1 MR. EADON - If I have a filed copy, Judge, I'll
2 be happy to let you know. (Pause) It was filed on November
3 22nd, 2016.

4 MS. O'BRIEN - And my answer was filed November
5 21st, 2016.

6 So, Your Honor, the affidavit by Mr. Rice was
7 filed after the answer was filed, after the motion to
8 dismiss was properly before the Court, and it's our
9 position that based upon Collins v. Doe, number one, that
10 the affidavit was not timely filed, that the condition
11 precedent per the statute, the condition to sue is that the
12 affidavit has to be drafted, that the affidavit has to meet
13 the three different criterias that are specifically listed
14 under subsection one, two and three and then contain a
15 statement that says a false statement was not made. If you
16 get past the point of the condition precedent, which I
17 would argue would not be appropriate, but if you get past
18 that, specifically the affidavit has to say, number one,
19 the insured or someone on his behalf has reported the
20 accident to some appropriate police authority within a
21 reasonable time under all the circumstances after its
22 occurrence. If you look at the affidavit that was filed on
23 November 22nd, 2016, it completely omits subsection number
24 one. There is nothing that addresses subsection one in any
25 way. With respect to condition number two, there has to be

1 a statement that the injury or damage was caused by
2 physical contact with the unknown vehicle, or the accident
3 must've been witnessed by someone other than the owner or
4 operator of the insured vehicle; provided however, the
5 witness must sign an affidavit attesting to the truth of
6 the facts of the accident contained in the affidavit. With
7 respect to subsection number two, the affidavit in
8 paragraph seven says that the defendant, Mr. Dye, tried to
9 avoid colliding with the pickup truck -- and I want to read
10 specifically -- it says in number five: "As we approached
11 a slight curve on the roadway, I observed two headlights
12 traveling in the on-coming lane of travel." Paragraph six:
13 "I was able to determine that the headlights were those of
14 a pickup truck." Number seven: "As the vehicle driven by
15 Mr. Dye approached the truck, Mr. Dye steered his vehicle
16 to the right in what I believe to be an effort to avoid
17 colliding into the pickup truck." Number eight: "In
18 making this maneuver, Mr. Dye lost control of the vehicle I
19 was riding in and went off the roadway striking a tree."
20 So with respect to subsection two of 38-77-170, we believe
21 that based upon the affidavit that was filed after the
22 answer that they have met condition number two. With
23 respect to condition number three, the insured was not
24 negligent in failing to determine the identity of the other
25 vehicle and the driver of the other vehicle at the time of

1 the accident, meaning that there must be some statement in
2 the affidavit that Mr. Dye, who was the insured in this
3 case, was not negligent in failing to determine the
4 identity of the vehicle and the driver of the other
5 vehicle. Mr. Rice's affidavit does not contain any
6 statement that deals in any way with condition number
7 three. Additionally, Your Honor, there is a requirement
8 per the statute that there has to be a statement that is
9 displayed on the affidavit dealing with the false
10 statement. Nowhere is that contained on the face of the
11 affidavit. So with respect to, again, Collins v. Doe,
12 Collins v. Doe specifically goes through and outlines in
13 the Supreme Court case that -- and in this case Ms. Collins
14 did not have an affidavit, and then she tried to come to
15 Court and have someone testify as to all of these issues,
16 and the Supreme Court held that without the affidavit
17 containing each of the three conditions and also having the
18 false statement displayed on the face of the affidavit,
19 that she had failed to comply with 38-77-170 in that her
20 failure to have an affidavit that specifically listed all
21 of the conditions under 38-77-170 meant that her case was
22 not properly before the Court and the -- should not have
23 been heard and directed verdict should've been granted.

24 Also, Your Honor, after we deposed Mr. Dye and
25 Mr. Rice, I notified the plaintiff's attorney that his

1 affidavit did not comply with the statute. He then sent
2 another affidavit to be filed with the Court, and I
3 received the affidavit some time after January 30th of
4 2018, so less than six months ago.

5 And, Hampton, can you tell me -- because I did
6 not get a filed copy of that affidavit either -- the date
7 that the second affidavit was filed?

8 MR. EADON - I'll look for it. It was signed on
9 September 26th of '17. I don't have a filed copy in my
10 records.

11 MS. O'BRIEN - What do you mean in your records?
12 You mean in the Court file?

13 MR. EADON - I don't have the Court file, Carrie.
14 I ---

15 THE COURT - I can pull up the Court file.

16 All right, go ahead. We'll -- we'll resolve that
17 issue.

18 MS. O'BRIEN - So, Your Honor, with respect to the
19 second affidavit that was filed, it would be our position
20 that the affidavit, again, was not properly filed at the
21 time that this action was brought. It was not a condition
22 to suing, and if you look at the second affidavit, the
23 second affidavit adds -- it's identical except for it adds
24 two paragraphs. Paragraph number ten specifically says
25 there was no physical contact between Mr. Dye's vehicle and

1 the pickup truck. Paragraph number eleven says, the
2 collision was reported to law enforcement authorities and
3 that Trooper T.M. McNeace with the South Carolina Highway
4 Patrol responded to the scene of the collision to
5 investigate. So it now meets condition number one, which
6 is that it was reported to some appropriate police
7 authority. Condition number three is still missing where
8 there is a statement that the insured, again, Mr. Dye, was
9 not negligent in failing to determine the identity of the
10 vehicle and the driver of the vehicle. So it would be our
11 position that condition number three has not been met and
12 the affidavit does not comply with the statute under 38-77-
13 170. In addition to the two paragraphs, the additional
14 affidavit contains the statement that is also required to
15 be on the face of the affidavit that the witness is not
16 making a false statement concerning the facts in the
17 affidavit and may be subject, the person making the false
18 statement, to criminal penalties as provided by law.

19 So, Your Honor, our position is that based upon
20 the statute, based upon the Supreme Court case, Collins vs.
21 Doe, that is still current law in South Carolina from 2002,
22 that in order for the plaintiff to bring a right of action
23 to the Court and have the case before the Court, that the
24 plaintiff has to have an affidavit that is filed with the
25 complaint. The affidavit cannot be filed after the

1 complaint. The affidavit cannot be filed after there has
2 been an answer in this case that has been filed where a
3 motion to dismiss is properly before the Court. Again, if
4 you believe that a condition precedent of filing the
5 affidavit at the time of the lawsuit is not required, the
6 affidavit -- the first affidavit fails to meet criteria in
7 38-77-170 of subsection one and three and fails to contain
8 the statement that must be on the face of the affidavit.
9 The subsequent affidavit that was filed some time in 2018
10 and had to have been after January 30 of 2018, also fails
11 to comply with subsection three, and based upon Collins v.
12 Doe, Your Honor, it's our position that the plaintiff has
13 not complied with 38-77-170 and the Supreme Court requires
14 strict compliance, and there is no testimony that is to be
15 allowed based upon 38-77-170 as a substitute for the
16 affidavit based upon Collins v. Doe.

17 THE COURT - All right, thank y'all. And when
18 y'all -- I may be reading and have my head down when y'all
19 are talking. I don't mean to show y'all, Mr. Dye, (sic)
20 any disrespect. I'm listening at the same time.

21 All right, so Mr. Eadon, I'll be glad to hear
22 your response to the motion to dismiss.

23 MR. EADON - Judge, I don't have a whole lot to
24 add, because that's the exact same argument that was
25 advanced at summary judgment. Judge Henderson heard all of

1 the same arguments. He rendered a decision at that time.
2 There's no new information that's been brought before the
3 Court. It's the same argument under a different name. And
4 in his decision he evaluated all of the case law. He
5 evaluated all of the arguments that were advanced just a
6 moment ago. In his order he specifically found that the
7 affidavit satisfied the affidavit requirements of 38-77-
8 170, and I -- I certainly don't want to be in a position
9 where I'm saying a Judge can't do something, because that's
10 certainly not my place, but, you know, this motion of
11 dismissal was filed with an answer, what, two years ago,
12 and we're sitting here literally the eve of trial to hear
13 this, this motion to dismiss after a motion for summary
14 judgment has been denied. If there is any -- if there was
15 any relief of granting a motion to dismiss, it should've
16 been done prior to this point, because the statute of
17 limitations had not expired. Obviously as we sit here --
18 this wreck happened in April of 2015. The statute has
19 expired. The statute of limitations has expired, but I'll
20 be happy to rehash all the arguments that I made at summary
21 judgment.

22 THE COURT - Well, let me -- you don't need to
23 that. I mean it does -- what I would like you to -- hear
24 is that -- his order -- and I have a copy of his order here
25 in the clerk's file before me -- he says that I find that

1 the September the 26th, 2017 affidavit submitted by Mr.
2 Rice satisfies the affidavit requirements of South Carolina
3 Code Section 38-77-170 (2) -- subsection two and if I
4 understand defenses' argument that -- her -- the argument
5 for the motion to dismiss probably goes beyond just
6 subsection two.

7 MS. O'BRIEN - Correct.

8 THE COURT - All right, so -- so I'll be glad to
9 hear you -- or at least that's the way the Court sees it.
10 Mr. Eadon, let me hear from you and then I'll come back to
11 you.

12 MR. EADON - Yes, sir. And, Judge, if you'll just
13 give me a moment, again, we didn't have -- I don't have all
14 my case law. It's in there as it relates to --

15 THE COURT - You want to go get it?

16 MR. EADON - If you don't mind.

17 THE COURT - Yeah. We'll -- yeah, go get ---

18 MR. EADON - Okay, thank you. Make sure I have
19 everything so that we can be on the same page.

20 (WHEREUPON, BRIEF PAUSE)

21 MR. EADON - Thank you, Your Honor.

22 THE COURT - And let me do this. I'm satisfied
23 that the -- I mean I'm not here to -- I'm satisfied that
24 Judge Henderson's order on the summary judgment is the law
25 of the case, and so we really don't need to rehash the --

1 the compliance with the statute as far as -- it appeared to
2 me -- and when I read through the file that what Judge
3 Henderson ordered was that even though the initial
4 affidavit did not have the required language stating about
5 the potential penalties and then the subsequent affidavit
6 did, that the law appeared to be -- and I think obviously I
7 believe he was correct -- and that that did not mean that
8 the affidavit was not sufficient. So that's -- it does not
9 appear to be the issue before the Court or that I'm going
10 to consider whether that affidavit ended up being
11 sufficient. What appears that defense is arguing that is -
12 - was not argued as part of the motion is this -- is the
13 broader concept of that the filing of an affidavit -- and
14 it appears that the case law that I looked at -- and you
15 can correct me if I'm wrong -- all dealt with cases where
16 there was not an issue of the timeliness of the affidavit,
17 it was more of the sufficiency of the affidavit that, you
18 know, I guess we must assume were all timely filed, and it
19 appears what the defense is arguing is that as a condition
20 -- well, now she is arguing -- as a condition precedent to
21 the bringing -- actually filing the suit, then an affidavit
22 must've been filed, so that's what I'd like to hear from
23 you, Mr. Eadon, on that particular issue.

24 MR. EADON - Okay. As to -- I'm sorry, the last
25 part as to whether this a condition precedent to ---

1 THE COURT - Yes. Yes. In other words, you filed
2 a lawsuit and what she's arguing -- at least is the way the
3 Court is interpreting it -- filed a lawsuit, filed the
4 complaint, you got to have the affidavit -- an affidavit
5 filed at the time of the action for it to be a proper
6 action.

7 MR. EADON - Okay.

8 THE COURT - The cases that dealt with the summary
9 judgment it appeared that affidavits were timely filed, but
10 you -- then you had this disagreement over whether the
11 language requiring the notice of a criminal penalty and it
12 appears to this Court that our -- our Courts have said,
13 hey, look, even if they file one later on and it has the
14 language on there, then that's fine, so -- do you
15 understand my question?

16 MR. EADON - Yes, sir. So you're wanting us to
17 address ---

18 THE COURT - The condition ---

19 MR. EADON - The condition precedent.

20 THE COURT - --- being a condition precedent ---

21 MR. EADON - Sure.

22 THE COURT - --- in this case factually an
23 affidavit -- and there doesn't appear to be a factual
24 dispute that the affidavit was not filed until a day after
25 the ans -- the defenses' answer was filed.

1 MR. EADON - Yes, sir.

2 THE COURT - Am I right factually?

3 MR. EADON - Yes, sir. Yes, sir, that's correct.

4 THE COURT - Okay.

5 MR. EADON - And, Judge, that's -- that's part of
6 the argument that was advanced at summary judgment and we
7 submitted a case and, again, I don't have all of the case
8 law from that argument which was done months ago, but
9 there's a Tucker v. Doe case that was decided by the Court
10 of Appeals where the sufficiency of an affidavit was tested
11 and ---

12 THE COURT - And she -- defense has just handed me
13 a copy of Tucker v. Doe.

14 MR. EADON - Okay. And, you know, in that case,
15 Judge, the affidavits were filed after the lawsuit was
16 initiated, and the Court in that case held that the
17 affidavit complied with the section, and our position would
18 be if the -- if the Court found that it was a true
19 condition precedent, then that case should've been
20 dismissed as Ms. O'Brien is asking this Court to do on Mr.
21 Rice's case. You know, our -- our other position is that
22 the legislature in writing laws is clear of what they want,
23 and the medical malpractice arena, South Carolina Code 15-
24 79-125, they create a true condition precedent, and the way
25 they do that is they say the subject of this statute is

1 notice of intent to file suit as a prerequisite to filing
2 an action. Subsection one -- or Subsection A says prior to
3 filing or initiating a civil action alleging injury or
4 death as a result of medical malpractice, the plaintiff
5 shall contemporaneously file a notice of intent to file
6 suit and an affidavit of an expert witness. So our
7 position is when the legislature intends for something to
8 be a true condition precedent in order to bring a case to
9 Court or to be able to recover from a uninsured claim, then
10 it should mirror the language that they've used in this
11 medical malpractice statute. The heading of the uninsured
12 statute is conditions to sue or recover under uninsured
13 motorist provisions. So our position is that if the
14 legislature specifically intended that the filing of this
15 affidavit be a true condition precedent as being argued
16 this morning, they should've specifically stated it as they
17 did in the med mal statute, and, you know, otherwise the
18 statute has been satisfied per Judge Henderson's summary
19 judgment order. I mean I'm happy to ---

20 THE COURT - All right, and -- I mean would you
21 agree that -- and I'll be glad to hear you on this -- that
22 the summary judgment order did not contain any language
23 that dealt with the issue of it being a condition
24 precedent?

1 MR. EADON - I would have to go back through it,
2 because quite frankly I haven't reviewed it since ---

3 THE COURT - Okay, all right. Well, take a look
4 at it, because I'm going to take a -- I'm going to do a
5 little bit of research before I rule.

6 MR. EADON - Okay. I know -- I know for a fact
7 that that argument was advanced at the hearing. I do
8 recall that.

9 MS. O'BRIEN - No, it wasn't, and there's nowhere
10 in the order ---

11 THE COURT - Well, I mean -- we're --

12 MS. O'BRIEN - --- that it deals with that.

13 THE COURT - That's all right. That's all right.
14 We're bound by the order.

15 MS. O'BRIEN - Right. The order does not address
16 that at all.

17 THE COURT - All right. Let me do this, so we're
18 back to you ---

19 MS. O'BRIEN - Your Honor, and I'm going to ---

20 THE COURT - --- defense.

21 MS. O'BRIEN - --- hand up Collins v. Doe. And,
22 Your Honor, I have highlighted specifically what Collins v.
23 Doe on the second page specifically says and deals with the
24 -- and it says that, you know, the requirements are
25 necessary to support a plaintiff's right of action, and it

1 defines right of action and goes on to say -- Your Honor,
2 it's the -- actually the other case. It specifically says
3 that without a sworn affidavit, a plaintiff has no right of
4 action. It also goes on to say that -- that a plaintiff's
5 strict compliance with the affidavit requirement is
6 mandatory. The case also in Collins v. Doe talks about
7 that under the rules of statutory interpretation the use of
8 words such as shall or must indicates the legislature's
9 intent to enact a mandatory requirement. The statute
10 specifically says that this must -- the affidavit must
11 contain and must be filed and it defines as when it must be
12 filed. It is a condition precedent. The statute even
13 says, it is a condition to sue. That is the heading of the
14 statute. So they -- it's the defenses' position that they
15 have failed on that. With respect to the fact that the
16 affidavit was filed later, if you read the Tucker v. Doe
17 case, the Tucker v. Doe case never addresses that issue.
18 In fact, the Court says that it was not preserved because
19 it was not raised until it was on the appellate level, so
20 therefore they did not address that at all. There has been
21 no case law that I have been able to find that shows that
22 when an affidavit is filed after the complaint or after the
23 answer that it is sufficient. All of the case law -- no
24 one has raised that argument. No one has dealt with it,
25 and if you look at Tucker v. Doe and read through the case

1 -- and I went through it again, because in the order Mr.
2 Eadon argued that Tucker v. Doe stands for the proposition
3 that you can file an affidavit anytime you want. Tucker v.
4 Doe does not say that anywhere in the case law. It wasn't
5 addressed; it wasn't raised, and therefore, the appellate
6 court said that they could not deal with it because the
7 first time it had been raised was on the appellate level,
8 and therefore, it failed.

9 Your Honor, the condition precedent is one issue.
10 The other issue that will have to be dealt with -- and if
11 you look at the order, it specifically says that the only
12 thing that was addressed with respect to the affidavit was
13 subsection two. Your Honor, subsection three requires that
14 the insured has to -- it has to be in the affidavit -- the
15 insured wasn't negligent in failing to determine the
16 identity of the vehicle and the driver of the vehicle.
17 Both affidavits do not deal in any way with 38-77-170
18 paragraph three. And, Your Honor, it's our position that
19 the affidavit that was filed in 2018 does not address
20 subsection three. The affidavit that was filed on November
21 22nd, 2016 does not address subsection three. Statute of
22 limitations has expired in this case and no affidavit can
23 now be filed, and no testimony can come in to correct the
24 deficiencies in the affidavit.

1 THE COURT - All right, Mr. Eadon, I'll give you
2 the last word.

3 MR. EADON - Yes, sir, Your Honor. I mean I don't
4 have a whole heck of a lot to add to be honest with you due
5 to the fact that this -- we weren't -- in truthful, we
6 weren't prepared to come and argue something that our
7 position has been heard on the case. Some of the things
8 that Ms. O'Brien has argued I don't necessarily agree with.
9 There has been testimony by way of video depo -- or by way
10 of video -- by deposition that there was no way for them to
11 determine. Mr. Dye testified that there's no way for him
12 to determine the vehicle that ran them off the roadway as
13 it didn't hit the brakes -- and I'm paraphrasing. I'm not
14 directly quoting -- but that the vehicle did not stop. The
15 individual did not come to where they were down in the
16 trees after they ran off, and he is here and he will
17 testify to that fact. Mr. Rice is in a position where he
18 is unable to say that they were able to find out and
19 determine the identity of the individual who ran them off
20 the road. The law enforcement, the highway patrolman who
21 showed up in his -- in his accident report does not show
22 the identity of the other driver. The other driver just
23 kept going and there will be testimony today in trial from
24 Mr. Rice and from Mr. Dye that there is no way for them to
25 be able to determine who that driver was, because he didn't

1 stop, and it's not anything that they did or didn't do that
2 led to that. It's just the facts of this case, and there's
3 a case -- I do remember in researching this months and
4 months ago -- in Orangeburg where an unnamed driver caused
5 a wreck and then fled the scene and the Court essentially
6 in listening to deposition -- or testimony at trial that
7 that person was negligent in failing to identify that
8 driver. That driver came up to the door of the plaintiff,
9 spoke to them and then took off. And if memory serves me,
10 it was somebody with a Texas license plate. The Court
11 ultimately decided that that person -- the plaintiff was
12 negligent in failing to identify the John Doe driver who
13 left the scene. This case is factually distinguishable and
14 different in that they're down in a grove of trees, the
15 other car never stops, continues going; it was reported to
16 law enforcement. There will be testimony to that, and
17 there's already been deposition testimony to that, that
18 there was -- there's nothing else that could be done to
19 determine the identity under subsection three.

20 THE COURT - All right.

21 MS. O'BRIEN - Your Honor, the only thing I want
22 to say is, Collins v. Doe specifically addresses the issue
23 as to whether a witnesses' testimony at trial is the
24 functional equivalent of the affidavit requirement, and
25 Collins v. Doe says that even if you have testimony at

1 trial that can correct the -- that can support the
2 affidavit, that could deal with the deficiencies of the
3 affidavit, that that testimony cannot be used in lieu of
4 making sure that you have met the statutory requirements.

5 THE COURT - I'll take a look at those. All
6 right, any other motions?

7 MR. EADON - To that issue, Judge, I would hand up
8 Gilliland v. Doe, which is a 2004 ---

9 THE COURT - And I have -- I've pulled it up. I
10 have looked at it a little bit earlier, but I'll take a
11 look at that again.

12 MR. EADON - And the only response to that is that
13 in that case the Court discussed witness testimony from
14 Gayle Norris whose testimony actually supported the claim
15 by the plaintiff, and so to the -- in deciding a case after
16 the Collins' decision, this Court essentially said that her
17 testimony does corroborate and support and provide
18 circumstantial evidence to the issue that this is a John
19 Doe.

20 THE COURT - All right.

21 MS. O'BRIEN - But there's a difference, because
22 there was an affidavit in Gilliland v. Doe, so there ---

23 THE COURT - All right. I'll look at Gilliland v.
24 Doe ---

1 MS. O'BRIEN - Yeah. Yeah, Gilliland v. Doe does
2 not stand ---
3 THE COURT - Anything other issues ---
4 MS. O'BRIEN - --- for that proposition.
5 THE COURT - Anything other issues we need to take
6 up?
7 MR. EADON - I have a motion in limine, Judge.
8 THE COURT - All right, and what does that
9 involve?
10 MR. EADON - I'll be happy to hand it up.
11 (WHEREUPON, DOCUMENT HANDED TO THE COURT)
12 MR. EADON - The majority of it, Judge, is a
13 traditional motion in limine dealing with evidentiary
14 matters.
15 (WHEREUPON, DOCUMENT HANDED TO MS. O'BRIEN)
16 MS. O'BRIEN - Thank you.
17 MR. EADON - You're welcome.
18 Here's a memorandum in support of the motion in
19 limine.
20 Judge, the first one, and I don't know if Ms.
21 O'Brien intends to get into this or not on this particular
22 case, but it's asking that the Court direct that there be
23 no questioning along the lines of when Mr. Rice hired
24 counsel. I don't believe that was a question in the

1 deposition but I don't think it's proper for the reasons
2 contained in this motion in limine.

3 THE COURT - Ms. O'Brien, do you want to be heard
4 on the timing of hiring of counsel?

5 MS. O'BRIEN - Yeah, none of the cases cited are
6 South Carolina cases. That's not South Carolina case law.
7 South Carolina case law doesn't deal nor address with the
8 timing of hiring counsel, so yeah, that doesn't -- I'd like
9 to see some South Carolina case law that supports that.

10 THE COURT - Well, I'm going to grant that motion.
11 I'm not going to allow you if we go to trial to go into the
12 timing of counsel.

13 How about prior settlement of Bobby Rae Dye?

14 MR. EADON - Yes, sir, Judge. This is -- we've
15 eluded to this and discussed this earlier. Mr. Dye was an
16 original defendant in this case. He entered into a
17 settlement agreement with Mr. Rice months ago; a release
18 was signed. The release specifically states that -- that
19 liability is expressly denied contrary to some positions
20 taken earlier. A stipulation of dismissal was entered with
21 prejudice as it relates to Bobby Rae Dye, and then the
22 memorandum that I have attached discusses South Carolina
23 law specifically as it relates to this issue of settlement
24 agreements and the admissibility of settlement agreements.

1 It talks about -- I don't want to waste the Court's time
2 reading something that the Court can read, but ---

3 THE COURT - Well, let me hear where -- what the
4 defense position is to ---

5 MS. O'BRIEN - Your Honor, -- yeah, our position
6 is not that we are going to admit the settlement agreement,
7 but Mr. Dye has admitted liability in this case. Mr. Dye
8 paid money to the plaintiff admitting that he had caused
9 injury to him and the jury has a right to know that Mr. Dye
10 had -- and I have a right to question him as to the fact
11 that he has admitted that he injured the plaintiff as a
12 result of this accident.

13 THE COURT - Well, that doesn't go to any
14 settlement. I mean do you have an objection to her being
15 able to ---

16 MR. EADON - Yes, sir, I do, and -- because I
17 think that -- I mean this is the release that was signed by
18 Mr. Rice, and providing to Progressive, Ms. O'Brien's
19 client, it specifically states, Bobby Dye, which liability
20 was and is expressly denied. There is no -- I mean yeah,
21 they -- I mean just like any ---

22 THE COURT - Well, how do we know -- well, then
23 what you're telling me is that there's some information or
24 at least the defense is arguing there's some information
25 that he has admitted liability.

1 MR. EADON - Not in the -- and my understanding of
2 defenses' argument is that by settling he has admitted
3 liability. This release just like any other release that
4 I've seen expressly denies liability.

5 THE COURT - All right, well, that's -- I'll --
6 I'm going to grant the motion in limine if we get to that
7 point of his -- just because he settled the case it appears
8 to the Court that he has not -- it appears as part of their
9 negotiations he denied liability. Certainly if he takes
10 the stand, that will be a factual issue for the jury to
11 determine. I mean a jury's got to decide what -- if -- I
12 mean that may be their defense that he's liable. I mean
13 there's -- he still has a -- they still have a right to
14 examine him if he's a witness on what he did or didn't do.

15 MR. EADON - Okay, but not -- but not the fact
16 that he was involved in the lawsuit or that any other ---

17 THE COURT - Right.

18 MS. O'BRIEN - Why not? I have a right to -- the
19 -- I have a right to question the plaintiff on the
20 pleadings, and the pleadings are -- the pleadings are
21 evidence in this case, and I can pull up the specific case
22 that says that I have a right to question the plaintiff on
23 the pleadings in this case ---

24 THE COURT - And ---

1 MS. O'BRIEN - --- and the fact that he alleged
2 that Bobby Rae Dye caused this accident. Absolutely. And
3 I ---

4 THE COURT - Well, let's -- hold on a minute.

5 MS. O'BRIEN - Yeah.

6 THE COURT - I'm not necessarily -- I don't -- I
7 don't believe that the settlement precludes you from
8 examining him about the facts of the case and then -- and --
9 - I don't know how he's going to answer the question. We
10 don't know how he's going to answer the question, but we'll
11 -- we'll deal with that if and when Mr. Dye takes the
12 stand. We'll revisit that. How about collateral source?

13 MS. O'BRIEN - We agree on collateral source.

14 THE COURT - All right. How about ---

15 MR. EADON - And, Judge, as to discuss prohibiting
16 the discussion of any write-offs, any agreements as it
17 relates to the medical bills that have been incurred in
18 this case, just so we're on the same page. Right?

19 MS. O'BRIEN - Yeah.

20 THE COURT - And then four, use of documentary
21 evidence without proper foundation. That's a rule the
22 Court -- I don't know that -- I mean certainly the Court
23 will enforce whatever appropriate evidentiary rules as far
24 as proper admission of evidence.

25 Number five?

1 MR. EADON - Judge, this -- this really kind of
2 goes hand-in-hand with number six. Mr. Rice was involved
3 in a motor vehicle collision in November of 2014 I believe,
4 which was about six months prior to this one. All
5 indications in his testimony that I'm aware of is that he
6 went and got checked out, didn't have any further
7 treatment. You know, it's our position is that that is
8 irrelevant to this case that's being judged on these facts,
9 that it's not a pre-existing type continual injury that has
10 anything to do with his one ER visit in this case, as well
11 as there was a subsequent motor vehicle collision that
12 doesn't have anything to do with this case.

13 THE COURT - Well, I would say that we need to
14 deal with five and six if and when Mr. Dye testifies and
15 once he testifies before cross examination we'll revisit
16 that, because it goes to the issue of what she's allowed to
17 ask on cross. Isn't that right?

18 MR. EADON - Yes, sir.

19 THE COURT - All right, we'll revisit those.
20 We'll see how -- what happens at trial.

21 All right, seven?

22 MR. EADON - I don't know if that's something that
23 Ms. O'Brien intends to get into, but -- and I'll be honest
24 with you, as long as there's no claim that John Doe is
25 somebody who can't pay a judgment, which I don't think Ms.

1 O'Brien's going to do. I don't think we need to address
2 seven?

3 THE COURT - All right, eight, failure to call
4 witnesses?

5 MR. EADON - That's just asking that there be no -
6 - no mention of somebody that's equally available to both
7 parties, and in this case there's a passenger that's gone
8 AWOL, Derrick McCrorey, who Mr. Dye -- I mean Mr. Rice nor
9 us nor Ms. O'Brien's been able to find. We've all tried to
10 notice him and serve him subpoenas, tried to get him
11 deposed and he's been uncooperative to everybody.

12 THE COURT - Ms. O'Brien, you want to be heard on
13 that?

14 MS. O'BRIEN - Absolutely. I have a right to
15 discuss the fact that there was an additional passenger in
16 the vehicle who has never testified and never made a
17 statement that the -- there was a phantom vehicle or that
18 it caused this accident. I have a right to cross examine
19 the plaintiff about that. I have a right to cross examine
20 the plaintiff about the fact that there's no medical
21 provider that has supported that he was injured as a result
22 of this accident, and that goes to a directed verdict
23 motion ---

24 THE COURT - I'll deny that motion.

25 Criminal history?

1 MR. EADON - There -- Mr. Rice has testified to
2 some misdemeanors in his deposition. I don't know if
3 defense intends to get into any of that, but this is just a
4 blanket motion in limine to -- to ask that no criminal
5 history that Mr. Rice may have been involved in ---

6 THE COURT - Well, that will be dependent upon
7 what he -- how he answers and testifies at trial. We'll
8 revisit that one.

9 MR. EADON - All right, and I believe that's it,
10 Judge.

11 THE COURT - All right.

12 MS. O'BRIEN - Your Honor, the only motion that we
13 have is that there be no mention of insurance by any party
14 or any witness.

15 THE COURT - I assume that everybody's willing to
16 abide that ---

17 MR. EADON - Yes, sir.

18 Don't say the word insurance. Okay?

19 THE COURT - All right, anything else we need to
20 take up?

21 MS. O'BRIEN - And I would also ask if Mr. Dye
22 testifies that he not mention insurance and be instructed
23 by the plaintiff not to mention insurance.

24 THE COURT - That'll be left up to them.
25 Hopefully they will ---

1 MR. EADON - I will -- I will tell him.

2 THE COURT - All right, let's go in -- y'all take
3 your places in the courtroom and get yourself settled and
4 then I'm going to take a ---

5 (WHEREUPON, BRIEF PAUSE WHILE PARTIES TAKE THEIR
6 POSITIONS IN THE COURTROOM)

7 (WHEREUPON, BRIEF RECESS TAKEN.)

8 (WHEREUPON, HEARING CONTINUES IN THE COURTROOM.)

9 THE COURT - All right, plaintiffs ready to
10 proceed?

11 MR. EADON - Yes, sir, Your Honor.

12 THE COURT - Defense?

13 MS. O'BRIEN - Yes, sir, Your Honor.

14 THE COURT - All right.

15 Ladies and gentlemen of the jury, we've got some
16 issues that we need to take up outside of your presence.
17 I'm going to release you for lunch. If you would call at
18 1:00 o'clock, call the number that you have at 1:00
19 o'clock. The clerk will leave a message on when you'll
20 need -- when you'll be needed next, so I'm going to allow
21 you to leave for lunch. It is twenty til 12:00, but call
22 at 1:00 o'clock and you will have instructions about what
23 to do next.

24 THE COURT - All right, everybody be seated while
25 this jury panel ---

1 (WHEREUPON, JURY POOL EXITS THE COURTROOM.)

2 THE COURT - All right, we're back on the record
3 and this is 2016-CP-20-00011, Peter Rice vs. Bobby Dye and
4 John Doe. Bobby Dye is no longer a party to this action,
5 so this is Peter Rice vs. John Doe. The Court has heard a
6 motion to dismiss on the record outside the presence of the
7 jury in another area of the courtroom, also went through
8 some motions in limine is also on the record, motion from -
9 - the motions in limine brought by the defense and the
10 Court had taken under advisement the motion to dismiss.
11 We're back in the courtroom to deal with that motion first.
12 Is there anything else that you want to put on the record
13 as far as the motion to dismiss from the defense?

14 MS. O'BRIEN - Other than the case law that was
15 handed to Your Honor a few minutes ago by plaintiff's
16 attorney in chambers, Jordan v. Doe. The Jordan v. Doe
17 case stands for the proposition of whether there was
18 sufficiency of evidence that dealt with subsection three in
19 statute 38-77-170, and, Your Honor, we are not arguing
20 whether there is sufficient evidence with respect to
21 subsection three. Our position has been and we maintain is
22 that the affidavit doesn't address in any way subsection
23 number three, either the affidavit that was filed on
24 November 22nd, 2016 or the affidavit that was filed in
25 2018, and based upon Collins v. Doe and the case stands for

1 the proposition that the statute is a strict requirement
2 that it must contain the three provisions along with a
3 statement on the face, that it must contain about the
4 falsity and it has not been made under false pretenses, our
5 position is is not whether there's sufficient evidence, it
6 is whether there was any evidence whatsoever with respect
7 to subsection three on the affidavit, and our position is
8 that the plaintiff has not complied in that statutory
9 requirement under subsection three.

10 THE COURT - All right, thank you.

11 Mr. Eadon, anything on behalf of the plaintiff?

12 MR. EADON - Nothing from the plaintiff, Your
13 Honor, other than we believe the light -- all the arguments
14 that have been advanced in the light most favorable to Mr.
15 Rice that the -- and in light of Judge Henderson's ruling
16 on the summary judgment, that the affidavit requirements
17 have been met in this case and the case should move forward
18 to a jury trial.

19 THE COURT - All right, thank you.

20 Well, here's what I'm going to do. I'm going to
21 grant the motion to dismiss, and here are the reasons why.
22 It appears that summons and complaint were filed on June
23 the 12th, 2016. At that time there was no affidavit as
24 required by 38-77-170 either served on the defendant or
25 filed and made a part of the initial complaint. Indeed it

1 appears that the defendant filed an answer on November the
2 21st, 2016 that included the motion to dismiss in their
3 answer and it was on November the 28th was when the ---

4 MS. O'BRIEN - It was the 22nd, Your Honor.

5 THE COURT - I'm sorry, it was November the 22nd,
6 one day later the first affidavit -- the first affidavit
7 was filed by the plaintiff. That affidavit did not include
8 the language required by 38-77-170, however, subsequent
9 affidavit was filed on -- it was actually filed on February
10 the 8th, 2018 containing that language. It appears that --
11 that the summary judgment motion, which is the law of the
12 case, that was ordered -- or the order of the summary
13 judgment by Judge Henderson dealt with 38-77-170 subsection
14 two, which dealt with the language that -- but had to be
15 added to an affidavit and certainly the case law supports
16 Judge Henderson's ruling on that that even though an
17 affidavit that's properly filed does not include that
18 language. I believe the case -- that the case law was
19 clear that subsequent remedies are proper and that, so,
20 therefore, the summary judgment motion was -- that the
21 Court agree -- whatever it's worth, the Court agrees with
22 Judge Henderson on that, however, the issue on the motion
23 to dismiss goes to the -- and the defense argued that at
24 the time of the filing of the complaint as a condition
25 precedent for the right to sue or have a cause of action

1 that -- that the affidavit had to have been the basis of
2 which under 38-77-170, that that was a necessary condition
3 to sue or recover and so -- and I am -- the Court is
4 persuaded by the language -- the Supreme Court case of
5 Collins v. Doe, the language that the Supreme Court spelled
6 out in there about -- whether the nature of this particular
7 statute that a strict compliance with that statute is
8 required and the affidavit -- and I'm not even going to go
9 into the sufficiency of the affidavit or the sufficiency of
10 any evidence that might have been presented later on. I
11 find that the -- that the motion to dismiss is granted
12 because of the failure to file an affidavit until after an
13 answer was filed in the case, and so that's the basis for
14 the Court's ruling. Thank you.

15 MS. O'BRIEN - Thank you, Your Honor.

16 MR. EADON - Thank you, Your Honor.

17 THE COURT - I can do that on a form -- Well, I'll
18 do a form four. If you would like to submit a more formal
19 order, Ms. O'Brien then do that. Certainly run it by your
20 counterparts and then send that to me and I'll review it,
21 and if I need to make that part of the file, I'll sign it.

22 MS. O'BRIEN - Okay. Thank you.

23 THE COURT - However, I will sign a form four.

24 Thank y'all.

25 MR. EADON - Thank you, Judge.

ROA 089

(END OF TRANSCRIPT)

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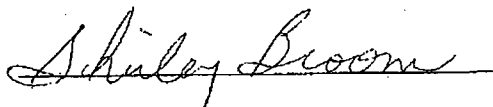
ROA 090

App. 092

C E R T I F I C A T E

I, Shirley Broom, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing 40 pages is a true and accurate Transcript of Record of the proceedings had and the evidence introduced in the proceedings of Peter Rice vs. Bobby Rae Dye and John Doe, as taken by me in The Court of Common Pleas for the Sixth Judicial Circuit on June 20th, 2018, and provided by me this the 27th day of Sept., 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party herein.



Shirley Broom, CVR-M
Official Court Reporter,
Certified Verbatim Reporter, In and
for the State of South Carolina

ROA 091

Exhibits In Plaintiff's Motion to Reconsider

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

2016 NOV 22 AM 10:11
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

IN THE COURT OF COMMON PLEAS

Peter Rice,

Plaintiff,

Civil Action No. 2016CP20011

vs.

AFFIDAVIT OF PETER RICE

Bobby Rae Dye and John Doe,

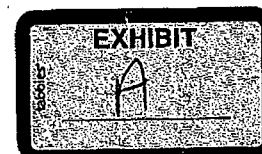
Defendant.

PERSONALLY APPEARED before me, Peter Rice, who, being first duly sworn, deposes and says that:

1. I am over the age of 18 and otherwise qualified to give sworn testimony;
2. I am a citizen and resident of Chester County, South Carolina;
3. I am the Plaintiff in the above-referenced legal action;
4. I was a passenger in a vehicle being driven by Bobby Rae Dye, traveling on Highway 901 in Fairfield County, South Carolina on April 17, 2015;
5. As we approached a slight curve of the roadway, I observed two headlights traveling in the oncoming lane of travel;
6. I was able to determine that the headlights were those of a pick-up truck;
7. As the vehicle driven by Mr. Dye approached the truck, Mr. Dye steered his vehicle to the right in what I believe to be an effort to avoid colliding into the pick-up truck;
8. In making this maneuver, Mr. Dye lost control of the vehicle I was riding in and went off of the roadway, striking a tree.
9. The truck that was traveling in the oncoming lane never stopped and I was unable to determine the identity of the truck or it's driver.

FURTHER AFFIANT SAYETH NOT

(Signature page to follow)



ROA 092

App. 095

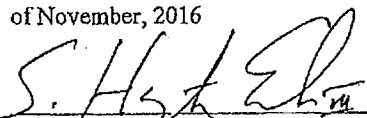
Date: November 18, 2016



PETER RICE

Sworn To Before me this 18th day

of November, 2016



Notary Public for South Carolina
My Commission Expires: 1-13-2021

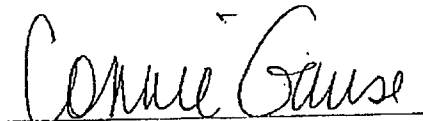
CERTIFICATE OF SERVICE

Connie Gause says that (s)he is the Paralegal for the Attorney for the Plaintiff, with offices at 1518 Richland Street, Columbia, SC, and that on November 21, 2016, (s)he mailed in a sealed envelope, postage prepaid, a copy of Affidavit of Peter Rice to:

Michael T. Coulter, Esq.
CLARKSON, WALSH & TERRELL, P.A.
PO Box 6728
Greenville, SC 29606

Carrie H. O'Brien, Esq.
Willson Jones Carter & Baxley, PA
6701 Carmel Road, Ste. 475
Charlotte, NC 28226

NOV 22 10 11 AM
FAIRFIELD COUNTY
CLERK OF COURT
BETH JO BECKHAM


Connie I. Gause

Hampton Eadon

Subject:

FW: Peter Rice vs. Bobby Rae Dye and John Doe 16-5250933:

From: Carrie H. O'Brien (<mailto:chobrien@wjlaw.net>)

Sent: Wednesday, January 4, 2017 6:07 PM

To: Hampton Eadon <she@harrisgraves.com>; Connie Gause <cgause@harrisgraves.com>

Cc: 'mcoulter@clarksonwalsh.com' <mcoulter@clarksonwalsh.com>; 'thammett@clarksonwalsh.com' <thammett@clarksonwalsh.com>; Mandy B. Given <abgiven@wjlaw.net>

Subject: Peter Rice vs. Bobby Rae Dye and John Doe 16-5250933:

All,

I am removing my Motion to Dismiss.

The Motion to Amend Answer is as to John Doe and I have let Mike know I have no objection, previously.

I am notifying Court as to both first thing in morning.

Feel free to call my cell, 704-577-4261, with questions.

Thanks,

WJC&B

Willson Jones Carter & Baxley, P.A.

Carrie Hailman O'Brien, Attorney

chobrien@wjlaw.net

6701 Carmel Road, Suite 475

Charlotte, North Carolina 28226

Phone: (704) 247-9679

Fax: (704) 544-1719

wjcbfaw.com

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ROA 095

App. 098

Connie Gause

From: Durham, Tammy <Tammy.Durham@fairfield.sc.gov>
Sent: Thursday, January 5, 2017 10:09 AM
To: Mandy B. Given
Subject: RE: Peter Rice vs. Bobby Rae Dye and John Doe 16-5250933:

I will note the roster. Thanks for the update

Tammy

From: Mandy B. Given [mailto:abgiven@wjlaw.net]
Sent: Thursday, January 05, 2017 9:34 AM
To: Durham, Tammy
Cc: 'mcoulter@clarksonwalsh.com'; 'thammatt@clarksonwalsh.com'; 'she@harrisgraves.com'; 'cgause@harrisgraves.com'; Carrie H. O'Brien
Subject: Peter Rice vs. Bobby Rae Dye and John Doe 16-5250933:

Tammy,

Per our telephone conversation this morning, Attorney O'Brien's Motion to Dismiss has been removed, and you have noted that she consents to the Motion to Amend. Do not hesitate to contact me with any questions.

Thank you,



Mandy Given, Paralegal to Carrie Hallman O'Brien
abgiven@wjlaw.net
6701 Carmel Road, Suite 475
Charlotte, North Carolina 28226
Phone: (704) 247-9687
Fax: (704) 544-1719
wjcblaw.com

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To: abgiven@wjlaw.net [Remove](#) this sender from my allow list
From: tammy.durham@fairfield.sc.gov

You received this message because the sender is on your allow list.



Fairfield County Sixth Judicial Circuit - Roster Details
Motion Roster for January 5, 2017 @ 9:30 AM

Court Agency		Common Pleas		Judge		Benjamin		Roster ID		46	
Roster Type		Motion Roster		Roster Begin Date		01/05/2017		Roster End Date		01/05/2017	
Number of motions = 16											
#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
3	01/05/2017	9:30 AM	0:4	Motion/Summary Judgment	Broad River Campground Llc-PLT	08/22/2016	2014CP2000349 Broad River Campground Llc VS Jenkinsville Water Co Inc	Premises Liab 330	Glenn E. Bowers (803) 714-7766	Reginald Wayne Belcher (803) 254-2200	CONF.
4	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss Plaintiff's Notice of Intent	Pruiththead-Ridgeway LLC-DEF	01/18/2016	2016NI2000005 Pruththead-Ridgeway LLC VS Pruththead-Ridgeway LLC	Notice/Med Mal/230	Daniel Nathan Hughey (843) 881-8644	Joshua Staven Whitley (843) 606-5635	
5	01/05/2017	9:30 AM	0:4	Motion/Dismiss Plt's Notice of Intent	Pruiththead-Ridgeway LLC-DEF	08/15/2016	2016NI2000002 Sheila Per Rep Hall VS Pruththead-Ridgeway LLC, defendant, et al	Notice/Med Mal/230	Daniel Nathan Hughey (843) 881-8644	Joshua Staven Whitley (843) 606-5635	resolved
6	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss Plaintiff's Notice of Intent	Pruiththead-Ridgeway LLC-DEF	11/10/2016	2016NI2000004 Debra A. Matthews VS Pruththead-Ridgeway LLC	Notice/Med Mal/230	Debra A. Matthews (803) 635-6000	Joshua Staven Whitley (843) 606-5635	
7	01/05/2017	9:30 AM	0:4	Motion/Refer to Special Referee	William Jr Russell-PLT	11/07/2016	2015CP2000223 William Jr Russell, plaintiff, et al VS Betty R Ginyard Pr	Special-Comp/Oth 699	Debra A. Matthews (803) 635-6000 Kenneth B. Wingate (803) 256-2233	Thomas Jefferson Goodwyn Jr (803) 251-4517 E. Crosby Lewis Sr. (803) 635-1920	Resolved
8	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss Plaintiff's Notice of Intent	Pruiththead-Ridgeway LLC-DEF	11/10/2016	2016NI2000004 Debra A. Matthews VS Pruththead-Ridgeway LLC	Notice/Med Mal/230	Debra A. Matthews (803) 635-6000	Joshua Staven Whitley (843) 606-5635	Resolved
9	01/05/2017	9:30 AM	0:4	Motion/Dismiss/Answer	John Doe-DEF	11/21/2016	2016CP2000011 Peter Rice VS Bobby Rae Dye	Motor Veh Accid 320	Sherod Hampton Eadon III (803) 799-2911	Michael T. Coulter (864) 232-4400 Carmie H. O'Brien (704) 247-9679	Resolved
10	01/05/2017	9:30 AM	0:4	Motion to Amend Answer	Bobby Rae Dye-DEF	08/12/2016	2016CP2000011 Peter Rice VS Bobby Rae Dye	Motor Veh Accid 320	Sherod Hampton Eadon III (803) 799-2911	Michael T. Coulter (864) 232-4400 Carmie H. O'Brien (704) 247-9679	CONSENT ORDER TO COME
11	01/05/2017	9:30 AM	0:4	Motion/Sanctions	Detra K Johnson Pr -PLT	11/18/2016	2016CP2000159 Detra K Johnson Pr, plaintiff, et al VS Bruce Fernell Johnson defendant, et al	Wrongful Death 360	Shane Morris Burroughs (803) 268-9800 David C. Marshall (803) 268-9800	Curtis Lyman Olt (803) 724-1713 D. Cravens Ravenel (803) 799-9091	Requested conf.
12	01/05/2017	9:30 AM	0:4	Notice/Motion/Summary Judgment	Christopher S. Staveland-PLT	10/24/2016	2016CP2000230 Christopher S. Staveland VS Daniel S. Friedman	Foreclosure 420	Robert Nicholas G. Eddle (843) 215-2172	Michael T. Coulter (864) 232-4400	Resolved
13	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss and Compel Arbitration	Pruiththead-Ridgeway Llc-DEF	09/19/2016	2016CP2000298 Cassandra Phillips Poa VS Pruththead-	Medical Malpract 220	Arthur Stuart Hudson (843) 881-8644	Montelth Powell Todd (803) 231-7837	



STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

2018 MAR 14 AM 9:09
IN THE COURT OF COMMON PLEAS
Civil Action No.: 2016-CP-20-011
FAIRFIELD COUNTY
CLERK OF COURT
JUDY M BONDS

Peter Rice,

Plaintiff,

vs.

Bobby Rae Dye and John Doe

Defendants.

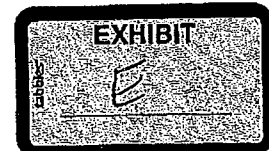
MEMORANDUM OF LAW IN SUPPORT
OF UNNAMED DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

NOW COMES the Unnamed Defendant, Progressive Insurance Company, by and through undersigned counsel, and hereby submits the following memorandum of law in support of its Motion for Summary Judgment as follows:

BACKGROUND

This action arises out of a motor vehicle accident that occurred on April 17, 2015 in Fairfield County, SC. Plaintiff Peter Rice alleges that he was a passenger in a vehicle driven by Defendant Bobby Rae Dye. Non-party Derrick McCrorey was also a passenger in the vehicle. As they were traveling south on Hwy 901, Plaintiff alleges that an unknown vehicle traveling north on Hwy 901 swerved across the center line, causing Defendant Dye to veer off the highway and strike a tree. The owner and operator of the other vehicle remain unknown.

Plaintiff filed this action against Defendant Dye and John Doe on January 12, 2016. Plaintiff has asserted a claim for Uninsured Motorists benefits, pursuant to Defendant Dye's policy of insurance with the Unnamed Defendant, Progressive Insurance Company. Written discovery



has been exchanged and the Plaintiff has been deposed. The Unnamed Defendant noticed the deposition of McCrorey, but he did not appear. The parties have been unable to take the deposition of Defendant Dyc. The Unnamed Defendant now moves for summary judgment on the grounds that the Plaintiff has failed to satisfy the terms of S.C. Gen. Stat. §38-77-170.

ARGUMENT

I. THE PLAINTIFF HAS FAILED TO COMPLY WITH THE TERMS OF S.C. GEN. STAT. §38-77-170 REGARDING HIS CLAIM FOR UNINSURED MOTORIST BENEFITS. THEREFORE, HIS CLAIM MUST BE DISMISSED.

Plaintiff is making a claim for uninsured motorist benefits as the result of a "phantom" vehicle that allegedly ran the vehicle in which he was a passenger off the road. In order for a claimant to prevail on an uninsured motorist claim where there was no direct contact between vehicles, he must comply with the relevant statutes. Specifically, the claimant must satisfy the following:

SECTION 38-77-170. Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown.

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.

Plaintiff filed this action on January 12, 2016. On November 18, 2016 he executed an affidavit in support of his claim. (Exhibit 1) Plaintiff was deposed on August 17, 2017. (Exhibit 2) He executed a second affidavit on September 26, 2017. (Exhibit 3) Paragraphs 1-9 of the two affidavits are identical. However, the 2017 affidavit contains two additional paragraphs that state there was no contact between Mr. Dye's vehicle and the phantom vehicle and that law enforcement was called to the scene of the accident to investigate. Additionally, the 2017 affidavit contains the following language above the signature line: "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."

A. No Affidavit Prior to Filing Suit

Per the language of SC Gen. Stat. §38-77-170, a plaintiff seeking uninsured motorist coverage where there was no physical contact between vehicles must produce an affidavit that complies with the statute's terms *as a condition precedent to filing suit*. The Plaintiff did not produce any affidavit until over 10 months after he filed this action. For purposes of pursuing a claim for uninsured motorist benefits, this affidavit was required prior to filing suit.

In Collins v. Doe, 352 S.C. 462 (2002), the South Carolina Supreme Court held that strict compliance with §38-77-170 is required as a *prerequisite* to maintaining a cause of action under the statute. In Collins, the plaintiff filed suit against a John Doe for purposes of pursuing an

uninsured motorist claim. No witness affidavit was ever produced, as required by the statute, but the plaintiff did produce a witness at trial who testified that a vehicle driven by John Doe caused the accident. The trial court granted a directed verdict on the grounds that the plaintiff had failed to produce the required affidavit. Plaintiff argued that the witness' testimony was sufficient to satisfy the statute's requirements. The Court of Appeals reversed the trial court and the Supreme Court again reversed, holding that the trial court was correct in its dismissal of the plaintiff's action for failure to comply with the terms of the statute.

The Collins court found that the legislature was clear and unambiguous in identifying the "requirements necessary to support a plaintiff's right of action" and found that "Without a sworn affidavit, a plaintiff has no right of action." The court went on to hold that "In other words, without the affidavit, she has no right to bring her case to court." Id. The Court further stated that "Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover." Id. By stating that without an affidavit there is no right of action, the Court is making clear that the affidavit is a condition precedent to filing suit and that no suit may be initiated without first fulfilling the statutory requirement.

In an earlier decision the Supreme Court held that "proof of physical contact, a requirement in the predecessor statute to Section 38-77-170, was a *condition precedent* to a plaintiff's right of action against an unknown Joe Doe defendant." Wynn v. Doe, 255 S.C. 509 (1971). (emphasis added) Here, the Court explicitly held that the requirements of the statute were conditions precedent to filing suit. Again, no suit may be filed without first complying with the terms of the statute. Because the Plaintiff failed to do this, his suit must be dismissed.

B. November 18, 2016 Affidavit did not Comply with Statute

Even if the deems the Plaintiff's November 18, 2016 statute as timely, the affidavit did not comply with the requirements of the statute. Specifically, subsection 3 of S.C. Gen. Stat. §38-77-170 required that any such affidavit contain the following statement, "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," and be prominently displayed on the face of the affidavit. No such statement appeared on the 2016 affidavit, making it non-compliant with the statute. As previously noted, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover." Collins v. Doe, 352 S.C. 462 (2002). The Plaintiff's affidavit did not comply, therefore no right to bring suit existed. His suit must therefore be dismissed.

C. Plaintiff's Affidavits Contradict Deposition Testimony

Plaintiff made clear in his deposition testimony on August 17, 2017 that he did not see the phantom vehicle in his lane of travel at any time. He testified that he said he heard Dye say "Oh, the truck coming at me" (Ex. 2, page 48, line 9) and that it was "coming towards us." (Ex. 2, page 49, line 16). When asked to clarify whether Dye simply stated that a vehicle was approaching them or approaching them in their lane, Rice testified "I can only tell you what he said." (Ex. 2, page 49, line 12) Rice was then asked specifically if he ever saw the other vehicle in his lane, and he testified "No, I didn't see it." (Ex. 2, page 49, line 19) He further clarified that he didn't see the vehicle because "Actually, I was – on the phone." (Ex. 2, page 49, lines 20-23) He testified once more that he never saw the phantom vehicle in his lane of travel. (Ex. 2, page 50, lines 8-10)

The Plaintiff then presented an affidavit on September 26, 2017 that states "I observed two headlights traveling in the oncoming lane of travel." (Ex. 3, paragraph 5) To begin with, the statement in the affidavit is somewhat confusing. If this is to be interpreted as meaning that the headlights were in the opposite lane of travel, then the Plaintiff has failed identify any vehicle illegally traveling in his lane that might have caused the accident. If this is interpreted as meaning that the headlights were in the Plaintiff's lane of travel, then it is in contradiction with the Plaintiff's prior deposition testimony, as described in the preceding paragraph. It is well established that a party cannot provide an affidavit that conflicts with prior testimony for the purpose of avoiding summary judgment. See: Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d. 629, 633 (2004) (holding that "a court may disregard subsequent affidavit as a 'sham,' that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict the party's own prior sworn statement")

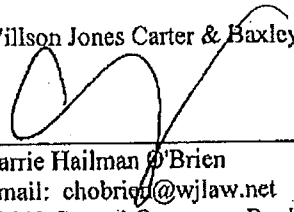
In addition to the Plaintiff's testimony that he did not see the phantom vehicle in his lane of travel, there is no statement from McCrorey about a phantom vehicle crossing the center line, as he did not show up for his deposition and has not executed any affidavits. Defendant Dye has also not provided any testimony in the form of an affidavit or deposition. In sum, there is no evidence from anyone that John Doe was negligent or causing the subject accident, and no testimony sufficient to comply with the terms of SC Gen. Stat. §38-77-170.

CONCLUSION

For the foregoing reasons, the Plaintiff has failed to comply with the express terms of SC Gen. Stat. §38-77-170 in regard to his claim for uninsured motorist benefits. As such, the Plaintiff's claims against John Doe, and his claim for uninsured motorist benefits must be dismissed.

THIS THE 13TH DAY OF MARCH, 2018.

Willson Jones Carter & Baxley, P.A.



Carrie Hailman O'Brien
Email: chobrien@wjlaw.net
11440 Carmel Commons Boulevard
Suite 206
Charlotte, NC 28226
(704) 247-9679 (phone)
(704) 544-1719 (fax)

**ATTORNEYS FOR THE UNNAMED
DEFENDANT**

ELECTRONICALLY FILED - 2018 Jun 29 11:36 PM - FAIRFIELD - COMMON PLEAS - CASE#2016CP2000011

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document, Memorandum of Law in Support of the Unnamed Defendant's Motion for Summary Judgment, was served upon all counsel of Record:

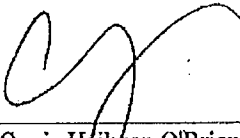
- ☒ as an attachment to an electronic correspondence
- ☒ by depositing a copy of the same in an official depository of the United States mail in a postage-paid envelope
- ☐ via facsimile, or
- ☐ by hand delivery

addressed as follows:

S. HAMPTON EADON, III, ESQUIRE
HARRIS & GRAVES, P.A.
P.O. BOX 11566
COLUMBIA, SC 29211
(803) 799-2911
ATTORNEY FOR PLAINTIFF
PETER RICE

MICHAEL T. COULTER, ESQUIRE
CLARKSON, WALSH, & COULTER, P.A.
P.O. BOX 6728
GREENVILLE, SC 29606-6728
(864) 232-4400/(864) 672-7102/(864) 235-4399 (F)
ATTORNEY FOR DEFENDANT
BOBBY RAE DYE

This the 13th day of March, 2018.


Carrie Hallman O'Brien
Email: chobrien@wjlaw.net
11440 Cannel Commons Boulevard
Suite 206
Charlotte, NC 28226
(704) 247-9679 (phone)
(704) 544-1719 (fax)

**ATTORNEYS FOR THE UNNAMED
DEFENDANT**

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

2018 APR 13 AM 11:18
FAIRFIELD COUNTY
CLERK OF COURT
JUDY M BOND

IN THE COURT OF COMMON PLEAS

Peter Rice,

Plaintiff(s),

Civil Action No. 2016CP20011

vs.

**ORDER DENYING JOHN DOE'S
MOTION FOR SUMMARY JUDGMENT**

John Doe,

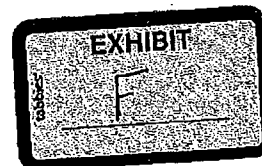
Defendant(s).

This matter came before the Court upon a Motion for Summary Judgment filed by Defendant John Doe ("Doe"). The Court heard arguments from counsel on March 14, 2018, at the Fairfield County Courthouse. Plaintiff was represented by S. Hampton Eadon III. Defendant Doe was represented by Carrie H. O'Brien. After reviewing the written submissions and hearing oral argument, this Court denies Defendant Doe's Motion.

FACTUAL BACKGROUND

This action arises out of a motor vehicle collision that occurred on April 17, 2015 in Fairfield County, SC. Plaintiff Peter Rice ("Rice") was a passenger in a vehicle driven by Bobby Rae Dye. Non-party Derrick McCrorey was also a passenger in the vehicle driven by Mr. Dye. While traveling south on Hwy 901, Plaintiff alleges that an unknown vehicle traveling north on Hwy 901 came across the center line, causing Mr. Dye to leave the highway and strike a tree, thereby injuring Plaintiff Rice. The owner and operator of the John Doe vehicle remains unknown. It is undisputed that there was no contact between the John Doe vehicle and the vehicle driven by Bobby Rae Dye.

Plaintiff filed this action against Defendant Doe and Bobby Rae Day on January 12, 2016. During the pendency of the case, Plaintiff's claim against Mr. Dye has been resolved and he has been dismissed from the lawsuit. Written discovery has been exchanged and Plaintiff Rice has been deposed twice and Bobby Rae Dye has been deposed once.

HEA
#1

STANDARD

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330 (2009). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." B&B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270 (Ct. App. 2004). "Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Id.

DISCUSSION

Defendant Doe's motion is based upon the grounds that the Plaintiff has failed to satisfy the terms of S.C. Code §38-77-170, namely due to alleged defects with the affidavit requirement. Defense counsel's oral argument in support of their Motion alleged two deficiencies in the affidavit requirement. The Court will address each argument in turn.

In a situation where there is no physical contact with the unknown vehicle, S.C. Code §38-77-170 (2) requires that "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." There is also an endorsement that must be displayed on the affidavit stating, "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".

Mr. Dye was the owner/operator of the insured vehicle and as such, would not be qualified to sign an affidavit pursuant to S.C. Code §38-77-170 (2). Plaintiff Rice qualifies as a witness able to provide the statutorily required affidavit, as he was not an owner or operator of the insured vehicle. Plaintiff Rice executed an Affidavit on November 18, 2016 based upon his personal observations from the night of the wreck. On September 26, 2017, Plaintiff Rice executed a second affidavit, which contained the identical language from the first affidavit along with two additional paragraphs stating that there was no contact

between Mr. Dye's vehicle and the John Doe vehicle and that the wreck was reported to law enforcement. The September 2017 affidavit also contained the required statement of S.C. Code §38-77-170 concerning the implications of making a false statement.

I.

Defense counsel argued that Mr. Rice's affidavit of November 18, 2016 did not contain the required statutory language of S.C. Code §38-77-170 (2) and the suit must therefore be dismissed.

In Tucker v. Doe, 413 S.C. 389, 776 S.E.2d 121 (S.C. App., 2015), the Court dealt with a similar challenge to the sufficiency of the witness affidavit, where the witness executed two affidavits. In Tucker, the John Doe action was filed on May 14, 2010. On July 14, 2010, the Plaintiff (Tucker) filed a witness affidavit from Anthony Bernardo that did not include the statutorily required language. On March 3, 2011, Plaintiff (Tucker) filed a second affidavit from Bernardo that included the required statutory language. The Court disagreed with Doe's contention that the affidavit did not satisfy the statute because it failed to suggest the driver of the unknown vehicle proximately caused the accident and held that the statutory affidavit requirement was met. The Court further reasoned that in applying the analysis of Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d. 626 (S.C. 2004), we hold the affidavit complied with section 38-77-170. (Id. at 399)

I find that the September 26, 2017 affidavit submitted by Mr. Rice satisfies the affidavit requirements of S.C. Code §38-77-170 (2).

II.

Defendant Doe next contends that Plaintiff Rice's affidavit contradicts his deposition testimony. At issue in this contention is paragraph 5 of the affidavit. The Rice affidavit states, "As we approached a slight curve of the roadway, I observed two headlights traveling in the oncoming lane of travel" (Rice Affidavit ¶ 5). In his deposition taken on August 17, 2017, Mr. Rice testified (p. 48, L17):

Q: And did you see the truck coming at you?

A: I'd seen the headlights.

3
[Signature]

Q: All right. Where were the headlights?

A: Coming towards us.

Q: Okay. Were they in front of you, to the left of you, to the right of you?

A: Well they would be to the left of me.

During his first deposition taken on September 12, 2016, Plaintiff Rice testified as follows to a similar line of questioning (p. 20, L13):

Q: Okay. Do you have any information as to the identity of that other vehicle that came into your lane?

A: No, sir. I was in the back so I couldn't—all I seen was—

Q: What kind of truck was it? Was it like a semi truck or a—

A: It was headlights. I couldn't—I was in the back so I...

The owner/operator of the vehicle, Bobby Rae Dye was deposed on March 7, 2018. Mr. Dye testified as to the existence of the John Doe vehicle as well as its location on the roadway. Mr. Dye testified (p.10, L.13):

Q: When you first saw the other vehicle who you are saying his, was he in your lane or was he in his own lane?

A: He was in my lane. Two—about—I'd say about two of his tires were over in my lane.

(P.11, L.4) Q: Were you able to determine that other vehicle, whether it was a truck or a car or an 18 wheeler or anything like that?

A: It was—it was a truck, a four wheel truck. It was a truck.

Q: Like a pick up truck?

A: Yes, sir.

(P.14, L.13) Q: If you would have stayed in your lane of travel, based on your observation, would you have hit that other vehicle?

A: Yeah. He would have hit the driver's side.

Q: Okay. So you—did you feel like you had any—any option other than to do what you did?

A: That, yes, what I had to do. Get out of the road. Get out of his way.

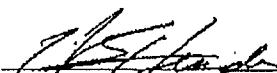
Our Supreme Court dealt with a similar factual scenario in the case of Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d. 626 (S.C. 2004). In Gilliland, the witness, Gayle Norris, testified that she saw the lights of two cars as the cars came around the curve. She also testified that after the accident, she saw the lights of the car behind the Petitioner/Plaintiff "arc through a field" as if it were making a U-turn. The witness never saw the unknown vehicle, other than its headlights. In reversing the Court of Appeals, the Supreme Court held the witness's testimony "contained circumstantial evidence that supports Petitioner's testimony that an unknown driver contributed to her accident. Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates Petitioner's testimony creating a question of fact as to causation for the jury," Id. at 202.

The Court of Appeals in Tucker addressed an alleged insufficiency of the witness's testimony (Bernardo) relative to the issue of proximate cause. The Court stated, "Bernardo described how Tucker 'suddenly veered to the left as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass.'" While this statement did not provide direct evidence as to the involvement of an unknown driver, it amounted to sufficient circumstantial evidence that supported Tucker's testimony and the other evidence in the record suggesting an unknown driver contributed to the accident." Tucker at. 401.

In applying the Supreme Court's reasoned decision in Gilliland and the Court of Appeal's decision in Tucker, I find that the Rice affidavit creates circumstantial evidence of the John Doe vehicle's involvement in the wreck and is supported and corroborated by Mr. Dye's testimony such that a genuine question of material fact exists that must be determined by a jury.

CONCLUSION

Based upon the foregoing, this Court DENIES Defendant John Doe's Motion for Summary Judgment.


The Honorable Roger E. Henderson
Presiding Circuit Court Judge

Cherter Field, South Carolina

April 6, 2018

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY

Daniel Dewitt Hall, Circuit Court Judge

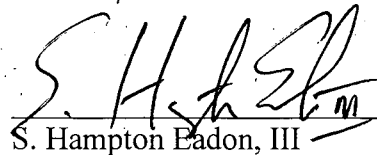
Peter Rice, ...Appellant,

v.

John Doe, ...Respondent.

CERTIFICATE OF COMPLIANCE

I, S. Hampton Eadon, III, as attorney for Appellant, do hereby certify that the Record on Appeal filed on 5/24/2019 in the within matter complies with Rule 210(c), SCACR.



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May 24, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

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

Case No. 2018-001508

Peter Rice

Appellant,

RECEIVED
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SC Court of Appeals

v.

John Doe

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. DID THE COURT ERR IN FINDING THAT, THE AFFIDAVIT REQUIREMENT OF S.C. CODE §38-77-170(2) IS A CONDITION PRECEDENT TO FILING A LAWSUIT INVOLVING A JOHN DOE VEHICLE WHERE THERE WAS NO CONTACT PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS?
2. DID THE COURT ERR IN DETERMINING JOHN DOE'S MOTION TO DISMISS DURING THE SCRCP 16(A) PRE-TRIAL CONFERENCE WAS PROPERLY RIPE FOR ADJUDICATION GIVEN THAT THE ISSUE HAD ALREADY BEEN DECIDED BY ANOTHER CIRCUIT COURT JUDGE AND GIVEN THAT THE MOTION TO DISMISS WAS NO LONGER PENDING?

STATEMENT OF THE CASE

On January 12, 2016, Peter Rice, Appellant, brought this action against Bobby Rae Dye and John Doe, as an unknown driver pursuant to uninsured motorist coverage afforded to him under S.C. Code §38-77-150, S.C. Code §38-77-170 and S.C. Code §38-77-180. (R. pp. 21-26). Mr. Rice, a passenger in Mr. Dye's vehicle alleged that Mr. Dye and Respondent were negligent in the operation of their respective vehicles resulting in a wreck. Respondent John Doe was served through the Department of Insurance on September 15, 2016 with the filing of an Affidavit of Service received by the Fairfield County Clerk of Court on September 22, 2016. Appellant's counsel agreed to a 30-day extension for Respondent Doe to file its Answer. On November 18, 2016, Plaintiff executed an Affidavit pursuant to S.C. Code §38-77-170(2) which was emailed to Respondent Doe's counsel with a hard copy sent by mail on November 21, 2016. (R. pp. 33-35). On November 21, 2016, Respondent Doe filed an Answer with a general denial which included a motion to dismiss alleging that Appellant failed to comply with S.C. Code §38-77-170. (R. pp. 27-32). On November 22, 2016, Appellant Rice filed the November 18, 2016 Affidavit with the Fairfield County Clerk of Court. (R. p. 36)

A hearing on Respondent Doe's Motion to Dismiss was scheduled for a hearing on January 5, 2017 at 9:30 a.m. On January 4, 2017, counsel for Respondent Doe sent an email indicating that the motion to dismiss was being removed and counsel would be advising the clerk's office the following morning. (R. p. 95). The morning of January 5, 2017, a paralegal from the office of Respondent Doe's counsel sent an email following up with the clerk that the motion hearing was being removed. (R. p. 96). The clerk's office marked the official hearing roster that the motion was "resolved". (R. p. 97).

On September 26, 2017, Appellant signed an Affidavit which included the same sworn testimony as the November 18, 2016 Affidavit with the addition of two paragraphs (#9 and #10) and a statement at the bottom of the affidavit indicating the affiant's understanding of the ramifications of making a false statement. (R. pp. 37-38). This September 26, 2017 Affidavit was mailed to Respondent's counsel on October 9, 2017. (R. p. 39). On October 19, 2017, Respondent filed a Motion for Summary Judgment alleging that Appellant failed to satisfy the terms of S.C. Code §38-77-170. (R. pp. 40-41). During the pendency of the case, Bobby Rae Dye settled with Appellant and a Stipulation of Dismissal with Prejudice was filed on November 8, 2017 as to Bobby Rae Dye. On March 14, 2018, Respondent filed a Memorandum of Law in Support of its Motion for Summary Judgment. (R. pp. 98-105).

On March 14, 2018, Respondent's Motion for Summary Judgment was heard before the Honorable Roger E. Henderson. Judge Henderson denied Respondent's Motion for Summary Judgment finding that Appellant's Affidavit of September 26, 2017 satisfied the requirements of S.C. Code §38-77-170(2). (R. p. 12). On April 13, 2018, the Order Denying Respondent's Motion for Summary Judgment was filed with the Fairfield County Clerk of Court. (R. pp. 3-8). This matter was set for trial the week of June 18, 2018 and was called for trial on June 20, 2018 before the Honorable Daniel D. Hall. During the SCRCF 16(a) Pre-trial Conference, Respondent requested that its Motion to Dismiss be heard prior to selecting a jury. (R. p. 55, line 16-p. 77, line 4). Respondent's Motion to Dismiss was heard and granted on a Form 4, which was filed on June 20, 2018 dismissing Appellant's case. (R. pp. 14-16). Appellant timely filed a Motion for Reconsideration on June 29, 2018. (R. pp. 42-49). Appellant's Motion for Reconsideration was denied on a Form 4 filed July 17, 2018. (R. pp. 17-19). Appellant filed a Notice to Appeal on

August 16, 2018 and served it upon Respondent. (R. p. 50). The Appellant hereby files this brief in support of that Appeal.

STATEMENT OF THE FACTS

This personal injury action arises out of a motor vehicle collision that occurred on April 17, 2015 in Fairfield County, SC. Appellant was a passenger in a vehicle driven by Bobby Rae Dye. While traveling South on Hwy 901, Appellant alleges that an unknown vehicle traveling North on Hwy 901 came across the center line, causing Mr. Dye to leave the highway and strike a tree, thereby injuring Appellant. The owner and operator of the Respondent's vehicle never stopped at the scene and remains unknown. It is undisputed that there was no contact between the Respondent's vehicle and the vehicle Appellant was a passenger in.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT, THE FILING OF AN AFFIDAVIT PURSUANT TO S.C. CODE §38-77-170(2) IS A CONDITION PRECEDENT TO FILING A LAWSUIT INVOLVING A JOHN DOE VEHICLE WHERE THERE WAS NO CONTACT PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS

South Carolina authority for “John Doe” actions in order to sue and recover uninsured motorist benefits are contained within S.C. Code of Laws. §38-77-170.

§38-77-170. Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown.

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 subitem (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.

From the plain reading of S.C. Code §38-77-170, there is no requirement that the affidavit be filed with the Court. The trial court ultimately granted Respondent’s Motion to Dismiss on the ground that the filing of an affidavit was a condition precedent for filing suit under

S.C. Code §38-77-170(2). (R. p. 87, line 19-p. 89, line 25). In so holding, the trial court stated, “I find that the—that the motion to dismiss is granted because of the failure to file an affidavit until after an answer was filed in this case, and so that’s the basis for the Court’s ruling.” (R. p. 89, lines 10-14). However, a plain reading of the language of the statute at issue contains no requirement that the Affidavit needs to be filed, nor that it needs to be filed prior to Respondent’s filing its Answer.

In Collins v. Doe, 352 S.C. 462 (2002), our Supreme Court noted that “the sworn affidavit requirement fulfills a notice function; providing, *upon request*, the defendant-insurer with information relating to the validity of Plaintiff’s case.” (Collins at 470, emphasis added). Upon request via email on November 7, 2016, counsel for Respondent requested the affidavit be provided. Email receipts confirm that counsel for Respondent was provided with Appellant’s Affidavit on November 18, 2016 via email. This email was responded to, prior to the filing of Respondent’s Answer on November 21, 2016. Appellant’s first affidavit was filed with the clerk’s office on November 22, 2016.

The Collins case is factually distinguishable from the instant case. In Collins, there was no affidavit filed by any witness and the court determined that witness testimony could not act as the functional equivalent of the affidavit requirement of S.C. Code §38-77-170(2). Two years after the Supreme Court decided Collins, it heard Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (S.C., 2004), another no-contact John Doe case which dealt with challenges to the requirements of S.C. Code §38-77-170(2).

The Court in Gilliland did allow recovery to Ms. Gilliland. The reasoning was based upon a seeming disagreement between Wausau Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992) and Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002). Howser seemed to

liberally interpret §38-77-170(2) while Collins more strictly interpreted the statute with regard to the requirement of a witness affidavit versus court testimony from a witness.

In reversing the Court of Appeals, the Supreme Court stated:

In Collins, this Court strictly interpreted § 38-77-170(2). This Court held that while the purpose of the affidavit requirement of § 38-77-170(2) could have been met by witness testimony, the statute specifically required that the plaintiff provide an affidavit of an independent witness.

Here, § 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, Collins suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to Collins, is not); therefore, a strict interpretation of § 38-77-170(2) would undermine the statute's purpose. See Kiriakides v. United Artists Communications, Inc., 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")

The net result of the trial court's interpretation of the case at bar that the filing of an affidavit as a condition precedent results in Appellant losing his ability to have his claim against Respondent decided by the jury. Both affidavits were executed by Plaintiff, unquestionably in advance of the expiration of the statute of limitations.

If the trial court determined that an affidavit being filed was in fact a condition precedent to filing a John Doe, no-contact action, the end result could have been cured in a timely fashion by Appellant dismissing his case without prejudice and simply re-filing it at any point from when Respondent's initial Motion to Dismiss was raised on November 22, 2016 until the statute of limitations expired on April 17, 2018, approximately one and a half years later. Respondent was afforded the opportunity to depose the Appellant and the driver of the Appellant's vehicle, Mr. Dye. The concerns of fraud prevention of the legislature involving single-vehicle accidents have been satisfied. Respondent and his insurer have not been prejudiced due to a lack of notice or an

opportunity to further investigation this claim, as this litigation has spanned over two years. In sum, the resulting prejudice to Appellant rises to the level that is so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intent.

In Hooper v. Ebenezer Sr. Services, 687 S.E.2d 29, 386 S.C. 108 (S.C., 2009), the South Carolina Supreme Court adopted the remedy of equitable tolling. "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." Ocana v. Am. Furniture Co., 135 N.M. 539, 91 P.3d 58, 66 (2004), cited by Hooper at 33.. The remedy of equitable tolling is to be used "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." 54 C.J.S. Limitations of Actions § 115 (2005). The Hooper court held, "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex.App.2006). Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use. Hooper at 33.

Due to the delay in hearing Respondent's Motion to Dismiss from when it was initially filed in November of 2016, due to its removal from the motion roster in January of 2017 led to this motion not being heard until June 20, 2018, the day the case was set for trial. The consequence of the timing of the hearing granting Respondent's Motion to Dismiss rendered Appellant's claim expired due to the running of the statute of limitations. This result seems patently unfair given that, in the light most favorable to Appellant, he filed an Affidavit which

met all requirements of S.C. Code §38-77-170(2) on February 5, 2018, at the latest, well before the statute of limitations on his claim expired on April 17, 2018. Appellant respectfully requests that the Court consider the remedy of equitable tolling of the statute of limitations due to these exceptional circumstances.

II. THE CIRCUIT COURT ERRED IN HEARING AND ULTIMATELY GRANTING JOHN DOE'S MOTION TO DISMISS AS THE ISSUE WAS NOT RIPE FOR ADJUDICATION

This appeal emanates from the Circuit Courts granting of Respondent's Motion to Dismiss on the eve of trial of this case. Appellant contends that based upon South Carolina law, the Motion should not have been heard, and if heard, should have been denied and seeks reversal by the Appellate Court.

Respondent raised a Motion to Dismiss in its Answer filed on November 21, 2016 alleging that Appellant failed to comply with S.C. Code §38-77-170. (R. pp. 27-32). A hearing on this motion was scheduled for January 5, 2017. (R. p. 97). The day before the scheduled motion hearing, counsel for Respondent sent counsel for all parties an email indicating that the motion to dismiss was being removed. (R. p. 95). The morning of January 5, 2017, a paralegal from the office of Respondent's counsel sent an email to the clerk that the motion was removed. (R. p. 96). The clerk's office marked the official hearing roster that the motion was "resolved". (R. p. 97).

On June 20, 2018, during the SCRCF 16(a) Pre-Trial Conference, Respondent requested that the Motion to Dismiss be heard. (R. p. 55, lines 16-18). Appellant's counsel argued against this motion being heard claiming that it was not properly before the Court due to it being withdrawn and never having been re-filed or noticed. (R. pp. 44-45). South Carolina Rules of Civil Procedure Rule 7(b)(1) provides that "an application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall

be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.” Plaintiff submits that the Motion to Dismiss was never re-filed or re-noticed after being removed on January 4, 2017.

The Court of Appeals encountered a similar situation in Summer Place of Myrtle Beach Homeowner's Ass'n, Inc. v. Knight et al., 379 S.E.2d 724, 298 S.C. 241 (S.C. App., 1989). In that case, the trial court granted a summary judgment motion that was not pending during a SCRCP 16(a) Pre-Trial Conference. In reversing the trial court, the Court of Appeals held, “because there were no motions for summary judgment pending at the time of the pre-trial hearing, there was no motion before the court to grant.” (Id. at 729). While South Carolina Rules of Civil Procedure Rule 16(a)(7) allows for the disposition of pending motions during the Pre-Trial Conference, since Respondent’s Motion to Dismiss was not filed or noticed after being removed on January 5, 2017, it was not pending before the trial court on June 20, 2018 and was not ripe for adjudication.

Appellant asserts that the issue ultimately ruled upon in Respondent’s Motion to Dismiss had already been determined in Respondent’s Summary Judgment Motion by Judge Henderson. (R. pp. 3-8).

The Order denying Summary Judgment specifically states, “after reviewing the written submissions and hearing oral argument, this Court denies Defendant Doe’s Motion.” (R. p. 3) (emphasis added). The only written submission Judge Henderson reviewed was Respondent’s Memorandum in Support as it was the only written submission submitted to the Court. The first argument contained in the Respondent’s memorandum in support of its Motion for Summary Judgment, under Section 1.A. is that there was no affidavit prior to filing suit. (R. pp. 100-101). The memorandum cites Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002) to advance

Respondent's arguments that the filing of an affidavit is a condition precedent to filing a lawsuit against an unknown driver pursuant to S.C. Code §38-77-170. Following Judge Henderson's denial of Respondent's Motion for Summary Judgment there was no motion for reconsideration filed by Respondent.

The arguments made during Respondent's Motion to Dismiss on June 20, 2018 considered matters outside of the pleadings, namely the Affidavits submitted by Appellant. (R. pp. 51-91). South Carolina courts have long held that a Motion to Dismiss under SCRCP Rule 12 converts into a Motion for Summary Judgment under SCRCP 56 when matters outside of the pleadings are considered. During the June 20, 2018, hearing on Respondent's Motion to Dismiss, counsel for Appellant raised the issue that the argument being advanced by Respondent had already been heard and decided at the summary judgment stage by Judge Henderson. (R. p. 55, line 22-p. 56, line 3; p. 64, line 23-p. 65, line 21).

Once the matter had been decided by Judge Henderson it was improper to have it reheard by Judge Hall pursuant to Graham v. Town of Loris, 272 S.C. 442 248 S.E.2d 594 (S.C. 1978). In essence, Judge Hall was asked to decide whether the filing of an affidavit was a condition precedent under S.C. Code §38-77-170(2) in a John Doe action involving no contact. The condition precedent argument was raised in the Respondent's written submissions and considered by Judge Henderson prior to issuing his ruling denying Respondent's Motion for Summary Judgment over 3 months prior. (R. pp. 100-101).

In discussing the interplay of different circuit court judges being asked to adjudicate the same issue without new facts or evidence being presented, the Graham court cited In Steele v. C., C. & A. Railroad Co., 14 S.C. 324 (1880), the Court stated:

The Court of Common Pleas is a unity, although its jurisdiction is administered by a number of judges who are, in some sense, the exponents of

the court. When one of these judges makes a decision upon the merits of a matter within his jurisdiction, that is not merely the personal opinion of the judge, but a judgment of the Court of Common Pleas, which exhausts the power of the court upon that subject and must stand until reversed Or set aside in the manner prescribed by law. There is no appeal from one Circuit Judge to another. All are of equal dignity and have the same right to pronounce the judgments of the court. One Circuit Judge Upon the same state of facts, has no power to change, alter or reverse a decision of a brother judge of the same Circuit.

Appellant respectfully requests this Court to reverse the trial court's grant of Respondent's Motion to Dismiss because: 1) the motion was not properly pending before the trial court and therefore not ripe for adjudication; and 2) the motion to dismiss was ultimately turned into a summary judgment motion due to the introduction of matters outside of the pleadings which had already been ruled upon by Judge Henderson.

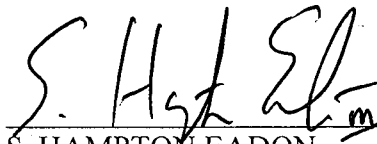
CONCLUSION

The Respondent's Motion to Dismiss was not ripe for hearing as the aforementioned motion was previously removed from the motion roster and had already been decided by another judge. At no time from January 5, 2017 until the hearing date of June 20, 2018 was there any mention or notice of an intent to have Respondent's Motion to Dismiss calendared or set for a hearing. Assuming that this Court finds that Respondent's Motion to Dismiss was properly before the trial court, the plain language of S.C. Code of Laws §38-77-170 does not require the filing of an affidavit. It requires that an Affidavit must be completed pursuant to the terms of the statute. Case law cites concerns of fraud prevention an issue which is inapplicable here, as evidenced by the years spent litigating the case. The trial court's ruling, if allowed to stand, allows a procedural loophole to create an absurd result outside of the legislature's intent if strictly applied to the facts in this case. When a lawsuit is filed, properly served and required affidavits are provided prior to the expiration of the statute of limitations, surely the net result of

that claim being dismissed is a result so absurd that it runs counter to the legislative intent of this, or any statute. The Circuit Court's granting of the Motion to Dismiss was in error and should be reversed or equitable tolling should be applied so this controversy may proceed with the issues to be fairly determined by a jury.

RESPECTFULLY SUBMITTED,

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Dated:

June 25, 2019

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

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

Case No. 2018-001508

Peter Rice

RECEIVED
JUN 25 2019
Appellant, SC Court of Appeals

v.

John Doe

Respondent.

CERTIFICATE OF COUNSEL

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

This 25th day of June, 2019.



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Appellant,

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RECEIVED

JUN 21 2019

SC Court of Appeals

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STATEMENT OF THE ISSUES ON APPEAL

- I. DID THE TRIAL JUDGE ERR IN RULING THAT APPELLANT FAILED TO SATISFY THE AFFIDAVIT REQUIREMENT OF S.C. CODE § 38-77-170 AS A CONDITION PRECEDENT TO FILING A LAWSUIT INVOLVING A JOHN DOE VEHICLE WHERE THERE WAS NO CONTACT?
- II. DID THE TRIAL JUDGE ERR IN HEARING JOHN DOE'S MOTION TO DISMISS DURING THE RULE 16, SCRPC, PRE-TRIAL HEARING?
- III. WERE THE AFFIDAVITS FILED AFTER JOHN DOE'S ANSWER SUFFICIENT TO SATISFY THE REQUIREMENTS SET FORTH IN S.C. CODE § 38-77-170?

STATEMENT OF THE CASE

On January 12, 2016, Appellant Peter Rice sued Respondent John Doe and Defendant Bobby Rae Dye seeking damages for alleged injuries he sustained as a passenger as a result of a motor vehicle accident that occurred on April 17, 2015. (R. p. 24, ¶4). Appellant asserted a claim for uninsured motorists benefits pursuant to Defendant Dye's policy of insurance, claiming an unknown vehicle crossed the center line, causing Defendant Dye to drive off the roadway. (R. p. 24, ¶3). Appellant 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. (R. p. 33).

On November 21, 2016, John Doe filed an answer reserving a motion to dismiss for failure to comply with S.C. Code § 38-77-170. (R. p. 28). On November 22, 2016, Appellant filed an affidavit. (R. p. 33). On January 4, 2017, John Doe withdrew the motion to dismiss from the motions roster without comment as to its resolution. (R. p. 96).

On October 19, 2017, John Doe filed a Motion for Summary Judgment. (R. pp. 40-41). On February 5, 2018, Appellant filed a second affidavit containing identical information as the November 2016 affidavit, with the addition of two paragraphs. (R. pp. 37-38). Following a March 14, 2018 hearing, Judge Henderson ruled that Appellant's affidavit, filed February 5, 2018,

satisfied the language and content requirements set forth by S.C. Code § 38-77-170(2). (R. pp. 3-8). The Order, prepared by Appellant's counsel, was filed on April 13, 2018. *Id.*

The case was called for trial on June 20, 2018. (R. p. 51). Judge Hall directed the attorneys, pursuant to Rule 16(a), SCRCP, to appear before the court for a pre-trial hearing. (R. p. 54). After hearing arguments from counsel, Judge Hall dismissed Appellant's case for failure to file an affidavit as required by S.C. Code § 38-77-170(2) prior to initiating this lawsuit. (R. pp. 14-16; 54-89). Appellant's Motion for Reconsideration was denied on July 17, 2018. (R. pp. 17-19).

This appeal follows.

ARGUMENTS

The issue in this case is whether Judge Hall properly heard and granted John Doe's Motion to Dismiss during a pre-trial hearing on grounds that Appellant had not met the "conditions to sue or recover" with a sufficient affidavit as required by S.C. Code § 38-77-170. This Court should affirm his ruling.

I. THE TRIAL JUDGE CORRECTLY DETERMINED THAT APPELLANT FAILED TO SATISFY 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 (Supp. 1999) (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), the Supreme 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 Appellant argues in the subject appeal, "lead to a result so plainly absurd that it could not possibly have been intended by the Legislature" (Appellant Br. p. 8). 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.

Appellant muddies 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 Appellant brought this case to court. Appellant 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.

Appellant argues *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, the Supreme 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.").

Appellant's 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 Appellant'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).

Additionally, 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, Appellant seeks to apply a prejudice analysis to this matter and asks this Court to relax the statutory interpretation as discussed in *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004).¹ 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.").

Appellant'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

¹ To the extent Appellant argues *Gilliland* stands for the proposition that the affidavit requirement, if strictly construed, would "lead to a result so plainly absurd that it could not possibly have intended by the Legislature," Respondent notes that the basis of the Court's holding was that there was sufficient evidence to fulfill the statute's requirements; not that finding the witness's testimony insufficient would lead to an absurd result. *Id.*

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 Appellant. 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.

Appellant 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.

II. THE TRIAL JUDGE DID NOT ERR IN HEARING JOHN DOE'S MOTION TO DISMISS DURING THE RULE 16, SCRCP, PRE-TRIAL HEARING

John Doe's Motion to Dismiss for Appellant's failure to comply with pre-suit statutory requirements was properly before the court at the Rule 16, SCRCP, pre-trial hearing. Judge Hall's dismissal of Appellant's case for failure to comply with S.C. Code § 38-77-170 did not overrule Judge Henderson's Order, which spoke solely to the sufficiency of Appellant's second filed affidavit. Furthermore, the motion did not require Judge Hall to consider any materials outside of the Complaint such that it would be converted to a motion for summary judgment. If this Court were to consider the motion to have been converted, it was harmless error, as Appellant presented his affidavits and supportive case law, and analysis of the affidavits was not required to find Appellant failed to comply with the statute.

A. Motion to Dismiss Properly Before the Trial Court

John Doe's Motion to Dismiss for failure to comply with pre-suit statutory requirements was reserved in his Answer to Appellant's Complaint. (R. p. 28). As an initial matter, John Doe submits that because the motion was reserved in the Answer and had not been ruled upon, it was properly "pending" before the court. Despite initially withdrawing the motion, John Doe was not foreclosed from having the motion heard at any point during the litigation, including during the

pre-trial hearing.² Additionally, the motion was made during the Rule 16, SCRCPP, pre-trial hearing in open court with a court reporter present.³ See Rule 7(b)(1), SCRCPP ("an application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing . . .") (emphasis added). The purpose of the hearing is to dispose of motions, simplify issues, and generally allow the court to consider "[s]uch other matters as may aid in the disposition of the action." See Rule 16(a), SCRCPP.

Appellant relies on *Summer Place of Myrtle Beach Homeowner's Ass'n, Inc. v. Knight et al.*, 298 S.C. 241, 379 S.E.2d 724 (Ct. App. 1989), for the proposition that John Doe's Motion to Dismiss, if not "refiled", was not pending and could not be heard during the hearing. *Summer Place* is distinguishable to the present case because defendants made their motion in the judge's chambers and without a court reporter present, which would have required a filed and pending motion pursuant to Rule 7(b)(1), SCRCPP. *Summer Place*, therefore, supports a finding in this case that John Doe's motion was properly before the court, as it was made in open court with a court reporter.

Finally, the motion was properly raised and heard at the trial pursuant to Rule 12(h)(2), SCRCPP, 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 e.g., *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), SCRCPP).

² Respondent further notes that withdrawing a motion from a roster does not foreclose his ability to seek a ruling at a later date. Furthermore, the clerk's notation that the motion was "resolved" had no dispositive effect. See *Innovative Waste Mgmt. Inc. v. Crest Energy Partners GP, LLC*, 423 S.C. 611, 614, 815 S.E.2d 780, 782 (Ct. App. 2018) ("The tasks of the clerk of court are ministerial, always subject to judicial control and the rules of court.").

³ The Note to Rule 16, SCRCPP, specifically addresses the pre-trial session as a "hearing" rather than a "conference", such that it would comply with the Rule 7(b)(1), SCRCPP, requirement that a motion be raised during a "hearing." See Rule 16, SCRCPP, advisory note; Rule 7(b)(1), SCRCPP.

B. The Motion was Not Previously Ruled On

Appellant contends Judge Hall improperly ruled on John Doe's Motion to Dismiss, and in doing so, overruled Judge Henderson's previously filed Order. However, Judge Henderson's Order denied John Doe's Motion for Summary Judgment exclusively on grounds of the affidavits' sufficiency. (R. pp. 3-8). Appellant relies on *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978), for the proposition that Judge Hall could not hear or decide whether Appellant 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. Interestingly, the *Graham* court ultimately affirmed the ability of one judge to vacate the order for summary judgment of another pursuant to a statute that no longer exists and therefore, does not support Appellant's position. 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.*

Judge Hall properly reviewed Judge Henderson's previous Order and found that there had been no ruling on Appellant's ability to sue without having satisfied the prerequisite conditions enumerated in S.C. Code § 38-77-170. (R. p. 64, line 21 – p. 66, line 7; p. 66, line 11 – p. 67, line 23). Therefore, Judge Hall properly ruled on an issue that Judge Henderson had not addressed. Regardless of the language Judge Henderson utilized in his Order, John Doe was not foreclosed from raising the Motion to Dismiss at trial for purposes of obtaining a ruling. *See 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.").

C. The Motion Was Not Converted

Appellant argues that because Judge Hall considered Appellant's affidavits, he improperly converted John Doe's Motion to Dismiss into a Motion for Summary Judgment. Judge Hall's dismissal was ultimately based on Appellant's failure to produce or file an affidavit prior to filing a Complaint, as required by S.C. Code § 38-77-170. While the parties discussed the sufficiency of the affidavits for additional grounds for the motion to dismiss, Judge Hall ruled on the motion based on the law and the Complaint, without considering or relying on any extraneous materials:

I'm going to grant the motion to dismiss, and here are the reasons why. It appears that summons and complaint were filed on June the 12th, 2016. At that time there was no affidavit as required by 38-77-170 either served on the defendant or filed and made part of the initial complaint. Indeed it appears that the defendant filed an answer on November the 21st, 2016 that included the motion to dismiss in their answer [T]he Court is persuaded by the language – the Supreme Court case of Collins v. Doe, the language that the Supreme Court spelled out in there about whether the nature of this particular statute that a strict compliance with that statute is required and the affidavit – and I'm not even going to go into the sufficiency of the affidavit or the sufficiency of any evidence that might have been presented later on. I find that the – that the motion to dismiss is granted because of the failure to file an affidavit until after an answer was filed in the case, and so that's the basis of the Court's ruling.

(R. p. 87, line 20 – p. 88, line 3; p. 89, lines 3-14). Therefore, there is no indication Judge Hall converted John Doe's motion to dismiss into a motion for summary judgment.

Even if the motion were converted to a Rule 56, SCRCP, motion, there was no prejudice to Appellant. Analysis of the affidavits were not necessary for Judge Hall to find Appellant failed to comply with S.C. Code § 38-77-170. *See Shealy v. Doe*, 370 S.C. 194, 198, 634 S.E.2d 45, 47 (Ct. App. 2006) (wherein trial court converted John Doe's motion to dismiss to a motion for summary judgment because it considered plaintiff's affidavit and a letter in finding the affidavit did not contain the necessary evidentiary support required by the statute, although affidavit was

properly attached and incorporated within plaintiff's complaint); *Higgins v. Med. Univ.*, 326 S.C. 592, 605, 486 S.E.2d 269, 275 (Ct. App. 1997) (holding that the conversion error was harmless inasmuch as dismissal was justified pursuant to Rule 12(b)(6), SCRCF, without reference to matters extrinsic to the pleadings); Rule 12(b), SCRCF (providing a motion asserting failure to state facts sufficient to constitute a cause of action, the motion shall be treated as one for summary judgment if matter outside the pleading are presented to and not excluded by the court). As in *Shealy*, the affidavit should properly have been contained within the Complaint. Failure to even reference the required affidavit or its contents was evidence Appellant failed to comply with S.C. Code § 38-77-170.

Appellant failed to file the affidavit which met all requirements of the claim for which relief was sought pursuant to S.C. Code § 38-77-170(2) until February 5, 2018, nearly three years after Appellants alleged date of injury, and nearly fifteen months after Respondent filed an Answer to Appellant's Complaint. Again, no suit may be filed without first complying with the terms of the statute. Because the Appellant failed to do this, Appellant failed to state a claim upon which relief may be granted. Therefore, his suit was rightfully and correctly dismissed by the Honorable Daniel D. Hall.

III. THE AFFIDAVITS FILED AFTER JOHN DOE'S ANSWER WERE NOT SUFFICIENT TO SATISFY THE REQUIREMENTS SET FORTH BY S.C. CODE § 38-77-170

Respondent raises as an additional sustaining grounds the insufficiency of the affidavits Appellant filed after John Doe filed his Answer. A respondent may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons were presented to or ruled on by the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000); *see also* Rule 220(c), SCACR ("The appellate court

may affirm a ruling, order, decision, or judgment upon any ground(s) appearing in the Record on Appeal.").

Should this Court find the affidavit requirement is not a condition precedent to filing a John Doe lawsuit, Respondent submits the trial court's grant of John Doe's pre-trial motion to dismiss should be affirmed because the affidavits filed did not meet the three criteria required in S.C. Code § 38-77-170.

Appellant failed to file any affidavit until November 22, 2016 – one day after Respondent filed the aforementioned Answer to Appellant's Complaint. Appellant executed a second affidavit filed on February 5, 2018. Paragraphs one through nine of the two affidavits are identical; however, the February 5, 2018 affidavit contains two additional paragraphs that state there was no contact between Defendant Dye's vehicle and the phantom vehicle and that law enforcement was called to the scene of the accident to investigate. (R. pp. 37-38). Additionally, the February 5, 2018 affidavit contains the following required language above the signature line: "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.*

The November 22, 2016 affidavit failed to specify or speak to whether the accident had been timely reported to an appropriate police authority as required by S.C. Code § 38-77-170(1). (R. pp. 33-35). The affidavit is void of a statement that the injury or damage was witnessed by someone other than the owner or operator of the insured vehicle as required by S.C. Code § 38-77-170(2). *Id.* The affidavit also fails to include a statement indicating the insured was not negligent in failing to determine the identity of the other driver as required by S.C. Code § 38-77-170(3). *Id.* Finally, the November 22, 2016 affidavit does not contain any statement about steps

Appellant or some other person may have taken to discover the identity of John Doe and did not contain the required "false statement" language on the face of the affidavit. *Id.* For these reasons, the November 22, 2016 affidavit fails to satisfy S.C. Code § 38-77-170 requirements.

The February 5, 2018 affidavit, in addition to not being timely, fails to include a statement indicating the insured was not negligent in failing to discover John Doe's identity as required by S.C. Code § 38-77-170(3), and therefore, cannot be found sufficient for Appellant to bring this cause of action or recover uninsured motorist benefits. *Shealy*, 370 S.C. 194, 199, 634 S.E.2d 45, 48 ("An insured cannot recover uninsured motorist coverage unless the three conditions under § 38-77-170 are met.") (quoting *Miller v. Doe*, 312 S.C. 444, 446, 441 S.E.2d 319, 320 (1994)).

CONCLUSION

For the reasons stated above, this Court should affirm the trial judge's ruling.

Respectfully submitted.

The 19 Day of June, 2019.

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ATTORNEYS FOR RESPONDENT

IN THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY

Court of Common Pleas

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

Case No. 2018-001508

Appellate Case No.

RECEIVED

JUN 21 2019

SC Court of Appeals

Peter Rice

Appellant,

v.

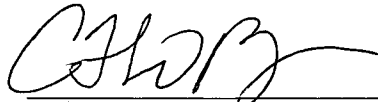
John Doe

Respondent.

CERTIFICATE OF COUNSEL

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

The 19 Day of June, 2019.



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**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

Peter Rice, Appellant,

v.

John Doe, Respondent.

Appellate Case No. 2018-001508

Appeal From Fairfield County
Daniel Dewitt Hall, Circuit Court Judge

Unpublished Opinion No. 2021-UP-229
Submitted May 3, 2021 – Filed June 23, 2021

REVERSED AND REMANDED

Sherod Hampton Eadon, III, of Harris & Graves, PA, of
Columbia, for Appellant.

Sarah Rand-McDaniel and Seth Thomas McDaniel, both
of Walker Allen Grice Ammons & Foy, LLP, of Mount
Pleasant, for Respondent.

PER CURIAM: Peter Rice appeals the dismissal of his negligence action against John Doe, an unknown driver, arguing the circuit court erred in ruling: 1) an affidavit compliant with section 38-77-170 of the South Carolina Code (2015) must be filed contemporaneously with the lawsuit; and 2) the issue of whether Rice

met the affidavit requirement of section 38-77-170 had not already been ruled on by another circuit court judge. Because the order dismissing the lawsuit improperly overruled another circuit court judge's ruling in the same action, we reverse.

I. FACTS

Rice was the passenger in a vehicle driven by Bobby Rae Dye. They were traveling south on Hwy. 901 in Fairfield County when an oncoming vehicle "crossed the center line causing [Dye] to lose control, swerve, and hit a tree." The oncoming vehicle never stopped, and the driver was not identified. The collision caused Rice to suffer "severe and painful injuries and damages." On January 12, 2016, Rice filed this action against Dye and Doe—the unknown driver of the oncoming vehicle—asserting their negligence caused his injuries. Such a "John Doe" action is governed by section 38-77-170, formally titled, "Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown," which states in part:

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:

....

(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.

(Emphasis added). Rice did not file a section 38-77-170(2) affidavit until November 22, 2016. He executed a second section 38-77-170(2) affidavit on September 26, 2017, that was identical to the first—but included two more paragraphs as well as the required language from section 38-77-170 acknowledging a false statement could lead to criminal penalties.

On October 19, 2017, Doe moved for summary judgment and filed a memorandum in support, raising three grounds for summary judgment: 1) Rice's lawsuit was not proper because a section 38-77-170(2) affidavit is a "condition precedent to filing suit" and Rice's first affidavit was not filed until ten months after he commenced his action against Doe; 2) Rice's first affidavit did not comply with section 38-77-170 because it did not include the false statement acknowledgment; and 3) Rice's affidavit contradicted the account of the accident he gave at his deposition. (emphasis omitted).

Judge Roger E. Henderson heard Doe's summary judgment motion. In the April 2018 order that followed, Judge Henderson stated he had reviewed Doe's written and oral arguments. He noted Doe alleged "two deficiencies in the [section 38-77-170(2)] affidavit requirement"—first, Rice did not properly include the false statement statutory language in his affidavit, and second, Rice's affidavit contradicted his deposition testimony. Judge Henderson ruled Rice's September 26, 2017 affidavit met all of the section 38-77-170(2) requirements and was sufficient to preclude dismissal of the lawsuit. Judge Henderson next found the arguably conflicting deposition testimony regarding the cause of the accident raised a fact question for the jury, and therefore, summary judgment was not appropriate.

The case was called to trial on June 20, 2018, in front of Judge Daniel D. Hall. Before trial, Judge Hall heard a motion to dismiss from Doe, who argued an affidavit meeting section 38-77-170(2)'s requirements was a condition precedent to initiating a lawsuit against an unknown no-contact driver. Doe argued strict compliance with the affidavit requirement meant Rice had to file his affidavit when he filed his complaint in January 2016. In response, Rice asserted Doe had raised the argument of the sufficiency of the affidavits at summary judgment and Judge Henderson had ruled Rice had met the section 38-77-170 requirements.

Judge Hall concluded Judge Henderson ruled on whether Rice's affidavits

contained sufficient language to comply with section 38-77-170(2) but did not rule on the issue of whether the statute required the affidavit to be filed contemporaneously with the commencement of the lawsuit. Judge Hall then granted Doe's motion to dismiss the case, finding a section 38-77-170(2) affidavit must be filed when the lawsuit was filed, and because Rice failed to file a section 38-77-170(2) affidavit in January 2016, his lawsuit was not proper. After Rice's Rule 59(e), SCRCP motion for reconsideration was denied, he filed this appeal.

II. DISCUSSION

On appeal, Rice argues Judge Hall erred in ruling on whether section 38-77-170 required Rice to file his section 38-77-170(2) affidavit contemporaneously with the filing of the suit. Rice asserts this issue was raised in Doe's motion for summary judgment and was ruled on when Judge Henderson denied summary judgment. We agree.

We understand how Judge Hall could have read Judge Henderson's order and concluded the issue of the timeliness of Rice's section 38-77-170(2) affidavit had not been considered and ruled upon. However, upon our review of the record, we find the issue was ruled upon when Judge Henderson denied Doe's motion for summary judgment.

Section I.A of Doe's memorandum in support of his motion for summary judgment raised the same legal argument regarding the contemporaneous filing of a section 38-77-170(2) affidavit that Doe raised to Judge Hall at the June 20, 2018 motion to dismiss hearing. In the order denying summary judgment, Judge Henderson wrote, "After reviewing the written submissions and hearing oral argument, this Court denies Defendant Doe's motion." While Judge Henderson did not discuss Doe's timeliness argument further in the April 13, 2018 order, it was nevertheless ruled upon when Judge Henderson denied summary judgment. *See Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E.2d 169, 170 (2009) (per curiam) (finding while the circuit court did not explicitly reiterate the argument raised by the losing party at summary judgment in its order, the issue was nevertheless ruled upon by a general ruling as to the issue and adoption of the precise argument of the winning party). Notably, Doe did not ask Judge Henderson to reconsider his order or elaborate further on his ruling. Whether section 38-77-170 requires the filing of an affidavit contemporaneously with the commencement of the lawsuit is a purely legal question, and Judge Hall did not have the authority to overrule Judge Henderson's previous rejection of Doe's timeliness argument. *See Neumayer v. Philadelphia Indem. Ins. Co.*, 427 S.C. 261, 265, 831 S.E.2d 406, 408 (2019) ("[T]he

interpretation of a statute is a question of law."); *Belton v. State*, 313 S.C. 549, 554, 443 S.E.2d 554, 557 (1994) (holding one judge did not have authority to overrule another judge's order regarding jurisdiction as the question of jurisdiction in the case was "purely a legal one"); *Enoree Baptist Church v. Fletcher*, 287 S.C. 602, 604, 340 S.E.2d 546, 547 (1986) ("One Circuit Court Judge does not have the authority to set aside the order of another."). Accordingly, we reverse Judge Hall's order dismissing Rice's suit and remand the case for trial.

Because this issue is dispositive of the appeal, it is not necessary for us to consider the issues Rice raises concerning whether Doe had withdrawn his motion or whether equitable tolling applied. *See Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 613, 518 S.E.2d 591, 598 (1999) (providing an appellate court need not address remaining issues when resolution of a prior issue is dispositive). We decide this case without oral argument pursuant to Rule 215, SCACR.

REVERSED AND REMANDED.

WILLIAMS, THOMAS, and HILL, JJ., concur.

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Honorable Daniel D. Hall, Presiding Judge, Sixth Judicial Circuit
Case No. 2016-CP-20-0011

Appellate Case No. 2018-001508

Peter Rice

Appellant,

v.

John Doe

Respondent.

RESPONDENT'S PETITION FOR REHEARING

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ATTORNEYS FOR RESPONDENT

Respondent, John Doe, hereby petitions this Honorable Court for a rehearing pursuant to Rule 221(a), SCACR, in connection with its decision entered herein on June 23, 2021 reversing the Circuit Court's grant of Respondent's Motion to Dismiss for Appellant's failure to contemporaneously file a witness affidavit as required by S.C. Code Ann. § 38-77-170. (R. p. ____). Respondent respectfully submits that the Court erred in reversing Judge Hall's Order granting dismissal on grounds that he "did not have the authority to overrule Judge Henderson's previous rejection of Doe's timeliness argument."¹ Respondent submits the following points have been overlooked or misapprehended by the Court and requests review and affirmation on all remaining issues brought on appeal.

ARGUMENT

This Court erred in determining that Judge Henderson "ruled upon" whether section 38-77-170 required Appellant to file, or at least provide, a John Doe affidavit contemporaneously with the Complaint. Despite stating he "review[ed] the written submissions and [heard] oral argument,"

¹ It appears, as well, that the Court finds this issue was not properly preserved in noting in its opinion that Respondent did not file a Rule 59(e), SCRCR, motion asking Judge Henderson to address the contemporaneous affidavit requirement. Respondent respectfully submits that a finding on one hand that Judge Hall's dismissal served to "overrule" Judge Henderson's determination on timeliness of Appellant's affidavits conflicts with the notion that Doe was required to seek a ruling on the same issue after the fact.

Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Issue preservation rules are designed to give the trial court a fair opportunity to rule on issues, and thus provide [an appellate court] with a platform for meaningful appellate review.

Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp., 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006).

Judge Henderson's Order spoke solely to the sufficiency of Appellant's second filed affidavit. (R. pp. 3-8). This Court overlooked that there was no acknowledgment, interpretation, analysis, and thus no ruling on whether Appellant's affidavits (as sufficient in content as they may have been) existed to fulfill the contemporaneous filing requirement.

This Court correctly states that the contemporaneous filing requirement involves the interpretation of a statute and is a question of law. Appellant'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 determination was made. To the contrary, the Order makes a specific finding that summary judgment was improper because “a genuine question of material fact exists that must be determined by a jury.” (R. p. 7).

This Court cites *Spence v. Wingate* for the proposition that Judge Henderson's Order was a “general ruling” that included a determination on Respondent'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 this 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 Appellant's second affidavit included sufficient content and created a jury question is wholly distinct from the issue of whether Appellant was required by statute to submit an affidavit at the time the Complaint was filed.

Respondent's Answer reserved his Motion to Dismiss, and the issue was appropriately raised during Judge Hall's Rule 16 pre-trial conference. The Supreme Court has 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 left unresolved by a prior judge.). Additionally, this Court’s opinion appears to conflict with the Supreme Court’s opinion in *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978). Appellant initially cited the case for the proposition that Judge Hall could not hear or decide whether Appellant 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 pursuant to a statute that no longer existed. 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.*

Judge Hall properly reviewed Judge Henderson’s previous Order and found that there had been no ruling on Appellant’s ability to sue without having satisfied the prerequisite conditions enumerated in S.C. Code § 38-77-170. (R. p. 64, line 21 – p. 66, line 7; p. 66, line 11 – p. 67, line 23). Therefore, Judge Hall properly ruled on an issue that Judge Henderson had not addressed. Regardless of the language Judge Henderson utilized in his Order, John Doe was not foreclosed from raising the Motion to Dismiss at trial for purposes of obtaining a ruling. *See 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.”).

Appellant failed to file the affidavit which met all requirements of the claim for which relief was sought pursuant to S.C. Code § 38-77-170(2) until February 5, 2018, nearly three years after Appellants alleged date of injury, and nearly fifteen months after Respondent filed an Answer to Appellant's Complaint. No suit may be filed without first complying with the terms of the statute. Because the Appellant failed to do this, Appellant failed to state a claim upon which relief may be granted. Therefore, his suit was rightfully and correctly dismissed by the Honorable Daniel D. Hall.

Respondent respectfully asks this Court for rehearing, that it consider and affirm on all remaining issues left unaddressed pursuant to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1991), including Respondent's additional sustaining ground regarding the insufficiency of the subsequently filed affidavits addressed in Respondent's Final Brief.

CONCLUSION

For the reasons stated above, Respondent respectfully requests that the Court grant a rehearing and affirm the Circuit Court's Order Grant of Defendant's Motion to Dismiss.

Respectfully submitted.

The 8th Day of July, 2021.

(SIGNATURE ON FOLLOWING)

WALKER ALLEN GRICE AMMONS & FOY LLP

s/ Sarah Rand-McDaniel

Sarah Rand-McDaniel

S.C. Bar No.: 101340

Seth McDaniel

S.C. Bar No.: 100689

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ATTORNEYS FOR RESPONDENT

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

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

Case No. 2016-CP-20-0011

Appellate Case No. 2018-001508

Peter Rice

Appellant,

v.

John Doe

Respondent.

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of Respondent's Petition for Rehearing has been served on this date upon opposing counsel by e-mailing a copy of the e-mail address provided in the Attorney Information System in accordance with the South Carolina Supreme Court Order dated March 20, 2020. A copy of the e-mail is attached.

S. Hampton Eadon, III, Esquire
Harris & Graves, P.A.
she@harrisgraves.com

s/ Sarah Rand-McDaniel
Attorney for Respondent

July 8, 2021
Mt. Pleasant, South Carolina

From: [Sarah McDaniel](#)
To: [Hampton Eadon](#)
Cc: [Seth McDaniel](#); [Cass Lambert](#); [Jeff Ammons \(jeff@walkerallenlaw.com\)](#)
Subject: Rice v. Doe appeal
Date: Thursday, July 8, 2021 11:21:00 PM
Attachments: [Petition for Rehearing COA 7.8.21.pdf](#)

Hampton,

Attached for service upon your client is Respondent's Petition for Rehearing dated today, July 8, 2021, for filing in Appellate Case No. 2018-001508 entitled Peter Rice v. John Doe. Pursuant to the Supreme Court Order regarding Appellate Court Operations during the Covid-19 Crisis dated March 20, 2020, I will attach this email to the Proof of Service for this filing. All documents are being filed via the South Carolina Judicial Branch online filing portal utilizing OneDrive for Business as directed by the Supreme Court's April 9, 2020 announcement.

Due to an earlier announcement on sccourts.org regarding a temporary issue with the courts' e-filing system, I will also e-mail the Petition and the Proof of Service to the Court of Appeals.

I hope you are doing well. Should you have any questions or concerns, please do not hesitate to contact me.

Regards,

Sarah Rand-McDaniel
Attorney at Law



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The South Carolina Court of Appeals

Peter Rice, Appellant,

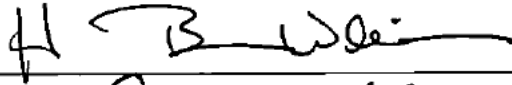
v.

John Doe, Respondent.

Appellate Case No. 2018-001508

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.


_____ J.

_____ J.

_____ J.

Columbia, South Carolina

cc:

Sherod Hampton Eadon, III, Esquire
Sarah Rand-McDaniel, Esquire
Seth Thomas McDaniel, Esquire
The Honorable Daniel Dewitt Hall

FILED
Jul 20 2021

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

RECEIVED
Aug 19 2021

S.C. SUPREME COURT

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

Case No. 2016-CP-20-0011

Appellate Case No. 2018-001508

Peter Rice

Respondent,

v.

John Doe

Petitioner.

PETITION FOR WRIT OF CERTIORARI

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ATTORNEYS FOR PETITIONER

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was made and finally ruled upon by the Court of Appeals on July 20, 2021.

QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN FINDING THE TRIAL JUDGE’S ORDER FOR DISMISSAL IMPROPERLY OVERRULED A PRIOR TRIAL COURT ORDER DENYING SUMMARY JUDGMENT?
- II. DID THE TRIAL JUDGE PROPERLY FIND THAT PLAINTIFF FAILED TO SATISFY THE AFFIDAVIT REQUIREMENT OF S.C. CODE § 38-77-170 AS A CONDITION PRECEDENT TO FILING A LAWSUIT INVOLVING A JOHN DOE VEHICLE WHERE THERE WAS NO CONTACT?
- III. WERE THE AFFIDAVITS FILED AFTER JOHN DOE’S ANSWER SUFFICIENT TO SATISFY THE REQUIREMENTS SET FORTH IN S.C. CODE § 38-77-170?

STATEMENT OF THE CASE

This appeal arises from the trial court’s dismissal of Respondent Rice’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 (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. (App. p. 25-27). Specifically, Rice 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. p. 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, 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). Rice 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. p. 34).

Doe filed an answer on November 21, 2016 reserving as a first defense a motion to dismiss for failure to comply with section 38-77-170. (App. p. 29). The next day, Rice filed his first affidavit. (App. p. 34). 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. p. 97).

On October 19, 2017, Doe moved for summary judgment. (App. pp. 41-42). On February

5, 2018, Rice filed a second affidavit containing identical information as the November 2016 affidavit, with the addition of two paragraphs and the required attestation. (App. pp. 38-39). On March 13, 2018, Doe filed a Memorandum of Law in Support of Unnamed Defendant’s Motion for Summary Judgment. (App. pp. 101-104). A hearing was held before Judge Henderson on March 14, 2018.¹ Judge Henderson denied Doe’s motion for summary judgment and ruled that Rice’s second affidavit, filed February 5, 2018, satisfied the language and content requirements set forth by section 38-77-170(2). (App. pp. 4-9). The Order denying summary judgment, prepared by Respondent’s counsel, was filed on April 13, 2018. *Id.*

Judge Hall called the case for trial on June 20, 2018. (App. p. 52). During the Rule 16(a), SCRCP, pre-trial hearing, Doe sought a determination on the motion to dismiss reserved in her Answer. (App. p. 57, ll. 15-18). Rice argued, in part, that Judge Henderson’s order denying summary judgment precluded Judge Hall from hearing Doe’s motion to dismiss. (App. pp. 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 content was sufficient in the context of section 38-77-170(2). (App. pp. 68, l. 22 – 69, l. 23; p. 90, ll. 10-22). Judge Hall agreed that Judge Henderson had not examined or ruled upon whether Rice 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 Rice’s case for failure to provide an affidavit as required by section 38-77-170(2) prior to initiating this lawsuit. (App. pp. 15-17; 55-90). Rice’s Motion for Reconsideration was denied

¹ A transcript of this hearing was not included in the Record on Appeal.

on July 17, 2018. (App. pp. 18-20).

Rice filed a Notice of Appeal on August 16, 2018. (App. p. 51). On appeal, Rice first argued the trial court erred in ruling the John Doe affidavit is a condition precedent to filing a lawsuit pursuant to section 38-77-170. (App. pp. 124-28). Second, Rice argued Judge Hall erred in hearing Doe’s Motion to Dismiss pre-trial for lack of proper notice (App. pp. 128-29) and because the motion had been ruled on by Judge Henderson’s April 13, 2018 order denying summary judgment. (App. pp. 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. (App. pp. 152-56). It found Judge Henderson’s order denying summary judgment constituted a “general ruling” as to the timing requirement, despite the fact that the order itself did not address the issue. (App. p. 155).

The Court of Appeals did not examine whether the subject action, or any John Doe action, can 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 Rice’s issues concerning the withdrawal of a motion and equitable tolling. The Court of Appeals, likewise, did not review whether Judge Henderson erred in finding the affidavits contained the required content to satisfy the statute.

Petitioner filed a Petition for Rehearing on July 8, 2021, requesting reconsideration of the court’s holding that Judge Hall had improperly entered an order overruling Judge Henderson’s order and sought examination of the remaining issues left unaddressed. The Court of Appeals denied rehearing by order filed July 20, 2021. (App. 157; 165).

This Petition follows.

ARGUMENT

The Court of Appeals committed reversible error in determining that Judge Hall improperly overruled Judge Henderson's order when he found Rice 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. This Court should review the opinion of the Court of Appeals, reverse its holdings, and either modify the opinion or remand to the Court of Appeals for a determination on the insufficiency of Rice's affidavits to comply with the John Doe statute.

I. 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. p. 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 either reviewed or was provided 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 Rice have acknowledged, the order was devoid of any finding relevant to the affidavits’ timing. When Judge Hall asked whether Rice agreed that Judge Henderson’s order did not address the contemporary filing requirement, Rice was unable to identify any such finding. (App. pp. 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. pp. 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 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. p 155). Rice’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. p. 8). There is no dispute Rice failed to produce an affidavit before filing suit or before Doe filed her answer and motion to

dismiss. (App. pp. 70, 1.22 – 71, 1.1). Had Judge Henderson’s order ruled on the contemporaneous filing requirement, the existence of the material fact 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.

II. 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.

Petitioner additionally argues 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 contemporary 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). Rice initially cited the case for the proposition that Judge Hall could not hear or decide whether Rice 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.*

III. Rice failed to comply with each of the three explicit statutory requirements outlined by S.C. Code § 38-77-170.

The November 22, 2016 affidavit, in addition to being untimely, failed to specify whether the accident had been timely reported to an appropriate police authority as required by S.C. Code § 38-77-170(1). (App. pp. 34-36). The affidavit is void of a statement that the injury or damage was witnessed by someone other than the owner or operator of the insured vehicle as required by S.C. Code § 38-77-170(2). *Id.* The affidavit also fails to include a statement indicating the insured was not negligent in failing to determine the identity of the other driver as required by S.C. Code § 38-77-170(3). *Id.* Finally, the November 22, 2016 affidavit does not contain any statement about steps taken to discover the identity of John Doe and did not contain the required “false statement” attestation. *Id.* For these reasons, the November 22, 2016 affidavit fails to satisfy S.C. Code § 38-77-170 requirements.

Likewise, the February 5, 2018 affidavit fails to comply with each of the requirements of the John Doe statute. In addition to not being timely, the second affidavit failed to include a statement indicating the insured was not negligent in failing to discover John Doe’s identity as required by S.C. Code § 38-77-170(3), and therefore, is not sufficient for Rice to bring this cause of action or recover uninsured motorist benefits. *Shealy*, 370 S.C. 194, 199, 634 S.E.2d 45, 48 (“An insured cannot recover uninsured motorist coverage unless the three conditions under § 38-77-170 are met.”) (quoting *Miller v. Doe*, 312 S.C. 444, 446, 441 S.E.2d 319, 320 (1994)).

Issuance of a writ of certiorari is necessary in this matter to review and uphold the dismissal of Rice’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.

In *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 188 S.E.2d 459 (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.*; *see also*, *Collins*, 352, S.C. at 470, 574 S.E.2d at 743.

The practical effect of a remand from the Court of Appeals for trial likely leaves the outcome unchanged. As Rice acknowledged, Doe would have the opportunity at trial to move for a directed verdict. (App. p. 47). For this reason, and for judicial economy, Petitioner seeks certiorari in order for the Court to additionally determine the sufficiency of the affidavits as applied to the John Doe statute, or in the alternative, to direct the Court of Appeals to do so.

CONCLUSION

This case warrants review because the Court of Appeals' decision improperly analyzed the respondent's issues on appeal and incorrectly disposed of substantive procedural and statutory issues of great import. Therefore, Petitioner requests this Court grant this petition for a writ of certiorari to review the Court of Appeal's decision below.

Respectfully submitted.

The 19th day of August, 2021.

WALKER ALLEN GRICE AMMONS & FOY,
LLP

s/Sarah Rand-McDaniel

Sarah Rand-McDaniel

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ATTORNEYS FOR PETITIONER

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

RECEIVED
Aug 19 2021

S.C. SUPREME COURT

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

Case No. 2016-CP-20-0011

Appellate Case No. 2018-001508

Peter Rice

Respondent,

v.

John Doe

Petitioner.

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Petition for Writ of Certiorari and Appendix has been served on this date upon opposing counsel by e-mailing a copy at the e-mail address provided in the Attorney Information System in accordance with the South Carolina Supreme Court Order dated March 20, 2020. A copy of the e-mail is attached.

S. Hampton Eadon, III, Esquire
Harris & Graves, P.A.
she@harrisgraves.com

s/ Sarah Rand-McDaniel
Attorney for Respondent

August 19, 2021
Mt. Pleasant, South Carolina

From: [Sarah McDaniel](#)
To: ["Hampton Eadon"](#)
Cc: [Seth McDaniel](#)
Subject: Rice v. Doe
Date: Thursday, August 19, 2021 10:56:00 PM
Attachments: [Petition for Writ final 8.19.21.pdf](#)
[Appendix \(final\).pdf](#)

Hampton,

I hope you are feeling better after Covid. Attached is the Petition for a Writ of Certiorari and Appendix which I will be filing via e-mail to the Supreme Court momentarily.

Regards,

Sarah Rand-McDaniel



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THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

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Sep 17 2021

S.C. SUPREME COURT

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Honorable Daniel D. Hall, Circuit Court Judge

Case No. 2016- CP- 20- 011

Appellate Case No. 2021-000894

Peter Rice

Respondent,

v.

John Doe

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

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Attorney for Respondent

STATEMENT OF ISSUES ON APPEAL

- I. Whether the Court of Appeals correctly found that the trial judge's order for dismissal improperly overruled a prior trial court order on a purely legal issue.
- II. Whether the trial judge erred in finding that Plaintiff failed to satisfy the affidavit requirement of S.C. Code §38-77-170(2) as a condition precedent to filing a lawsuit involving a John Doe vehicle where there was no contact.
- III. Whether Rice's affidavit(s) were sufficient to satisfy the requirements set forth in S.C. Code §38-77-170.

STATEMENT OF THE CASE

On April 17, 2015, Respondent Peter Rice was a passenger in a vehicle being driven by Bobby Ray Dye that was involved in a motor vehicle collision involving an unknown vehicle that ultimately led to Mr. Dye's vehicle striking a tree. On January 12, 2016, Respondent Peter Rice, brought this action against Bobby Rae Dye and Petitioner John Doe, as an unknown driver pursuant to uninsured motorist coverage afforded to him under S.C. Code §38-77-150, S.C. Code §38-77-170 and S.C. Code §38-77-180. Rice alleged that Mr. Dye and Petitioner Doe were negligent in the operation of their respective vehicles resulting in a wreck injuring Respondent Rice. (App. pp. 25-27). Respondent Rice executed an Affidavit pursuant to S.C. Code §38-77-170(2) dated November 18, 2016 which was emailed to Respondent Doe's counsel with a hard copy sent by mail on November 21, 2016. (App. pp. 34-37). On November 21, 2016, Respondent Doe filed an Answer with a general denial which included a Motion to Dismiss alleging that Rice failed to comply with S.C. Code §38-77-170. (App. pp. 28-33). Rice's November 18, 2016 Affidavit was filed with the Fairfield County Clerk of Court on November 22, 2016. (App. p. 34).

Petitioner Doe's Motion to Dismiss was scheduled for a hearing on January 5, 2017 at 9:30 a.m. On January 4, 2017, Doe's counsel sent an email indicating that the motion to dismiss was being removed and counsel would be advising the clerk's office the following morning. (App. p. 98). On the morning of January 5, 2017, a paralegal from the office of Petitioner Doe's counsel sent an email to the clerk that Doe's motion hearing was being removed. (App. p. 99). The clerk's office marked the official hearing roster that the motion was "resolved". (App. p. 100).

On September 26, 2017, Rice signed a second Affidavit which included the same sworn testimony as the initial November 18, 2016 Affidavit with the addition of two paragraphs (#9 and #10) and a statement at the bottom of the affidavit indicating the affiant's understanding of the ramifications of making a false statement. (App. pp. 38-40). On October 19, 2017, Doe filed a Motion for Summary Judgment alleging that Rice failed to satisfy the terms of S.C. Code §38-77-170. (App. pp. 40-42). On March 14, 2018, Petitioner Doe filed a Memorandum of Law in Support of its Motion for Summary Judgment. (App. pp.101-108)

On March 14, 2018, Petitioner Doe's Motion for Summary Judgment was heard before the Honorable Roger E. Henderson. In an Order filed on April 13, 2018, Judge Henderson denied Doe's Motion for Summary Judgment, after reviewing written submissions and considering oral arguments, finding that Rice's Affidavit satisfied the requirements of S.C. Code §38-77-170(2). (App. pp. 109-114). Petitioner Doe did not ask Judge Henderson to reconsider his order or elaborate further on his ruling. This matter was called for trial on June 20, 2018 before the Honorable Daniel D. Hall.

During the SCRCP 16(a) Pre-trial Conference, counsel for Petitioner Doe requested that its Motion to Dismiss be heard prior to selecting a jury. Judge Hall initially asked Respondent Rice if there was any basis by which the Court should not hear the Motion to Dismiss, to which Rice's counsel responded "This is the same argument that was in summary judgment that has already been heard by Judge Henderson and denied." (App. pp. 57-58 ll. 1-3). During the hearing, Judge Hall stated, "I'm satisfied that Judge Henderson's order on the summary judgment is the law of the case, and so we really don't need to rehash the compliance with the statute as far as – it appeared to me--and when I read through the file that what Judge Henderson ordered was that even though the initial affidavit did not have the required language stating about

the potential penalties and then the subsequent affidavit did, that the law appeared to be -- and I think obviously I believe he was correct --and that that did not mean that the affidavit was not sufficient.” (App. pp. 68 L.23 – p.69 l. 8). Judge Hall further stated, “It appears that what the defense is arguing is arguing is that as a condition—well, now she is arguing—as a condition precedent to the bringing—actually filing the suit, then an affidavit must’ve been filed.” (App. p. 69 ll. 18-22). Further discussion ensued as to whether Judge Henderson’s Order Denying Summary Judgment considered Petitioner Doe’s condition precedent argument relative to Doe’s motion to dismiss:

THE COURT: All right, and – I mean would you agree that -- and I’ll be glad to hear you on this—that the summary judgment order did not contain any language that dealt with the issue of it being a condition precedent?

MR. EADON: I would have to go back through it, because quite frankly, I haven’t reviewed it since ---

THE COURT: Okay, alright. Well, take a look at it, because I’m going to take a – I’m going to do a little bit of research before I rule.

MR. EADON: Okay. I know—I know for a fact that that argument was advanced at the hearing, I do recall that.

MS. O’BRIEN: No, it wasn’t, and there’s nowhere in the order—

THE COURT: Well, I mean—we’re—

MS. O’BRIEN: --- that it deals with that.

THE COURT: That’s all right. That’s all right. We’re bound by the Order.

MS. O’BRIEN: Right. The order does not address that at all.

(App. pp. 72 l. 20 – 73 l. 16).

Petitioner Doe's Motion to Dismiss was granted on a Form 4, which was filed on June 20, 2018 dismissing Rice's case. (App. pp.15-17). Rice timely filed a Motion for Reconsideration which was denied on a Form 4. (App. pp. 18-20). Rice filed a Notice to Appeal on August 16, 2018. (App. p. 51).

On appeal, Rice first argued the trial court erred in ruling that the filing of a John Doe affidavit is a condition precedent to filing a lawsuit pursuant to S.C. Code § 38-77-170. (App. pp. 124-128). Second, Rice argued Judge Hall erred in hearing Doe's Motion to Dismiss pre-trial for lack of proper notice (App. pp. 128-129) and because the motion had been ruled on by Judge Henderson's April 13, 2018 order denying summary judgment. (App. pp. 129-131).

On June 23, 2021 the Court of Appeals unanimously 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. (App. pp. 152-156). The Court of Appeals found Judge Henderson's order denying summary judgment constituted a "general ruling" of a purely legal question and determined that Judge Hall did not have the authority to overrule Judge Henderson's previous rejection of Doe's timeliness argument. (App. p. 155). As the resolution of this issue was dispositive of the appeal, the court declined to address Rice's other appellate issues concerning the withdrawal of a motion and equitable tolling. (App. p. 156).

Doe's Petition for Certiorari followed.

STANDARD OF REVIEW

“A writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons.” Rule 242 (B), SCACR.

ARGUMENT

The Court of Appeals correctly determined, in a unanimous decision, that in granting Doe’s Motion to Dismiss, Judge Hall improperly overruled Judge Henderson’s previous order concerning a purely legal issue.

I. THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL JUDGE’S ORDER FOR DISMISSAL IMPROPERLY OVERRULED A PRIOR TRIAL COURT ORDER ON A PURELY LEGAL ISSUE.

The Order by Judge Henderson denying Summary Judgment specifically states, “After reviewing *the written submissions* and hearing oral argument, this Court denies Defendant Doe’s Motion.” (App. p. 4) (emphasis added). Petitioner’s argument that there was no evidence in the Record that Judge Henderson either reviewed or was provided any materials by which he could have considered the contemporaneous filing requirement issue is disproven by the documents in the Record itself. The written submission Judge Henderson reviewed was Petitioner Doe’s Memorandum in Support as it was the only written submission submitted to the trial court. The first argument advanced in Doe’s memorandum in support of its Motion for Summary Judgment, in Section 1.A., was that there was no affidavit filed prior to filing suit, raising the issue of the timeliness of Rice’s section 38-77-170(2) affidavit i.e. the contemporaneous filing requirement.

(App. pp. 103-104). This timeliness issue was reviewed, considered and ruled upon in Judge Henderson's Order.

Citing *Spence v. Wingate*, 381 S.C. 487, 489, 674 S.E. 2d 169, 170 (2009), the Court of Appeals correctly determined, unanimously, that Judge Henderson's Order made a general ruling on the purely legal issue of the timeliness of the affidavit. The transcript from the summary judgment hearing is not part of the Record; however, Doe's memorandum and Judge Henderson's Order clearly indicate that the timeliness issue was decided. Doe did not request Judge Henderson to reconsider the Order nor was he asked to elaborate further on the ruling.

II. THE TRIAL COURT LACKED THE AUTHORITY TO HEAR AND DECIDE PETITIONER DOE'S MOTION TO DISMISS

Rice contends that based upon South Carolina law, Doe's Motion to Dismiss was not ripe for the trial court's consideration on the eve of trial, due to the motion being withdrawn over one and a half years prior. This contention was not ruled upon by the Court of Appeals as other issues were dispositive of the appeal.

Doe raised a general Motion to Dismiss in its Answer filed on November 21, 2016, alleging that Rice failed to comply with S.C. Code §38-77-170. (App. p. 29). The hearing on this motion was scheduled for January 5, 2017. (R. p. 97). The day before the scheduled motion hearing, counsel for Doe sent counsel for all parties an email indicating that the motion to dismiss was being removed. (App. p. 98). The morning of January 5, 2017, a paralegal from the office of Doe's trial counsel sent an email to the clerk of court indicating that the motion was removed from the motion roster. (App. p. 99). The clerk's office marked the official hearing roster that the motion, listed as #9 on the motion roster, was "resolved". (R. p. 97).

On June 20, 2018, during the SCRCF 16(a) Pre-Trial Conference, Doe requested that the Motion to Dismiss be heard. (App. p. 57, lines 16-18). Rice's counsel argued against this motion

being heard claiming that it was not properly before the Court due to it being withdrawn and never having been re-filed or noticed. (App. p. 45). South Carolina Rules of Civil Procedure Rule 7(b)(1) provides that “an application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.” Doe contends that the Motion to Dismiss was never re-filed or re-noticed after being removed on January 4, 2017, approximately 1 ½ years prior to the hearing.

The Court of Appeals encountered a similar situation in *Summer Place of Myrtle Beach Homeowner's Ass'n, Inc. v. Knight et al.*, 379 S.E.2d 724, 298 S.C. 241 (S.C. App., 1989). In that case, the trial court granted a summary judgment motion that was not pending during a SCRCP 16(a) Pre-Trial Conference. In reversing the trial court, the Court of Appeals held, “because there were no motions for summary judgment pending at the time of the pre-trial hearing, there was no motion before the court to grant.” (*Id.* at 729). While South Carolina Rules of Civil Procedure Rule 16(a)(7) allows for the disposition of pending motions during the Pre-Trial Conference, since Doe’s Motion to Dismiss was not filed or noticed after being removed and marked “resolved” on January 5, 2017, it was not pending before the trial court on June 20, 2018 and was not ripe for adjudication.

Rule 12(b)(6) SCRCP states, “If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment, and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56.” The arguments made during Doe’s Motion to Dismiss on June 20, 2018 considered matters outside of

the pleadings, namely the affidavit(s) submitted by Rice, which provided the central argument of Doe's motion. (App. pp. 53-91). South Carolina courts have long held that a Motion to Dismiss under SCRPC Rule 12 converts into a Motion for Summary Judgment under SCRPC 56 when matters outside of the pleadings are considered. During the June 20, 2018, hearing on Doe's Motion to Dismiss, counsel for Rice raised the issue that the argument being advanced by Respondent had already been heard and decided at the summary judgment stage by Judge Henderson. (App. p. 57, l. 22 - p. 58, l. 3; p. 66, l. 23-p. 67, l. 21).

Once the purely legal issue concerning the timeliness of Rice's section 38-77-170(2) affidavit had been decided by Judge Henderson, it was improper to have it reheard by Judge Hall pursuant to *Graham v. Town of Loris*, 272 S.C. 442 248 S.E.2d 594 (S.C. 1978). Judge Hall was asked to decide whether the filing of an affidavit was a condition precedent under S.C. Code §38-77-170(2). The condition precedent argument was raised, considered and ruled upon by Judge Henderson in denying Doe's Motion for Summary Judgment over 3 months prior. (App. pp. 103-104). This issue was clearly resolved as determined by the Court of Appeals, and thus was not subject to being changed, altered or reversed by another Circuit Court Judge.

In discussing the interplay of different circuit court judges being asked to adjudicate the same issue without new facts or evidence being presented, the Graham court cited *Steele v. C., C. & A. Railroad Co.*, 14 S.C. 324 (1880):

The Court of Common Pleas is a unity, although its jurisdiction is administered by a number of judges who are, in some sense, the exponents of the court. When one of these judges makes a decision upon the merits of a matter within his jurisdiction, that is not merely the personal opinion of the judge, but a judgment of the Court of Common Pleas, which exhausts the power of the court upon that subject and must stand until reversed or set aside in the manner prescribed by law. There is no appeal from one Circuit Judge to another. All are of equal dignity and have the same right to pronounce the judgments of the court. One Circuit Judge upon the same state of facts, has no power to change, alter or reverse a decision of a brother judge of the same Circuit.

III. THE TRIAL COURT ERRED IN FINDING THE PLAINTIFF FAILED TO SATISFY THE AFFIDAVIT REQUIREMENTS OF S.C. CODE §38-77-170(2) IN GRANTING DOE'S MOTION TO DISMISS

A S.C. CODE §38-77-170(2) FILING REQUIREMENTS

Assuming *arguendo* that this Court finds that Doe's Order to Dismiss was properly before the trial court, had not been withdrawn, did not convert into a summary judgment motion, did not conflict with Judge Henderson's Order and was correctly decided by Judge Hall, Rice asserts that a plain reading of S.C. Code § 38-77-170(2) does not impose a requirement of filing an affidavit prior to an Answer being filed.

South Carolina authority for "John Doe" actions in order to sue and recover uninsured motorist benefits is contained within S.C. Code of Laws. §38-77-170.

§38-77-170. Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown.

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 subitem (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.

From the plain reading of S.C. Code §38-77-170, there is no requirement that the affidavit be filed with the Court. (emphasis added) The trial court ultimately granted Respondent's Motion to Dismiss on the ground that the filing of an affidavit was a condition precedent for filing suit under S.C. Code §38-77-170(2). (App. p. 89, l 19 - p. 91, l. 25). In so holding, the trial court stated, "I find that the—that the motion to dismiss is granted because of the failure to file an affidavit until after an answer was filed in this case, and so that's the basis for the Court's ruling." (App. p. 89, ll 10-14). However, a plain reading of the language of the statute at issue contains no requirement that the Affidavit is required to be filed, nor that it is required to be filed prior to Respondent's filing its Answer. It simply states that the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit.

In *Collins v. Doe*, 352 S.C. 462 (2002), our Supreme Court noted that "the sworn affidavit requirement fulfills a notice function; providing, *upon request*, the defendant-insurer with information relating to the validity of Plaintiff's case." (*Collins* at 470, emphasis added). Upon request via email on November 7, 2016, counsel for Doe requested the affidavit be provided. Email receipts confirm that counsel for Respondent was provided with Rice's Affidavit on November 18, 2016 via email. (App. p. 42). Rice's first affidavit, signed on November 18, 2016 was filed with the clerk's office on November 22, 2016.

The *Collins* case is factually distinguishable from the instant case. In *Collins*, there was no affidavit filed by any witness and the court determined that witness testimony could not act as the functional equivalent of the affidavit requirement of S.C. Code §38-77-170(2). Two years after the Supreme Court decided *Collins*, it heard *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626

(S.C., 2004), another no-contact John Doe case which dealt with challenges to the requirements of S.C. Code §38-77-170(2).

This Court in *Gilliland* allowed recovery to Ms. Gilliland. The reasoning was based upon a seeming disagreement between *Wausau Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) and *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002). *Howser* seemed to liberally interpret §38-77-170(2) while *Collins* more strictly interpreted the statute with regard to the requirement of a witness affidavit versus court testimony from a witness.

In reversing the Court of Appeals, the Supreme Court stated:

In *Collins*, this Court strictly interpreted § 38-77-170(2). This Court held that while the purpose of the affidavit requirement of § 38-77-170(2) could have been met by witness testimony, the statute specifically required that the plaintiff provide an affidavit of an independent witness.

Here, § 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, *Collins* suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to *Collins*, is not); therefore, a strict interpretation of § 38-77-170(2) would undermine the statute's purpose. See *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) ("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")

B. EQUITABLE TOLLING

Assuming *arguendo* that this Court finds that Rice failed to meet the affidavit requirements of S.C. Code §38-77-170(2), Rice contends the remedy of equitable tolling should be applied to prevent an unjust and unintended result based on the unique facts present in the instant case. In *Hooper v. Ebenezer Sr. Services*, 687 S.E.2d 29, 386 S.C. 108 (S.C., 2009), the South Carolina Supreme Court adopted the remedy of equitable tolling. "Equitable tolling is a

nonstatutory tolling theory which suspends a limitations period." *Ocana v. Am. Furniture Co.*, 135 N.M. 539, 91 P.3d 58, 66 (2004), cited by *Hooper at 33*. The remedy of equitable tolling is to be used "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." 54 C.J.S. Limitations of Actions § 115 (2005). The *Hooper* court held, "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex.App.2006). Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use. *Hooper at 33*.

If the trial court determined that an affidavit being filed was a condition precedent to filing a John Doe, no-contact action, the end result could have been cured in a timely fashion by Rice dismissing his case without prejudice and simply re-filing it at any point from when Respondent's initial Motion to Dismiss was raised on November 22, 2016 until the statute of limitations expired on April 17, 2018, approximately one and a half years later.

Trial counsel for Doe was afforded the opportunity to depose Rice and the driver of the vehicle in which Rice was a passenger, Mr. Dye, as well as engage in written discovery. (App. p. 45). Rice signed a second affidavit on September 26, 2017, which was filed February 5, 2018 (App. pp. 38-40). The legislature's concern of fraud prevention involving single-vehicle accidents was satisfied. Neither Doe nor his insurer have been prejudiced due to a lack of notice or an opportunity to further investigate this claim, as litigation spanned over two years, involved

multiple depositions, and two filed affidavits. In sum, the resulting prejudice to Rice rises to the level that is so plainly absurd that it could not possibly have been intended by the legislature or would defeat the plain legislative intent.

Doe's Motion to Dismiss was initially scheduled to be heard in January 5, 2017. Doe's trial counsel removed the hearing from the calendar and it was marked as "resolved" by court personnel. (R. p. 97). The motion was resurrected on June 20, 2018, the day the case was set for trial. The consequence of the delay in timing of the hearing granting Respondent's Motion to Dismiss, whether intentional or unintentional by Doe's former counsel, rendered Rice's claim expired due to the running of the statute of limitations. This result seems patently unfair given that, in the light most favorable to Rice, he filed an Affidavit which met all requirements of S.C. Code §38-77-170(2) on February 5, 2018, at the latest, well before the statute of limitations on his claim expired on April 17, 2018.

If this Court is inclined to revisit the trial court's ruling that Rice was required to file his affidavit prior to the filing of Doe's Answer, as a condition precedent, Rice submits that the doctrine of equitable tolling should be applied to prevent an injustice based on a delayed ruling which Rice had no control over. Both affidavits were executed by Rice, unquestionably in advance of the expiration of the statute of limitations. All legislative concerns of fraud prevention have been satisfied by the opportunity to depose the parties and engage in written discovery. There was no prejudice to Doe. Respondent Rice respectfully requests that the Court consider the remedy of equitable tolling of the statute of limitations due to these exceptional circumstances, if further appellate consideration is warranted.

CONCLUSION

The Court of Appeals, in its unanimous decision, correctly determined that Judge Henderson reviewed, considered and ruled on the purely legal issue of the timeliness of Rice's section 38-77-170(2) affidavit in the Order Denying Summary Judgement. As such, the Court of Appeals correctly determined that Judge Hall was without authority to rule on the same issue in the subsequent motion to dismiss the action. Furthermore, Doe's motion to dismiss was not ripe for adjudication since it had been withdrawn on January 5, 2017 prior to the June 20, 2018 hearing. It was never re-filed nor re-noticed during that 17 month period. Assuming *arguendo* that the motion was properly heard on the eve of trial, since matters were considered outside of the pleadings, Doe's Motion to Dismiss converted to a Rule 56 Motion for Summary Judgment, which had previously been reviewed, considered and rejected by Judge Henderson.

If this Court finds that Petitioner Doe's Motion to Dismiss was properly before the trial court, the plain language of S.C. Code of Laws §38-77-170 does not require the filing of an affidavit. It requires that an Affidavit must be completed and signed pursuant to the terms of the statute. A plain reading of the statute shows no requirement that the affidavit be filed and by extension, makes no requirement that the affidavit be filed prior to the filing of a Complaint or an Answer.

The trial court's ruling, if allowed to stand, allows a procedural loophole to create an absurd result outside of the legislature's intent if strictly applied to the facts in this case. When this lawsuit was filed, properly served and required affidavits were provided prior to the expiration of the statute of limitations, surely the net result of this action being dismissed is a result so absurd that it runs counter to the legislative intent of this, or any, statute. If the trial court's dismissal is allowed to stand, equitable tolling should be applied so this controversy may

proceed with the issues to be fairly determined by a jury. Therefore, the Petition should be denied and this matter remanded to the trial court for adjudication by a jury.

RESPECTFULLY SUBMITTED,

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Columbia, South Carolina

September 17, 2021

THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Honorable Daniel D. Hall, Circuit Court Judge

Case No. 2016- CP- 20- 011

Appellate Case No. 2021-000894

RECEIVED

Sep 20 2021

S.C. SUPREME COURT

Peter Rice

Respondent,

v.

John Doe

Petitioner.

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Return to Petition of Certiorari of Respondent has been served on this date upon opposing counsel by e-mailing a copy at the e-mail address provided in the Attorney Information System in accordance with the South Carolina Supreme Court Order dated March 20, 2020. A copy of the e-mail is attached.

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s/ S. Hampton Eadon, III
S. Hampton Eadon, III
Attorney for Respondent
SC Bar No. 76158

September 17, 2021
Columbia, South Carolina

The Supreme Court of South Carolina

Peter Rice, Respondent,

v.

John Doe, Petitioner.

Appellate Case No. 2021-000894

ORDER

Based on the vote of the Court, the petition for a writ of certiorari is granted on Petitioner's Questions I and II and denied on Question III. The parties shall proceed to serve and file ten copies of the Appendix and ten copies of their briefs in the manner provided by Rule 242(i), SCACR.

FOR THE COURT

BY Patricia A. Howard
CLERK

Columbia, South Carolina

June 28, 2022

cc:

Sarah Rand-McDaniel, Esquire

Seth Thomas McDaniel, Esquire

Sherod Hampton Eadon, III, Esquire

The Honorable Jenny Abbott Kitchings