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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

_____

APPEAL FROM FAIRFIELD COUNTY

Court of Common Pleas

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

_____

Case No. 2016- CP- 20- 011

Appellate Case No. 2021-000894

_____

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

_____

Peter Rice

Respondent,

v.

John Doe

Petitioner.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

On April 17, 2015, Respondent Peter Rice was a passenger in a vehicle driven by Bobby Ray Dye that was involved in a motor vehicle collision after being forced off the roadway by an unknown vehicle. Mr. Dye's vehicle ultimately came to rest after 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 the 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 each negligent in the operation of their respective vehicles resulting in a wreck injuring Respondent Rice. (App. pp. 25-27). Respondent filed his lawsuit approximately 8 months after the collision, over 2 years and 4 months prior to the expiration of the statute of limitations.

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 prior counsel with a hard copy sent

by mail on November 21, 2016. (App. pp. 34-37). On November 21, 2016, Respondent 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).

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 former counsel sent an email indicating that their 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 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). Following the cancellation of the January 5, 2017 motion hearing, Doe's motion to dismiss was never noticed or requested for a hearing. The parties moved the case forward in preparation for trial, engaging in written discovery, participating in the depositions of Respondent Rice and co-Defendant Bobby Ray Dye and mediation.

On September 26, 2017, Respondent 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 indicating the affiant's understanding of the ramifications of making a false statement. (App. pp. 38-40). Respondent's second Affidavit was filed with the Fairfield County Clerk of Court on February 5, 2018. On October 19, 2017, Doe filed a Motion for Summary Judgment alleging that Respondent 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, 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 Respondent's Affidavit satisfied the requirements of S.C. Code §38-77-170(2). (App. pp. 109-114). Petitioner did not ask Judge Henderson to reconsider his ruling or elaborate further on his Order. On April 17, 2018, the statute of limitations on Respondent's expired, ending his ability to re-file or correct any alleged defects in his lawsuit. This matter was called for trial on June 20, 2018 before the Honorable Daniel D. Hall.

During the SCRCP 16(a) Pre-trial Conference, Carrie H. O'Brien, trial counsel for Petitioner Doe, requested that Doe's Motion to Dismiss be heard prior to selecting a jury. Judge Hall initially asked Respondent if there was any basis by which the Court should not hear the Motion to Dismiss, to which Respondent'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).

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

On appeal, Respondent 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, Respondent 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 Respondent's other appellate issues concerning the withdrawal of a motion and equitable tolling. (App. p. 156). Doe filed a Petition for Rehearing on July 8, 2021. (App. P. 157). The Court of Appeals denied rehearing by order filed on July 20, 2021.

Doe's Petition for Certiorari followed in the Supreme Court. Doe sought review of the Court of Appeals' opinion reversing Judge Hall's Order of dismissal of Rice's case. Additionally, Doe requested a determination by this Court of issues regarding the timeliness and

sufficiency of Respondent's affidavits. (App. 166). Respondent submitted a Return in Petition for Writ of Certiorari (App. 181), after which this Court filed an Order granting the petition for a writ of certiorari on Petitioner's Questions I and II. (App. 199).

This appeal follows.

STANDARD OF REVIEW

"On appeal from the dismissal of a case pursuant to Rule 12(b)(6), an appellate court applies the same standard of review as the trial court." *Rydde v. Morris, 381 S.C. 643, 646, 675 S.E.2d 431, 433* (2009). "That standard requires the Court to construe the complaint in a light most favorable to the nonmovant and determine if the facts alleged and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Id. (internal quotations omitted). *Wilkinson v. E. Cooper Cmty. Hosp., Inc*., 410 S.C. 163, 763 S.E.2d 426 (S.C. 2014).

ARGUMENT

The Court of Appeals correctly determined, in a unanimous *per curiam* 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 DETERMINED THE TRIAL JUDGE'S ORDER FOR DISMISSAL IMPROPERLY OVERRULED A PRIOR TRIAL COURT ORDER DENYING SUMMARY JUDGMENT ON THE SAME, PURELY LEGAL ISSUE.

The Court of Appeals correctly determined that Judge Hall overruled Judge Henderson's Order on whether Respondent complied with S.C. Code §38-77-170.

A. Judge Henderson denied Petitioner's Motion for Summary Judgment based on S.C. Code §38-77-170 after oral argument and review of written submissions.

The Order by Judge Roger E. Henderson denying Petitioner's Motion for 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). During the subsequent hearing on Doe's Motion to Dismiss on the morning of the scheduled trial, discussion ensued as to whether Judge Henderson's Order Denying Summary Judgment considered Petitioner Doe's condition precedent argument:

> 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's trial counsel argued that there was no evidence in the Record that Judge Henderson either reviewed, heard arguments, or was provided any materials by which he considered

the contemporaneous filing requirement/condition precedent issue in ordering the denial of Doe's Motion for Summary Judgment. Though a transcript of this hearing is not included in the record on appeal, this contention is plainly disproven by the documents in the record itself. The only written submission Judge Henderson reviewed in deciding Petitioner's Motion for Summary Judgment was Doe's Memorandum in Support. (App. pp. 101-107) The first argument advanced by Petitioner in its memorandum in support of its Motion for Summary Judgment, in Section 1.A., is entitled "No Affidavit Prior to Filing Suit". (App. p. 103). Petitioner, in this written submission cited *Collins v. Doe*, 352 S.C. 462 (2002), claiming that Respondent's section 38-77-170(2) affidavit did not comply with the alleged condition precedent requirement and therefore should be dismissed. (App. pp. 103-104). A review of the Record makes it clear that Petitioner's legal argument regarding Respondent's affidavit timeliness 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 ruling on the purely legal issue of the timeliness of the affidavit. In determining that Respondent's affidavit complied with S.C. Code §38-77-170, Judge Hall improperly overruled Judge Henderson's ruling. As this Court stated in *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". Petitioner did not request Judge Henderson to reconsider the Order nor was he asked to elaborate further on the ruling.

B. The trial judge erred in hearing and ultimately granting Doe's Motion to Dismiss.

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 Petitioner'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 consistently 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 four corners of the pleadings are considered. This Court stated, "In considering a motion for dismissal under Rule 12(b)(6), if "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."" Rule 12(b), SCRCP. *Allen Patterson, Steve Tilton, Richard Sendler, Lincoln Privette, Marc Ellis, Joey Carter, Barry Davis, Michael Nieri, Allen Patterson Residential LLC v. Witter*, 425 S.C. 213, 226, 821 S.E.2d 677 (S.C. 2018).

During the June 20, 2018, hearing on Doe's Motion to Dismiss, counsel for Respondent raised the issue that the argument being advanced by Doe 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 at the first summary judgment hearing, 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 Respondent's affidavit met the requirements of S.C. Code §38-77-170(2). Petitioner's motion to dismiss required the trial judge to consider matters other than those based solely upon the allegations set forth on the face of a

complaint, namely Respondent Rice's affidavit and thus converted the motion to dismiss into a motion for summary judgment. In *Shealy v. Doe*, 634 S.E.2d. 45, 370 S.C. 194 (S.C. App. 2006), the Court of Appeals reviewed the trial court's grant of Doe's motion to dismiss. In an analogous situation to the one at bar, the Court of Appeals decided, "In this case, the trial court considered Cromer's affidavit and the letter from Safeco before granting Doe's motion to dismiss. Accordingly, we review the trial court's order as if it were an appeal from a grant of summary judgment." *Shealy* at 47. 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). The condition precedent argument was ruled upon as correctly 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.

C. Timeliness of Petitioner Doe's Motion to Dismiss

Respondent contends that based upon South Carolina law, Petitioner 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.

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 SCRCP 16(a) Pre-Trial Conference, Doe requested that the Motion to Dismiss be heard. (App. p. 57, lines 16-18). Respondent'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." Respondent 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 summary judgment 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. South Carolina Rules of Civil Procedure Rule 16(a)(7) allows for the disposition of pending motions during the Pre-Trial Conference. However, since Petitioner'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.

II. THE TRIAL COURT ERRED IN FINDING THE RESPONDENT FAILED TO SATISFY S.C. CODE §38-77-170(2)

A. S.C. Code §38-77-170(2) contains no filing requirement

South Carolina authority for "John Doe" actions to sue or 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.

Assuming *arguendo* that this Court finds that Doe's Motion 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, then Respondent asserts that a plain reading of S.C. Code § 38-77-170(2) supports reversal of Judge Hall's Order since the statute does not impose a filing requirement.

S.C. Code §38-77-170, does not contain a requirement that the affidavit ***be filed*** with the Court. (emphasis added). The trial court ultimately granted Petitioner'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). Simply put, S.C. Code §38-77-170 contains no requirement that the Affidavit must be filed, nor that it must be filed prior to John Doe filing its Answer. The statute requires the witness to sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit under subsection 2.

In *Collins v. Doe*, 352 S.C. 462 (2002), our Supreme Court decided, in a majority opinion, 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). The Court's language identifying the defendant-insurer is important. A defendant-insurer requesting the affidavit can only take place after a lawsuit has been initiated as there would be no Defendant until after the Complaint is filed. The exact factual scenario discussed in the *Collins* case to fulfill the notice function took place in the instant matter. Upon request via email on November 7, 2016, counsel for Doe requested the affidavit be provided. Counsel for Doe was provided with Rice's Affidavit on November 18, 2016 via email. The

defendant-insurer was put on notice of the validity of Plaintiff's case the same day the affidavit was signed. Rice's 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 were no affidavits filed by any witness at any point during the litigation and the question before the court was whether witness testimony could act as a functional equivalent of the statutorily required affidavit. This Court determined, in a majority opinion, that witness testimony could not serve as the functional equivalent of the affidavit requirement of S.C. Code §38-77-170(2) and strictly interpreted the statute to require the affidavit in order to bring a case to court.

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 allowing recovery for the Plaintiff 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 regarding 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 unanimous *Gilliland* decision by this Court, decided two years after *Collins* determined that "a strict interpretation of S.C. Code §38-77-170(2) would undermine the statute's purpose." See *Gilliland*, 357 S.C. at 201, 592 S.E.2d 630 (S.C., 2004).

B. S.C. Code § 38-77-170 requires an affidavit as a condition to recover

S.C. Code §38-77-170 is titled 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 General Assembly's most recent amendment of S.C. Code §38-77-170 took place in 1989. The Act is "to amend section 38-77-170 relating to the requirements to recover under the uninsured motorist provisions when the at-fault party is unknown, so as to require a witness to the accident to sign an affidavit attesting to the truth of the facts about the accident and to provide a warning statement to be displayed on the affidavit." Act No. 148, 1989 S.C. Acts 439 (emphasis added).

Black's Law Dictionary defines "recover" as:

> 1. To get back or regain in full or in equivalence. 2. To obtain by judgment or other legal process. 3. To obtain (a judgment) in one's favor. 4. To obtain damages or other relief. To succeed in a lawsuit or other legal proceeding. Black's Law Dictionary pp. 3992-3993 (Bryan A. Garner ed., 8th ed, West 2004)

South Carolina courts have long held that the cardinal rule of statutory construction is to ascertain and effectuate the intent of the legislature. *Charleston County Sch. Dist. v. State Budget and Control Bd.*, 313 S.C. 1, 437 S.E.2d 6 (1993). Under the plain meaning rule, it is not the court's place to change the meaning of a clear and

unambiguous statute. *In re Vincent J.*, 333 S.C. 233, 509 S.E.2d 261 (1998) (citations omitted). Where the statute's language is plain and unambiguous, and conveys a clear and definite meaning, the rules of statutory interpretation are not needed and the court has no right to impose another meaning. *Id.* at 233, 509 S.E.2d at 262 (citing *Paschal v. State Election Comm'n*, 317 S.C. 434, 454 S.E.2d 890 (1995)). "What a legislature says in the text of a statute is considered the best evidence of the legislative intent or will. Therefore, the courts are bound to give effect to the expressed intent of the legislature." Norman J. Singer, Sutherland Statutory Construction § 46.03 at 94 (5th ed. 1992).

Hodges v. Rainey, 341 S.C. 79, 533 S.E.2d 578 (S.C. 2000).

The legislature carefully chose the word “or” in bridging the words “sue” and “recover” in defining the title to S.C. Code §38-77-170. If the statute were defined ”conditions to sue and recover” it would lend support to the argument that an affidavit operates as a condition precedent to sue “and” recover. The legislature did not use these words. They instead chose to use the word “or”. As noted above, Black’s Law Dictionary defines “recover” as an active verb in this context referring to a Plaintiff obtaining a judgment, damages and/or succeed in a lawsuit or other proceeding. Naturally, recovery means a recovery or judgment which can only take place after the commencement of an action, litigation and a decision by a judge or jury.

The General Assembly is well-versed in drafting laws that create a condition precedent when it is their intent. S.C. Code §15-79-125 is titled “Notice of Intent to File Suit as a prerequisite to filing action…”. Subsection (A) of the above statute creates a true condition precedent by requiring, “Prior to filing or initiating a civil action alleging injury or death as a result of medical malpractice, *the plaintiff shall contemporaneously*

file a Notice of Intent to File Suit and an affidavit of an expert witness". (emphasis added). This statute specifically states that the Notice of Intent (NOI) and expert affidavit must be filed with the court. It further requires that the NOI and expert affidavit must be filed prior to initiating or commencing a civil action for medical malpractice. This statute unquestionably illustrates the legislature's intent and ability to create a true condition precedent. Subsequent decisions by this Court interpreting the above statute's interplay with S.C. Code §15-36-100 are not included in this brief as they are not germane to the issue at bar.

The contemporaneous filing requirement of an affidavit contained in S.C. Code §15-79-125 is simply not present in S.C. Code §38-77-170. First, there is no filing requirement of the affidavit in the clear, unambiguous language of S.C. Code §38-77-170. Second, there is no condition precedent or contemporaneous filing requirement in the plain reading of the text of S.C. Code §38-77-170. As such, Judge Hall's granting of Doe's motion to dismiss on the basis that S.C. Code §38-77-170 requires the filing of an affidavit and such affidavit must be filed prior to defense's Answer, should be reversed and the Court of Appeals decision affirmed.

C. Equitable Tolling

Assuming *arguendo* that this Court finds that Respondent failed to meet the affidavit requirements of S.C. Code §38-77-170(2), Respondent 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. Doe's Motion to Dismiss was initially scheduled to be heard on January 5, 2017. Doe's trial counsel removed the hearing from the calendar, and it was marked as "resolved" by court personnel. (App. p. 100). The motion was resurrected without notice on June 20, 2018, the

day the case was called for a jury trial. The consequence of the delay of timing in scheduling the hearing on Doe's Motion to Dismiss, whether intentional or unintentional by Doe's former counsel, eliminated Respondent's ability to amend his claim due to the expiration 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 hearing and subsequent ruling on the morning of trial. 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 discovery. There was no prejudice to Doe, the defendant-insurer. Respondent 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. As this Court noted in *Spence v. Spence*, 628 S.E.2d 869, 881, 368 S.C. 106 (S.C. 2006), "When a plaintiff is not given the opportunity to file and serve an amended complaint, but is left with no choice but to appeal after dismissal of her case with prejudice, an appellate court which affirms the dismissal may modify the lower court's order to find the dismissal is without prejudice. When the statute of limitations has expired, the appellate court may in its discretion impose a reasonable period of time in which to amend the complaint."

In *Hooper v. Ebenezer Sr. Services*, 687 S.E.2d 29, 386 S.C. 108 (S.C., 2009), this 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). This Court held in *Hooper*, "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. In discussing the frequency of equitable tolling as a remedy, this Court stated, "equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use." *Hooper at 33*.

Assuming *arguendo* that this Court finds that an affidavit being filed was a condition precedent to filing a John Doe, no-contact action, the ultimate result of this case could have been cured in a timely fashion. Respondent would have dismissed his case without prejudice and simply re-filed it at any point from when Petitioner's initial Motion to Dismiss was raised on November 22, 2016 until the statute of limitations expired on April 17, 2018, a period spanning approximately 17 months.

Petitioner's trial counsel was afforded the opportunity to depose Respondent and the driver of the vehicle in which Respondent was a passenger, Mr. Dye, as well as engage in written discovery. (App. p. 45). Respondent signed a second affidavit on September 26, 2017, which was filed February 5, 2018 (App. pp. 38-40). The legislative concern of notice and fraud prevention involving single-vehicle accidents is 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 multiple years, involved multiple depositions, two filed affidavits and a mediation. In sum, the resulting prejudice to Respondent 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.

CONCLUSION

The Court of Appeals, in its unanimous decision, correctly determined that Judge Henderson reviewed, considered and ruled on the purely legal issue of whether Rice's affidavit satisfied section 38-77-170(2) in the Order Denying Doe's Motion for 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 well in advance of the June 20, 2018 hearing. It was never re-filed nor re-noticed during that 17-month period while "running out the clock" on Respondent's statute of limitations. Assuming *arguendo* that the motion was properly heard on the eve of trial, since matters were considered outside of the pleadings, namely the affidavit in question, Doe's Motion to Dismiss converted to a Rule 56 Motion for Summary Judgment, which raised the same issues that were previously reviewed, considered and ruled upon by Judge Henderson and were therefore improper for Judge Hall to overrule.

However, if this Court finds that Petitioner Doe's Motion to Dismiss was properly before the trial court, the clear, unambiguous language of S.C. Code of Laws §38-77-170 must be examined. The statute requires that an Affidavit must be completed and signed pursuant to the terms of the statute. There is no filing requirement, certainly no requirement that the affidavit be filed prior to Defendant's Answer. This Court stated the method and purpose of the sworn

affidavit in *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d. 739 (S.C. 2002), "the sworn affidavit requirement fulfills a notice function: Providing, upon request, the defendant-insurer with information relating to the validity of the plaintiff's case" *Id.* at 470. (emphasis added). In the instant matter, the affidavit(s) were provided to Petitioner's prior counsel, upon request, as outlined in *Collins*. The Court of Appeals decision should be affirmed and this matter remanded to the trial court for adjudication on the merits by a jury.

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 the required affidavit(s) 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. In the alternative, if the trial court's dismissal is allowed to stand, equitable tolling should be applied so the issues in controversy can be determined on the merits by a jury.

Respectfully submitted,

This the 12th day of October, 2022.

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