STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	C/A NO.: 2024-CP-23-01585
	)	
Thomas Carswell, Jr.,	)	
Plaintiff,	)	**ORDER**
vs.	)	
John Doe, an unidentified motorist,	)	
Defendant.	)	

This matter came before the Court on Defendant John Doe's motion for judgment on the pleadings on September 5, 2024. Counsel for both parties made compelling arguments. Based on my review of the case filings, the submissions of the parties, case and statutory law, and oral arguments, Defendant's motion is granted. Assuming all of the factual allegations asserted against Defendant Doe by the Plaintiff are true, there is no basis for relief because the facts alleged in the Complaint, attached affidavit, and supplemental affidavits do not support a cause of action under S.C. Code Ann. § 38-77-170 and Defendant Doe is entitled to judgment as a matter of law.

FACTS

This lawsuit arises out of a single motorcycle accident that occurred on I-385 in Greenville County, South Carolina on April 26, 2021. The Complaint alleges that Plaintiff Thomas Carswell, Jr. was driving a motorcycle with his father on the date of the accident. The Complaint incorporates by reference and attaches the affidavit of Plaintiff's father, Thomas S. Carswell, Sr., as an exhibit to the Complaint. The affidavit of Mr. Carswell, Sr., dated June 12, 2023, clarifies that Plaintiff and his father were traveling on separate motorcycles. According to the affidavit, they were traveling to the home of Mr. Carswell, Sr. to load a motorcycle onto a trailer. The Complaint and

affidavit both allege that they entered I-385 Southbound from Woodruff Road. According to his affidavit, Mr. Carswell, Sr. was operating his own motorcycle and Plaintiff was driving the motorcycle they were going to load onto the trailer. Mr. Carswell, Sr. states that he was traveling in front of his son.

The Complaint and affidavit both assert that, as Mr. Carswell, Sr. merged onto I-385, a BMW SUV came "flying up" behind him in the near lane, swerved, and moved onto the shoulder of the road to his right. The driver of the BMW then allegedly cut back into Mr. Carswell, Sr.'s lane of travel. However, Mr. Carswell, Sr. was able to merge quickly into the next lane and avoid a collision. The BMW allegedly merged again into Mr. Carswell, Sr.'s lane, "almost striking [him] and forcing [him]to merge into the lane to [his] left". (Complaint, ¶14; *See also* Affidavit of Carswell, Sr., ¶12). The Complaint alleges that it appeared that John Doe was attempting to hit Plaintiff's father on purpose and that Plaintiff observed the interactions since he was riding behind his father. Mr. Carswell, Sr. states that the BMW then drove off from him "at a tremendous rate of speed".

Mr. Carswell, Sr. admits that he followed and kept pace with the BMW to shout at the driver for nearly striking him. Plaintiff alleges that his father and John Doe "rode next to each other after the repeated near-collisions caused by John Doe, accelerating away from Plaintiff in an apparent 'road rage' type incident." (Complaint, ¶17). Mr. Carswell, Sr. states that Plaintiff did not keep pace with him or the BMW. According to the Complaint and affidavit of Mr. Carswell, Sr., Plaintiff allegedly moved into the leftmost lane to keep Mr. Carswell, Sr. in his sight. Plaintiff alleges that he crashed because he "was paying attention to the BMW driven by John Doe that nearly killed his father." (Complaint, ¶19). Mr. Carswell, Sr. states that his son lost control of his

motorcycle and crashed "because he was paying attention to my interactions with the BMW that nearly killed me". (Affidavit of Carswell, Sr., ¶17).

Plaintiff alleges causes of action for negligence, gross negligence, recklessness, negligence per se, gross negligence per se, recklessness per se, and strict liability for abnormally dangerous activities seeking actual and punitive damages against Defendant Doe. Defendant Doe filed a motion for judgment on the pleadings and an answer which included defenses regarding proximate cause and intervening and superseding acts of a third party. Prior to the hearing, Defendant Doe filed a memorandum in support of his motion. Plaintiff filed a memorandum in opposition to the motion and the affidavits of Blair Vana and Melissa Mack. Ms. Vana's affidavit states that she witnessed a motorcycle crash on April 26, 2021 involving a young man on I-385. She states that she saw the young man and his father riding on motorcycles in front of her and that she witnessed the father drive off. According to her affidavit, after the father drove off she witnessed the son crash his motorcycle. Ms. Mack's affidavit also states that she saw a young man on I-385 crash a motorcycle on or about April 26, 2021. Ms. Mack states that before the crash she saw an SUV speeding and swerving in traffic in front of the motorcycles, nearly hitting them. She also states that she saw one motorcyclist attempt to stay with the SUV while the other motorcyclist stayed in front of her. According to her affidavit, "[s]hortly thereafter, the motorcycle that did not keep pace with the SUV, apparently focusing on the SUV, crashed." (Affidavit of Mack, ¶ 10).

LEGAL STANDARD

A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Judgment on the pleadings is proper when the plaintiff cannot recover as a matter of law. Lydia v. Horton, 355 S.C.

36, 583 S.E.2d 750 (2003). When considering a motion for judgment on the pleadings, exhibits attached to the pleading are considered "a part thereof for all purposes". Rule 10(c), SCRCP. However, "if matters outside the pleadings are presented to and not excluded by the Court", the motion is treated as a summary judgment motion. Rule 12(c), SCRCP. Summary judgment is appropriate where the pleadings, discovery, admissions, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Rule 56 (c), SCRCP.

DISCUSSION

Assuming all allegations of fact in the Complaint and affidavits are true, Plaintiff does not meet the required conditions to bring an action or to recover under the statutory uninsured motorist provision. South Carolina Code § 38-77-170 (2023) provides:

> 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 is 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 (2023) (bold emphasis added).

The Complaint reveals there was no physical contact between the motorcycle Plaintiff was operating at the time of his accident and the unknown vehicle. Therefore, a witness affidavit is required for Plaintiff to have a right of action under the statute. The South Carolina Supreme Court's recent decision in Rice v. Doe addressed the timing of the witness affidavit, not its sufficiency, and found that S.C. Code § 38-77-170(2) does not require that the affidavit be filed at the same time as a John Doe lawsuit. However, the Court also recognized that the affidavit is "essential to the success of the claim." Rice v. Doe, 442 S.C.160, 167, 898 S.E.2d 127, 131 (2024). The South Carolina Supreme Court has previously noted that one of the functions of the affidavit requirement is that it provides "tangible evidence that the insured has a good faith basis for making the claim." Collins v. Doe, 352 S.C. 462, 470, 574 S.E.2d 739, 743 (2002). Although Plaintiff was not required to present a witness affidavit in conjunction with filing the complaint in this matter, he chose to do so. The Complaint states: "Plaintiff's father has provided an affidavit regarding the circumstances in this case in compliance with South Carolina Code Section 38-77-170(2)." (Complaint, ¶ 8). The affidavit was attached to the Complaint as an exhibit and incorporated by reference.

Whether an independent witness affidavit meets the requirements of S.C. Code § 38-77-170(2) is a question of law that is well-established in South Carolina. Courts construe the statute narrowly and strict compliance with the statute's affidavit requirements is mandatory to recover against a John Doe driver. *See, e.g.* Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002). The Court has held that "[t]he plain language of § 38-77-170(2) requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident "*must* have been witnessed by someone other than the owner or operator of the insured

vehicle and the witness *must* sign an affidavit attesting to the truth of the facts of the accident contained therein." Id. 352 S.C. at 470, 574 S.E.2d at 743 (internal quotation marks omitted). *See also* Bradley v. Doe, 374 S.C. 622, 626-627, 649 S.E.2d 153, 156 (Ct. App. 2007). The independent witness affidavit requirement applies equally to single vehicle accidents. Enos v. Doe, 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008). Here, Thomas S. Carswell, Sr. was not the owner of the motorcycle operated by Plaintiff. However, his affidavit fails to satisfy the remaining statutory requirements because he did not witness the accident and cannot testify to the truth of the facts of the accident as required by South Carolina case law.

The threshold requirement is that the affiant must have been a witness to the accident. "Section 38-77-170(2) is clear on its face. It expressly requires that someone other than the owner or operator of the insured vehicle witness the accident." Bradley v. Doe, 374 S.C. 622, 629, 649 S.E.2d 153, 157 (Ct. App. 2007); Shealy v. Doe, 370 S.C. 194, 200, 634 S.E.2d 45, 48 (Ct. App. 2006). The independent witness must actually see the accident and attest to facts they perceived; repeating the driver's account of what happened is not sufficient. Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct.App.2006) (holding that affidavits of two workers thrown out of bed of truck when the truck's driver swerved did not satisfy the requirements of the statute since they did not actually see the driver swerve to avoid unknown vehicle).

Plaintiff does not meet the requirements of S.C. Code § 38-77-170 because the affidavit on which his complaint is based is fatally deficient. Mr. Carswell, Sr. does not state that he witnessed the Plaintiff lose control of his motorcycle and crash. In fact, he places himself traveling at a "tremendous rate of speed" in front of the Plaintiff pursuing and shouting at the driver of the BMW when the Plaintiff's accident occurred. (Affidavit of Carswell, Sr., ¶13-14). Plaintiff's memorandum states that Plaintiff's father "witnessed the event central to the cause of action" and

that he "witnessed" John Doe swerving toward him. (Reply to Defendant's Memo. In Supp. of Motion to Dismiss, p.8). Notably, the phrase "he knew" is used instead of "witnessed" when describing the Plaintiff moving into the left lane, losing control of his motorcycle, and crashing. (Id.) At the hearing, Plaintiff's argument is that "witness" does not mean "eyeball". However, the case law interpreting § 38-77-170(2) is clear that witnessing events before or after an accident is not sufficient to satisfy the statute. *See* Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007). The affiant must contemporaneously witness the accident. Silva v. Allstate Property & Casualty Insurance Company, 424 S.C. 512, 818 S.E.2d 753 (2018).

Plaintiff relies on Gilliland v. Doe and Tucker v. Doe for the proposition that circumstantial evidence is sufficient to satisfy the witness requirement of § 38-77-170(2). However, those cases are not applicable here because the witnesses in both of those cases were eyewitnesses to the accidents. *See* Gilliland v. Doe, 351 S.C. 497, 570 S.E.2d 545 (Ct. App. 2002) (indicating Ms. Norris witnessed Gilliand's car hit tree) and Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004) (holding Ms. Norris' circumstantial evidence regarding John Doe's involvement in accident sufficient). *See also* Tucker v. Doe, 413 S.C.389, 776 S.E.2d 121 (Ct. App. 2015) (holding affidavit of witness who saw Tucker swerve to avoid something in road and hit concrete post but did not see item in road sufficient). Furthermore, the Court has explicitly held that "[w]hile circumstantial evidence may be sufficient to satisfy the 'truth of the facts' prong of [38-77-170], it does not satisfy the statutory requirement that the affiant actually witness the accident". Silva, 424 S.C. at 519, 818 S.E.2d at 757 (2018).

Even if Mr. Carswell, Sr. had witnessed the accident, his affidavit would still be insufficient because it does not satisfy § 38-77-170(2)'s "the truth of the facts of the accident" requirement In Gilliland v. Doe, the Court looked at the "extent [to which] an independent witness must testify

about the casual connection between the unknown vehicle and the accident to satisfy the legislature's intent to protect insurance companies from fraudulent claims in 'John Doe' actions." Gilliland v. Doe, 357 S.C. 197, 200, 592 S.E.2d 626, 628 (2004). Although ultimately reversing the court of appeals, the Court agreed with and adopted its interpretation of § 38-77-170(2)'s requirement that an independent witness must attest to "the truth of the facts of the accident" and held that the witness must "be able to attest to the circumstances surrounding the accident, **i.e., what actions of the unknown driver contributed to the accident**." Id. 357 S.C. at 201, 592 S.E.2d at 628 (emphasis added).

Mr. Carswell, Sr.'s affidavit does not attest to any actions of John Doe that contributed to Plaintiff's accident. There is no statement in his affidavit about any interaction between the Plaintiff and John Doe. His affidavit indicates that the BMW was not near the Plaintiff when the accident occurred. His affidavit provides a detailed description of his own interaction with the unknown vehicle prior to Plaintiff's accident. Mr. Carswell, Sr. also attests that, after this interaction with the BMW ended, "the BMW drove off from [him] at a tremendous rate of speed". (Affidavit of Carswell, Sr., ¶13). Mr. Carswell, Sr. admits that he then decided to follow the vehicle and "kept pace with the BMW and shouted at him for nearly striking me two times." (Id. at ¶14). Mr. Carswell, Sr. also opines that Plaintiff lost control of his motorcycle and crashed "[b]ecause he was paying attention to my interactions with the BMW". (Id. at ¶17). However, Mr. Carswell, Sr. does not attest to any facts that he observed to support this conclusion. Therefore, his affidavit is insufficient as a matter of law. *See* Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct.App. 2006) (holding witness must attest to facts they perceived and not recount driver's account).

The supplemental affidavits filed by Plaintiff also do not meet the requirements of § 38-77-170(2) regarding attesting to the facts of the accident. Blair Vana's affidavit indicates that she

witnessed the Plaintiff's accident shortly after witnessing his father drive off. She did not attest to any actions of John Doe that caused Plaintiff's accident. Melissa Mack's affidavit indicates that she witnessed actions of John Doe prior to Plaintiff's accident, however, her affidavit does not place John Doe near the Plaintiff at the time of the accident and fails to attest to any actions by John Doe that contributed to the Plaintiff's accident. Although her affidavit states that Plaintiff "was apparently focusing on the SUV" she does not attest to any facts that she observed to support this presumption as required. *See* Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct.App. 2006).

The Complaint does not allege an interaction between John Doe and Plaintiff. It alleges that Plaintiff observed John Doe's near collisions with his father before John Doe sped away and then Plaintiff moved into "to the far-left lane to observe his father about whose safety Plaintiff was concerned give the driving and behaviors of John Doe". (Complaint, ¶18). Plaintiff alleges that he crashed because he "was paying attention to the BMW driven by John Doe that nearly killed his father." (Complaint, ¶19). None of the affidavits contain any facts observed by a witness to corroborate Plaintiff's account that he was distracted by John Doe or any actions by John Doe that caused the Plaintiff to lose control of his motorcycle and crash. However, the Complaint and affidavits all indicate that the interaction between Mr. Carswell, Sr. and John Doe had ended without any accident or injury when the BMW sped away. They also attest to Mr. Carswell, Sr. then deciding to follow the speeding SUV, keeping pace with it, after their initial interaction had ended. The only evidence in the affidavits regarding what John Doe was doing at the time Plaintiff's accident occurred is that he was being pursued by Mr. Carswell, Sr.

The Court finds that the Complaint and affidavits fail to allege a set of facts that, if true, support a cause of action against John Doe in this case. Plaintiff has failed to satisfy the requirements for a right of action against John Doe as provided in S.C. Code § 38-77-170 and the

relevant case law. Since this Court considered the supplemental affidavits submitted by Plaintiff in addition to the pleadings, Defendant is granted summary judgment as a matter of law.

CONCLUSION

For the reasons stated above, Defendant's motion is GRANTED.

IT IS SO ORDERED.

Greenville Common Pleas

Case Caption: Thomas Carswell Jr vs. John Doe

Case Number: 2024CP2301585

Type: Order/Other

So Ordered

G.D. Morgan Jr.