RECEIVED
Mar 05 2025
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

G.D. Morgan, Jr., Circuit Court Judge

Case No. 2024-CP-23-01585

Appellate Case No.: 2024-001864

Thomas Carswell, Jr.,

Appellant,

v.

John Doe, an unidentified motorist,

Respondent.

INITIAL BRIEF OF RESPONDENT

Susan Drake DuBose
S.C. Bar. No.: 11543
BAKER, RAVENEL & BENDER, L.L.P.
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
Phone:(803) 799-9091; Fax:(803) 779-3423
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

STATEMENT OF ISSUES ON APPEAL.....1

STATEMENT OF THE CASE.....1

STANDARD OF REVIEW.....2

FACTS.....3

ARGUMENTS

I. THE CIRCIUIT COURT'S CONSIDERATION OF THE AFFIDAVIT SERVED WITH THE COMPLAINT AT THE HEARING ON JOHN DOE'S MOTION FOR JUDGMENT ON THE PLEADINGS WAS TIMELY AND PROPER.....5

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR JOHN DOE WHERE THE FACTS ALLEGED IN THE COMPLAINT AND AFFIDAVITS SUBMITTED BY APPELLANT FAILED TO SATISFY THE STATUTORY REQUIREMENTS FOR A JOHN DOE ACTION.....11

CONCLUSION.....20

TABLE OF AUTHORITIES

CASES

Belton v. Cincinnati Ins. Co., 360 S.C. 575, 602 S.E.2d 389 (2004) 3

Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007) 11,12

Carter v. Standard Fire Ins. Co., 406 S.C. 609, 753 S.E.2d 515 (2013). 3

Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002) 9,11

Enos v. Doe, 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008) 9,13

Gilbert v. Miller, 356 S.C. 25, 586 S.E.2d 861 (Ct. App. 2003) 13

Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004) 12,16,17,18

Lydia v. Horton, 355 S.C. 36, 583 S.E.2d 750 (2003).....2,7

Progressive Direct Ins. Co. v. Groves, 438 S.C. 26, 882 S.E.2d 464 (2022).....18

Rice v. Doe, 442 S.C.160, 898 S.E.2d 127 (2024).....7,8,9,10

Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006) 8,9,12,16

Silva v. Allstate Property & Casualty Insurance Company, 424 S.C. 512, 818 S.E.2d 753 (2018).....12

Town of Hollywood v. Floyd, 403 S.C. 466, 744 S.E.2d 161 (2013) 3

Tucker v. Doe, 413 S.C. 389, 776 S.E.2d 121 (Ct. App. 2015).....16, 17,18

Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992).....18

STATUTES

S.C. Code Ann. § 38-77-140 (2015).....18

S.C. Code Ann. § 38-77-170 (2015).....5,6,7,10,11,12,13,14,15,16,18,20

RULES

Rule 10(c), SCRCP.....2,7

Rule 12(c), SCRCP.....2-3

Rule 56(c), SCRCP.....3

Rule 701, SCRE.....14,16

STATEMENT OF ISSUES ON APPEAL

I. **WAS THE CIRCUIT COURT'S CONSIDERATION OF THE AFFIDAVIT SERVED WITH THE COMPLAINT AT THE HEARING ON RESPONDENT'S MOTION FOR JUDGMENT ON THE PLEADINGS TIMELY AND PROPER?**

II. **DID THE CIRCUIT COURT PROPERLY GRANT JOHN DOE SUMMARY JUDGMENT WHERE THE FACTS ALLEGED IN THE COMPLAINT AND AFFIDAVITS SUBMITTED BY APPELLANT IN OPPOSITION TO JOHN DOE'S MOTION FOR JUDGMENT ON THE PLEADINGS FAILED TO SATISFY THE REQUIREMENTS FOR A CAUSE OF ACTION UNDER S.C. CODE ANN. § 38-77-170?**

STATEMENT OF THE CASE

On March 13, 2024, Appellant Thomas Carswell, Jr. commenced this action with the filing of a summons and complaint (Summons and Complaint). On April 9, 2024, Appellant filed Exhibit A, the affidavit of Thomas S. Carswell, Sr., as an exhibit to the complaint. (Letter/Exhibit A). Appellant served a copy of the complaint and Exhibit A on the Greenville County Clerk of Court as the statutory agent for John Doe the same day. (Aff. of Service).

The South Carolina Department of Insurance accepted service of the Summons and Complaint with the attached affidavit of Thomas S. Carswell, Sr. on behalf of Markel American Insurance Company (hereinafter "MAIC") on April 24, 2024. (DOI Service Letter, Exhibit A to Defendant's Memo. In Opp. To Plaintiff's Motion to Reconsider). Progressive Northern Insurance Company was also served on April 24, 2024. (Aff. of Service, filed June 10, 2024). Progressive Northern Insurance Company filed a notice of appearance and conditional answer on May 1, 2024. (Progressive Northern Notice of Appearance). On May 23, 2024, MAIC filed Respondent's answer, which included defenses for the failure to meet the statutory requirements for a John Doe action and several causation defenses. (Answer). Respondent also filed a motion for judgment on the pleadings based on Appellant's failure to set forth facts in the Complaint and attached exhibit

to support a cause of action under S.C. Code Ann. § 38-77-170 and § 38-77-180. (Defendant's Motion for Judgment on the Pleadings). Respondent filed a memorandum in support of his motion on September 2, 2024. On the same date, Appellant filed a reply memorandum in opposition to the motion with the affidavit of Blair Vana as an exhibit. (Reply to Defendant's Memo. In Support of Motion; Aff. of Vana). On September 3, 2024, Appellant filed the affidavit of Ms. Vana and the affidavit of Melissa Mack with cover sheets indicating they were submitted for inclusion in his case. (Cover Sheet and Aff. of Vana; Cover Sheet and Aff. of Mack).

An in-person hearing on Respondent's motion was held on September 5, 2024. A Form 4 order granting Respondent's motion was filed on September 11, 2024. (Form 4 Order). The formal order was filed on October 1, 2024. (Order). Appellant moved for reconsideration of the order on October 11, 2024, including the partial transcript of the hearing as an exhibit. (Motion for Reconsideration; Ex. A). Due to a technical error with the Webex recording system the statements made by Respondent's counsel at the hearing were not recorded. (Ex. B to Motion for Reconsideration). Respondent filed a memorandum in opposition to the motion for reconsideration which included an affidavit of counsel regarding the statements made at the hearing on September 5, 2024. (Memo. In Opp. to Motion for Reconsideration; Ex. D, Aff. of DuBose). The motion for reconsideration was denied on October 31, 2024. Appellant timely served and filed his notice of appeal.

STANDARD OF REVIEW

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. If matters outside the pleadings "are presented to and not excluded by the

Court", a motion for judgment on the pleadings 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. "When determining whether triable issues of fact exist, all evidence and inferences drawn from the evidence must be viewed in the light most favorable to the non-moving party." Belton v. Cincinnati Ins. Co., 360 S.C. 575, 578, 602 S.E.2d 389, 391 (2004). "However, it is not sufficient for a party to create an inference that is not reasonable or an issue of fact that is not genuine." Town of Hollywood v. Floyd, 403 S.C. 466, 477, 744 S.E.2d 161, 166 (2013). "An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." Carter v. Standard Fire Ins. Co., 406 S.C. 609, 614, 753 S.E.2d 515, 517 (2013).

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 Appellant Thomas Carswell, Jr. was driving a motorcycle with his father on the date of the accident. (Complaint, ¶7). The Complaint incorporates by reference and attaches the affidavit of Appellant's father, Thomas S. Carswell, Sr., as Exhibit A to the Complaint. (Complaint, ¶8 and ¶26). The affidavit of Mr. Carswell, Sr., dated June 12, 2023, clarifies that Appellant and his father were traveling on separate motorcycles. (Ex. A, ¶5). According to the affidavit, they were traveling to the home of Mr. Carswell, Sr. to load a motorcycle onto a trailer. (Ex. A, ¶4). The Complaint and affidavit both allege that they entered I-385 Southbound from Woodruff Road. (Complaint, ¶9; Ex. A, ¶6). Mr. Carswell, Sr. states that he was operating his own motorcycle and Appellant was driving the motorcycle they were going to load onto the trailer. (Ex. A, ¶5). Mr. Carswell, Sr. also states that

he was traveling in front of his son. (Ex. A, ¶7). The Complaint and affidavit both assert that, as Mr. Carswell, Sr. merged onto I-385, a gray colored BMW SUV came "flying up" behind Mr. Carswell, Sr. in the near lane, swerved, and moved onto the shoulder of the road to his right. (Complaint, ¶10; Ex. A, ¶8-9). The driver of the BMW then allegedly cut back into Mr. Carswell, Sr.'s lane of travel. (Complaint, ¶12; Ex. A, ¶10). However, Mr. Carswell, Sr., was able to merge quickly into the next lane and avoid a collision. (Complaint, ¶12; Ex. A, ¶11). The BMW then 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* Ex. A, ¶12). The Complaint alleges that it appeared that John Doe was attempting to hit Plaintiff's father on purpose and that Appellant observed the interactions since he was riding behind his father. (Complaint, ¶15-16). Mr. Carswell, Sr. states that the BMW appeared to cut back into his lane intentionally without regard for his safety. (Ex. A, ¶10).

Mr. Carswell, Sr. describes the BMW then driving away from him "at a tremendous rate of speed." (Ex. A, ¶13). Appellant alleges that his father and John Doe "rode next to each other after the repeated near-collisions caused by John Doe, accelerating away from Appellant in an apparent 'road rage' type incident." (Complaint, ¶17). Mr. Carswell, Sr. admits that, after the BMW drove away from him, he kept pace with the BMW and shouted at the driver for nearly striking him. (Ex. A, ¶14). Mr. Carswell, Sr. also states that Appellant did not keep pace with him or the BMW. (Ex. A, ¶15). Appellant allegedly moved into the leftmost lane of travel to keep Mr. Carswell, Sr. in his sight because he was concerned about his father. (Complaint, ¶18; Ex. A, ¶16). 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." (Ex. A, ¶17). Appellant

alleges that he crashed because he "was paying attention to the BMW driven by John Doe that nearly killed his father." (Complaint, ¶19).

Blair Vana, a witness to Appellant's accident, signed an affidavit stating that she saw Appellant and his father riding motorcycles in front of her vehicle on I- 385. (Aff. of Vana, ¶1, ¶5). Ms. Vana also stated that she witnessed the father driving off and saw Appellant crash his motorcycle after his father drove off. (Aff. of Vana, ¶7-8). Melissa Mack, another witness to Appellant's accident, signed an affidavit stating that she saw a SUV speeding, swerving in traffic, and using the on and off ramps to pass vehicles prior to Appellant's accident. (Aff. of Mack, ¶4-6). She also stated that she saw the SUV cut in front of the motorcycles she was traveling behind. (Aff. of Mack, ¶7-8). Ms. Mack then describes one motorcyclist attempting to keep up with the SUV and the other motorcyclist staying in front of her and not keeping pace with the other motorcycle or SUV. (Aff. of Mack, ¶9). Ms. Mack saw the motorcycle that did not keep up with the SUV crash. (Aff. of Mack, ¶10).

ARGUMENTS

I. THE CIRCUIT COURT'S CONSIDERATION OF THE AFFIDAVIT SERVED WITH THE COMPLAINT AT THE HEARING ON JOHN DOE'S MOTION FOR JUDGMENT ON THE PLEADINGS WAS TIMELY AND PROPER

The circuit court's consideration of the affidavit of Thomas S. Carswell, Sr. at the hearing on Respondent's motion for judgment on the pleadings was timely and proper. Appellant's Complaint seeks damages for injuries he alleges were caused by the actions of John Doe, an unknown driver. South Carolina Code Ann. § 38-77-170 (2015) establishes the right of action against an unknown operator of a vehicle and provides:

> **(A)** 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.
>
> **(B)** 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.

S.C. Code Ann. § 38-77-170 (2015) (bold emphasis added).[1] As the allegations in the Complaint clearly reveal, there was no physical contact between the motorcycle Appellant was operating at

---

[1] After the filing of this lawsuit, section (A)(2) of this statutory provision was amended as follows and requires that one of the following conditions is met:

> **(a)** the injury or damage was caused by physical contact with the unknown vehicle;
> **(b)** the accident was 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 or upon failing to obtain the affidavit, the insured may seek a court order for a presuit deposition of the witness under the procedures set forth in Rule 27, South Carolina Rules of Civil Procedure; or
> **(c)** the insured can provide a recording of the accident, obtained electronically or otherwise, showing that the damage or injury was caused by the unknown vehicle;

S.C. Code Ann. § 38-77-170(A)(2) (May 20, 2024). The act called for prospective application. Nevertheless, based on the description of the accident in the Complaint and the lack of contact between Appellant's motorcycle and the unknown vehicle, no recording satisfying section (c) exists.

the time of his accident and the unknown vehicle, triggering the statute's mandatory witness affidavit requirement for a right of action.

Appellant was aware of this requirement, as evidenced by his allegations in paragraph eight of the Complaint:

> Plaintiff's father has provided an affidavit regarding the circumstances in this case in compliance with South Carolina Code Section 38-77-170(2). That affidavit is attached as "Exhibit A" and incorporated herein by reference.

(Complaint, ¶8). 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. Despite referring to the required affidavit in the complaint, attaching it as an exhibit to the complaint, incorporating the affidavit into the complaint by reference, and specifically alleging that the affidavit complied with the requirements of the statute, Appellant argues that it was improper for the circuit court to consider the sufficiency of the affidavit at the hearing on Respondent's motion for judgment on the pleadings.

Appellant relies on Rice v. Doe, 442 S.C.160, 898 S.E.2d 127 (2024) to support his argument that the consideration of the affidavit of Thomas S. Carswell, Sr. and Respondent's motion were untimely. Appellant correctly cites Rice v. Doe for holding that S.C. Code § 38-77-170(A)(2) does not mandate that the required witness affidavit be filed at the same time as a John Doe lawsuit. Appellant was not required to file a witness affidavit with his complaint, and in fact, he did not. The record reveals that the affidavit of Thomas S. Carswell, Sr., referred to as "Exhibit A" in the complaint, was actually filed several weeks after the filing of his complaint but prior to service on Respondent. (Letter to Court/Exhibit A).

Appellant's expansive reading of the holding in Rice v. Doe to prevent a court from reviewing the contents of a filed affidavit pursuant to a motion is misplaced. Rice did not address the contents or sufficiency of the affidavit that was submitted but focused on whether the affidavit was timely filed. The first paragraph of the opinion establishes the limited scope of the decision:

> This case presents the question whether compliance with the witness affidavit requirement in subsection 38-77-170(2) of the South Carolina Code (2015) is a condition precedent to the filing of a "John Doe" civil action. We hold it is not. Rather, the witness affidavit may be produced after the commencement of the lawsuit. As we will explain, however, the affidavit should be produced promptly upon request, and if it is not, the action is subject to dismissal pursuant to Rule 56(c) of the South Carolina Rules of Civil Procedure.

Rice v. Doe, 442 S.C.160, 162, 898 S.E.2d 127, 128 (2024). The case involved an appeal of the order dismissing the case prior to trial for failing to file a witness affidavit with the complaint. A prior order denying summary judgment that was not on appeal addressed the sufficiency of the contents of the affidavit. The Court's opinion was limited to whether the statute required that the affidavit be filed at the same time as the action. The Court held that a witness affidavit may be produced after a lawsuit is filed, as Appellant did in the instant matter. However, there is nothing in the opinion to suggest that, once an affidavit is produced, a court cannot consider the sufficiency of the affidavit on a motion for judgment on the pleadings or motion to dismiss.

Appellant argues that interpreting the statute to require a trial court to grant a motion to dismiss when an affidavit filed with a complaint is fatally deficient is contrary to the remedial nature of the statute. (App. Informal Brief, p. 12). However, compliance with the statute's affidavit requirements is mandatory to maintain a right of action where there is no contact with the unknown vehicle. The Court of Appeals granted summary judgment under similar facts in Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006). In Shealy, the plaintiff filed a complaint and "submitted an affidavit, which he attached and incorporated into the complaint." Defendant Doe

filed a motion to dismiss for failure to state facts sufficient to constitute a cause of action. At the hearing, the plaintiff presented an additional affidavit and letter. Noting that these submissions converted the motion to one for summary judgment, the lower court held that the affidavits did not comply with the statutory witness affidavit requirements and granted the motion. The Court of Appeals affirmed the lower court's decision on the grounds that the affidavits did not meet the statute's mandate because the affiants did not witness the accident. Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006).

Appellant cites Enos v. Doe, 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008) as recognizing that "the" purpose of the affidavit requirement is fraud prevention. (App. Initial Brief, p. 12). However, the Court of Appeals in Enos, quoting the South Carolina Supreme Court's decision in Collins v. Doe, noted "three purposes for the sworn affidavit requirement". Enos, 380 S.C. at 308, 669 S.E.2d at 626. In addition to fraud prevention and fulfilling a notice function to insurers regarding potential witnesses, the Court explicitly stated that a purpose of the affidavit requirement is to provide "tangible evidence that the insured has a good faith basis for making the claim". Id. The statute and the case law interpreting it are clear; without an affidavit satisfying the statutory requirements, a plaintiff has no right of action against John Doe where there is no contact with the unknown vehicle. *See, e.g.* Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002). Therefore, it is proper for a court to consider an affidavit that is produced by a plaintiff on a motion to dismiss or motion for judgment on the pleadings.

Appellant also argues that upholding the circuit court's order will incentivize plaintiffs to withhold filing affidavits with a John Doe complaint. (App. Initial Brief, p. 12). The opening paragraph to the Rice opinion states that "the affidavit should be produced promptly upon request, and if it is not, the action is subject to dismissal pursuant to Rule 56(c) of the South Carolina Rules

of Civil Procedure". Rice v. Doe, 442 S.C.160, 162, 898 S.E.2d 127, 128 (2024). The Court also recognized that the affidavit is "essential to the success of the claim" and states that the courts will not tolerate the type of gamesmanship Appellant suggests will result from upholding the circuit court's order:

> Though we find the witness affidavit is not a prerequisite to filing a John Doe action, we recognize the requirement is essential to the success of the claim. Initially, therefore, we wonder why any Appellant in such a case would not be eager to produce the affidavit at the earliest opportunity. Certainly, a John Doe defendant or the relevant insurer is entitled to have the affidavit produced promptly upon request. Our courts will not countenance the use of delay in producing the affidavit as an element of strategy.

Rice v. Doe, 442 S.C.160, 168, 898 S.E.2d 127, 131 (2024).

In order to maintain an action against John Doe in this case, Appellant was required to produce an affidavit of an independent witness. Rather than merely filing the affidavit "alongside" a complaint, as characterized by Appellant, the Complaint and affidavit of Thomas S. Carswell, Sr. are inextricably linked. The Complaint references the affidavit as an attached exhibit, incorporates the affidavit by reference, and states the factual allegations of the affidavit as allegations in the body of the complaint. *See* Comp., ¶ 8 -14, 16, 18-20 and Aff. of Carswell, Sr, ¶ 6, 8-12, 15-18. The Complaint also specifically alleges twice that the affidavit satisfies the requirements of the statute. *See* Comp. ¶ 8, ¶ 26. The circuit court's review of the sufficiency of the affidavit pursuant to Respondent's motion for judgment on the pleadings was timely and consistent with case law. As detailed below, the circuit court also correctly found that the affidavit of Thomas S. Carswell, Sr. and the additional affidavits submitted by Appellant did not meet the requirements of S.C. Code Ann. § 38-77-170 (A)(2).

II. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR JOHN DOE WHERE THE FACTS ALLEGED IN THE COMPLAINT AND AFFIDAVITS SUBMITTED BY APPELLANT FAILED TO SATISFY THE STATUTORY REQUIREMENTS FOR A JOHN DOE ACTION

The facts alleged in the Complaint and three affidavits submitted by Appellant failed to satisfy the requirements for a right of action under S.C. Code § 38-77-170 and summary judgment was proper. The John Doe statute requires that "someone other than the owner or operator of the insured vehicle must have witnessed the accident and attest to the facts of the accident in a signed affidavit." Bradley v. Doe, 374 S.C. 622, 626-627, 649 S.E.2d 153, 156 (Ct. App. 2007). The question of whether an independent witness affidavit meets the requirements of S.C. Code § 38-77-170 is well-established in South Carolina with courts construing the statute narrowly and requiring strict compliance with the statute's affidavit requirements in order to recover against a John Doe driver. *See, e.g.* Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002). The South Carolina Supreme Court has stated 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)(emphasis in original). All of the affidavits submitted by Appellant were from individuals other than the owner or operator of the insured vehicle and contained the required language regarding false statements. However, Appellant failed to submit an affidavit satisfying the other affidavit requirements for a right of action under S.C. Code § 38-77-170 and summary judgment is proper.

The initial 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 the facts they saw. Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006). 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 witness the accident contemporaneously. Silva v. Allstate Property & Casualty Insurance Company, 424 S.C. 512, 818 S.E.2d 753 (2018).

The independent eyewitness must also attest to actions of the unknown driver that causally contributed to the accident. *See* Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004). In Gilliland v. Doe, the South Carolina Supreme Court reviewed the court of appeals' decision to determine the "extent [to which] an independent witness must testify about the causal 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, 357 S.C. at 200, 592 S.E.2d at 628 (2004). The Court adopted the interpretation of Section 38-77-170(2)'s requirement that an independent witness must attest to "the truth of the facts of the accident" used by the court of appeals, holding 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.

In addition to the affidavit of Thomas S. Carswell, Sr., Appellant submitted the affidavits of Blair Vana and Melissa Mack for the circuit court's consideration prior to the hearing on Respondent's motion for judgment on the pleadings. The circuit court converted the motion for judgment on the pleadings in this matter to a motion for summary judgment since Appellant

submitted documents outside the pleadings in response to the motion, Respondent did not object to their consideration, and the court considered the documents when issuing its order. *See* Gilbert v. Miller, 356 S.C. 25, 586 S.E.2d 861 (Ct. App. 2003). To the extent Appellant is attempting to use the three affidavits he submitted cumulatively to satisfy the affidavit requirement, the plain language of the statute clearly refers to "the witness" signing "an affidavit".[2] "When a statute's terms are clear and unambiguous on their face, there is no room for statutory construction and a court must apply the statute according to its literal meaning." Enos v. Doe, 380 S.C. 295, 303, 669 S.E.2d 619, 624 (Ct. App. 2008). An analysis of each individual affidavit reveals that the circuit court correctly held that none of the affidavits submitted satisfies the statutory requirements.

a. The Affidavit of Thomas S. Carswell, Sr.

The circuit court correctly held that the affidavit of Thomas S. Carswell, Sr. does not meet the requirements of S.C. Code § 38-77-170(2). Mr. Carswell, Sr.'s affidavit provides a detailed description of his own interactions with the unknown vehicle, including the BMW "flying up behind him," swerving to his right onto the shoulder of the road, cutting back in front of him, and merging into his lane a second time. (Ex. A, ¶8-12). There is no statement in his affidavit, or the Complaint, about any interaction between the Appellant and John Doe. Mr. Carswell, Sr. also states that, after his interaction with the BMW ended, "the BMW drove off from [him] at a tremendous rate of speed." (Ex. A, ¶13). Mr. Carswell admits that he then decided to follow the unknown vehicle and "kept pace with the BMW and shouted at him for nearly striking me two times." (Ex. A, ¶14). Mr. Carswell, Sr. states that his son "observed all of this transpire, but he did not keep pace with me." (Ex. A, ¶15). He also states that instead of keeping pace with him,

[2] Appellant's brief refers to "analyzing all affidavits in conjunction with one another" in order to satisfy the statute. (App. Initial Brief, p. 13).

his son "moved to the far-left lane to keep me in his line of sight to make sure that I was okay and did not get hurt." (Ex. A, ¶16). Mr. Carswell, Sr. opines that "[b]ecause he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of this motorcycle and crashed" and "[had] it not been for the reckless actions of the BMW, my son would not have been injured." (Ex. A, ¶17-18).[3]

Mr. Carswell, Sr. does not state at any point in his affidavit that he witnessed the Appellant lose control of his motorcycle and crash. In fact, he places himself traveling at a "tremendous rate of speed" in front of the Appellant and shouting at the driver of the BMW when the Appellant lost control of his motorcycle. (Ex. A, ¶13-15). Appellant's counsel conceded at the hearing that Mr. Carswell, Sr. was looking ahead and did not see his son lose control of the motorcycle. (Transcript of Hearing, p. 9, ln. 8-10; p. 10, ln. 9-22; p. 12, ln. 17-20). Therefore, his affidavit does not satisfy the threshold requirement of being a witness to the accident.

Even if Mr. Carswell, Sr.'s affidavit was not fatally deficient because he was not a witness to Appellant's accident, the affidavit also does not attest to any actions of the unknown driver that contributed to the Appellant's accident. The circuit court correctly ruled that the affidavit was insufficient as a matter of law.

b. The Affidavit of Blair Vana

Appellant provided the affidavit of Blair Vana for the circuit court's consideration as an exhibit to his memorandum in opposition to Respondent's motion for judgment on the pleadings.

---

[3] Mr. Carswell, Sr.'s affidavit contains several statements not based on his observations and speculative opinions such as this that are insufficient to establish "the truth of the facts of the accident" as required by § 38-77-170(2). Rule 701, SCRE, requires: "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training."

Ms. Vana executed an affidavit stating that she saw Appellant and his father riding motorcycles in front of her vehicle on I- 385. (Aff. of Vana, ¶1, ¶5). Ms. Vana also stated that she witnessed the father driving off and saw Appellant crash his motorcycle after his father drove off. (Aff. of Vana, ¶7-8). Although Appellant's brief suggests that her affidavit states that she saw a vehicle nearly strike Mr. Carswell, Sr. and Appellant and speed off (App. Initial Brief, p. 14, p. 18, p. 20), her affidavit includes qualifying language that reveals that she did not actually perceive the alleged interaction. She states: "**To my understanding**, a vehicle nearly struck them and sped off." (Aff. of Vana, ¶6) (emphasis added).

Ms. Vana satisfies the eyewitness requirement of S.C. Code § 38-77-170(2) since she witnessed the Appellant crash his motorcycle. However, her affidavit does not attest to any actions of John Doe that she witnessed that contributed to the accident. Ms. Vana does not state any facts indicating that the actions of John Doe contributed to the Appellant losing control of the motorcycle. The only action she attests to observing that she relates to the Appellant losing control of his motorcycle is his father, Mr. Carswell, Sr., driving off. (Aff. of Vana, ¶8). The circuit court correctly held that Ms. Vana's affidavit failed to satisfy the statutory requirements because it did not attest to actions of the unknown driver contributing to the accident.

c. The Affidavit of Melissa Mack

Appellant also submitted the affidavit of Melissa Mack in opposition to Respondent's motion for judgment on the pleadings. Ms. Mack states that she saw a SUV speeding, swerving in traffic, and using the on and off ramps to pass vehicles prior to Appellant's accident. (Aff. of Mack, ¶4-6). She also stated that she saw the SUV cut in front of the motorcycles she was traveling behind, nearly hitting them. (Aff. of Mack, ¶7-9). Ms. Mack then describes one motorcyclist attempting to keep up with the SUV and the other motorcyclist staying in front of her and not

keeping up with the other motorcycle or SUV. (Aff. of Mack, ¶9). Ms. Mack states that, "[s]hortly thereafter, the motorcycle that did not keep pace with the SUV" wrecked. (Aff. of Mack, ¶10).

Ms. Mack's affidavit indicates that she witnessed the Appellant crash, however, her affidavit does not attest to any actions of John Doe she observed that caused the Appellant to lose control of his motorcycle and crash. Although Ms. Mack opines that "the motorcycle" was "apparently focusing on the SUV", she does not attest to any facts that she observed of Appellant or the SUV to support her supposition. (Aff. of Mack, ¶10). In order to satisfy the statute's requirements, affiants must attest to facts they perceive to support their assertions. Shealy v. Doe, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006). *See also* Rule 701, SCRE. The circuit court also correctly held that Ms. Mack's affidavit failed to satisfy S.C. Code § 38-77-170(2)'s requirements regarding attesting to the facts of the accident.

d. The circuit court's order is supported by the Gilliland and Tucker decisions

Appellant relies heavily on Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (2004) and Tucker v. Doe, 413 S.C. 389, 776 S.E.2d 121 (Ct. App. 2015) to support his argument that the affidavits he submitted in this case satisfy the statutory requirements. However, unlike the affiants in the current matter, the witnesses in Gilliland and Tucker both testified to actual facts they observed regarding the cause of the accident.

Although Appellant characterizes the Gilliland v. Doe as being "very similar" to the instant matter, there are several key distinctions between the two cases. The plaintiff in Gilliland alleged that she wrecked because she was being pursued by a John Doe vehicle and sped up to get away. In this case, the Complaint and two of the affidavits indicate that John Doe was traveling at some distance in front of Appellant at the time Appellant crashed his motorcycle. Most notably, the eyewitness to the accident in Gilliland testified to specific actions of the unknown driver that she

perceived, including seeing headlights of the unknown car traveling behind Ms. Gilliland just before she ran off the road and then seeing the headlights of that car turn around in a field after the wreck.[4] In the instant matter, the affidavits do not attest to any actions of the unknown driver at the time Appellant lost control of his motorcycle other than he was being pursued by Appellant's father.

In Tucker v. Doe, 413 S.C. 389, 776 S.E.2d 121 (Ct. App. 2015), the plaintiff alleged that his accident was caused by an object left in the roadway, which he attempted to avoid but lost control of his truck and hit a concrete column in the median. The witness affidavit stated that the witness saw the plaintiff "suddenly veer as if to avoid something in the roadway" before he hit a pillar. Tucker, 413 S.C. at 400, 776 S.E.2d at 128. Although the court recognized that the affiant did not see the object in the road or know how it arrived there, the court appeared to carve out an exception for "fallen object cases", noting that a witness could not observe both an object falling and the accident if the object fell at some time prior. Id. Unlike the affidavit in Tucker, the affidavits in the instant matter did not attest to any facts observed that indicate that Appellant losing control of his motorcycle was caused by actions of John Doe.

Appellant's brief cites the Gilliland court as adopting a rule that the statute's requirement is satisfied as long as there is "sufficient corroboration of the plaintiff's claim". (App. Initial Brief, pp. 16-17). Appellant also asserts that "the required corroboration is that John Doe existed and that his actions were consistent with those alleged by Appellant to have caused Appellant's collision." (App. Initial Brief, p. 17). These statements mischaracterize the Gilliland and Tucker cases, which

[4] Appellant implies that the Gilliland court did not require that the witness observe the collision. (App. Initial Brief, p. 16). The opening paragraph in the opinion indicates that the witness testified that she saw the accident. *See* Gilliland, 357 S.C. 197, 592 S.E.2d 626 (2004). Gilliland did not involve an analysis of a witness affidavit. The court examined trial testimony in relation to a motion for judgment notwithstanding the verdict.

both cited the standard adopted in Wausau Underwriters Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992). *See* Gilliland, 357 S.C. at 200-201, 592 S.E.2d at 628 and Tucker, 413 S.C. at 403-404, 776 S.E. 2d at 129. Gilliland and Tucker cited Wausau as holding that the causal connection required for an affidavit under S. C. Code § 38-77-170(2) is the same as the test used for determining whether an injury or damage arose out of the ownership, maintenance or use of an uninsured vehicle under S.C. Code § 38-77-140. *See* id. This test was referred to at the motions hearing by Appellant's counsel and included in his motion for reconsideration. *See* Transcript, p. 17; Motion for Reconsideration, pp. 11-12, fn. 9. As noted in Respondent's memorandum in opposition to Appellant's motion for reconsideration, the South Carolina Supreme Court recently clarified the test under this statute as follows:

> A three-prong test is used to determine whether an insured meets [38-77-140's] requirement: (1) the party seeking coverage must establish a causal connection between the injury and the uninsured vehicle, (2) there is no act of independent significance which breaks the chain of causation, and (3) the uninsured vehicle must have been used for transportation at the time. No distinction is made as to whether the injury resulted from a negligent, reckless, or intentional act.
>
> Under the first prong, the insured must also show three subparts: "a) the vehicle was an 'active accessory' to the assault; and b) something less than proximate cause but more than mere site of the injury; and c) that the 'injury must be foreseeably identifiable with the normal use of the automobile." *Bookert*, 337 S.C. at 293, 523 S.E.2d at 182.

Progressive Direct Ins. Co. v. Groves, 438 S.C. 26, 31-32, 882 S.E.2d 464, 466-467 (2022) (internal citations omitted).

Applying this test in the instant matter, there is absolutely no evidence that John Doe's vehicle was an "active accessory" to Appellant crashing his motorcycle. Appellant's accident was not caused by John Doe's vehicle cutting in front of him, following Appellant too closely, or dropping an item in the road that Appellant had to swerve to miss. In fact, the affidavits and the

Complaint all indicate that, at the time the accident occurred, John Doe's vehicle was ahead of Appellant and was being pursued by Appellant's father. Appellant's counsel conceded at the motions hearing that the basis for his claim is that Appellant lost control of his motorcycle because he was "distracted" by the interactions between his father and John Doe. (Transcript, pp. 18-20). However, as discussed above, there are no facts attested to in the affidavits to support that Appellant was distracted by John Doe at the time of the accident.

Even if the Complaint and affidavits had alleged facts establishing that the John Doe vehicle was an "active accessory" to Appellant losing control of his motorcycle, the witness affidavit's causation requirement would still not be met in this case. The allegations of the Complaint and affidavits of Mr. Carswell, Sr. and Ms. Mack all indicate that the interaction between Mr. Carswell, Sr. and John Doe had ended prior to Appellant's wreck with John Doe driving away. Ms. Mack describes seeing one motorcycle attempt to stay with the SUV after the near collision. (Aff. of Mack, ¶ 9). Mr. Carswell, Sr.'s affidavit indicates that his interaction with the unknown driver ended without any accident and that the BMW sped away from him. (Ex. A, ¶13). Mr. Carswell, Sr. then made the decision to chase after the unknown driver, matching the pace he characterized as "a tremendous rate of speed," to shout at John Doe for nearly hitting him. (Ex. A, ¶13-14). Appellant even alleges that his father and John Doe "rode next to each other after the repeated near-collisions caused by John Doe, accelerating away from Appellant **in an apparent 'road rage' type incident.**" (Complaint, ¶17) (emphasis added). Appellant alleges that he moved into the leftmost lane of travel to keep Mr. Carswell, Sr. in his sight because he was concerned about his father but then alleges that he crashed because he "was paying attention to the BMW driven by John Doe that nearly killed his father." (Complaint, ¶18-19). As argued by Respondent's counsel at the hearing, Mr. Carswell, Sr.'s decision to chase after John Doe and

shout at him after their interaction had ended without any accident or injury, along with Appellant's decision to watch his father's interactions with John Doe, clearly break any causal chain between John Doe and the Appellant losing control of his motorcycle. *See* Aff. of DuBose, ¶9,15. Mr. Carswell, Sr.'s actions and Appellant's decision to keep his speeding father in sight while operating his motorcycle are acts of independent significance under the Howser test.

The Complaint and affidavits presented in support of Appellant's case do not allege facts establishing a connection between the Appellant's injury and the John Doe vehicle as required by S.C. Code § 38-77-170(2) and the case law interpreting the statute. The circuit court examined the Complaint and the three affidavits submitted by Appellant and correctly found that Appellant failed to allege a set of facts that, if true, support a cause of action against John Doe.

CONCLUSION

The circuit court properly granted Respondent summary judgment because, as a matter of law, Appellant has failed to satisfy the requirements for a right of action against John Doe as provided by South Carolina's statutes and case law. Based on the reasons and authority cited above, the circuit court's grant of summary judgment in favor of Respondent should be affirmed.

Respectfully submitted,

Susan Drake DuBose
SC Bar No.: 11543
BAKER, RAVENEL & BENDER, LLP
3710 Landmark Drive, Suite 400
Post Office Box 8057
Columbia, South Carolina 29202
Phone: (803)799-9091; Fax: (803)779-3423
sdubose@brblegal.com
Attorneys for Respondent

March 5, 2025