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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,

FINAL BRIEF OF APPELLANT

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STATEMENT OF CASE

Appellant Thomas Carswell, Jr. (hereinafter "Appellant") filed suit against Respondent John Doe (hereinafter "Respondent") as a result of a wreck that occurred on or about April 26, 2021 in Greenville County, South Carolina that caused Appellant to sustain serious personal injuries. (R. pp. 21-31). Because Appellant's motorcycle and Respondent's SUV did not physically touch, Appellant was required to bring his action pursuant to South Carolina Code Sections 38-77-170 and 180. This appeal arises from the trial court's decision to grant Respondent John Doe's Motion for Judgment on the Pleadings based on the sufficiency of the affidavits produced by Appellant and filed with the trial court.

On the date of the wreck, Appellant and his father were driving two motorcycles on Interstate 385 Southbound. (R. p. 23). Appellant was driving his motorcycle immediately behind his father. (R. p. 23). At that same point in time, a BMW sport utility vehicle, driven by Respondent Doe, who was operating the vehicle in a reckless fashion, came flying up behind Appellant and his father. (R. p. 23). Respondent Doe drove around the motorcyclists on the shoulder of the interstate then appeared to cut into their lane of travel without regard for their safety. (R. p. 23). Respondent Doe nearly struck Appellant's father, who was directly in front of Appellant, forcing Appellant and his father to merge into the next lane to avoid being hit. (R. p. 23). Respondent Doe, in an apparent attempt to strike Appellant's father again, merged into Appellant's father's lane of travel, while Appellant was immediately behind his father. (R. p. 23).

Respondent Doe and Appellant's father quickly accelerated in an apparent "road rage" incident, which caused Appellant, who was paying attention to Respondent Doe and

who was worried about his father, to lose control of his motorcycle and crash. (R. pp. 23-24). Appellant alleged in his Complaint that it was foreseeable that Respondent Doe's driving could cause injuries to other motorists, that it was a natural and probable consequence of Respondent Doe's driving that another motorist could be hurt, that no third party's actions broke the causal chain, and that Respondent Doe's actions were abnormally dangerous. (R. p. 24). Appellant suffered serious injuries as a result of Respondent Doe's reckless driving. (R. p. 25).

The wreck caused by Respondent Doe was reported to law enforcement on the day of the incident and within a reasonable time after its occurrence. (R. p. 24). Appellant was not negligent in failing to identify Respondent Doe. (R. p. 25). However, because Respondent Doe did not make contact with Appellant, Appellant could only sue Respondent Doe in accordance with South Carolina Code Sections 38-77-170 and 180.

Appellant filed suit against Respondent Doe on March 13, 2024 and included three causes of action: negligence/gross negligence/recklessness; negligence per se/gross negligence per se/recklessness per se; and strict liability for abnormally dangerous activities. (R. pp. 25-30). Further, Appellant filed an affidavit from his father alongside Appellant's Summons and Complaint, supporting Appellant's allegation that Respondent Doe was responsible for his injuries. (R. pp. 32-34).

Appellant's father's affidavit affirmed that he was operating a motorcycle on I-385 directly in front of Appellant. (R. p. 33). Appellant's father's affidavit affirmed that a BMW SUV operated by an unknown driver, drove on the shoulder of the roadway and twice swung into the lane in which Appellant and his father were traveling. (R. p. 33). Appellant's father's affidavit further attested to the fact that when Appellant's father and

Respondent Doe accelerated away from the near collisions and because of Respondent Doe's driving, Appellant crashed his motorcycle. (R. p. 34).

Appellant served the Greenville County Clerk of Court as statutory agent for service of process for Respondent Doe on April 9, 2024. (R. p. 186). Appellant further served the Department of Insurance as the statutory agent for service of process for Appellant's uninsured motorist carrier. The Department of Insurance accepted service on April 24, 2024. (R. p. 187). Respondent Doe filed an Answer and a Motion for Judgment on the Pleadings on May 23, 2024. (R. pp. 35-43 and pp. 44-45). In Respondent Doe's subsequent Memorandum in Support of its Motion for Judgment on the Pleadings, which was filed on September 2, 2024, Respondent Doe argued that Appellant's Complaint should be dismissed because Appellant's father's affidavit failed to satisfy the requirements of South Carolina Code Section 38-77-170(2). (R. pp. 46-55).

That same day, Appellant filed a Reply to Respondent's Memorandum and argued that, consistent with *Rice v. Doe*, 442 S.C. 160, 898 S.E.2d 127 (2024), Appellant was not required to file an affidavit alongside his Complaint and therefore arguments about the sufficiency of the affidavit Appellant did file were premature. (R. pp. 71-82). Appellant further argued in his Reply that even if Appellant were required to file an affidavit alongside his Complaint, Appellant's father's affidavit did, in fact, satisfy the requirements of Section 38-77-170(2). Appellant subsequently obtained and filed two additional affidavits from witnesses: Ms. Melissa Mack and Ms. Blair Vana, both of which were filed on September 3, 2024. (R. pp. 188-193).

In her affidavit, Ms. Mack stated that she saw an SUV "flying" down I-385 and "swerving in and out of traffic and going around people at an extremely high rate of speed."

(R. p. 189). Ms. Mack stated in her affidavit that the SUV was passing vehicles illegally before it "cut in front of the motorcycle and another motorcycle with which it was traveling." (R. p. 189). Ms. Mack stated in her affidavit that she "witnessed the SUV nearly hit the motorcycles" after which she saw "one motorcyclist attempt to stay with the SUV, while the other motorcyclist stayed in front of [her]." (R. p. 189). Then, she stated, "the motorcycle that did not keep pace with the SUV, apparently focusing on the SUV, crashed." (R. p. 189).

Similarly, in Ms. Vana's affidavit, she offered that she also witnessed the crash that resulted in Appellant's injuries. (R. p. 192). Ms. Vana stated in her affidavit that she saw Appellant and his father on their motorcycles in front of her. (R. p. 192). She stated in her affidavit that she understood that "a vehicle nearly struck them and sped off." (R. p. 192). She further stated in her affidavit that Appellant crashed his motorcycle after his father drove off with Respondent Doe. (R. p. 192).

Respondent Doe's Motion for Judgment on the Pleadings was heard on September 5, 2024 before the Honorable G.D. Morgan, Jr., circuit judge. (R. p. 164). The hearing occurred in person but was recorded by WebEx and subsequently transcribed by a court reporter. As a result of a technical error, the court reporter could not transcribe any statements made by Respondent Doe's attorney. (R. pp. 120-123). However, the trial court's statements and statements by Plaintiff's counsel were recorded. (R. p. 164-185).

The trial court heard oral arguments and subsequently issued a Form 4 Order on September 11, 2024 granting Respondent's Motion for Judgment on the Pleadings and instructed counsel for Respondent to draft a formal order. (R. pp. 4-6). The trial court then issued a written order, which it filed on October 1, 2024. (R. pp. 7-17).

Appellant then filed a Motion for Reconsideration on October 11, 2024. (R. pp. 85-97). Judge Morgan issued a Form 4 Order denying Appellant's Motion for Reconsideration on October 31, 2024. (R. pp. 18-20).

On October 31, 2024, Appellant filed his Notice of Appeal. (R. pp. 195-196). Appellant served his Notice of Appeal on counsel for Respondent Doe on October 31, 2024. Appellant then filed his Amended Notice of Appeal on November 1, 2024, which was similarly served on counsel for Respondent Doe that same day. (R. pp. 197-198).

Appellant respectfully appeals the trial court's Order Granting Doe's Motion for Judgment on the Pleadings dated October 1, 2024, and the trial court's Order dated October 31, 2024 denying Appellant's Motion for Reconsideration.

STANDARD OF REVIEW

A judgment on the pleadings shall be granted "where there is no issue of fact raised by the complaint that would entitle the plaintiff to judgment if resolved in plaintiff's favor." *Home Builders Ass'n of S.C. v. Sch. Dist. No. 2 of Dorchester Cnty.*, 405 S.C. 458, 460, 748 S.E.2d 230, 231 (2013),

"All properly pleaded factual allegations are deemed admitted for purposes of the consideration of a [motion for judgment on the pleadings]." *Russell v. City of Columbia*, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). "When a fact is well pleaded, any inference of law or conclusions of fact that may properly arise therefrom are to be regarded as embraced in the averment." *Id*. "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." *Id*. "Our courts have held that pleadings in a case should be construed liberally so that substantial justice is done between the parties."

Id. "Further, a judgment on the pleadings is considered to be a drastic procedure by our courts." *Id.*

"Any party may move for a judgment on the pleadings under Rule 12(c), SCRCP." *Falk v. Sadler*, 341 S.C. 281, 286, 533 S.E.2d 350, 353 (Ct. App. 2000). "On review of the motion, the court may not consider matters outside the pleadings." *Id*. If "on a motion for judgment on the pleadings, matters outside the pleadings 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 material made pertinent to such a motion by Rule 56." *Ballard v. Admiral Ins. Co.*, 442 S.C. 22, 34, 897 S.E.2d 183, 189 (Ct. App. 2023), *reh'g denied* (Feb. 21, 2024), *cert. denied* (Nov. 14, 2024). When reviewing a judgment on the pleadings, the appellate court applies "the same legal standards as the trial court." *Id*. The appellate courts "review questions of law de novo." *Id*.

ARGUMENT

I. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS BASED ON THE ALLEGED INSUFFICIENCY OF THE AFFIDAVIT FILED ALONGSIDE PLAINTIFF'S COMPLAINT WHEN THERE IS NO REQUIREMENT THAT AN AFFIDAVIT BE FILED ALONGSIDE A COMPLAINT IN A PHANTOM DRIVER CASE

The trial court's Order granting Respondent Doe's Motion for Judgment on the Pleadings contravenes the South Carolina Supreme Court's recent decision in *Rice v. Doe*. The trial court stated that Appellant's Complaint and the affidavit of Appellant's father filed along with the Complaint "[did] not meet the required conditions to bring an action under the statutory uninsured motorist provision." (R. p. 10). The trial court stated that Appellant's Complaint "[did] not meet the requirements of S.C. Code Section 38-77-170

because the affidavit on which his complaint is based is fatally deficient." (R. p. 12). The court's order appeared to interpret Section 38-77-170 and *Rice v. Doe* to hold that while an affidavit is not required to be filed alongside a complaint, if an affidavit is filed and is deficient for some reason, then the proper remedy, upon motion, is a dismissal of the action. The court's articulation in its Order is inconsistent with the Supreme Court's ruling in *Rice* and should be reversed.

The trial court, in its Order Granting John Doe's Motion for Judgment on the Pleadings, acknowledged the holding of *Rice*, stating that "S.C. Code Section 38-77-170(2) does not require that the affidavit be filed at the same time as a John Doe lawsuit." (R. p. 11). The trial court then stated that "[a]lthough Plaintiff was not required to present a witness affidavit in conjunction with filing the complaint in this matter, he chose to do so." (R. p. 11). The court further noted that "[t]he affidavit was attached to the Complaint as an exhibit and incorporated by reference." (R. p. 11).

The trial court then concluded that the affidavit filed alongside Appellant's complaint "[did] not meet the requirements of S.C. Code Section 38-77-170 because the affidavit on which [Appellant's] complaint is based is fatally deficient." (R. p. 12). The court concluded the affidavit attached as an exhibit to Appellant's complaint was deficient because the affiant did not "witness" the event and could not testify to "the truth of the facts of the accident." (R. p. 6-8). The trial court's order, then, appears to interpret *Rice* as not requiring the filing of an affidavit contemporaneously with a complaint but holding that if an affidavit is filed and if it is for some reason defective, then the proper remedy is a dismissal of the action. Such a ruling is at odds with the ruling and rationale in *Rice*, and, as Appellant argued in his Memorandum in Opposition to John Doe's Motion for Judgment

on the Pleadings, Respondent's motion to dismiss was untimely at that phase in litigation. (R. pp. 75-76).

In *Rice v. Doe*, the plaintiff filed an affidavit from a witness to his collision after filing a complaint and after the defendant filed an answer including a motion to dismiss based on the plaintiff's failure to file a witness affidavit contemporaneously with his complaint. *Rice v. Doe*, 442 S.C. 160, 163, 898 S.E.2d 127, 128 (2024). The defendant subsequently filed a motion for summary judgment alleging that the plaintiff's affidavit failed to satisfy the requirements of section 38-77-170 after which the plaintiff filed an amended affidavit curing the defects articulated by the defendant in his motion. *Id.* At trial, the trial court held that filing of an affidavit consistent with section 38-77-170 was a condition precedent to filing an action under sections 38-77-170 and 38-77-180. *Id*. Because the plaintiff failed to file an affidavit satisfying section 38-77-170 alongside his complaint, the trial court dismissed the plaintiff's case. *Id*.

The Supreme Court overruled the trial court's decision and held that section 38-77-170 "does not provide that the affidavit must be filed as a condition precedent to filing the action." *Id*., at 167, 898 S.E.2d at 130. The Court held that "the statute simply does not provide for" a requirement that a plaintiff file an affidavit contemporaneously with an action under section 38-77-170. *Id*., at 167, 898 S.E.2d at 131. The Supreme Court acknowledged the "remedial nature" of the uninsured motorist statute, which was "enacted for the benefit of injured persons, and is to be liberally construed so that the purposes intended may be accomplished." *Id*., at 167-168, 898 S.E.2d at 131.

Citing the statutory requirement that an affidavit from an expert witness be filed in a medical malpractice action contemporaneously with the complaint, the Court held that

"[i]f the General Assembly intended such a requirement, it could easily have stated the requirement in the statute." *Id.*, at 168, 898 S.E.2d at 131. Further, the Court provided that the remedy available to an insurer or John Doe defendant in the event that a plaintiff fails to produce a witness affidavit upon request by the carrier or counsel would be "relief through Rule 37(a) (motion to compel) or, if necessary, even Rule 56(c) (motion for summary judgment)." *Id*.

As the *Rice* Court held that there was no requirement that a plaintiff file a supporting affidavit contemporaneously with a complaint to successfully bring a John Doe case against a phantom driver, it would be wholly inconsistent with that logic to find that Appellant's complaint should, as a matter of law, be dismissed if the affidavit contemporaneously filed with that complaint does not satisfy Section 38-77-170(2). Were the trial court's finding to be correct, then litigants would, as a matter of course, refrain from filing affidavits alongside complaints in John Doe cases for fear that their witness affidavit would be deemed, in some way, deficient.

As the Court of Appeals acknowledged in *Enos v. Doe*, the "obvious purpose" of the affidavit requirement of the Phantom Driver statute is "fraud prevention." *Enos v. Doe*, 380 S.C. 295, 308, 669 S.E.2d 619, 625 (Ct. App. 2008). Were this Court to uphold the trial court's decision and Order, it would incentivize litigants to withhold affidavits when filing complaints. This would encourage gamesmanship and the withholding of otherwise relevant evidence. Such an outcome would be inconsistent with the holding in *Rice* and the express purpose of our John Doe motorist statute. Further, a reading of the statute that required the trial court to grant a motion to dismiss in the event an affidavit filed alongside a complaint is fatally deficient would run afoul of the remedial nature of the uninsured

motorist statute, which is to be liberally construed to benefit injured persons.

The trial court's Order Granting John Doe's Motion for Judgment on the Pleadings should, therefore, be modified to deny John Doe's motion, Appellant's Motion for Reconsideration should be granted, and Appellant's case should be remanded for trial.

II. THE TRIAL COURT ERRED IN GRANTING DEFENDANT'S MOTION ON THE PLEADINGS AND MOTION FOR SUMMARY JUDGMENT AFTER CONSIDERING THE TWO ADDITIONAL WITNESS AFFIDAVITS FILED BY PLAINTIFF AFTER PLAINTIFF'S COMPLAINT WAS FILED

The trial court's Order granting John Doe's Motion for Judgment on the Pleadings further erred by finding that the three affidavits available to the court failed to satisfy South Carolina Code Sections 38-77-170 and 180. These sections are colloquially referred to as the "Phantom Driver" statute and "collectively allow recovery under a driver's uninsured motorist policy when an accident is caused by an unidentified driver." *Rice v. Doe*, 442 S.C. 160, 162, 898 S.E.2d 127, 128 (2024). Analyzing all affidavits filed by Plaintiff in conjunction with one another, the facts averred by the witnesses were sufficient to satisfy South Carolina Code Section 38-77-170 when subject to either Rule 12(c) or Rule 56(c) scrutiny as the only evidence available to the court was Appellant's allegations and affidavits.

Section 38-77-170 outlines the mechanism for the maintenance of a case against a "John Doe" motorist providing that to successfully prosecute a claim against a John Doe:

> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident

> contained in the affidavit;
>
> (3) the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.
>
> The following statement must be prominently displayed on the face of the affidavit provided in item (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

S.C. Code Ann. § 38-77-170.[1]

Our appellate courts have also commented on the legislative intent behind the statute finding that the "obvious purpose" of the affidavit requirement of the Phantom Driver statute is "fraud prevention" as "[b]y offering sworn trial testimony, the witness subjects herself to the criminal penalties for perjury." *Enos v. Doe*, 380 S.C. 295, 308, 669 S.E.2d 619, 625 (Ct. App. 2008). "The affidavit also allows the defendant, at trial, to cross examine the witness regarding the statement." *Id*. Further, "the affidavit constitutes tangible evidence that the insured has a good faith basis for making the claim." *Id*. "Finally, 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*.

Appellant collected three affidavits, all of which were filed and purportedly examined by the trial court. The first, which was filed alongside Appellant's complaint, was from Appellant's father, who had been riding a motorcycle with Appellant at the time of Appellant's crash. (R. p. 33). Mr. Carswell, Sr., stated that he witnessed John Doe driving recklessly and with the apparent intention of hurting Mr. Carswell. (R. pp. 33-34). Mr. Carswell, Sr. stated that he was driving his motorcycle in front of his son when John

[1] Section 38-77-170 was rewritten, signed into law, and put into effect after Appellant's cause of action arose and after he filed his action. The above-cited version of the statute was the version in effect at the time of Appellant's wreck and when Appellant filed his complaint.

Doe nearly struck him. (R. pp. 33-34). Mr. Carswell, Sr., further stated that Appellant observed these events transpire and moved into the left bound lane where he crashed while "paying attention to [Carswell, Sr.'s] interactions with the BMW that nearly killed [him]." (R. p. 34).

The second affidavit filed by Appellant was from Ms. Blair Vana. Ms. Blair Vana's affidavit provided additional context to Mr. Carswell, Sr.'s affidavit. Ms. Vana stated in her affidavit that "a vehicle nearly struck [Mr. Carswell, Sr. and Appellant] and sped off" after which Appellant's "father dr[o]ve off." Immediately following those events, Appellant "crashed his motorcycle on I-385 and was hurt badly." (R. p. 192).

The third affidavit filed by Appellant was from Ms. Melissa Mack. From her vantage point behind Plaintiff, Ms. Melissa Mack was able to observe facts which made plain that John Doe was the proximate cause of Appellant's crash and injuries. Ms. Mack stated that she saw an "SUV c[o]me flying down the interstate" while "swerving in and out of traffic and going around people at an extremely high rate of speed." (R. p. 189). Ms. Mack saw John Doe "getting on and off the onramps and offramps to go around vehicles illegally." (R. p. 189). At this point in time, she saw John Doe driving recklessly while "cut[ting] in front of the motorcycle and another motorcycle with which it was traveling." (R. p. 189). She said she "witnessed the SUV nearly hit the motorcycles" after which Appellant "stayed in front of [her]" while his father kept pace with John Doe. (R. p. 189). At this point she observed Appellant, "apparently focusing on the SUV, crash[]." (R. p. 189).

Section 38-77-170(1) provides that to maintain a cause of action against a John Doe motorist "the insured or someone in his behalf reports the accident to some appropriate

police authority within a reasonable time, under all the circumstances, after its occurrence." There is no dispute that this occurred in Appellant's case, and Appellant's complaint alleged that the collision "was reported to appropriate police authorities on the day of the wreck and within a reasonable time after its occurrence." (R. p. 24).

Section 38-77-170(2), which is the only section of the statute in dispute, provides that if John Doe does not make contact with a claimant's vehicle, then for a claimant to successfully maintain a cause of action, the accident must be 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."

The first requirement of subsection (2), then, is that the event must be witnessed by someone other than the owner or operator of the insured vehicle. As none of Appellant's affidavits were from individuals who owned or operated Appellant's vehicle, the next question is whether the affidavits satisfy the "witness" requirement of the statute.

The Supreme Court addressed the witness requirement in *Gilliland v. Doe*—a case very similar to Appellant's. The plaintiff in *Gilliland* alleged that she was followed by two young men in a motor vehicle after leaving a grocery store in her motor vehicle. *Gilliland v. Doe*, 357 S.C. 197, 198, 592 S.E.2d 626, 627 (2004). She said that these young men "rode her bumper," which caused her to speed up out of fright. *Id*. When she accelerated, she said that she lost control of her car and wrecked. *Id*. She said that the other vehicle never made contact with her vehicle. *Id*.

The witness to the plaintiff's collision in *Gilliland* testified that "she saw the lights of two cars as the cars came around the curve." *Id*. at 198–99, 592 S.E.2d at 627. She further testified that "she saw the lights of the car behind Petitioner's "arc through a field"

as if it were making a U-turn." *Id*. The Supreme Court in *Gilliland* held that the witness's testimony that she saw the lights of another vehicle that subsequently appeared to make a U-turn constituted "sufficient evidence that an unknown vehicle was involved in Petitioner's accident." *Id*. at 202, 592 S.E.2d at 629. The Supreme Court did not require that the witness observe the collision from the same vantage point as the plaintiff or that the witness was to have observed every event alleged by the plaintiff in her complaint. Instead, all that was required pursuant to S.C. Code Section 38-77-170, the Supreme Court held, was "sufficient[] corroborat[ion]" of the plaintiff's claim, which "create[ed] a question of fact as to causation for the jury." *Id*. Appellant's affidavits provided that corroboration.

Similarly, in *Tucker v. Doe*, the plaintiff swerved to avoid a box laying in the middle of the roadway and struck a concrete column, which caused him to suffer bodily injuries. *Tucker v. Doe*, 413 S.C. 389, 393, 776 S.E.2d 121, 124 (Ct. App. 2015). The witness in *Tucker* provided an affidavit that he observed the plaintiff, from approximately 150 feet, swerve as if to avoid something before striking a concrete pillar. *Id*. at 400-401, 776 S.E.2d at 128. The Court of Appeals found that, consistent with the Supreme Court's finding in *Gilliland*, "[w]hile this statement did not provide direct evidence as to the involvement of an unknown driver, it amounted to sufficient circumstantial evidence that supported [plaintiff's] testimony and the other evidence in the record suggesting an unknown driver contributed to the accident." *Id*.

Just like the witness to the actions of the John Does in *Gilliland* and *Tucker*, the witness affidavits in Appellant's case corroborated Appellant's claim. The affidavits were both consistent with Appellant's allegations and attested to the part that Respondent Doe

played in Appellant's collision. The affidavits made obvious that John Doe engaged in "road rage" behaviors, nearly struck Appellant's father and Appellant, then sped off immediately before Appellant lost control of his motorcycle and crashed. There can be no question that there was a John Doe driving a BMW SUV recklessly before, during, and after Appellant lost control of his motorcycle.

Appellant's allegations that he lost control of his bike because of John Doe do not require that someone corroborate that they saw Appellant's head turn or that they saw his eyes on John Doe when he crashed. Rather, 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. Mr. Carswell, Sr., attested to the fact that his son crashed after John Doe engaged in a road rage incident with him. (R. pp. 33-34). Ms. Vana testified that Appellant crashed when John Doe nearly struck Appellant and Mr. Carswell, Sr., and sped off with Mr. Carswell, Sr. (R. pp. 192-193). Most significantly, Ms. Mack, who was driving behind Appellant and his father, testified that she witnessed Appellant, "apparently focusing on [John Doe]" after he nearly hit Appellant and his father and sped off, crash his motorcycle. (R. pp. 189-190). These affidavits, "amount[] to sufficient circumstantial evidence" supporting Appellant's claims suggesting that Respondent Doe contributed to Appellant's collision and injuries. *Tucker* at 393, 776 S.E.2d at 124.

The second requirement of subsection (2) is that the witness sign an affidavit "attesting to the truth of the facts of the accident" contained in the affidavit. The Supreme Court in *Gilliland* and the Court of Appeals in *Tucker* both state that to satisfy the "truth of the facts of the accident" provision of subsection (2), the witness must "attest to facts that provide at least some causal connection between an unknown driver and the accident."

Gilliland at 200, 357 S.E.2d at 628. The Supreme Court held that the "test regarding the sufficiency of the evidence is something less than proximate cause and something more than the vehicle being the mere site of the injury." *Id*. at 201, 357 S.E.2d at 628 (internal quotations omitted).

Acknowledging that the "truth of the facts of the accident" provision is "arguably ambiguous," the Court held that a strict interpretation of section 38-77-170(2) "would undermine the statute's purpose." *Id*. The Supreme Court upheld the Court of Appeals ruling that the independent 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*. (internal quotations omitted).

Appellant's witnesses' affidavits plainly attested to John Doe's actions and how those actions caused Appellant to lose control of his motorcycle and crash. Appellant's father's affidavit provided that "[b]ecause [Appellant] was paying attention to [his father's] interactions with [John Doe's] BMW that nearly killed [Appellant's father], [Appellant] lost control of his motorcycle and crashed." (R. pp. 33-34). Ms. Vana, who was behind Appellant and his father, saw Appellant crash after his father drove off with John Doe, which provides valuable context to Mr. Carswell, Sr.'s affidavit. (R. p. 192). Similarly, and most importantly, Ms. Melissa Mack, driving behind Appellant, stated that she witnessed John Doe nearly hit Appellant and his father, saw Appellant's father keep pace with John Doe as he sped off, and watched Appellant crash while "focusing on the SUV." (R. p. 189). These affidavits attest to the "circumstances surrounding the accident"—that John Doe drove recklessly, nearly struck Appellant and his father, and engaged in road rage with Appellant's father, which distracted Appellant and caused him to crash. It was

these actions of Doe, which were observed by multiple witnesses, that contributed to Appellant's crash and subsequent injuries.

Section 38-77-170(3) provides that to recover the claimant must not have been "negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident." There is no dispute that Appellant "was not negligent in failing to identify the John Doe motorist operating the dark in color BMW SUV that caused [Appellant's] wreck." (R. p. 25).

Finally, Section 38-77-170 provides that any affidavit filed pursuant to that section must prominently display the following on the face of the affidavit: "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." There is no dispute that each of Appellant's affidavits contained this language verbatim.

The Court's finding that the Appellant's affidavits, together, failed to satisfy section 38-77-170(2) was wholly inconsistent with the available caselaw and the stated purpose of our John Doe motorist statute. It is obvious that each of the above persons witnessed the events central to Appellant's claim. Appellant's father was riding with his son, saw John Doe driving recklessly, and was aware that his son crashed. Ms. Vana saw Appellant and his father riding their bikes and observed Plaintiff crash after his father sped off with John Doe. Ms. Blair saw the entirety of the occurrence, witnessed John Doe driving recklessly, saw John Doe nearly strike Appellant and his father, and witnessed Appellant wreck while distracted by John Doe's apparent "road rage."

Appellant's affidavits satisfied each of the elements of section 38-77-170. None of

Appellant's witnesses owned or operated Appellant's motorcycle. Each of these witnesses saw John Doe and witnessed Appellant's wreck. The information in these affidavits attested to the "truth of the facts of the accident" as the affiants all attested to "circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." *Gilliland* at 201, 357 S.E.2d at 628. Finally, Appellant was not negligent in failing to identify John Doe, and each affidavit contained language expressly required by the statute.

Appellant's affidavits further satisfy the articulated purpose of the Phantom Driver statute: fraud prevention; affording Appellant's carrier the ability to cross examine his witnesses with their written statements; demonstrating the good faith basis for Appellant's claim; and putting Appellant's carrier on notice of the circumstances that resulted in his injuries. *Enos* at 308, 669 S.E.2d at 625. Because of these affidavits, we know that Appellant's claim is valid, and he is not perpetrating a fraud on his uninsured motorist carrier. Further, the affidavits afforded Appellant's carrier with notice of important facts surrounding the collision and the identity of witnesses likely called to testify at trial. Based on the foregoing, the trial court erred in finding that Appellant's affidavits failed to satisfy section 38-77-170(2) when examined under either a Rule 12(c) or Rule 56(c) standard.

CONCLUSION

The trial court erred in holding that, despite the Supreme Court's ruling in *Rice v. Doe*, by filing an affidavit alongside his complaint Appellant had effectively ceded to the Respondent the right to file a motion for judgment on the pleadings based on the sufficiency or insufficiency of the filed affidavit.

Further, and more significantly, the trial court erred in holding that the three

affidavits that Appellant produced did not satisfy South Carolina Code Section 38-77-170. Specifically, the affidavits were signed by people who each witnessed Respondent's driving and who had direct knowledge of Appellant's crash. These affidavits satisfied both prongs of section 38-77-170(2) as well as the remaining requirements of section 38-77-170, and it was error for the trial court to grant Respondent's Motion for Judgment on the Pleadings and to subsequently deny Appellant's Motion to Reconsider.

For all of these reasons, Appellant respectfully requests that this Court overrule the trial court's Order Granting John Doe's Motion for Judgment on the Pleadings and its Form 4 Order Denying Appellant's Motion to Reconsider, and Appellant requests that this Court remand his case for trial.

Respectfully Submitted,

/s/Sam Tooker
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June 3, 2025