RECEIVED
Jun 03 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,

FINAL REPLY BRIEF OF APPELLANT TO FINAL BRIEF OF JOHN DOE

/s/Sam Tooker
Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
1001 E. Washington St. (29601)
Post Office Box 2446
Greenville, South Carolina 29602-2446
(864) 271-2636 office
(864) 271-2637 fax
Sam@GreenvilleLegal.com
Attorney for the Appellant Thomas Carswell, Jr.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

ARGUMENT

I. JOHN DOE MISSTATES THE HOLDING IN *SHEALY V. DOE* AND CREATES EXTRA-STATUTORY AFFIDAVIT REQUIREMENTS

Despite the fact that two of Appellant's affidavits explicitly mention that Appellant crashed his motorcycle because he was distracted by John Doe's reckless driving, between pages fourteen and sixteen of John Doe's brief, John Doe argues that each of Appellant's affidavits is insufficient as the affidavits do not explain "how" they knew Appellant was distracted by John Doe when he crashed, when that is not required by section 38-77-170(2) or the applicable caselaw.

Before discussing the caselaw, it is important to acknowledge that both Mr. Carswell, Sr., and Ms. Mack attested that John Doe caused Appellant to crash by distracting Appellant. Mr. Carswell, Sr., attested that "[b]ecause he was paying attention to [Mr. Carswell, Sr.'s] interactions with the BMW that nearly killed [him], [his] son lost control of his motorcycle and crashed." (R. p. 34). Ms. Mack attested that she "witnessed one motorcyclist attempt to stay with the SUV, while the other motorcyclist stayed in front of [her] and did not keep pace with the SUV," shortly after which, "the motorcycle that did not keep pace with the SUV, apparently focusing on the SUV, crashed. (R. p. 189).

John Doe argues that these affidavits should fail as a matter of law because, he says, the "affiants must attest to the facts they perceive to support their assertions," attributing this requirement to *Shealy v. Doe*, 370 S.C. 194, 634 S.E.2d 45 (Ct. App. 2006). This articulation incorrectly summarizes the holding in *Shealy* and adds requirements not included in the statute or other caselaw. Were John Doe's interpretation of *Shealy* to be correct, then many witness affidavits would fail as independent witnesses would not be

able to explain how a John Doe motorist's actions caused a third party to crash a vehicle.

In *Shealy*, the plaintiff brought suit after he was injured when the pickup truck in which he was a truck bed passenger, swerved abruptly causing the plaintiff to be thrown from the truck and be injured. *Shealy v. Doe*, 370 S.C. 194, 196, 634 S.E.2d 45, 46 (Ct. App. 2006). The plaintiff in *Shealy* submitted an affidavit he prepared and one from his co-passenger that both stated that the driver *told them* that he swerved to avoid hitting an unknown driver. *Id*. at 197, 634 S.E.2d at 46-47.

The Court of Appeals upheld the lower court's order granting summary judgment because the two affidavits submitted by the plaintiff "merely restate[d] the perceptions of the vehicle's operator." *Id*. at 200, 634 S.E.2d at 48. The plaintiff argued that the witnesses did not have to have "personal knowledge" of the facts of the accident and that the affiants could merely restate what they were told by the driver of the pickup truck. *Id*. The Court of Appeals rejected the plaintiff's argument and held that because no one other than "the operator of the insured vehicle witnessed the accident," the affidavits did not comply with the statute. *Id*.

John Doe, though, expands this decision and argues that "[i]n order to satisfy the statute's requirements, affiants must attest to facts they perceive **to support their assertions**." (Respondent's Final Brief, p. 16) (emphasis added). *Shealy* does not support this reading. Instead, *Shealy* provides that the plaintiff's affidavits failed because they did "not attest to the facts they perceived" and "merely restate[d] the perceptions of the vehicle's operator." *Id*. Importantly, John Doe adds to the court's language in *Shealy* the phrase "to support their assertions," which is not included in the court's opinion.

While the sentences seem similar, the difference between the language in *Shealy*

and John Doe's argument is important. John Doe's reading of *Shealy* would require that affiants state the specific circumstances that underscored the articulation of the events they witnessed. In other words, an affiant would need to state something like "because I noticed the Appellant's eyes dart toward John Doe and his chin drop to the right, I knew he was paying attention to John Doe and not the roadway." Such a requirement would wholly subvert the purpose of the statute, which John Doe acknowledged is remedial in nature, designed to prevent fraud, to put insurers on notice of the basis of a claim, and to demonstrate that a party has a good faith basis for making a claim. (Respondent's Final Brief, pp. 8-9). The Court of Appeals went so far as to explain in *Shealy* that Shealy's affidavits failed because they "eviscerate[d] the statutes' efficacy" by subverting "the 'obvious purpose' of the affidavit requirement … [which] is 'fraud prevention.'" *Id*. at 200-201, 643 S.E.2d at 48. The driver in *Shealy* had plenty of reason to attribute his wreck to a phantom driver, and permitting *Shealy's* affiants to merely parrot the driver's own statements would have removed the check on the self-serving statement of a potentially negligent driver.

Shealy's use of the word "perceive" is to underscore that the witness must observe the event through the use of the witness's senses. This use of "perceive" is consistent with the holdings in *Gilliland v. Doe* and *Tucker v. Doe*, discussed at length in Appellant's brief, which both endorse as satisfactory witness affidavits that "sufficiently corroborate[] Petitioner's testimony creating a question of fact as to causation for the jury." *Gilliland v. Doe,* 357 S.C. 197, 202, 592 S.E.2d 626, 629 (2004).

Further, the Supreme Court addressed John Doe's articulation regarding "the truth of the facts of the accident" in *Estate of Silva v. Allstate*, wherein the Court stated:

> Our jurisprudence thus requires that in order to comply with section 38-77-170(2), the

> affiant must have observed at least some part of the incident. While **circumstantial evidence may be sufficient to satisfy the "truth of the facts" prong** of this provision, it does not satisfy the **statutory requirement that the affiant actually witness the accident**. Moreover, we must honor the General Assembly's effort to balance compensation for those injured by unknown motorists while safeguarding against fraudulent claims.

Silva for Est. of Silva v. Allstate Prop. & Cas. Ins. Co., 424 S.C. 512, 519, 818 S.E.2d 753, 757 (2018) (emphasis added).

The Court in *Silva* examined *Gilliland*, *Tucker*, and *Shealy*, and upheld the ruling in *Gilliland* that circumstantial evidence can satisfy the "truth of the facts of the accident" prong of section 38-77-170(2). *Id*. The Court further discussed *Tucker* in relation to *Gilliland* and found that the affidavit in *Tucker* satisfied the statute as "the motorist's account was analogous to the witness's testimony in *Gilliland* because both observed the accidents in question despite their inability to provide direct evidence of the involvement of an unknown driver." *Id*., at 518, 818 S.E.2d at 757. The witnesses did not need to provide information sufficient to establish causation in fact, but they needed to have "observed the accidents in question" even if they could not "provide direct evidence of the involvement of an unknown driver." *Id.*

The distinction between *Gilliland* and *Tucker*, on one hand, and *Shealy* on the other was the fact that the "witnesses" in *Shealy* never saw the John Doe motorist alleged to have caused the vehicle in which they were traveling to wreck. *Id*. at 519, 818 S.E.2d at 757. The Court in *Silva* emphasized that the affiants needed to witness "at least some part of the incident" but only needed to provide "circumstantial evidence" that the wreck was caused by a phantom driver. *Id*.

In the present matter, all three of Appellant's affidavits attested to the fact that John

Doe was traveling on the roadway at the same point in time as Appellant and his father. The affidavits all established that John Doe appeared to have driven in a reckless fashion, and two of the affidavits attributed Appellant's crash to his preoccupation with the reckless driving of John Doe.

Consistent with the holdings in *Gilliland* and *Tucker*, Appellant's witnesses attested to "circumstantial evidence corroborating [Appellant's] testimony that an unknown vehicle contributed to [his] accident." *Shealy v. Doe*, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006). These affidavits corroborated Appellant's allegations in his pleadings and provided "circumstantial evidence supporting the driver's version of the accident." *Id*., at 205, 634 S.E.2d at 51. As there is "some independent evidence that an unknown vehicle was involved in the accident," Appellant's affidavits satisfy the statute and the lower court's Order dismissing Appellant's case should be overturned. *Id*.

II. JOHN DOE'S ARGUMENT THAT APPELLANT'S AFFIDAVITS DO NOT SATISFY THE "TRUTH OF THE FACTS OF THE ACCIDENT" PRONG OF SECTION 38-77-170(2) OVERSTATES THE CAUSATION REQUIREMENT AND FUNCTIONS AS A COMPARATIVE NEGLIGENCE ARGUMENT IN DISGUISE

John Doe's final brief attempts to disguise arguments about comparative negligence as arguments about the sufficiency of Appellant's three affidavits. John Doe argues that Appellant's affidavits do not satisfy the causal connection and "truth of the facts of the accident" requirements because John Doe did not swerve in front of Appellant, did not drop anything in front of Appellant, and was driving away from Appellant when Appellant lost control of his motorcycle and crashed. However, these arguments are effectively back-door attempts to argue that John Doe should be entitled to a determination

that Appellant was, as a matter of law, more negligent than John Doe and that his cause of action should fail.

It is well settled that "comparison of a plaintiff's negligence with that of the defendant is a question of fact for the jury to decide." *Creech v. S.C. Wildlife & Marine Res. Dep't*, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997). Because comparative negligence is "relative and dependent on the facts of a particular case, comparing the negligence of two parties is ordinarily a question of fact for the jury." *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). "Therefore, summary judgment is generally not appropriate in a comparative negligence case." *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000).

John Doe argues between pages fourteen and twenty of his brief that Appellant's affidavits fail because each fails to satisfy the "truth of the facts of the accident" prong of section 38-77-170(2). John Doe appears to take issue with Appellant's case theory—namely, that John Doe could be civilly responsible for causing Appellant's injuries when John Doe's reckless driving distracted Appellant and caused him to lose control of his motorcycle. Instead of arguing to a jury that Appellant would bear more responsibility for crashing his motorcycle than John Doe, Appellant argues that Appellant's affidavits do not satisfy the statute because Appellant crashed as John Doe was driving away from Appellant. This misstates the requirements of section 38-77-170(2) and attempts to backdoor an argument about comparative negligence into an argument regarding compliance with the Phantom Driver statute.

Our Supreme Court has stated that section 38-77-170(2) requires an independent witness to provide an affidavit attesting "to facts that provide **at least some causal**

connection between an unknown driver and the accident." *Gilliland v. Doe*, 357 S.C.197, 200, 592 S.E.2d 626, 628 (2004) (emphasis added). "[T]he adequacy of the 'causal connection' should pass the same test used in determining whether an injury or damage arose out of the ownership, maintenance, or use of the uninsured vehicle." *Id*. "[T]his 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, 592 S.E.2d at 628 (quoting *Wausau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 272, 422 S.E.2d 106, 108 (1992)).

The Court in *Gilliland* held that the "truth of the facts of the accident" provision was "arguably ambiguous" and attempted to discern the meaning of the phrase. *Id*., at 201, 592 S.E.2d at 628. According to the Court of Appeals in *Shealy*, "[t]he linchpin of the court's ruling [in *Gilliland*] was its determination that the witness affidavit contained circumstantial evidence corroborating Gilliland's testimony that an unknown vehicle contributed to her accident." *Shealy v. Doe*, 370 S.C. 194, 204, 634 S.E.2d 45, 50 (Ct. App. 2006). The Court in *Gilliland* provided its own definition for what constitutes "truth of the facts of the accident" but also cited *Howser*, a case about the applicability of UM coverage during an intentional assault, as providing an appropriate test to satisfy the "truth of the facts of the accident" prong. *Gilliland*, at 201, 592 S.E.2d at 108. *Howser* was subsequently distinguished by *Progressive Direct Ins. Co. v. Groves*, which restated the test for the applicability of UM coverage.

According to the Court in *Groves*, "[t]o recover under an automobile insurance policy, the insured's damages must "arise out of the ownership, maintenance, or use" of the uninsured motor vehicle." *Progressive Direct Ins. Co. v. Groves*, 438 S.C. 26, 31, 882

S.E.2d 464, 466 (2022). "A three-prong test is used to determine whether an insured meets that 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." *Id*., at 31–32, 882 S.E.2d at 466. "Under the first prong, the insured must also show three subparts: a) the vehicle was an active accessory to the [injury][1]; 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." *Id*., at 32, 882 S.E.2d at 467.

Regarding the first prong, there is no question that there exists a causal connection between Appellant's injuries and John Doe's vehicle. The affidavits provided that John Doe's reckless driving immediately precipitated Appellant's crash. Mr. Carswell, Sr. stated that Appellant lost control of his motorcycle because he was "paying attention" to his father's interactions with John Doe. (R. p. 34). Similarly, Ms. Mack stated that she "witnessed the [John Doe] nearly hit the motorcycles" after which Appellant "stayed in front of [her]" while his father kept pace with John Doe at which point she observed Appellant, "apparently focusing on the [John Doe], crash[]." (R. p. 189). Finally, Ms. Vana stated that John Doe "nearly struck" Appellant and his father "and sped off" followed by Appellant's father, after which Appellant "crashed his motorcycle on I-385 and was hurt badly." (R. p. 192).

Under either *Gilliland's* facts or the definition provided by *Howser* and its progeny,

[1] These cases discuss the applicability of UM in the context of intentional assaults, the majority of which involved firearms, and the word "assault" is used by the Court in Groves. However, for purposes of discussing the applicability of UM to the present matter where recklessness rather than an intentional infliction of harm has been alleged, Appellant is substituting the word "injury" for the word "assault."

Appellant's affidavits satisfy the "truth of the facts" prong of section 38-77-170(2). John Doe's vehicle was an active participant in the events that resulted in Appellant crashing his motorcycle. It was John Doe's driving, not some other act by Doe, that distracted Appellant and caused him to crash. John Doe's use of his motor vehicle was certainly something more than the "mere site" of the injury, and, of course, it is foreseeable that reckless driving could distract other motorists and cause them to lose control of their vehicles.

Second, there was no act of independent significance breaking the causal chain. John Doe's driving was reckless. It was foreseeable that such reckless driving would distract other motorists, and he continued to drive recklessly as he engaged in "road rage" with Appellant's father. Again, while John Doe may believe that Appellant bears more responsibility than he does for failing to keep his motorcycle from crashing, the fact that Appellant crashed while distracted by John Doe's *continued recklessness*[2] subverts any notion that the causal chain was broken by any independent act.

Finally, it is undisputed that John Doe was using his vehicle for transportation at all times central to these events. He was driving on the interstate, albeit illegally, transporting, at least, himself.

On the other hand, the holding in *Gilliland* provides its own definition of "the truth of the facts of the accident," "the linchpin of [which] was [the Court's] determination that the witness affidavit contained circumstantial evidence corroborating Gilliland's testimony that an unknown vehicle contributed to her accident." *Shealy v. Doe*, 370 S.C. 194, 204,

[2] John Doe appears to argue that he stopped being reckless when he sped away from Appellant after almost hitting him and his father and that this decision to attempt to flee from the men he almost killed constituted an independent act severing the causal chain. While it seems obvious that Doe's speeding was one more reckless decision in the continuous set of events that resulted in Appellant's injuries, whether Doe's decision-making absolves him of liability for Appellant's crash should be an issue of fact to be tried by jury rather than decided by the court.

634 S.E.2d 45, 50 (Ct. App. 2006). As *Gilliland's* witness's affidavit "**contained circumstantial evidence that supports Petitioner' s testimony** that an unknown driver contributed to her accident," there was "**sufficient[] corroborat[ion] [of]** Petitioner's testimony creating a question of fact as to causation for the jury." *Id*. (emphasis original).

Under either the test outlined in *Groves* or the facts contemplated by *Gilliland*, Appellant's affidavits satisfy the "truth of the facts of the accident" requirement of section 38-77-170(2). Based on the foregoing, the lower court's Order granting John Doe's motion to dismiss should be overturned.

CONCLUSION

John Doe reads into the statute requirements greater than those contained in the text of the law or in our caselaw. Appellant's witnesses need not provide attestations regarding every circumstance that informed their assessments of the conditions that resulted in Appellant's injuries. Instead, the witnesses need to perceive the crash and attest to facts or circumstances that corroborate Appellant's claims.

John Doe's arguments regarding causation do more than address the minimal requirements outlined in *Groves*. Under the guise of arguments regarding "the truth of the facts of the accident," Doe argues that Appellant's Complaint should fail as a matter of law because Doe did not hit Appellant, did not swerve in front of Appellant, and sped away after almost striking Appellant. The statute does not create such a high causative threshold. Instead, it provides that there must be "some causal connection" between John Doe's driving and the crash, and Appellant's witnesses' affidavits provide *some causal connection* between John Doe's recklessness and Appellant's injuries.

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
Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
1001 E. Washington St. (29601)
Post Office Box 2446
Greenville, South Carolina 29602-2446
(864) 271-2636 office
(864) 271-2637 fax
Sam@GreenvilleLegal.com
Attorney for the Appellant Thomas Carswell, Jr.

June 3, 2025