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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,

RECORD ON APPEAL

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INDEX

I. ORDERS

Form 4 Order Granting John Doe's Motion for Judgment on the Pleadings, Filed September 11, 2024 ……..**4-6**

Order Granting John Doe's Motion for Judgment on the Pleadings, Filed October 1, 2024 ……...**7-17**

Form 4 Order Denying Thomas Carswell, Jr.'s Motion for Reconsideration, Filed October 31, 2024 ……..**18-20**

II. PLEADINGS

Summons and Complaint, Filed March 13, 2024 ……..**21-31**

Letter and Exhibit A to Summons and Complaint, Filed April 9, 2024 …**32-34**

Answer of John Doe, Filed May 23, 2024 …….**35-43**

III. MOTIONS AND MEMORANDA

John Doe's Motion for Judgment on the Pleadings, Filed May 23, 2024 .**44-45**

John Doe's Memorandum in Support of Motion for Judgment on the Pleadings, Filed September 2, 2024 ……..**46-55**

Exhibit A and Exhibit B to John Doe's Memo in Support of Motion for Judgment on the Pleadings, Filed September 2, 2024 ……..**56-70**

Thomas Carswell, Jr.'s Reply to John Doe's Motion for Judgment on the Pleadings, Filed September 2, 2024 ……..**71-82**

Exhibit A to Thomas Carswell, Jr.'s Memo in Opposition, Filed September 2, 2024 ……...**83-84**

Thomas Carswell, Jr.'s Motion for Reconsideration, Filed October 11, 2024 . ……**85-97**

Exhibit A, Exhibit B, Exhibit C, Exhibit D, and Exhibit E to Thomas Carswell, Jr.'s Motion for Reconsideration, Filed October 11, 2024 …..**98-129**

John Doe's Memorandum in Opposition to Thomas Carswell, Jr.'s Motion for Reconsideration, Filed October 21, 2024 ……..**130-136**

Exhibit A, Exhibit B, Exhibit C, and Exhibit D to John Doe's Memorandum in Opposition to Thomas Carswell, Jr.'s Motion for Reconsideration, Filed October 21, 2024 ……...**137-163**

IV. TRANSCRIPTS

Transcript of Hearing from Hearing on John Doe's Motion for Judgment on the Pleadings, September 5, 2024 ……..**164-185**

V. OTHER MATERIALS OR DOCUMENTS

Affidavit of Service on John Doe, Filed April 9, 2024 …….**186**

Letter of Acceptance from Department of Insurance, Filed June 10, 2024 ..**187**

Coversheet and Affidavit of Melissa Mack, Filed September 3, 2024 ..**188-190**

Coversheet and Affidavit of Blair Vana, Filed September 3, 2024 …...**191-193**

Certificate of Service of Thomas Carswell, Jr.'s Motion for Reconsideration and Exhibits, Filed October 15, 2024……**194**

Notice of Appeal and Electronic Service, Filed October 31, 2024……**195-196**

Amended Notice of Appeal and Electronic Service, Filed November 1, 2024 ……**197-198**

VI. CERTIFICATE OF COUNSEL

Certificate by Appellant…….**199**

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2024CP2301585

Thomas Carswell, Jr
PLAINTIFF(S)

John Doe
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This matter is before the Court on Defendant John Doe's Motion for Judgment on the Pleadings. Counsel for both parties made compelling arguments for their respective positions. Based on a review of the file, submissions of the parties, case and statutory law, and oral arguments, the motion is GRANTED. Counsel for Defendant to prepare a formal order.

It Is So Ordered.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/10/2024 .

John Doe

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

ELECTRONICALLY FILED - 2024 Sep 11 9:16 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Greenville Common Pleas

Case Caption: Thomas Carswell Jr vs. John Doe

Case Number: 2024CP2301585

Type: Order/Electronic Form 4

So Ordered

G.D. Morgan Jr.

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

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

FACTS

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

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

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

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

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

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

LEGAL STANDARD

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

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

DISCUSSION

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

> If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, **there is no right of action or recovery under the uninsured motorist provision, unless:**
>
> (1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;
>
> (2) the injury or damage was caused by physical contact with the unknown vehicle, **or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;**
>
> (3) the insured is not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.
>
> The following statement must be prominently displayed on the face of the affidavit provided in item (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

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S.C. Code Ann. § 38-77-170 (2023) (bold emphasis added).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

IT IS SO ORDERED.

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Greenville Common Pleas

Case Caption: Thomas Carswell Jr vs. John Doe

Case Number: 2024CP2301585

Type: Order/Other

So Ordered

G.D. Morgan Jr.

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF Greenville
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2024CP2301585

Thomas Carswell, Jr
PLAINTIFF(S)

John Doe
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT**. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☑ **DECISION BY THE COURT**. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** *(CHECK APPLICABLE BOX)*: ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☑ Statement of Judgment by the Court:

This matter is before the Court on Plaintiff's Motion for Reconsideration of the Court's Order of October 1,2024. As in the initial hearing, both parties made compelling arguments for their client's positions. Based on a thorough review of the file and submissions of the parties, the motion is respectfully denied. No hearing will be necessary for a ruling on the motion pursuant to Rule 59(f) SCRCP.

It Is So Ordered.

ORDER INFORMATION

This order ☑ ends ☐ does not end the case. ☐ See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 10/31/2024 .

John Doe

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

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Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Greenville Common Pleas

Case Caption: Thomas Carswell Jr vs. John Doe

Case Number: 2024CP2301585

Type: Order/Electronic Form 4

So Ordered

G.D. Morgan Jr.

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	C.A. No.: 2024-CP-23-_____
)	
Thomas Carswell, Jr.,)	
)	
Plaintiff,)	
)	**SUMMONS**
vs.)	(Jury Trial Demanded)
)	
John Doe, an unidentified motorist,)	
)	
Defendant(s).)	
)	

TO: THE DEFENDANT HEREIN:

YOU ARE HEREBY SUMMONED and required to answer the COMPLAINT in this action of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their office, 1001 East Washington Street, (P.O. Box 2446, 29602), Greenville, South Carolina, 29601, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for relief demanded in the Complaint.

Respectfully Submitted,

/s/ Sam Tooker_____

Samuel B. Tooker (S.C. Bar # 78999)
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Attorneys for Plaintiff

Greenville, South Carolina
March 13, 2024

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	C.A. No.: 2024-CP-23-_____
	)	
Thomas Carswell, Jr.,	)	
	)	
Plaintiff,	)	
	)	**COMPLAINT**
vs.	)	(Jury Trial Demanded)
	)	
John Doe, an unidentified motorist,	)	
	)	
Defendant(s).	)	
	)	

Plaintiff complains of the Defendant as follows:

1. At the time of the collision central to this complaint, Plaintiff was a citizen and resident of Greenville County, South Carolina.
2. Plaintiff is presently a citizen and resident of Flagler County, Florida.
3. Defendant John Doe has not been identified, and his whereabouts are unknown.
4. The incident giving rise to this cause of action occurred in Greenville County, South Carolina.
5. South Carolina Code Section 15-7-30 provides that this Court is the appropriate venue to hear Plaintiff's Complaint.
6. Plaintiff has brought this action pursuant to South Carolina Code Section 38-77-180 (1976, as amended). Defendant John Doe has the capacity to be sued as "John Doe" pursuant to this statute.
7. On or about April 26, 2021, Plaintiff was driving a motorcycle with his father in Greenville County, South Carolina.

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

8. 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.
9. According to Plaintiff's father's affidavit, Plaintiff and his father got onto I-385 Southbound from Woodruff Rd.
10. As Plaintiff and his father merged onto I-385, John Doe, driving a dark in color BMW SUV and operating with reckless disregard for the rights and safety of others, came flying up behind Plaintiff and his father in the near lane.
11. The BMW, driven by John Doe, swerved and went to Plaintiff's father's right onto the shoulder of the roadway.
12. The BMW, driven by John Doe, then appeared to intentionally cut back into Plaintiff's father's lane of travel with no regard for any other motorist's safety.
13. Plaintiff's father had to quickly merge into the lane to his left which was free of traffic.
14. The BMW, driven by John Doe, then again merged into Plaintiff's father's lane of travel, almost striking him and forcing him to merge into the lane to his left.
15. It appeared that John Doe was attempting to strike Plaintiff's father with his motor vehicle on purpose.
16. Plaintiff observed all of these events transpire as he was riding immediately behind his father.
17. John Doe and Plaintiff's father rode next to each other after the repeated near-collisions caused by John Doe, accelerating away from Plaintiff in an apparent "road rage" type incident.

18. Plaintiff then merged to the far-left lane to observe his father about whose safety Plaintiff was concerned given the driving and behaviors of John Doe.
19. Because Plaintiff was paying attention to the BMW driven by John Doe that nearly killed his father, Plaintiff's motorcycle crashed.
20. Had it not been for the reckless actions of John Doe, Plaintiff would not have been injured.
21. It was foreseeable that John Doe's driving, behavior, and apparent attempt to strike Plaintiff's father with his motor vehicle could result in injuries or damage to other motorists on the roadway.
22. It was a natural and probable consequence of John Doe's driving, behavior, and apparent attempt to strike Plaintiff's father with his motor vehicle that another motorist could be injured.
23. No third party's actions broke the causal chain, and John Doe's actions were such that they would probably cause injury to something or someone.
24. John Doe's actions were abnormally dangerous and created a highly significant risk of harm to others.
25. The collision in this case was reported to appropriate police authorities on the day of the wreck and within a reasonable time after its occurrence in accordance with South Carolina Code Section 38-77-170(1).
26. The affidavit from Plaintiff's father attached as **"Exhibit A"** satisfies the requirements of South Carolina Code Section 38-77-170(2).

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

27. Plaintiff was not negligent in failing to identify the John Doe motorist operating the dark in color BMW SUV that caused Plaintiff's wreck consistent with South Carolina Code Section 38-77-170(3).

28. As a direct and proximate result of the collision, Plaintiff sustained significant bodily injuries and damage to his personal property. Plaintiff underwent surgery and incurred a great deal of scarring.

29. All of the foregoing damages are attributable to the acts and/or omissions of Defendant John Doe.

FOR A FIRST CAUSE OF ACTION
Negligence/Gross Negligence/Recklessness

30. The Plaintiff reiterates and realleges the prior allegations in this Complaint as if repeated herein verbatim.

31. Defendant John Doe was careless, negligent, reckless, and grossly negligent at the time and place above-mentioned in the following particulars:

    a. In failing to keep the Defendant's vehicle under proper control;

    b. In failing to use the degree of care and caution that a reasonable and prudent person would have used under the circumstances then and there existing;

    c. In failing to maintain a proper lookout;

    d. In failing to refrain from attempting to strike another motorist;

    e. In driving at a speed that was greater than reasonable and prudent;

    f. In failing and omitting to exercise proper precautions under the existing circumstances;

    g. In driving unreasonably and imprudently;

    h. In failing to remain on the scene of a collision that Defendant John Doe caused;

i. In failing to drive cautiously;

j. In driving recklessly;

k. In driving in a manner that was abnormally dangerous;

l. In engaging in apparent "road rage;"

m. In failing to keep his vehicle under proper control;

n. In violating the laws, statutes, and ordinances of the State of South Carolina; and

o. In failing to exercise the degree and caution that a reasonable prudent person would have executed under the circumstances then and there prevailing.

All of which were the direct and proximate cause of the damages suffered by Plaintiff, said acts being in violation of the statutory laws of the State of South Carolina and the dictates of ordinary prudence.

32. As a direct and proximate result of the willful, wanton, and reckless negligence of Defendant John Doe, Plaintiff suffered physical harm, injury, damage to personal property, and scarring.

33. The Plaintiff is informed and believes that he is entitled to judgment against Defendant John Doe for such an amount of actual and punitive damages as the trier of fact may find, for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

FOR A SECOND CAUSE OF ACTION

Negligence Per Se/Gross Negligence Per Se/Recklessness Per Se

34. The Plaintiff reiterates and realleges the prior allegations in this Complaint as if repeated herein verbatim.

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

35. On or about April 26, 2021, there existed in the State of South Carolina a statute governing a driver of a vehicle's duties to maintain the speed of his vehicle, S.C. Code Ann. § 56-5-1520.

36. S.C. Code Ann. § 56-5-1520 states that "[a] person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions . . ."

37. S.C. Code Ann. § 56-5-1520 further requires a driver to control his speed "to avoid colliding with a person, vehicle, or other conveyance on . . . the highway in compliance with legal requirements and the duty of a person to use due care."

38. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by driving his vehicle at a speed greater than was reasonable and prudent, and attempting to strike Plaintiff's father, while Plaintiff was directly behind both motorists.

39. On or about April 26, 2021, there existed in the State of South Carolina a statute governing a driver of a vehicle's duties not to follow too closely, S.C. Code Ann. § 56-5-1930.

40. S.C. Code Ann. § 56-5-1930 states that "[t]he driver of a motor vehicle shall not follow another motor vehicle more closely than is reasonable and prudent . . ."

41. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by driving his vehicle in a manner that followed Plaintiff's father's vehicle more closely than was reasonable and prudent, as prohibited by statute.

42. On or about April 26, 2021, there existed in the State of South Carolina a statute governing a driver of a vehicle's duties after being involved in a collision, S.C. Code Ann. § 56-5-1210, et seq.

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

43. S.C. Code Ann. §§ 56-5-1210-1360 provide that a motorist involved in a collision shall remain on the scene of any collision in which he is involved until he has provided his name, address, vehicle registration number, and driver's license number to any other individuals involved in said collision as well as rendering aid to "any person injured."

44. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by failing to remain on scene after causing the wreck that injured Plaintiff. Rather than fulfill this duty, Defendant John Doe fled the scene of the collision he caused to avoid responsibility for his actions.

45. On or about April 26, 2021, there existed in the State of South Carolina a statute stating that it is unlawful to "drive[] any vehicle in such a manner as to indicate either a willful or wanton disregard of the safety of persons or property", S.C. Code Ann. § 56-5-2920.

46. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by driving recklessly and indicating a willful and wanton disregard for the safety of other motorists.

47. Defendant John Doe's willful, wanton, and reckless violation of the above-referenced statutes was the direct and proximate cause of the physical injuries, property damages, and lost wages suffered by the Plaintiff.

48. As a direct and proximate result of the willful, wanton, and reckless negligence of Defendant John Doe, Plaintiff suffered physical harm, injury, damage to personal property, and the accrual of medical bills.

49. The Plaintiff is informed and believes that he is entitled to judgment against Defendant John Doe for such an amount of actual and punitive damages as the trier of fact may find,

for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

FOR A THIRD CAUSE OF ACTION
Strict Liability for Abnormally Dangerous Activities

50. The Plaintiff reiterates and realleges the prior allegations of this Complaint as if repeated verbatim herein.

51. John Doe's conduct on April 26, 2021, was abnormally dangerous, which exposes John Doe to strict liability for the harm John Doe caused.

52. An activity that is not of common usage and creates a foreseeable and highly significant risk of physical harm to others, even when they exercise reasonable care, constitutes an abnormally dangerous activity. Restatement (Third) of Torts § 20(b) (2009).

53. Upon information and belief, John Doe's decision to attempt to hit a motorcyclist is an abnormally dangerous activity.

54. Upon information and belief, John Doe's decision to engage in "road rage" type behavior is an abnormally dangerous activity.

55. Upon information and belief, John Doe's decision to travel at excess speeds while arguing with Plaintiff's father is an abnormally dangerous activity.

56. Upon information and belief, John Doe's actions while operating his BMW and coming up behind Plaintiff and Plaintiff's father were abnormally dangerous activities.

57. A person found by a court to have carried on an abnormally dangerous activity will be subject to strict liability for physical harm resulting from that activity. Id. § 20(a).

58. Strict liability for abnormally dangerous or "ultrahazardous" activities has been recognized in South Carolina. See: Sherr v. South Carolina Electric & Gas Company, 180 F.Supp.3d 407 (D.S.C. 2016).

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

59. Defendant's decision to drive dangerously around motorcycles, attempt to hit Plaintiff's father, and then speed off, while weaving in and out of traffic, is intrinsically dangerous, not a common activity, and one that created a significant risk of harm to others.

60. Defendant's Doe's driving on April 26, 2021, was not commonly done and was not an activity of common usage.

61. Defendant's driving on April 26, 2021, created a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors.

62. As a direct and proximate result of the abnormally dangerous or ultrahazardous activities of the Defendant, the Plaintiff suffered great physical harm and injury, all of which has caused and will continue to cause Plaintiff to undergo much physical pain and suffering and mental anguish and distress and has caused and will continue to cause Plaintiff to have to spend money for medical services. The Plaintiff has suffered permanent injury as well as loss of enjoyment of life, suffered damage to his property, and has been otherwise damaged.

63. The Plaintiff is informed and believes that he is entitled to judgment against the Defendant for such an amount of actual and punitive damages as the tier of fact may find, for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

WHEREFORE, Plaintiff prays for judgment against Defendant John Doe for actual and punitive damages in such amount as a jury shall award, together with the costs of this action and any such other and further relief as this Court may deem to be just and proper.

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

/s/ Sam Tooker

Samuel Barton Tooker (S.C. Bar # 78999)
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Greenville, South Carolina
Date: March 13, 2024

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Apr 09 11:00 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

DAVID R. PRICE, JR., P.A.
ATTORNEYS AT LAW

DAVID R. PRICE, JR.
SAMUEL B. TOOKER

WILLIE H. MCABEE, III

April 9, 2024

VIA ELECTRONIC SUBMISSION
13th Judicial Circuit Clerk of Court
Attn: Common Pleas Clerk

Re:	**Our Client:**	**Thomas Carswell, Jr.**
	CA No.:	**2024CP2301585**

Dear Sir/Madam:

My firm previously filed a Summons and Complaint against John Doe on behalf of Thomas Carswell, Jr. When we filed the Complaint, we neglected to e-file "Exhibit A" to our Complaint, which is attached hereto. Please e-file "Exhibit A" as an exhibit to the Complaint filed in 2024CP23010585.

If you have any questions, please feel free to contact our office.

Sincerely,

/s/Sam Tooker
Samuel B. Tooker

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ELECTRONICALLY FILED - 2024 Apr 09 11:00 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**THOMAS S. CARSWELL, SR.**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Thomas S. Carswell, Sr.
2. I am a citizen and resident of Greenville County, South Carolina.
3. I am the father of Thomas S. Carswell, Jr.
4. On or about April 26, 2021, my son, Thomas Carswell, Jr., and I were taking a motorcycle to my house to load it onto a trailer.
5. I was driving my motorcycle, and my son was driving the motorcycle that we were going to load onto the trailer.
6. We both got onto I-385 Southbound from Woodruff Rd.
7. I was in front of my son.
8. As I merged onto I-385, a gray in color BMW SUV came flying up behind me in the near lane.
9. That BMW swerved and went to my right onto the shoulder of the roadway.
10. The BMW then appeared to intentionally cut back into my lane of travel with no regard for my safety.
11. To avoid a collision, I had to quickly merge into the next lane, which was, fortunately, free of traffic.
12. Then, the BMW again merged into my lane of travel almost striking me and forcing me to merge into the lane to my left.

TSC Affiant's Initials

13. The BMW then drove off from me at a tremendous rate of speed.

14. I kept pace with the BMW and shouted at him for nearly striking me two times.

15. My son observed all of this transpire, but he did not keep pace with me.

16. Instead, my 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.

17. Because he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of his motorcycle and crashed.

18. Had it not been for the reckless actions of the BMW, my son would not have been injured.

19. I am attesting to these facts in this affidavit pursuant to S.C. Code Section 38-77-170.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

6-12-23
Date

Thomas Carswell, Sr.

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before me this the 12th day of June, 2023.

Kimberly Bradley
Notary Public, State of South Carolina
My Commission Expires May 7, 2031

Notary Public
My Commission Expires: May 7, 2031

TSC Affiant's Initials

ELECTRONICALLY FILED - 2024 Apr 09 11:00 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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

Subject to its Motion for Judgment on the Pleadings, Markel American Insurance Company (hereinafter "MAIC"), a purported uninsured motorist insurance carrier for the Plaintiff, appearing and defending this matter in the name of Defendant pursuant to rights granted under S.C. Code Ann. § 38-77-150 et. seq., while specifically reserving and not waiving any rights pursuant to any policy of insurance, including the right to deny the availability of uninsured motorist coverage under said policy, hereby answers the plaintiff's Complaint as follows:

FOR A FIRST DEFENSE

1. Denies each and every allegation of the Complaint not herein specifically admitted, qualified or explained herein.

2. Admits, upon information and belief, the allegations of paragraph one (1) of the Complaint to the extent they allege that plaintiff was a citizen and resident of Greenville County, South Carolina at the time of the accident that occurred on April 26, 2021, but specifically denies the allegation that a collision occurred.

3. Admits, upon information and belief, the allegations of paragraphs two (2) and three (3) of the Complaint.

4. Admits, upon information and belief, the allegations of paragraph four (4) of the Complaint.

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

5. Paragraph five (5) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the allegations of paragraph five (5) of the Complaint.

6. Admits, upon information and belief, so much of the allegations of paragraph six (6) of the Complaint as allege that Plaintiff brought this action under S.C. Code § 38-77-180 but the remainder of paragraph six (6) of the Complaint calls for a legal conclusion, for which a response is not required. To the extent a response is required, Defendant denies the remaining allegations of paragraph six (6) of the Complaint.

7. Admits, upon information and belief, the allegations of paragraph seven (7) of the Complaint.

8. Admits so much of paragraph eight (8) of the Complaint as alleges that plaintiff's father has provided an affidavit which is attached as Exhibit A to the Complaint but denies the remaining allegations of paragraph eight (8) of the Complaint.

9. Admits the allegations of paragraph nine (9) of the Complaint.

10. Lacks sufficient information to form a belief as to the truth of the allegations of paragraphs ten (10), eleven (11), twelve (12), thirteen (13), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18) of the Complaint and, therefore, denies the same and demands strict proof thereof.

11. Denies the allegations of paragraphs nineteen (19), twenty (20), twenty-one (21), twenty-two (22), twenty-three (23), and twenty-four (24) of the Complaint.

12. Admits, upon information and belief, the allegations of paragraph twenty-five (25) of the Complaint to the extent they allege that the police were notified of plaintiff's accident on the day it occurred but denies the remaining allegations of paragraph twenty-five (25) of the Complaint.

13. Denies the allegations of paragraph twenty-six (26) of the Complaint.

14. Lacks sufficient information to form a belief as to the truth of the allegations of paragraph twenty-seven (27) of the Complaint and therefore denies the same and demands strict proof thereof.

15. Denies the allegations of paragraphs twenty-eight (28) and twenty-nine (29) of the Complaint.

16. In response to the allegations of paragraph thirty (30) of the Complaint, Defendant incorporates and reasserts its responses to paragraphs one (1) through twenty-nine (29) of the Complaint as if fully stated herein verbatim.

17. Denies the allegations of paragraph thirty-one (31) of the Complaint, including subparts (a) through (o).

18. Denies the allegations of paragraphs thirty-two (32) and thirty-three (33) of the Complaint.

19. In response to the allegations of paragraph thirty-four (34) of the Complaint, Defendant incorporates and reasserts its responses to paragraphs one (1) through thirty-three (33) of the Complaint as if fully stated herein verbatim.

20. Paragraph thirty-five (35) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the allegations of paragraph thirty-five (35) of the Complaint.

21. Paragraph thirty-six (36) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the allegations of paragraph thirty-six (36) of the Complaint.

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

22. Paragraph thirty-seven (37) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the allegations of paragraph thirty-seven (37) of the Complaint.

23. Denies the allegations of paragraph thirty-eight (38) of the Complaint.

24. Paragraph thirty-nine (39) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the allegations of paragraph thirty-nine (39) of the Complaint.

25. Paragraph forty (40) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the allegations of paragraph forty (40) of the Complaint.

26. Denies the allegations of paragraph forty-one (41) of the Complaint.

27. Paragraph forty-two (42) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the allegations of paragraph forty-two (42) of the Complaint.

28. Paragraph forty-three (43) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the allegations of paragraph forty-three (43) of the Complaint.

29. Denies the allegations of paragraph forty-four (44) of the Complaint.

30. Paragraph forty-five (45) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the allegations of paragraph forty-five (45) of the Complaint.

31. Denies the allegations of paragraphs forty-six (46), forty-seven (47), forty-eight (48), and forty-nine (49) of the Complaint.

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

32. In response to the allegations of paragraph fifty (50) of the Complaint, Defendant incorporates and reasserts its responses to paragraphs one (1) through forty-nine (49) of the Complaint as if fully stated herein verbatim.

33. Denies the allegations of paragraph fifty-one (51) of the Complaint.

34. Paragraph fifty-two (52) of the Complaint calls for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the same.

35. Denies the allegations of paragraphs fifty-three (53), fifty-four (54), fifty-five (55), and fifty-six (56) of the Complaint.

36. The allegations of paragraph fifty-seven (57) of the Complaint call for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the same.

37. The allegations of paragraph fifty-eight (58) of the Complaint call for a legal conclusion for which a response is not required. To the extent a response is required, Defendant denies the same.

38. Denies the allegations of paragraphs fifty-nine (59), sixty (60), sixty-one (61), sixty-two (62), and sixty-three (63) of the Complaint.

39. Denies the allegations contained in the "WHEREFORE" paragraph of the Complaint.

FOR A SECOND DEFENSE

The plaintiff's claim for punitive damages violates both the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that the jury's unfettered power to award punitive damages in any amount it chooses is wholly devoid of a meaningful standard and is inconsistent with due process guarantees.

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

FOR A THIRD DEFENSE

The plaintiff's claim for punitive damages violates the Fifth, Sixth and Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution for even if it could be argued that a standard governing the imposition of punitive damages exists, this standard is void for vagueness.

FOR A FOURTH DEFENSE

The plaintiff's claim for punitive damages violates the equal protection clause of the Fourteenth Amendment of the United States Constitution and Article 1, Section 3 of the South Carolina Constitution in that the amount of punitive damages is based upon the wealth of the defendant.

FOR A FIFTH DEFENSE

The plaintiff's claim for punitive damages violates the Federal doctrine of separation of powers and Article 1, Section 8, of the South Carolina Constitution for the reason that punitive damages are a creation of the judicial branch of government which invades the province of the legislative branch of government.

FOR A SIXTH DEFENSE

To the extent punitive damages are claimed, defendant demands a bifurcated jury trial. Defendant also pleads the limitations and statutory caps pursuant to South Carolina law and specifically, but not limited to, South Carolina Code Ann. § 15-32-530 and hereby notifies the plaintiff and his attorney that the defendant seeks to have the statutory limitations applied in this case.

FOR A SEVENTH DEFENSE

Upon information and belief, the negligence, recklessness, willfulness and wantonness of the Plaintiff, combining and concurring with this Defendant, if any, and the same is denied, was a

direct and proximate cause of the Plaintiff's injuries and damages and without which the same would not have occurred, and was greater in proportion to that of Defendant, if any, and same is denied, and, therefore, the Plaintiff may not recover from the Defendant for any of his alleged injuries or damages complained of in the Complaint. Defendant, therefore, expressly pleads the contributory and comparative negligence, recklessness, willfulness and wantonness of the Plaintiff as a bar to any recovery against him.

As an alternative, Defendant is entitled to a reduction of damages based upon the percentage of the Plaintiff's negligence, recklessness, willfulness and wantonness.

FOR A EIGHTH DEFENSE

Plaintiff's damages in this case were not proximately caused by any actions of Defendant and the defense of lack of proximate cause is pled as a defense.

FOR A NINTH DEFENSE

Defendant would respectfully show that each and every cause of action set forth in Plaintiff's complaint fails to state a claim upon which relief can be granted, and, therefore, the complaint should be dismissed.

FOR A TENTH DEFENSE

Pursuant to S.C. Code Ann § 38-77-170 and § 38-77-180 this action should be dismissed because Plaintiff has failed to meet the requirements giving rise to a cause of action under the aforementioned code sections.

FOR AN ELEVENTH DEFENSE

Defendant pleads the doctrine of assumption of the risk as a complete defense to this action and/or a reduction in the plaintiffs' damages.

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

FOR A TWELFTH DEFENSE

Defendant alleges that any injuries and damages sustained by Plaintiff were due to and proximately caused by the sole and negligent acts or omissions of persons other than Defendant over whom Defendant exercised no authority or control. Plaintiff's claims against this Defendant, therefore, should be barred or reduced due to such negligence, recklessness, willfulness and wantonness of others.

FOR A THIRTEENTH DEFENSE

Defendant pleads the intervening superseding acts of a third party as a complete defense to this action insofar as the acts of the other drivers were not foreseeable to Defendant. Plaintiff's claims against Defendant are thus barred by the superseding and intervening negligence of others.

FOR A FOURTEENTH DEFENSE

Defendant pleads sudden emergency as a complete defense in this action. This defendant alleges that at the time and place alleged in the Complaint, while through no fault of his own, he was placed in an unexpected emergency, and because of the unexpected emergency and sudden and negligent or intentional acts of another over which he had no control, Defendant was required to act as a reasonable and prudent person would have acted under the circumstances then and there prevailing, considering the emergency in which he was placed.

WHEREFORE, having fully answered the Complaint, Defendant prays for the dismissal of same, for a trial by jury, for costs, and such other and further relief that the Court deems just and proper.

(*signature page to follow*)

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

s/*Susan Drake DuBose*
Susan Drake DuBose, Esquire
SC Bar No.: 11543
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Attorneys for Markel American Insurance Company, appearing on behalf of John Doe

May 23, 2024

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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

TO: SAMUEL BARTON TOOKER, ATTORNEY FOR PLAINTIFF:

YOU WILL PLEASE TAKE NOTICE that Markel American Insurance Company (hereinafter "MAIC"), a purported uninsured motorist insurance carrier for the Plaintiff appearing and defending this matter in the name of Defendant pursuant to rights granted under S.C. Code Ann. § 38-77-150 et. seq., while specifically reserving and not waiving any rights pursuant to any policy of insurance, including the right to deny the availability of uninsured motorist coverage under said policy, will move as soon as practicable pursuant to Rule 12(c) of the *South Carolina Rules of Civil Procedure* before this Honorable Court for an order granting judgment on the pleadings because the facts alleged by the Plaintiff in the Complaint and in the attached exhibit do not support a cause of action under S.C. Code Ann. § 38-77-170 and § 38-77-180 under South Carolina law. If each fact alleged by the Complaint were viewed in the light most favorable to the Plaintiff, this Defendant is entitled to judgment as a matter of law.

This Motion is supported by the statutes and judicial precedents of South Carolina, and by a forthcoming memorandum.

(*signature page to follow)*

ELECTRONICALLY FILED - 2024 May 23 4:22 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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May 23, 2024

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA COUNTY OF GREENVILLE Thomas Carswell, Jr., Plaintiff, vs. John Doe, an unidentified motorist, Defendant.	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT C/A NO.: 2024-CP-23-01585 **DEFENDANT JOHN DOE'S MEMORANDUM IN SUPPORT OF HIS MOTION FOR JUDGMENT ON THE PLEADINGS**

Pursuant to Rule 12(c) of the *South Carolina Rules of Civil Procedure*, Defendant John Doe (hereinafter "Defendant Doe"), by and through his undersigned counsel, respectfully submits this Memorandum in Support of his Motion for Judgment on the Pleadings filed on May 23, 2024. Defendant Doe hereby requests that this Court grant his Motion for Judgment on the Pleadings and dismiss the Plaintiff's Complaint on the grounds that, even assuming all of the factual allegations asserted against Defendant Doe by the Plaintiff are true, there is no basis for relief because the facts alleged in the Complaint and attached Affidavit of Thomas S. Carswell, Sr. do not support a cause of action under S.C. Code Ann. § 38-77-170 and Defendant Doe is entitled to judgment as a matter of law.

FACTS ALLEGED

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, attached hereto as Exhibit A, alleges that Plaintiff 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 Plaintiff's father, Thomas S. Carswell, Sr., as an exhibit to the Complaint.

(Complaint, ¶8). The Affidavit of Mr. Carswell, Sr., dated June 12, 2023 and attached hereto as Exhibit B, clarifies that Plaintiff and his father were traveling on separate motorcycles. (Affidavit, ¶5). According to the affidavit, they were traveling to the home of Mr. Carswell, Sr. to load a motorcycle onto a trailer. (Affidavit, ¶4). The Complaint and affidavit both allege that they entered I-385 Southbound from Woodruff Road. (Complaint, ¶9; Affidavit, ¶6). According to his affidavit, Mr. Carswell, Sr. was operating his own motorcycle and Plaintiff was driving the motorcycle they were going to load onto the trailer. (Affidavit, ¶5). Mr. Carswell, Sr. states that he was traveling in front of his son. (Affidavit, ¶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 him in the near lane, swerved, and moved onto the shoulder of the road to his right. (Complaint, ¶10; Affidavit, ¶8-9). The driver of the BMW then allegedly cut back into Mr. Carswell, Sr.'s lane of travel. (Complaint, ¶12; Affidavit, ¶10). However, Mr. Carswell, Sr. was able to merge quickly into the next lane and avoid a collision. (Complaint, ¶12; Affidavit, ¶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* Affidavit, ¶12). The Complaint alleges that it appeared that John Doe was attempting to hit Plaintiff's father on purpose and that Plaintiff observed the interactions since he was riding behind his father. (Complaint, ¶15-16). Mr. Carswell, Sr. states that the BMW then drove off from him "at a tremendous rate of speed". (Affidavit, ¶13). Plaintiff alleges that his father and John Doe "rode next to each other after the repeated near-collisions caused by John Doe, accelerating away from Plaintiff in an apparent 'road rage' type incident." (Complaint, ¶17). Mr. Carswell, Sr. admits that he kept pace with the BMW and shouted at the driver for nearly striking him. (Affidavit, ¶14). Mr. Carswell, Sr. states that Plaintiff did not keep pace with him or the BMW. (Affidavit,

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

¶15). Plaintiff allegedly moved into the leftmost lane to keep Mr. Carswell, Sr. in his sight. (Complaint, ¶18; Affidavit, ¶15). Mr. Carswell, Sr. states that his son lost control of his motorcycle and crashed "because he was paying attention to my interactions with the BMW that nearly killed me". (Affidavit, ¶17). Plaintiff alleges that he crashed because he "was paying attention to the BMW driven by John Doe that nearly killed his father." (Complaint, ¶19).

Plaintiff alleges that he suffered bodily injuries requiring surgery and resulting in scarring as a result of the accident. He asserts causes of action for negligence, gross negligence, recklessness, negligence per se, gross negligence per se, recklessness per se, and strict liability for abnormally dangerous activities seeking actual and punitive damages against Defendant Doe.

Defendant John Doe filed a motion for judgment on the pleadings and an Answer.

LEGAL STANDARD

A judgment on the pleadings is in the nature of a demurrer. All properly pleaded factual allegations are deemed admitted for purposes of the consideration of a demurrer. Brown v. United Insurance Company of America, 268 S.C. 254, 233 S.E.2d 298 (1977). A motion for judgment on the pleadings should be granted if "under the facts, the moving party would be entitled to judgment on the merits, without regard to what the findings might be on the facts." Id. at 300. A judgment on the pleadings against the plaintiff is not proper if there is an issue of fact raised by the complaint which, if resolved in favor of the plaintiff, would entitle him to judgment. Russell v. City of Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). Judgement 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.

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ARGUMENT

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

> **(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 (2023) (bold emphasis added).[1]

[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

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

As the allegations in the Complaint clearly reveal, there was no physical contact between the motorcycle Plaintiff was operating at the time of his accident and the unknown vehicle. Plaintiff chose to attempt to satisfy S.C. Code Ann. § 38-77-170(A)(2)'s requirements by incorporating and attaching the affidavit of Thomas S. Carswell, Sr. to paragraph eight of his 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) (emphasis in original). The South Carolina Supreme Court's recent decision in Rice v. Doe found that S.C. Code § 38-77-170(A)(2) does not require that the witness affidavit must be filed at the same time as a John Doe lawsuit but recognized that the affidavit is "essential to the success of the claim". Rice v. Doe, 442 S.C.160, 167, 898 S.E.2d 127, 131 (2024). The statute does require 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 statute also requires that the affidavit contains the statement provided in § 38-77-170(B). The affidavit of Thomas S. Carswell, Sr. includes the required disclaimer warning the affiant of the consequences of a false affidavit but does not meet the other requirements of S.C. Code § 38-77-170 (A)(2), as a result of which "there is no right of action" in this case.

Whether an independent witness affidavit meets the requirements of S.C. Code § 38-77-

> **(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 Plaintiff's motorcycle and the unknown vehicle, no recording satisfying section (c) exists.

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

170 is a question of law that is well-established in South Carolina. The courts construe the statute narrowly and strict compliance with the statute's affidavit requirements is mandatory in order for an insured to recover against a John Doe driver. *See, e.g.* Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002) (holding that a plaintiff seeking to recover against their uninsured motorist carrier for the negligence of a John Doe driver must strictly comply with the statute's language). The South Carolina Supreme Court has held that "[t]he plain language of § 38-77-170(2) requires that where the accident involves no physical contact between the insured's vehicle and the unidentified vehicle, the accident "*must* have been witnessed by someone other than the owner or operator of the insured vehicle and the witness *must* sign an affidavit attesting to the truth of the facts of the accident contained therein." Id.. 352 S.C. at 470, 574 S.E.2d at 743 (internal quotation marks omitted). The independent witness affidavit requirement also applies to single vehicle accidents. Enos v. Doe, 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008).

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

Plaintiff does not meet the requirements of S.C. Code § 38-77-170(2) because a review of the affidavit of Thomas Carswell, Sr. reveals that he did not witness the Plaintiff's accident.

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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. (Affidavit, ¶ 8-12). He states that he was traveling in front of his son. (Affidavit, ¶7). 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". (Affidavit, ¶ 13) Mr. Carswell admits that he decided to follow the unknown vehicle and "kept pace with the BMW and shouted at him for nearly striking me two times." (Affidavit, ¶14). Mr. Carswell, Sr. states that his son "observed all of this transpire, but he did not keep pace with me." (Affidavit, ¶15) He states that instead of keeping pace with him, 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." (Affidavit, ¶ 16). Mr. Carswell, Sr. then states 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". (Affidavit, ¶17). Mr. Carswell, Sr. concludes that "[had] it not been for the reckless actions of the BMW, my son would not have been injured." (Affidavit, ¶ 18).[2]

Mr. Carswell, Sr. does not state at any point in his affidavit that he witnessed the Plaintiff lose control of his motorcycle and crash. In fact, he places himself traveling at a "tremendous rate of speed" in front of the Plaintiff and shouting at the driver of the BMW when the Plaintiff's

[2] Mr. Carswell, Sr.'s affidavit contains several speculative opinions 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."

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

accident occurred. The case law is clear that witnessing events before or after an accident is not sufficient to satisfy the statute. *See* Bradley v. Doe, 374 S.C. 622, 649 S.E.2d 153 (Ct. App. 2007) (holding witnesses did not satisfy the statute's requirements because they did not witness Bradley swerve to avoid a trash bag in the road and collide with the tree and their observations of trash bags before and after the accident were not sufficient). The affiant must contemporaneously witness the accident. In Silva v. Allstate Property & Casualty Insurance Company, 424 S.C. 512, 818 S.E.2d 753 (2018), the South Carolina Supreme Court accepted a certified question from the district court regarding whether a police officer who investigated a motorcycle accident but did not contemporaneously observe the accident qualified as a witness under § 38-77-170. After noting that the statute is strictly construed to protect against fraudulent claims and reviewing the cases interpreting the statute, the court held that the officer did not qualify as a witness because he did not observe the accident. The court recognized that the officer presented circumstantial evidence regarding the accident but held that "the statue requires more, specifically, that 'the accident must have been witnessed' by the affiant." Id. 424 S.C. at 519, 818 S.E.2d at 757. The court explicitly held that "[w]hile circumstantial evidence may be sufficient to satisfy the 'truth of the facts' prong of this provision, is does not satisfy the statutory requirement that the affiant actually witness the accident". Id. *See* Gilliland v. Doe, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004) (holding affidavit of witness who witnessed the accident but contained circumstantial evidence regarding John Doe's involvement sufficient) and Tucker v. Doe, 413 S.C.389, 776 S.E.2d 121 (Ct. App. 2015) (holding affidavit of witness who saw Tucker swerve to avoid something in road and hit concrete post but did not see item in road sufficient).

In Shealy v. Doe, the court of appeals addressed the argument that the requirement of an

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

affidavit causes a harsh result in some circumstances:

> According to Shealy, requiring the affiant to have witnessed the accident creates an unreasonably harsh result because a sleeping passenger or a blind passenger injured by a John Doe driver might be precluded from recovery. Yet the statute indubitably bars an operator and lone occupant of a vehicle from recovery where no contact is made with the unknown driver and where no one else witnesses the accident. In both instances, the result is lamentable to the injured party, but mandated by the statute. . . .

370 S.C. 194, 200-201, 634 S.E.2d 45, 48-49 (Ct. App. 2006).

Even had Mr. Carswell, Sr. witnessed the accident and satisfied the first prong of S.C. Code § 38-77-170(A)(2)'s affidavit requirements, his affidavit would still be insufficient because it does not satisfy the "truth of the facts of the accident" requirement. 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 casual connection between the unknown vehicle and the accident to satisfy the legislature's intent to protect insurance companies from fraudulent claims in 'John Doe' actions." Gilliland 357 S.C. 197, 200, 592 S.E.2d 626, 628 (2004). Although ultimately reversing the court of appeals, the supreme court agreed with and adopted its interpretation of § 38-77-170(2)'s requirement that an independent witness must attest to "the truth of the facts of the accident" and held that the witness must "be able to attest to the circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." Id. 357 S.C. at 201, 592 S.E.2d at 628.

Mr. Carswell, Sr.'s affidavit does not attest to any actions of the unknown driver that contributed to the Plaintiff's accident. There is no statement in the affidavit about any interaction between the Plaintiff and John Doe. The affidavit indicates that the interactions between Mr. Carswell, Sr. and the unknown driver ended without any accident or injury when the BMW drove off from him. Mr. Carswell, Sr. then decided to pursue the unknown driver. The affidavit clearly

indicates that Mr. Carswell, Sr. chose to chase down the unknown driver at "a tremendous rate of speed" to shout at him after their initial interaction had ended. There is no indication in the affidavit that the unknown driver did anything that contributed to the Plaintiff's accident. Mr. Carswell, Sr. even states in his affidavit that Plaintiff lost control of his motorcycle and crashed "**[b]ecause he was paying attention to my interactions with the BMW**". (Affidavit, ¶ 17) (emphasis added).

CONCLUSION

Defendant is entitled to judgment on the pleadings because Plaintiff does not meet the mandatory affidavit requirements to bring an action pursuant to S.C. Code § 38-77-170(A)(2). For the foregoing reasons, Defendant respectfully requests that his motion be granted and Plaintiff's Complaint dismissed.

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September 2, 2024

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

EXHIBIT A

The Complaint

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	C.A. No.: 2024-CP-23-_____
)	
Thomas Carswell, Jr.,)	
)	
Plaintiff,)	**SUMMONS**
)	(Jury Trial Demanded)
vs.)	
)	
John Doe, an unidentified motorist,)	
)	
Defendant(s).)	
)	

TO: THE DEFENDANT HEREIN:

YOU ARE HEREBY SUMMONED and required to answer the COMPLAINT in this action of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their office, 1001 East Washington Street, (P.O. Box 2446, 29602), Greenville, South Carolina, 29601, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for relief demanded in the Complaint.

Respectfully Submitted,

/s/ Sam Tooker

Samuel B. Tooker (S.C. Bar # 78999)
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ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	C.A. No.: 2024-CP-23-_____
)	
Thomas Carswell, Jr.,)	
)	
Plaintiff,)	**COMPLAINT**
)	(Jury Trial Demanded)
vs.)	
)	
John Doe, an unidentified motorist,)	
)	
Defendant(s).)	
)	

Plaintiff complains of the Defendant as follows:

1. At the time of the collision central to this complaint, Plaintiff was a citizen and resident of Greenville County, South Carolina.
2. Plaintiff is presently a citizen and resident of Flagler County, Florida.
3. Defendant John Doe has not been identified, and his whereabouts are unknown.
4. The incident giving rise to this cause of action occurred in Greenville County, South Carolina.
5. South Carolina Code Section 15-7-30 provides that this Court is the appropriate venue to hear Plaintiff's Complaint.
6. Plaintiff has brought this action pursuant to South Carolina Code Section 38-77-180 (1976, as amended). Defendant John Doe has the capacity to be sued as "John Doe" pursuant to this statute.
7. On or about April 26, 2021, Plaintiff was driving a motorcycle with his father in Greenville County, South Carolina.

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

8. 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.
9. According to Plaintiff's father's affidavit, Plaintiff and his father got onto I-385 Southbound from Woodruff Rd.
10. As Plaintiff and his father merged onto I-385, John Doe, driving a dark in color BMW SUV and operating with reckless disregard for the rights and safety of others, came flying up behind Plaintiff and his father in the near lane.
11. The BMW, driven by John Doe, swerved and went to Plaintiff's father's right onto the shoulder of the roadway.
12. The BMW, driven by John Doe, then appeared to intentionally cut back into Plaintiff's father's lane of travel with no regard for any other motorist's safety.
13. Plaintiff's father had to quickly merge into the lane to his left which was free of traffic.
14. The BMW, driven by John Doe, then again merged into Plaintiff's father's lane of travel, almost striking him and forcing him to merge into the lane to his left.
15. It appeared that John Doe was attempting to strike Plaintiff's father with his motor vehicle on purpose.
16. Plaintiff observed all of these events transpire as he was riding immediately behind his father.
17. John Doe and Plaintiff's father rode next to each other after the repeated near-collisions caused by John Doe, accelerating away from Plaintiff in an apparent "road rage" type incident.

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

18. Plaintiff then merged to the far-left lane to observe his father about whose safety Plaintiff was concerned given the driving and behaviors of John Doe.

19. Because Plaintiff was paying attention to the BMW driven by John Doe that nearly killed his father, Plaintiff's motorcycle crashed.

20. Had it not been for the reckless actions of John Doe, Plaintiff would not have been injured.

21. It was foreseeable that John Doe's driving, behavior, and apparent attempt to strike Plaintiff's father with his motor vehicle could result in injuries or damage to other motorists on the roadway.

22. It was a natural and probable consequence of John Doe's driving, behavior, and apparent attempt to strike Plaintiff's father with his motor vehicle that another motorist could be injured.

23. No third party's actions broke the causal chain, and John Doe's actions were such that they would probably cause injury to something or someone.

24. John Doe's actions were abnormally dangerous and created a highly significant risk of harm to others.

25. The collision in this case was reported to appropriate police authorities on the day of the wreck and within a reasonable time after its occurrence in accordance with South Carolina Code Section 38-77-170(1).

26. The affidavit from Plaintiff's father attached as **"Exhibit A"** satisfies the requirements of South Carolina Code Section 38-77-170(2).

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

27. Plaintiff was not negligent in failing to identify the John Doe motorist operating the dark in color BMW SUV that caused Plaintiff's wreck consistent with South Carolina Code Section 38-77-170(3).

28. As a direct and proximate result of the collision, Plaintiff sustained significant bodily injuries and damage to his personal property. Plaintiff underwent surgery and incurred a great deal of scarring.

29. All of the foregoing damages are attributable to the acts and/or omissions of Defendant John Doe.

FOR A FIRST CAUSE OF ACTION
Negligence/Gross Negligence/Recklessness

30. The Plaintiff reiterates and realleges the prior allegations in this Complaint as if repeated herein verbatim.

31. Defendant John Doe was careless, negligent, reckless, and grossly negligent at the time and place above-mentioned in the following particulars:

    a. In failing to keep the Defendant's vehicle under proper control;

    b. In failing to use the degree of care and caution that a reasonable and prudent person would have used under the circumstances then and there existing;

    c. In failing to maintain a proper lookout;

    d. In failing to refrain from attempting to strike another motorist;

    e. In driving at a speed that was greater than reasonable and prudent;

    f. In failing and omitting to exercise proper precautions under the existing circumstances;

    g. In driving unreasonably and imprudently;

    h. In failing to remain on the scene of a collision that Defendant John Doe caused;

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

i. In failing to drive cautiously;

j. In driving recklessly;

k. In driving in a manner that was abnormally dangerous;

l. In engaging in apparent "road rage;"

m. In failing to keep his vehicle under proper control;

n. In violating the laws, statutes, and ordinances of the State of South Carolina; and

o. In failing to exercise the degree and caution that a reasonable prudent person would have executed under the circumstances then and there prevailing.

All of which were the direct and proximate cause of the damages suffered by Plaintiff, said acts being in violation of the statutory laws of the State of South Carolina and the dictates of ordinary prudence.

32. As a direct and proximate result of the willful, wanton, and reckless negligence of Defendant John Doe, Plaintiff suffered physical harm, injury, damage to personal property, and scarring.

33. The Plaintiff is informed and believes that he is entitled to judgment against Defendant John Doe for such an amount of actual and punitive damages as the trier of fact may find, for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

FOR A SECOND CAUSE OF ACTION

Negligence Per Se/Gross Negligence Per Se/Recklessness Per Se

34. The Plaintiff reiterates and realleges the prior allegations in this Complaint as if repeated herein verbatim.

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

35. On or about April 26, 2021, there existed in the State of South Carolina a statute governing a driver of a vehicle's duties to maintain the speed of his vehicle, S.C. Code Ann. § 56-5-1520.

36. S.C. Code Ann. § 56-5-1520 states that "[a] person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions . . ."

37. S.C. Code Ann. § 56-5-1520 further requires a driver to control his speed "to avoid colliding with a person, vehicle, or other conveyance on . . . the highway in compliance with legal requirements and the duty of a person to use due care."

38. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by driving his vehicle at a speed greater than was reasonable and prudent, and attempting to strike Plaintiff's father, while Plaintiff was directly behind both motorists.

39. On or about April 26, 2021, there existed in the State of South Carolina a statute governing a driver of a vehicle's duties not to follow too closely, S.C. Code Ann. § 56-5-1930.

40. S.C. Code Ann. § 56-5-1930 states that "[t]he driver of a motor vehicle shall not follow another motor vehicle more closely than is reasonable and prudent . . ."

41. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by driving his vehicle in a manner that followed Plaintiff's father's vehicle more closely than was reasonable and prudent, as prohibited by statute.

42. On or about April 26, 2021, there existed in the State of South Carolina a statute governing a driver of a vehicle's duties after being involved in a collision, S.C. Code Ann. § 56-5-1210, et seq.

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

43. S.C. Code Ann. §§ 56-5-1210-1360 provide that a motorist involved in a collision shall remain on the scene of any collision in which he is involved until he has provided his name, address, vehicle registration number, and driver's license number to any other individuals involved in said collision as well as rendering aid to "any person injured."

44. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by failing to remain on scene after causing the wreck that injured Plaintiff. Rather than fulfill this duty, Defendant John Doe fled the scene of the collision he caused to avoid responsibility for his actions.

45. On or about April 26, 2021, there existed in the State of South Carolina a statute stating that it is unlawful to "drive[] any vehicle in such a manner as to indicate either a willful or wanton disregard of the safety of persons or property", S.C. Code Ann. § 56-5-2920.

46. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by driving recklessly and indicating a willful and wanton disregard for the safety of other motorists.

47. Defendant John Doe's willful, wanton, and reckless violation of the above-referenced statutes was the direct and proximate cause of the physical injuries, property damages, and lost wages suffered by the Plaintiff.

48. As a direct and proximate result of the willful, wanton, and reckless negligence of Defendant John Doe, Plaintiff suffered physical harm, injury, damage to personal property, and the accrual of medical bills.

49. The Plaintiff is informed and believes that he is entitled to judgment against Defendant John Doe for such an amount of actual and punitive damages as the trier of fact may find,

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

FOR A THIRD CAUSE OF ACTION
Strict Liability for Abnormally Dangerous Activities

50. The Plaintiff reiterates and realleges the prior allegations of this Complaint as if repeated verbatim herein.

51. John Doe's conduct on April 26, 2021, was abnormally dangerous, which exposes John Doe to strict liability for the harm John Doe caused.

52. An activity that is not of common usage and creates a foreseeable and highly significant risk of physical harm to others, even when they exercise reasonable care, constitutes an abnormally dangerous activity. Restatement (Third) of Torts § 20(b) (2009).

53. Upon information and belief, John Doe's decision to attempt to hit a motorcyclist is an abnormally dangerous activity.

54. Upon information and belief, John Doe's decision to engage in "road rage" type behavior is an abnormally dangerous activity.

55. Upon information and belief, John Doe's decision to travel at excess speeds while arguing with Plaintiff's father is an abnormally dangerous activity.

56. Upon information and belief, John Doe's actions while operating his BMW and coming up behind Plaintiff and Plaintiff's father were abnormally dangerous activities.

57. A person found by a court to have carried on an abnormally dangerous activity will be subject to strict liability for physical harm resulting from that activity. Id. § 20(a).

58. Strict liability for abnormally dangerous or "ultrahazardous" activities has been recognized in South Carolina. See: Sherr v. South Carolina Electric & Gas Company, 180 F.Supp.3d 407 (D.S.C. 2016).

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

59. Defendant's decision to drive dangerously around motorcycles, attempt to hit Plaintiff's father, and then speed off, while weaving in and out of traffic, is intrinsically dangerous, not a common activity, and one that created a significant risk of harm to others.

60. Defendant's Doe's driving on April 26, 2021, was not commonly done and was not an activity of common usage.

61. Defendant's driving on April 26, 2021, created a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors.

62. As a direct and proximate result of the abnormally dangerous or ultrahazardous activities of the Defendant, the Plaintiff suffered great physical harm and injury, all of which has caused and will continue to cause Plaintiff to undergo much physical pain and suffering and mental anguish and distress and has caused and will continue to cause Plaintiff to have to spend money for medical services. The Plaintiff has suffered permanent injury as well as loss of enjoyment of life, suffered damage to his property, and has been otherwise damaged.

63. The Plaintiff is informed and believes that he is entitled to judgment against the Defendant for such an amount of actual and punitive damages as the tier of fact may find, for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

WHEREFORE, Plaintiff prays for judgment against Defendant John Doe for actual and punitive damages in such amount as a jury shall award, together with the costs of this action and any such other and further relief as this Court may deem to be just and proper.

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

/s/ Sam Tooker

Samuel Barton Tooker (S.C. Bar # 78999)
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Attorney for the Plaintiff

Greenville, South Carolina
Date: March 13, 2024

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

EXHIBIT B

Affidavit of Thomas S. Carswell, Sr.

EXHIBIT A

STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**THOMAS S. CARSWELL, SR.**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Thomas S. Carswell, Sr.
2. I am a citizen and resident of Greenville County, South Carolina.
3. I am the father of Thomas S. Carswell, Jr.
4. On or about April 26, 2021, my son, Thomas Carswell, Jr., and I were taking a motorcycle to my house to load it onto a trailer.
5. I was driving my motorcycle, and my son was driving the motorcycle that we were going to load onto the trailer.
6. We both got onto I-385 Southbound from Woodruff Rd.
7. I was in front of my son.
8. As I merged onto I-385, a gray in color BMW SUV came flying up behind me in the near lane.
9. That BMW swerved and went to my right onto the shoulder of the roadway.
10. The BMW then appeared to intentionally cut back into my lane of travel with no regard for my safety.
11. To avoid a collision, I had to quickly merge into the next lane, which was, fortunately, free of traffic.
12. Then, the BMW again merged into my lane of travel almost striking me and forcing me to merge into the lane to my left.

TSC Affiant's Initials

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Apr 09 11:00 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

EXHIBIT A

13. The BMW then drove off from me at a tremendous rate of speed.

14. I kept pace with the BMW and shouted at him for nearly striking me two times.

15. My son observed all of this transpire, but he did not keep pace with me.

16. Instead, my 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.

17. Because he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of his motorcycle and crashed.

18. Had it not been for the reckless actions of the BMW, my son would not have been injured.

19. I am attesting to these facts in this affidavit pursuant to S.C. Code Section 38-77-170.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

6-12-23
Date

Thomas Carswell, Sr.

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before me this the 12th day of June, 2023.

Kimberly Bradley
Notary Public, State of South Carolina
My Commission Expires May 7, 2031

Notary Public
My Commission Expires: May 7, 2031

TSC Affiant's Initials

ELECTRONICALLY FILED - 2024 Sep 02 11:56 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Apr 09 11:00 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	C.A. No.: 2024-CP-23-01585
)	
Thomas Carswell, Jr.,)	
)	
Plaintiff,)	
)	**REPLY TO DEFENDANT'S MEMORANDUM**
vs.)	**IN SUPPORT OF ITS MOTION TO DISMISS**
)	
John Doe, an unidentified motorist,)	
)	
Defendant(s).)	
)	

Plaintiff, by and through his undersigned counsel and in response to Defendant MAIC's Memorandum in Support of its Motion to Dismiss pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure, files this Reply Memorandum.

FACTS

Plaintiff alleged in his complaint that or about April 26, 2021, Plaintiff and his father were driving motorcycles in Greenville County, South Carolina. Plaintiff's motorcycle was insured by Defendant MAIC. While driving Southbound on I-385, Defendant John Doe, driving a gray in color BMW SUV at a high rate of speed, attempted to merge onto I-385 and nearly struck Plaintiff and his father. Defendant Doe then attempted to hit Plaintiff's father in either a willful or reckless manner. Defendant Doe then attempted to hit Plaintiff's father again. After that, Defendant Doe drove off at a tremendous rate of speed with Plaintiff's father in tow. Plaintiff did not keep pace with Defendant Doe and moved into the far-left lane of travel where he, shaken from what had transpired, distracted by the reckless actions of Defendant Doe, and concerned for his father, lost control of his motorcycle and crashed.

LAW

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

Standard of Review

Defendant MAIC has filed a Motion to Dismiss pursuant to Rule 12(c) of the South Carolina Rules of Civil Procedure. Defendant MAIC's Motion to Dismiss stated that Plaintiff's Complaint failed to "support a cause of action under [the Phantom Driver Statute]." In Defendant MAIC's memorandum, Defendant argues that the affidavit of Plaintiff's father fails to satisfy the affidavit requirement of South Carolina Code Section 38-77-170.

"In considering a motion to dismiss a complaint based on a failure to state facts sufficient to constitute a cause of action, the trial court must base its ruling solely on allegations set forth in the complaint." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007). "If the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favorable to the plaintiff, would entitle the plaintiff to relief on any theory, then dismissal … is improper." Id. "The question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999). A complaint should not be dismissed even if the court doubts the plaintiff will ultimately prevail. Toussaint v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987). And, "[t]he motion [to dismiss] cannot be sustained if facts alleged in the complaint and inferences reasonably deducible therefrom would entitle plaintiff to any relief on any theory of the case." FOC Lawshe ltd. P'ship v. Int'l Paper Co., 352 S.C. 408, 413, 574 S.E.2d 228, 230 (Ct. App. 2002).

When considering a motion to dismiss, "[a]ll properly pleaded factual allegations are deemed admitted for the purposes of considering a motion for judgment on the pleadings." Russell v. Columbia, 305 S.C. 86, 89, 406 S.E.2d 338, 339 (1991). "A ruling on a motion to dismiss … must be based solely on the factual allegations set forth in the complaint, and the

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

court must consider all well-pled allegations as true." Fabian v. Lindsay, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014). Ultimately, the question before this court is whether the facts alleged "and the inferences reasonably deducible from the pleadings would entitle the plaintiff to relief on any theory of the case." Williams v. Condon, 347 S.C. 227, 233, 553 S.E.2d 496, 499 (Ct. App. 2001). So, if the facts and the inferences drawn from the facts alleged in the complaint, viewed in the light most favorable to the plaintiff, would entitled the plaintiff to relief on any theory, then it would be improper to grant of a motion to dismiss for failure to state a claim. Hotel & Motel Holdings, LLC v. BJC Enterprises, LLC, 414 S.C. 635, 650, 780 S.E.2d 263, 271 (Ct. App. 2015).

Furthermore, "important questions of novel impression should not be decided on a motion to dismiss." Unisys Corp. v. S.C. Budget & Control Bd. Div. of Gen. Servs. Info. Tech. Mgmt. Office, 346 S.C. 158, 165, 551, S.E.2d 263, 267 (2001) (See also Chestnut v. AVX Corp., 413 S.C. 224, 227, 776 S.E.2d 82, 84 (2015): "[N]ovel questions of law should not ordinarily be resolved on a Rule 12(b)(6) motion"). "Instead, a novel issue is best decided in light of the testimony to be adduced at trial." Evans v. State, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001).

John Doe Motorist Statute

There is no case in South Carolina directly addressing the facts specifically alleged by Plaintiff in his Complaint."[1] However, our present caselaw does stand for the proposition that cases like Plaintiff's should be decided by a finder of fact after discovery has been conducted rather than on dispositive motion.

[1] Of course, as a novel issue of law in South Carolina, the issues in this case would best be decided in the light of testimony adduced at trial. Evans v. State, 344 S.C. 60, 68, 543 S.E.2d 547, 551 (2001). Absent controlling case law immediately on point, this case presents a myriad of novel issues all of which should be fully explored via written discovery, depositions, and trial.

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

South Carolina Code Section 38-77-170 and 180 are colloquially referred to as the "Phantom Driver" statute. These sections "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).

Section 38-77-170 outlines the mechanism for the maintenance of a case against a "John Doe" motorist providing that "there is no right of action or recovery under the uninsured motorist provision, unless ... (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 ...." Id. When there is no physical contact between the unknown driver and the injured party, a "witness must sign an affidavit attesting to the truth of the facts of the accident…" Id.

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.

The John Doe statute "does not provide that the affidavit must be filed as a condition precedent to filing the action." Rice v. Doe at 167, 898 S.E.2d at 130. "[T]here is no requirement [in S.C. Code Ann. Sec. 38-77-170] that the witness affidavit be filed at the same time the action is filed." Id. As "the requirement is essential to the success of the claim" at least

one affidavit complying with the statute must be submitted during the lifespan of the case. Id. at 168, 898 S.E.2d at 131. Were a plaintiff to engage in dilatory tactics, "[i]f a defendant or an insurer requests the affidavit in discovery or otherwise, and if the plaintiff does not provide the affidavit promptly, the defendant or insurer may seek relief through Rule 37(a) of the Rules of Civil Procedure (motion to compel) or, if necessary, even Rule 56(c) (motion for summary judgment)." Id. Nevertheless, "[s]ubsection 38-77-170(2) does not require the witness affidavit to be filed at the time the complaint is filed." Id.

ANALYSIS

Defendant MAIC's motion to dismiss is untimely as it is based on the filing of an affidavit unnecessary at this stage and phase of litigation for Plaintiff's suit to survive. Further, the attack on the sufficiency of Plaintiff's father's affidavit misses the mark. Plaintiff's father witnessed all the events central to Plaintiff's claim. He was riding his motorcycle alongside his son when Defendant Doe arrived on scene, and he witnessed the entirety of the events that resulted in Plaintiff's injuries.

Defendant MAIC's Motion is Untimely

First, Defendant MAIC's Motion to Dismiss is untimely as, consistent with Rice v. Doe, Plaintiff does not need to file all affidavits at the time of filing his Complaint. Plaintiff chose to file the affidavit of his father with his Complaint, but such was not required by subsection 38-77-170(2). Rice v. Doe, 442 S.C. 160, 168, 898 S.E.2d 127, 131 (2024).

In Rice, the plaintiff filed an amended affidavit consistent with the requirements of Section 38-77-170 shortly before a motion for summary judgment was to be heard. Id. at 163, 898 S.E.2d at 128. That filing, the Supreme Court ultimately found, was sufficient for the maintenance of plaintiff's action, overruling the lower court's order dismissing the case for

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

failing to have filed an affidavit that complied with Section 38-77-170 at the time of filing the complaint. Id. at 168, 898 S.E.2d at 131.

The Supreme Court found that a plain reading of the statute did not require the Plaintiff to file an affidavit contemporaneously with Plaintiff's complaint. Id. at 167, 898 S.E 2d at 130. The Court held that because the "uninsured motorist statute is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished," reading such a requirement into the statute would run afoul of the legislative intent of the act. Id. at 167-168, 898 S.E.2d at 131 (internal quotations omitted).

As discovery advances, it is wholly likely that additional witnesses will be identified who can provide affidavits in support of Plaintiff's claims. On Friday, for instance, Plaintiff's counsel obtained an affidavit from Ms. Blair Vana, a witness identified by the South Carolina Highway Patrol in their case notes, who observed Plaintiff crash his motorcycle after his father sped off with Defendant John Doe. Ms. Vana's affidavit is attached to this reply as **"Exhibit A."**[2]

Were the court to find that an initial affidavit from one witness is insufficient for a plaintiff to initiate a case, the court would hamstring litigants pursuing cases against Phantom Drivers from using written discovery, subpoenas, and depositions to identify other witnesses capable of providing affidavits further supporting a plaintiffs' claims and in compliance with Section 38-77-170. Such an outcome would appear inconsistent with the legislative intent of the uninsured motorist statute, which is designed to benefit injured persons and is to be liberally construed to see this intent accomplished.

[2] Plaintiff is not offering this affidavit for any purpose other than to illustrate why the Court should not grant a motion to dismiss based the existence, non-existence, or sufficiency of an affidavit. That additional witnesses exist and could provide further information that would, ultimately, assist the trier of fact, indicates why it is so important that Phantom Driver cases go to discovery where the parties have the power to subpoena witnesses to testify regarding the facts about which they have firsthand knowledge.

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

Defendant MAIC's Argument that Witness did not "Witness" Event Fails

Defendant MAIC's memorandum in support of its motion to dismiss argues that Plaintiff's witness's affidavit is insufficient by attacking the witness's perception of the event causing Plaintiff's crash. This argument fails. Defendant cites Bradley v. Doe and Silva v. Allstate Property & Casualty Insurance Company in support of this argument but fails to acknowledge that each of these cases is wholly distinguishable from the circumstances present in the instant matter.

In Bradley, the plaintiff ran off the roadway when he swerved to avoid a trash bag that may have fallen off the back of a street sweeper. Bradley v. Doe, 374 S.C. 622, 624, 649 S.E.2d 153, 155 (Ct. App. 2007). The plaintiff produced affidavits from several people who arrived on scene after the collision and who saw the trash bag in the roadway; however, none of the witnesses plaintiff produced could testify that the bag itself fell from the back of a street sweeper or that plaintiff swerved to avoid the bag. Id at 633-634, 649 S.E.2d at 159-160. Because none of the affiants perceived the plaintiff swerving to avoid a trash bag that fell of a street sweeper truck, the plaintiff could not satisfy the requirements of the statute. Id. at 635, 649 S.E.2d at 160.

The holding in Silva misses the mark even further. The plaintiff in Silva was shot to death while driving his motorcycle, and his body was found in a ditch. Silva for Est. of Silva v. Allstate Prop. & Cas. Ins. Co., 424 S.C. 512, 514, 818 S.E.2d 753, 754 (2018). Officers subsequently recovered video footage from a nearby business that showed another motorcycle traveling behind the plaintiff shortly before he was murdered. Id. at 514-515, 818 S.E.2d 755. The plaintiff's estate obtained an affidavit from the investigator in the case attesting to his efforts and findings. Id. The Supreme Court, predictably, found that the law enforcement officer's affidavit failed to satisfy Section 38-77-170 as the investigator did not see, have firsthand

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

knowledge about, or attest to the circumstances that resulted in the plaintiff's death. Id. at 517, 818 S.E.2d 756.

Unlike the above cases cited by Defendant MAIC, Plaintiff's father witnessed the event central to this cause of action. He was riding his motorcycle with his son on I-385 in Greenville County when Defendant John Doe nearly hit them. He witnessed Defendant Doe swerve toward him twice without regard for his safety. He knew that when he kept pace with Defendant Doe his son went into the far-left lane of travel, and he knew that while his son was in that lane paying attention to his father, he lost control of his motorcycle and crashed. These are contemporaneous perceptions. Defendant argues that if Plaintiff's father were in front of Plaintiff, then he could not satisfy the "witness" provision of Section 38-77-170 because he was looking at Defendant Doe when Plaintiff crashed. However, our case law, including case law cited by Defendant MAIC, contravenes this position. Defendant MAIC cited both Gilliland v. Doe and Tucker v. Doe—cases where the plaintiffs' affiants' perceptions were sufficient to support plaintiffs' claims.

In Gilliland, the South Carolina Supreme Court found that circumstantial evidence is sufficient to support a claim under the John Doe statute. Gilliland v. Doe, 357 S.C. 197, 202, 592 S.E.2d 626, 629 (2004). The plaintiff in Gilliland ran off the road after being followed closely by another motorist. Id. at 198, 592 S.E.2d at 627. Plaintiff's witness then provided testimony that she saw two sets of headlights before one set of headlights turned around after the plaintiff's vehicle came to a rest. Id. That testimony, the Court found, was sufficient to satisfy Section 38-77-170.

Citing the Court of Appeals decision in the same case, the Supreme Court found that a witness supporting a claim pursuant to Section 38-77-170 "must be able to attest to the

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

circumstances surrounding the accident, i.e., what actions of the unknown driver contributed to the accident." Id. at 201, 592 S.E.2d at 628. The Supreme Court then reversed the Court of Appeals and found that the witness's statement that she witnessed two sets of headlights and saw one of those sets of headlights appear to turn around was a sufficient factual basis to "create a question of fact as to causation for the jury." Id at 202, 592 S.E.2d at 629.

Similarly, in Tucker, 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.

Like the witnesses in Gilliland and Tucker, Plaintiff's father's affidavit is both consistent with Plaintiff's allegations and attests to the part that Defendant Doe played in Plaintiff's collision. The affidavit verifies the existence of an unknown third party whose operation of a motor vehicle resulted in Plaintiff's collision and injuries. This affidavit, on its own, "amount[s] to sufficient circumstantial evidence" supporting Plaintiff's claims suggesting that Defendant Doe contributed to Plaintiff's collision and injuries. Id.

Defendant MAIC's "Truth of the Facts of the Accident" Argument Fails

Defendant MAIC argues that Plaintiff's father's affidavit fails to satisfy the "truth of the facts of the accident" requirement of Section 38-77-170(2) while quoting Gilliland and Tucker,

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

both of which are directly at odds with Defendant MAIC's position. In both Gilliland and Tucker, the cases outlined above, the Supreme Court and Court of Appeals respectively held that circumstantial evidence consistent with a plaintiff's claim is sufficient to satisfy Section 38-77-170 and held that an affidavit need not establish proximate cause to satisfy 38-77-170(2).

That the witness in Gilliland "saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborate[d] [plaintiff's] testimony creating a question of fact as to causation for the jury." Gilliland at 202, 592 S.E.2d at 629. The witness's perception of headlights was sufficient circumstantial evidence "for the jury to find the requisite causation necessary to satisfy Section 38-77-170(2)." Id.

Like Defendant MAIC, the defendant in Tucker argued that "the Affidavit itself must fully explain the unknown vehicle's involvement in the accident." Tucker at 401-402, 776 S.E.2d at 128. The Court of Appeals disagreed, stated that "[t]his argument attempts to impose requirements beyond the plain language of section 38-77-170(2)," and held that the event merely need be "witnessed by someone other than the owner or operator of the insured vehicle who sign[ed] an affidavit attesting to the truth of the facts of the accident contained in the affidavit." Id. (internal quotations omitted).

Citing the Supreme Court in Wausau Underwriters Insurance Co. v. Howser, the Court of Appeals in Tucker held that "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. at 404, 776 S.E.2d at 129. The court further stated that Section 38-77-170(2) "may be satisfied even though an independent witness fails to provide a clear answer to the question of proximate cause" and held that the affidavit submitted in Tucker satisfied the

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

Phantom Driver statute "even though it did not, by itself, provide a clear answer to the question of proximate cause."

Plaintiff's father's affidavit provides that "[b]ecause he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of his motorcycle and crashed." Further, he offered that "[h]ad it not been for the reckless actions of the BMW, my son would not have been injured." These statements are consistent with Plaintiff's allegations in his Complaint and provide sufficient corroboration of the nexus between John Doe's operation[3] of his vehicle and Plaintiff's crash to satisfy the requirements of Section 38-77-170(2).

CONCLUSION

Defendant MAIC's Motion to Dismiss fails because, at this stage in litigation, there is no requirement that Plaintiff produce every affidavit that could exist corroborating his cause of action and satisfying South Carolina Code Section 38-77-170. Further, if, inexplicably, Plaintiff's father's affidavit, which was submitted alongside Plaintiff's pleadings, were the only affidavit available to substantiate Plaintiff's claims that Defendant John Doe was the proximate cause of his injuries, that affidavit alone would satisfy the requirements of Section 38-77-170 as the same contains both direct and circumstantial evidence supporting Plaintiff's claims and is more factually robust than those found by the courts in Gilliland and Tucker to support the survival of a plaintiff's case. Based on the foregoing, Plaintiff humbly requests that Defendant MAIC's motion be denied.

[3] As the purpose of our Phantom Driver statute is to discourage fraudulent applications for insurance benefits, Plaintiff's father's affidavit makes plain that it was Defendant Doe, and not another party that initiated the chain of events that ultimately resulted in Plaintiff's crash.

Respectfully submitted,

/s/ Sam Tooker

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September 2, 2024

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**BLAIR VANA**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Blair Vana.
2. I am a citizen and resident of Greenville County, South Carolina.
3. I witnessed a crash involving a motorcycle on or about April 26, 2021 on I-385 Southbound.
4. It is my understanding that the young man who crashed is named Thomas Carswell.
5. The young man and his father were riding their motorcycles ahead of my vehicle.
6. To my understanding, a vehicle nearly struck them and sped off.
7. I witnessed the father drive off.
8. After the father drove off, the son crashed his motorcycle on I-385 and was hurt badly.
9. It was later explained to me that the father drove off after the vehicle that nearly struck him and his son.
10. I am attesting to these facts in this affidavit pursuant to S.C. Code Section 38-77-170.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

8/30/2024
Date

Blair Vana
Blair Vana

BV
Affiant's Initials

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before
me this the 30th day of August, 2024.

_____
Notary Public
My Commission Expires: 7/23/2025

_____ Affiant's Initials

ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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

TO: **THE HONORABLE G.D. MORGAN, JR.**, Thirteenth Judicial Circuit, Greenville County Courthouse, 305 E. North St., Greenville, SC 29601; and

SUSAN DRAKE DUBOSE, ESQ., Baker Ravenel & Bender, LLP, PO Box 8057, Columbia, SC 29202;

COMES NOW the Plaintiff, Thomas Carswell, Jr., by and pursuant to Rule 59 of the South Carolina Rules of Civil Procedure, who moves that this Court reconsider its Order dismissing Plaintiff's suit. Plaintiff's Motion is based on the following:

PROCEDURAL HISTORY

Plaintiff filed a Complaint against John Doe in the above-captioned action on or about March 13, 2024. Plaintiff served John Doe through the Greenville County Clerk of Court on or about April 9, 2024. Plaintiff served the uninsured motorist carriers via the South Carolina Department of Insurance on April 18, 2024. The uninsured motorist carriers for John Doe filed Answers on April 24, 2024 and May 1, 2024. Subsequently, Markel American Insurance Company ("MAIC"), the primary uninsured motorist carrier in the case, filed a Motion for Judgment on the Pleadings on or about May 23, 2024.

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

No discovery had been conducted when Defendant filed his motion to dismiss. There had been no exchange of written discovery, depositions had not been conducted, and no subpoenas had been sent. Rather, the only investigative work that occurred before Defendant's 12(c) motion was heard was that Plaintiff's counsel identified, talked to, and obtained affidavits from two witnesses to the collision. Those affidavits were filed after receipt and before the hearing on Defendant's Motion for Judgement on the Pleadings.

Defendant MAIC's Motion was heard on September 3, 2024 by the Honorable G.D. Morgan, Jr., Circuit Judge. This hearing occurred in person but was recorded by WebEx instead of a live court reporter. As a result of an issue with Defense counsel's microphone, only the statements of the Court and Plaintiff's counsel were recorded.[1] The Court issued a written Order on October 1, 2024 granting Defendant's motion to dismiss. Plaintiff hereby files this Motion for Reconsideration within ten (10) days from the date of receipt of the Order in this matter.[2]

QUESTIONS PRESENTED

I. Did the Court err in granting Defendant's Motion to Dismiss based on the alleged insufficiency of the affidavit filed alongside Plaintiff's Complaint when there is no requirement than an affidavit be filed alongside a Complaint in a phantom driver case?

II. Did the Court err in converting Defendant's Motion to Dismiss into a Motion for Summary Judgment after considering two additional witness affidavits filed by Plaintiff after Plaintiff's Complaint was filed?

[1] Included as "Exhibit A" is the transcript from oral arguments on Defendant's Motion to Dismiss. Included as "Exhibit B" is an email from Legal Eagle explaining why Defense counsel's arguments were not preserved.

[2] While this motion is being filed within ten days of the Court's issuance of its Order, that Order was filed in the aftermath of Hurricane Helene, during a filing "holiday" pursuant to Supreme Court Order. See: https://www.sccourts.org/media/1v4ijqq3/2024-10-01-01.pdf.

III. Did the Court err in granting Defendant's Motion to Dismiss and/or motion for summary judgment after considering the two additional witness affidavits filed by Plaintiff after Plaintiff's Complaint was filed?

FACTUAL STATEMENT OF THE CASE

This action arises out of a motor vehicle accident that occurred on or about April 26, 2021 in Greenville County, South Carolina. Plaintiff Thomas Carswell was driving a motorcycle alongside his father, who was also riding a motorcycle, on Interstate 385. The men were driving the motorcycles southbound when John Doe, driving a dark in color BMW, driving recklessly and at a tremendous rate of speed, swung around the men on the right and merged into their lane nearly striking them. Plaintiff and his father merged left and the BMW driven by John Doe again merged into that lane of travel, nearly striking Plaintiff's father. It appeared to all parties that John Doe was attempting to strike Plaintiff's father on purpose, while Plaintiff was *immediately behind* his father in the same lane of travel.

John Doe appeared to engage in "road rage," and was interacting with Plaintiff's father while driving. Plaintiff moved to the far left lane as this occurred as he was worried. Because he was paying attention to the actions of John Doe, Plaintiff lost control of hi s motorcycle and crashed. But for John Doe's driving, behavior, and apparent attempt to intentionally strike Plaintiff's father while Plaintiff was immediately behind his father, Plaintiff would not have crashed. No third party's actions broke this causal chain, and John Doe's actions were such that they would probably cause injury to something or someone.

ARGUMENT

I. Did the Court err in granting Defendant's Motion to Dismiss based on the alleged insufficiency of the affidavit filed alongside Plaintiff's Complaint

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

when there is no requirement than an affidavit be filed alongside a Complaint in a phantom driver case?

The Court erred as its Order dismissing Plaintiff's Complaint stated that Plaintiff's case failed as it "does not meet the required conditions to bring an action or to recover under the uninsured motorist provision" and then cites the language of South Carolina Code Section 38-77-170. **The Court's finding is wholly inconsistent with the Supreme Court's recent decision in Rice v. Doe**, which held, as a matter of law, that there was no requirement that a plaintiff file any affidavits at the time of filing his Complaint. Rice v. Doe, 442 S.C. 160, 168, 898 S.E.2d 127, 131 (2024).

In Rice, the plaintiff filed an amended affidavit consistent with the requirements of Section 38-77-170 shortly before a motion for summary judgment was to be heard. Id. at 163, 898 S.E.2d at 128. That filing, the Supreme Court ultimately found, was sufficient for the maintenance of plaintiff's action, overruling the lower court's order dismissing the case for failing to have filed an affidavit that complied with Section 38-77-170 at the time of filing the complaint. Id. at 168, 898 S.E.2d at 131.

The Supreme Court found that a plain reading of the statute did not require the Plaintiff to file an affidavit contemporaneously with Plaintiff's complaint. Id. at 167, 898 S.E 2d at 130. The Court held that because the "uninsured motorist statute is remedial in nature, enacted for the benefit of injured persons, and is to be liberally construed so that the purpose intended may be accomplished," reading such a requirement into the statute would run afoul of the legislative intent of the act. Id. at 167-168, 898 S.E.2d at 131 (internal quotations omitted).

In its Order dismissing Plaintiff's Complaint, the Court bizarrely acknowledged the holding of Rice stating that "[t]he South Carolina Supreme Court's recent decision in Rice v. Doe

addressed the timing of the witness affidavit, not its sufficiency, and found that S.C. Code Sec. 38-77-170(2) does not require that the affidavit be filed at the same time as the John Doe lawsuit." Then, after explicitly acknowledging that the John Doe statute does not requiring the filing of an affidavit contemporaneously with a complaint, the Court spent four pages explaining that Plaintiff's case failed as a matter of law because the affidavit that was filed alongside Plaintiff's Complaint failed to satisfy Section 38-77-170(2).[3]

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 Plaintiff'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).[4] Were the Court's finding to be correct, then litigants would, as a matter of course, refrain from ever filing affidavits alongside Complaints in John Doe cases for fear that the particular witness affidavit filed was in someway deficient. As the Court acknowledged during oral arguments, the primary purpose of the John Doe motorist statute is to prevent fraud. Incentivizing litigants to withhold affidavits when filing Complaints does the opposite—it encourages 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.

[3] It should be noted that, for the reasons discussed in Plaintiff's reply memorandum and during oral arguments, Plaintiff disagrees with the assertion that the affidavit filed alongside his Complaint failed to satisfy Section 38-77-170(2).

[4] During oral arguments, and inconsistent with the Court's Order to dismiss, it appeared that the Court focused more on the *nature* of Plaintiff's case rather than the holding in Rice or the actual requirements of Section 38-77-170(2). In pages 18-21 of Exhibit A, the transcript of hearing, the Court appeared to latch on to causation in fact rather than on the John Doe motorist statute and the majority of the Court's questions directed to counsel for Plaintiff related to causation rather than the requirements of the John Doe motorist statute or the Supreme Court's holding in Rice. Plaintiff would encourage the Court to remember that "The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action." Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 248 (2007).

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

II. Did the Court err in converting Defendant's Motion to Dismiss into a Motion for Summary Judgment after considering two additional witness affidavits filed by Plaintiff after Plaintiff's Complaint was filed?

The Court erred by converting Defendant MAIC's Motion for Judgment on the Pleadings into a motion for summary judgment.

In addition to the affidavit from Plaintiff's father that Plaintiff filed alongside his Complaint, Plaintiff's counsel subsequently obtained two additional affidavits, which were filed with the Clerk of Court before the hearing on Defendant MAIC's Motion for Judgment on the Pleadings. The Court, in its Order dismissing Plaintiff's Complaint, erred in determining that the filing of these affidavits converted Defendant's Motion for Judgment on the Pleadings into a motion for summary judgment pursuant to Rule 56.

"Under Rule 12[], SCRCP, a defendant may make a motion to dismiss based on a failure to state facts sufficient to constitute a cause of action." Baird v. Charleston Cnty., 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999). "Generally, in considering a [Rule 12] motion, the trial court must base its ruling solely upon allegations set forth on the face of the complaint." Id. The motion to dismiss "may not be sustained if the facts alleged and inferences therefrom would entitle the plaintiff to any relief on any theory." Id. Rule 12(c)[5] further provides:

> 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.

Rule 12(c), SCRCP.

[5] Defendant MAIC's Motion for Judgment on the Pleadings was brought pursuant to Rule 12(c) rather than Rule 12(b).

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

Our Supreme Court has interpreted this language to mean that "the trial court may treat a [motion to dismiss] as a motion for summary judgment and consider matters presented outside the pleadings if the parties are afforded a reasonable opportunity to respond to such matters in accordance with Rule 56(c) and (e) of the South Carolina Rules of Civil Procedure. The notice provisions in Rule 56 are incorporated into [Rule 12]." Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 698–99 (1987).

During oral arguments, the Court asked counsel for MAIC whether there were witnesses to the collision, and counsel for MAIC referenced both the affidavit filed alongside the Complaint as well as the additional affidavits that were subsequently filed. The Court then asked of counsel for MAIC "Is there any reason for me not to consider them before I get – before you get to the issue of whether sufficient?" Counsel for MAIC then indicated she was happy for the Court to include those affidavits in its analysis of Defendant's Motion for Judgment on the Pleadings.[6]

In Plaintiff's Reply to Defendant MAIC's motion, Plaintiff unequivocally stated that the additional affidavits that were filed were not filed and argued "for any purpose other than to illustrate why the Court should not grant a motion to dismiss based on the existence, non-existence, or sufficiency of an affidavit." Plaintiff further argued "[t]hat additional witnesses exist and could provide further information that would, ultimately, assist the trier of fact, indicates why it is so important that Phantom Driver cases go to discovery where the parties have the power to subpoena witnesses to testify regarding the facts about which they have firsthand knowledge."

At no point prior to the hearing, during the hearing, or after the hearing did the Court give notice to the parties that it was going to, upon considering the affidavits, convert the motion on the

[6] Counsel for MAIC was, again, not recorded as there was an apparent issue with the WebEx recording system hearing any of her arguments, so anything she said is "indiscernible." Plaintiff's representations regarding Counsel's statements are based on Plaintiff's Counsel's recollection of the hearing.

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

pleadings into a motion for summary judgment. It was not until it issued its written order on October 1, 2024[7] that the Court indicated that its ruling against Plaintiff was based on the additional affidavits and that it had converted Defendant's 12(c) motion into a motion for summary judgment.

Just like in Brown v. Leverette, prior to the hearing "[t]he trial court gave no notice to the parties that it was going to consider the affidavits." Brown v. Leverette, 291 S.C. 364, 367, 353 S.E.2d 697, 699 (1987). Further, at no point did it indicate to the parties that it would "hear the 12[(c)] motion as a motion for summary judgment" as "[t]he first indication" that the Defendant's motion on the pleadings had been converted into a motion for summary judgment "was the trial court's order of dismissal." Id.

Again, as was discussed above, Rice v. Doe expressly states that the filing of an affidavit that complies with the John Doe motorist statute is not a condition precedent to filing a cause of action against John Doe. As a result, the analysis the Court should have employed was not whether any affidavit satisfied Section 38-77-170(2) but whether an affidavit needed to be filed at all. By converting Defendant's Rule 12 motion into a motion for summary judgment, the Court moved the metaphorical ball on Plaintiff by converting what should have been a hearing regarding the necessity of an affidavit into a hearing on the substance of all the affidavits filed with the Clerk of Court.

III. Did the Court err in granting Defendant's Motion for Judgement on the Pleadings and/or Motion for Summary Judgment after considering the two additional witness affidavits filed by Plaintiff after Plaintiff's Complaint was filed?

[7] Even in its Form 4 Order instructing Counsel for MAIC to draft an Order the Court wrote that was merely granting Defendant's Motion for Judgment on the Pleadings and did not mention summary judgment.

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

The Court erred in finding the affidavits available to the Court failed to satisfy the John Doe motorist statute. 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 12(c) or 56(c) scrutiny.

If the Court did, in fact, consider the additional affidavits filed by Plaintiff with the Clerk of Court, then those affidavits, individually and in conjunction with the affidavit of Plaintiff's father filed alongside Plaintiff's Complaint, should dispel any notion that Plaintiff's affidavits fail to satisfy the requirements of Section 38-77-170.[8]

In his affidavit, Plaintiff's father, Mr. Thomas Carswell, Sr., stated that he witnessed John Doe drive recklessly and with the apparent intention of hurting Mr. Carswell. Mr. Carswell, Sr. stated that he was driving his motorcycle in front of his son when John Doe nearly struck him. Mr. Carswell, Sr., further stated that Plaintiff 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]."

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 Plaintiff] and sped off" after which Plaintiff's "father dr[o]ve off." Immediately following those events, Plaintiff "crashed his motorcycle on I-385 and was hurt badly."

Finally, from her vantage point behind Plaintiff, Ms. Melissa Mack was able to observe to facts to which she attested in her affidavit that made plain that John Doe was the proximate cause of Plaintiff'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

[8] Attached to this Motion as "Exhibit C" is Plaintiff's father's affidavit. Attached to this motion as "Exhibit D" is the affidavit of Ms. Blair Vana. Attached to this motion as "Exhibit E" is the affidavit of Ms. Melissa Mack.

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

of speed." Ms. Mack saw John Doe "getting on and off the onramps and offramps to go around vehicles illegally." 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." She said she "witnessed the SUV nearly hit the motorcycles" after which Plaintiff "stayed in front of [her]" while his father kept pace with John Doe. At this point she observed Plaintiff, "apparently focusing on the SUV, crash[]."

The Court's finding that the above affidavits, together, failed to satisfy S.C. Code Section 38-77-170 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 Plaintiff's claim. Plaintiff's father was riding with his son, saw John Doe driving recklessly, and was aware that his son crashed. Ms. Vana saw Plaintiff 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 and witnessed John Doe driving recklessly, saw John Doe nearly strike Plaintiff and his father, and witnessed Plaintiff wreck while distracted by John Doe's apparent "road rage."

Factually, the case closest to the facts alleged by Plaintiff in his Complaint and attested to by the witnesses in their affidavits are the facts in Gilliland v. Doe. 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 ought 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

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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 witnesses 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. 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.

Just like the witness to the actions of the John Does in Gilliland, the witness affidavits in Plaintiff's case corroborated Plaintiff's claim. The affidavits made obvious that John Doe engaged in "road rage" behaviors, nearly struck Plaintiff's father *and Plaintiff*, then sped off immediately before Plaintiff 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 Plaintiff lost control of his motorcycle. Like the plaintiff in Gilliland, Plaintiff's allegations that he lost control of his bike because of John Doe do not require that someone corroborate that they saw Plaintiff'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 Plaintiff to have caused Plaintiff's collision.

The Court's Order stated that "[n]one of the affidavits contain any facts observed by a witness to corroborate Plaintiff's account that he was distracted by John Doe or any actions by John Doe that caused the Plaintiff to lose control of his motorcycle and crash." This statement is inconsistent with the affidavits and caselaw[9] and is in error. Like the Court acknowledged in

[9] Citing the Supreme Court in Wausau Underwriters Insurance Co. v. Howser, the Court of Appeals in Tucker v. Doe held that "adequacy of the 'causal connection' should pass the same test used in determining whether an injury or

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

Gilliland, the question for the Court should have been whether the affidavits corroborated Plaintiff's allegations in his Complaint not whether a witness could attest that John Doe's actions definitively caused Plaintiff to lose control and crash.

CONCLUSION

The Court erred in granting Defendant's Rule 12(c) motion based on the sufficiency of Plaintiff's father's affidavit because, at this stage in litigation, there is no requirement that Plaintiff produce every affidavit that could exist corroborating his cause of action and satisfying South Carolina Code Section 38-77-170. Even if Plaintiff was required to file his father's affidavit alongside Plaintiff's pleadings, that affidavit alone would satisfy the requirements of Section 38-77-170 as the same contains both direct and circumstantial evidence supporting Plaintiff's claims.

The Court further erred in converting Defendant MAIC's Motion for Judgment on the Pleadings into a motion for summary judgment based on the additional affidavits filed by Plaintiff with the Clerk of Court after the action was filed as the same were not submitted by Plaintiff for consideration during oral arguments on Defendant's 12(c) motion.

Finally, the Court erred by concluding that, after considering the affidavit of Plaintiff's father, Ms. Vana, and Ms. Mack, that those affidavits failed to satisfy the statutory requirements of Section 38-77-170. These three affidavits together are far more factually robust than those found by the courts in Gilliland v. Doe and Tucker v. Doe to support the survival of a plaintiff's case.

damage arose out of the ownership, maintenance, or use of the uninsured vehicle." Tucker v. Doe, 413 S.C. 389, 404, 776 S.E.2d 121, 129 (Ct. App. 2015). The court further stated that Section 38-77-170(2) "may be satisfied even though an independent witness fails to provide a clear answer to the question of proximate cause" and held that the affidavit submitted in Tucker satisfied the Phantom Driver statute "even though it did not, by itself, provide a clear answer to the question of proximate cause."

WHEREFORE, based on the foregoing, Plaintiff prays that the Court rescind its Order and Deny Defendant MAIC's Motion for Judgment on the Pleadings.

Respectfully submitted,

/s/ Sam Tooker
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October 11, 2024

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
C.A. NO. 2024-CP-23-01585

THOMAS CARSWELL, JR.

PLAINTIFF,

vs.

JOHN DOE

DEFENDANT.

H E A R I N G
BEFORE THE HONORABLE G.D. MORGAN, JR.

DATE: SEPTEMBER 5, 2024
TIME: N/A
LOCATION: SOUTH CAROLINA CIRCUIT COURT 13

TRANSCRIBED BY: KELLEY PRIMM

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ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

INDEX

PROCEEDINGS..... 4

CERTIFICATE OF TRANSCRIBER..... 22

EXHIBITS

(NONE MARKED)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

P R O C E E D I N G S

THE COURT: All right. Next matter of *Carswell versus Doe.* 2024-CP-23-01585. All right. If y'all would identify yourself for the record, and who you represent.

MR. TOOKER: Sam Tooker on behalf of the Plaintiff.

THE COURT: All right. (Indiscernible) motion for (indiscernible) pleadings. I'll hear from you.

MS. DUBOSE: (Indiscernible)

THE COURT: I've read it, but I'll let you, if you want to for the record.

MS. DUBOSE: (Indiscernible)

THE COURT: It's not your classic -- classic John Doe case?

MS. DUBOSE: (Indiscernible)

THE COURT: And (indiscernible) was ahead of Junior, right?

MS. DUBOSE: (Indiscernible)

THE COURT: So they can keep an eye on it and see what's going on?

MS. DUBOSE: (Indiscernible)

THE COURT: Who witnessed it?

MS. DUBOSE: (Indiscernible)

THE COURT: Is there any reason for me not to consider them before I get -- before you get to the issue of whether sufficient?

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

MS. DUBOSE: (Indiscernible)

MR. TOOKER: I don't know if The Court wants to hear from me on that point, or I'll just wait my turn.

THE COURT: Yeah, just wait.

MS. DUBOSE: (Indiscernible)

THE COURT: All right. Thank you. I'll hear from the Plaintiff.

MR. TOOKER: Yes, sir. Your Honor, May I please The Court? And I'm going to rehash, in essence, what we argued in our reply memorandum. So if at any point I start arguing stuff you've already heard from us via our memorandum, please let me know, and I'll move on.

So first and foremost, and I think you already understand the allegations central to the complaint. We do think these factual circumstances are somewhat unique. And of course, in my memorandum, I cited the case law as it relates to novel issues of law, and how The Court's disfavor of ruling on novel issues of law on motions to dismiss at the stage in litigation, given the necessity of developing a record upon which you could subsequently base some sort of motion and then potentially an appellate case.

First, with regards to the John Doe motorist statute, you know, the purpose of the statute, and this is outlined in the case law, it's in Collins, which defense Counsel cited. It's in Enos v. Doe, which I believe defense Counsel cited.

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

But there are three primary purposes, the overwhelming or overarching, most important, is fraud prevention. So the idea that The Courts cite over, and over, and over again, is the purpose of our John Doe motorist or phantom driver statute, is that we want to ensure that motorists are not committing fraud on insurance companies by virtue of claiming that third parties who they can not identify, cause collisions, when in reality, the third parties were not present.

And, you know, folks make up the existence of those parties or factual circumstances to subsequently make a claim. Here, that's not the case. I mean, here, it's evident.

And I think that Defense will be loath to argue that John Doe existed, that there was a guy driving like a complete jerk at high rates of speed, that nearly struck motorists on the interstate on the day in question.

I don't think that there is an argument that this has been concocted whole cloth to create, you know, a cause of action when one otherwise did not exist. John Doe is a guy. John Doe was operating a motor vehicle.

That operation of the motor vehicle, we have alleged, is the proximate cause of Plaintiff's injuries. So as it relates to that first issue with fraud prevention, I don't think that there is an issue for The Court to be concerned

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

about.

That this is something that's been bought -- brought without substantial, factual basis. Second, it's for purposes of affording defense Counsel the ability to cross examine witnesses at trial.

Again, that's cited in that he Enos case. Third, it's for the purpose of putting the defense Counsel on notice of what the facts alleged are by a particular claim. And, of course, other items and documents do that.

That's why there is the police reporting requirement. But those are the three principles -- or three notions that are cited by our appellate courts as being the legislative basis for the affidavit requirement in our John Doe motorist statute.

Now, the thing that I think supersedes all of this, and what makes this motion to dismiss untimely and premature, is *Rice v. Doe*. So *Rice v. Doe* is a 2024 case. And Your Honor, I have all the cases that I cite printed, if you would require them.

I've provided copies to defense Counsel. Okay. So *Rice v. Doe* provides that quote, there is no requirement in SC code section set 38-77-170, that the witness affidavit be filed at the same time the action is filed, end quote.

As quote, the requirement is essential to the success of the claim, quote, at least one affidavit complying with

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statute must be submitted during the lifespan of the case, right? So the question is not at the time of filing, is there an affidavit?

It's over the course of litigation, is an affidavit, at least one, submitted, that sufficiently satisfies the requirements of the statute. The Court does provide that if a Plaintiff engages in sort of foul play with discovery, then they are subject to rule 37 motions and rule 55 motions -- or rule 56 motions.

So the notion in Rice is that you won't -- don't want to deprive a Plaintiff against a John Doe of their putative cause of action because of the lack of an affidavit, or because they've only been able to obtain one affidavit or multiple affidavits, if those affidavits are insufficient at the time of the filing of the complaint.

I think the purpose, I mean, the way The Court constructs the statutes, they say is not required. The legislature, if they wanted it, they would have written it in there like they did into medical malpractice, you know, legislation.

Because they didn't, the assumption is it's not required. So Rice is plain that you don't need one in order to survive at this stage. Secondary to the arguments about Rice and the timeliness of the affidavit, I think Plaintiff's father's affidavit, in and of itself, is sufficient to

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

satisfy both the quote, unquote, witness provision of the of the statute, but also the truth of the matter provision of the statute.

So those are both baked into subsection two. And as it relates to the affidavit, the person has to witness the event, and they have to be able to attest the truth of the matter of the circumstances to which they are attesting.

So defense Counsel argues that to witness a thing, you have to see it. And I don't see that. Witness does not mean, necessarily, eyeball, right? So here, and I'll give you an example. I don't know if The Court is familiar with the movie The Big Lebowski. Ever seen The Big Lebowski, Your Honor?

THE COURT: I don't think I have.

MR. TOOKER: An excellent movie. You should check it out. So in The Big Lebowski, there is a scene where a group of guys, the good guys, fight a group of bad guys. One of the good guys engages in fighting the bad guys, and then behind him is made aware, through his -- his observations of his environment, that one of his buddies has just had a heart attack.

Okay. And that's the scene. I don't think anyone would argue that the person engaged in the fight with the bad guys, who hears his buddy on the ground dying of a heart attack, didn't, in fact, witness those events.

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

He is a witness to the events. He's a witness to the altercation of the bad guys. He's a witness to the subsequent -- subsequent injuries to his friend. And he's made aware, by virtue of all the incumbent circumstances, that his friend is on the ground behind him dying. Similarly, in this case, Mr. Carswell Senior is aware of his circumstances, and is aware, after pulling off with John Doe, that his son is not there, is then aware of the crash, right? And so their argument is, if you don't eyeball the crash, it doesn't count. And I don't think that's the intent of the ---

THE COURT: You're saying automatically, because the son isn't there, that a crash happened? What if he just pulled off to tie his shoes or something?

MR. TOOKER: So his son's not there. And, I mean, this is now -- I worry about me proffering facts as he would testify to, but his son's not there. And he looks back and his son's down the ground.

He goes back to him, right? So the circumstances are such that all of a sudden, traffic's not keeping up. He's aware that something has changed. He looks back, there's a wreck, he goes back, right?

So, you know, if -- if the notion is fundamentally, we want to be aware of bogus claims and people making fraudulent claims about John Does, who don't exist, that -- that's

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

obviated ---

THE COURT: What if he just ---

MR. TOOKER: --- by the affidavit.

THE COURT: But what if he just lost control, and that's why he wrecked. And at the time, Senior looks back at him and he's wrecked?

MR. TOOKER: Yes.

THE COURT: So can that be possible? Does he have to -- do you need the statute? By saying, well, that -- he had a wreck, and it was a -- because of the John Doe?

MR. TOOKER: Yeah.

THE COURT: He just had a -- he lost control?

MR. TOOKER: Well, I want to be careful not to conflate two things. So one thing is contributory negligence, right, or comparative fault? Excuse me, not contributory, comparative fault.

So I think they have claims for comparative negligence, and how much negligence my own client bears, as it relates to his ability to maintain his motorcycle, while paying attention to other circumstances on the roadway, right?

That hadn't been said, you know, as it relates to the -- the understanding of why the person crashed. The two cases that we cite, that I think are directly on point in this case are Tucker and Gilliland.

So the Tucker case, it's *Tucker V doe*. It's a court of

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

appeals decision. The Tucker case, person behind a truck by about 150 feet, says they see the truck appear to swerve and then crash, right?

That was sufficient in that case for The Court of appeals to say yes, that affidavit conforms with the statute. When the trucker himself testified, I swerved to avoid a thing in front of me and crashed.

The person behind him couldn't see what was in front of the trucker. Doesn't know what was in front of the trucker, but he could say he appeared to swerve, right? Similarly, in Gilliland, and Gilliland ---

THE COURT: Wasn't that kind of -- he did see him swerve ---

MR. TOOKER: He saw him swerve and he saw him crash. And you know, the additional affidavits we have, they saw this guy lose it and crash, right?

THE COURT: Did senior actually see him crash, or did he turn around and saw him laying on the ground or whatever?

MR. TOOKER: I mean, you're asking me to proffer facts, but I would proffer that, no, that his eyes are ahead.

THE COURT: No -- what does your complaint -- what does the affidavit say?

MR. TOOKER: So my affidavit says that -- I don't want to quote improperly, but the affidavit says ---

THE COURT: And you're right. We're based on the

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

pleadings, and that's why I'm asking what the ---

MR. TOOKER: So the affidavit said, instead, my son moved in the far left lane to keep me in his line of sight to make sure that I was okay and did not get hurt. Then it says, because he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of his motorcycle and crashed.

Had it not been for the reckless actions of the BMW, my son would not have been injured, right? So that's what the affidavit says. So you're talking about his awareness of those facts, and I think you would have to testify as to what informed the reasonableness of those beliefs, right?

But I think that the affidavit itself, if you're just taking the words on the page, is sufficient to satisfy the statute. Now, that said, and again, like, just if we're going to have an honest argument, let's have an honest argument.

THE COURT: Well, let me ask you this, on paragraph 17, because he -- this is the affidavit of Senior, because he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of his motorcycle and crashed. Now, how would he know that he was paying attention to his actions with the BMW? How would he know that?

MR. TOOKER: Well, again, I think Your Honor's asking me to proffer.

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

THE COURT: I mean, it's in his affidavit. So what does he -- well, it's, I'm not asking you to proffer. How would anybody know? Because it is not in there. There's nothing in the affidavit before paragraph 17 that says, I looked back and I saw my son, and he was not paying attention.

And I'm just using his exact -- he was looking left, or he's looking right, or he's looking at -- or he was on his phone, and therefore, I can make that conclusion because he was looking at his phone, looking behind him, he was not paying attention, and -- or he was paying attention to whatever.

I mean, the factual situation -- or the factual -- or the facts in the affidavit, don't seem to be there to support the conclusion in paragraph 17. And that -- would you agree with that?

MR. TOOKER: I wouldn't see that. I mean, I -- again, ---

THE COURT: I didn't think you would, but I thought I'd ask anyway.

MR. TOOKER: Yeah, well, I appreciate the question. The -- what I was about to mention was the Gilliland case. And so the Gilliland case, too, is one that I think is more on point than the two cases cited by defense Counsel and her memorandum.

Gilliland case is a case wherein, Plaintiff contends or

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

claims that she is being pursued by a group of rowdy young men, and that she is scared because they're pursuing her, and she runs off the roadway and then they leave the scene.

And independent witness says, I saw two pairs of headlights and then I saw one pair of headlights turn around in a field as if to go the opposite direction. And that's the information from the witness in the Gilliland case. That, The Court said was sufficient to corroborate the allegations from the Plaintiff, that the John Doe caused the collision to merit the ultimate successful prosecution in that case.

So the incumbent question for The Court was, is there information making, not making likely, but verifying that these circumstances claimed by the Plaintiff did, in fact, occur. And in that case, the Court held that they did.

I do want to take issue with something that defense Counsel said, because Gillian and Tucker both stand for the proposition that circumstantial evidence -- the affidavits can use circumstantial evidence to corroborate the claims of the Plaintiff.

And we would argue here that the circumstances, incumbent circumstances, as it relates to father's affidavit alone, are sufficient to create that circumstantial evidence necessary to merit the survival of the claim.

That is taking aside from the fact that it doesn't even

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have to be before Your Honor at this point, because, again, per Rice, it is not a thing that is required to be submitted at this stage, and that's why, again, -- so, you know, we plead this case, get two additional affidavits, right? Discovery is ongoing, and there are additional witnesses, I imagine, who can provide affidavits that the other two that we've obtained, that are before Your Honor, Ms. Max says specifically, and explicitly, that she watches him, apparently distracted by the interactions between the BMW and his father, crash his bike, right?

So there is not an open factual question. The BMW is driving like a jerk. The dad and BMW go off on the right. The kid gets in the left, gets distracted and busts. I don't think that that is an open factual question, the open factual question is, how much fault would any finder of fact attribute to Plaintiff versus John Doe?

And that, I think, is the legitimate dispute in the case. Having said that, again, the issue in Gillian and Tucker, and both of these touch on -- so defense Counseling or memorandum argues both the, you know, she's says witness requires to see, right?

But the witness element, but then also the truth of the matter element. And in Tucker in particular, they talk about -- The Court talks about the truth of the matter requirement, and they say that it's not -- you don't need,

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

you know, proof positive of causation or anything.

They say that it is the same test as you would put a case through if you were talking about whether or not something arose in the course and scope of an operation of a motor vehicle.

So in the Tucker case, again, it's a, you know, the guy swerves and hits a concrete, I think, bridge support or divider or something. And the witness from behind said, well, he -- he moved and he hit something.

The witness couldn't say why, right? Similar in Gilliland, the witness couldn't say why the woman wrecked, right? Nope. They couldn't -- they couldn't tell The Court that, nobody could.

The only people who were capable of saying that were the Plaintiffs in those cases. You don't have to, pursuant to the statute, have the witness testify as to causation, and that's actually what the Defendants argued in Tucker.

So in Tucker, the issue that was argued by the Defendants was the same issue the Defense is arguing here, you've got to have every fact buttoned down by independent witness. If you don't, you lose.

And The Court said, no, that's not the requirement. The Court said the requirement is, you need information verifying that a third party was responsible for the collision, and there's a nexus between the third party information, or the

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

third party activity and the collision, right? That's -- that's the requirement.

THE COURT: All right. Very briefly, Ms. DuBose. Isn't it a totality of the circumstances, is that what the Plaintiff's saying, and is that legitimate? Is that a good argument?

If you just base it on the totality of the circumstances of what happened, the things that transpired before, then some things that transpired at it, isn't that enough? And to get around, which is the basis of John Doe so you don't have fraudulent claims. Is that enough in this case?

MS. DUBOSE: Well, Your Honor, (indiscernible).

THE COURT: There's more of a novel issue of facts. I don't think this -- it's not a -- yeah.

MS. DUBOSE: (Indiscernible)

THE COURT: All right. Mr. Tooker, is the sole reason or so cause in this case, based on your client watching his dad, and that's what caused his accident?

MR. TOOKER: I mean, so those are the factual allegations. So factual allegations are, by virtue, -- and it's not watching his dad.

THE COURT: Yeah. Your affidavit, or your client's -- or the father's affidavit says he was watching -- he was distracted because he was watching me, and that's why he wrecked. So, is the soul cause of this

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accident, which precipitates this John Doe action, he's watching his dad, and that's what caused him to wreck?

MR. TOOKER: So we would argue that the -- that the nexus between John Doe's actions and the collision, and I call it a collision, the wreck, ---

THE COURT: But John Doe didn't do anything to Junior. John Doe was doing everything to Senior. My question is, is the sole cause of Junior's wreck, the result of him watching his dad?

MR. TOOKER: The cause of Junior's wreck is Junior's apprehension, given the circumstances that just transpired with the BMW, and then seeing the BMW and his dad up ahead and being concerned.

THE COURT: But again, it's watching John Doe ---

MR. TOOKER: It's been distracted.

THE COURT: --- and he's watching them, and that's what causes him to wreck?

MR. TOOKER: Yes, it is being distracted by virtue of the careless operation by John Doe.

THE COURT: John Doe didn't do anything to Junior.

MR. TOOKER: John Doe ---

THE COURT: John Doe was up there with Senior, right?

MR. TOOKER: With the time that Junior wrecked, John Doe is ahead of him with Senior. This all transpires quickly, very quickly. But he comes over nearly, and defense Counsel

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

can correct me if I'm wrong here, because now we're again, starting to talk on the facts, but they've deposed my client already that John Doe nearly takes them out, then John Doe comes back, nearly takes dad out again, and then appears to intentionally hit dad, or nearly hit dad, and that's when dad and John Doe go up ahead and client then crashes.

THE COURT: But the allegations in reading the affidavit from Senior is that, he wrecked -- Junior wrecked because he was watching Senior and John Doe up there, and the actions that they were doing, not the John Doe.

John Doe wasn't anywhere near Junior. He was up there with senior, and the actions that they were doing back and forth with each other, and the argument is out -- or the allegations, as I see in reading the affidavit, is that Junior wrecks because he is -- your argument is he was distracted. But let's just assume for argument purposes, that, okay, he was distracted because he was watching Senior, and is that what caused him to ---

MR. TOOKER: He is distracted because the BMW motorist operated his vehicle in a way that was reckless on the day in question. And it was the reckless operation of the BMW that was the nexus for the -- for the ---

THE COURT: That reckless operation was then seen by Junior, and Junior is upset and distracted by seeing what's going on up there in the front, that he wrecks, is that -- I

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just want to make sure I'm clear as to what ---

MR. TOOKER: Yeah. So what we alleged in the complaint was that BMW engaged in road rage like behavior, and that road rage like behavior was the thing that distracted Plaintiff and caused him to crash. That's the allegation in the complaint.

THE COURT: All right. All right. I'll take it on advisement. Thank you both.

MR. TOOKER: I was just briefly ---

THE COURT: Very briefly. I've read everything, and I ---

MR. TOOKER: Okay.

THE COURT: --- I'm familiar with the law.

MR. TOOKER: Okay. I was just gonna say Rice and Tucker and Silva don't necessarily stand ---

THE COURT: I ---

MR. TOOKER: --- for the ---

THE COURT: I'm ---

MR. TOOKER: --- things that ---

THE COURT: I'm very familiar with all those cases.

MR. TOOKER: Okay.

THE COURT: Thank you all. Both of you made good arguments. I appreciate it. I'll let you know.

MR. TOOKER: Thank you, sir.

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Kelley Primm

September 19, 2024

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Would you still like for us to proceed with the production of the transcript? Thank you.

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Subject: RE: Carswell v Doe Transcript

Great! Thank you. Please proceed.

Sincerely,

Sam Tooker
Attorney



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Thank you,

Kevin Dehlinger
Director of Operations

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STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**THOMAS S. CARSWELL, SR.**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Thomas S. Carswell, Sr.
2. I am a citizen and resident of Greenville County, South Carolina.
3. I am the father of Thomas S. Carswell, Jr.
4. On or about April 26, 2021, my son, Thomas Carswell, Jr., and I were taking a motorcycle to my house to load it onto a trailer.
5. I was driving my motorcycle, and my son was driving the motorcycle that we were going to load onto the trailer.
6. We both got onto I-385 Southbound from Woodruff Rd.
7. I was in front of my son.
8. As I merged onto I-385, a gray in color BMW SUV came flying up behind me in the near lane.
9. That BMW swerved and went to my right onto the shoulder of the roadway.
10. The BMW then appeared to intentionally cut back into my lane of travel with no regard for my safety.
11. To avoid a collision, I had to quickly merge into the next lane, which was, fortunately, free of traffic.
12. Then, the BMW again merged into my lane of travel almost striking me and forcing me to merge into the lane to my left.

TSC Affiant's Initials

13. The BMW then drove off from me at a tremendous rate of speed.

14. I kept pace with the BMW and shouted at him for nearly striking me two times.

15. My son observed all of this transpire, but he did not keep pace with me.

16. Instead, my 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.

17. Because he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of his motorcycle and crashed.

18. Had it not been for the reckless actions of the BMW, my son would not have been injured.

19. I am attesting to these facts in this affidavit pursuant to S.C. Code Section 38-77-170.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

6-12-23
Date

Thomas Carswell, Sr.

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before me this the 12th day of June, 2023.

Kimberly Bradley
Notary Public, State of South Carolina
My Commission Expires May 7, 2031

Notary Public
My Commission Expires: May 7, 2031

TSC Affiant's Initials

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 11 9:57 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**BLAIR VANA**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Blair Vana.
2. I am a citizen and resident of Greenville County, South Carolina.
3. I witnessed a crash involving a motorcycle on or about April 26, 2021 on I-385 Southbound.
4. It is my understanding that the young man who crashed is named Thomas Carswell.
5. The young man and his father were riding their motorcycles ahead of my vehicle.
6. To my understanding, a vehicle nearly struck them and sped off.
7. I witnessed the father drive off.
8. After the father drove off, the son crashed his motorcycle on I-385 and was hurt badly.
9. It was later explained to me that the father drove off after the vehicle that nearly struck him and his son.
10. I am attesting to these facts in this affidavit pursuant to S.C. Code Section 38-77-170.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

8/30/2024
Date

Blair Vana
Blair Vana

BV
Affiant's Initials

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before
me this the 30th day of August, 2024.

Notary Public
My Commission Expires: 7/23/2025

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STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**MELISSA MACK**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Melissa Mack.
2. I am a citizen and resident of Lexington County, South Carolina.
3. On or about April 26, 2021, I witnessed a young man on a motorcycle crash on I-385 in Greenville County.
4. Before the young man on the motorcycle crashed, an SUV came flying down the interstate.
5. The SUV was swerving in and out of traffic and going around people at an extremely high rate of speed.
6. That SUV was getting on and off the onramps and offramps to go around vehicles illegally.
7. The SUV was driving recklessly and cut in front of the motorcycle and another motorcycle with which it was traveling.
8. I was behind both motorcycles for the entirety of these events.
9. I witnessed the SUV nearly hit the motorcycles, then I witnessed one motorcyclist attempt to stay with the SUV, while the other motorcyclist stayed in front of me and did not keep pace with the SUV.
10. Shortly thereafter, the motorcycle that did not keep pace with the SUV, apparently focusing on the SUV, crashed.

MM Affiant's Initials

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11. I remained on scene and provided my information to law enforcement and told law enforcement what I witnessed.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

9/3/24
Date

Melissa Mack
Melissa Mack

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before me this the 3rd day of Sept, 2024.

Notary Public
My Commission Expires: 7/23/2025

MM Affiant's Initials

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

Markel American Insurance Company, appearing in the name of Defendant John Doe, submits this memorandum in opposition to Plaintiff's Motion for Reconsideration of the Court's October 1, 2024 order.

PROCEDURAL HISTORY

Defendant seeks to clarify several dates related to the procedural history in Plaintiff's motion for reconsideration. 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 on April 24, 2024. *See* Exhibit A, DOI Service Letter, attached. The court records indicate that 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 as Possible UM Carrier on May 1, 2024. Markel American Insurance Company filed both its answer, appearing and defending in the name of Defendant, and its motion for judgment on the pleadings on May 23, 2024.

Plaintiff filed the Affidavit of Blair Vana on September 2, 2024. *See* Exhibit B, attached. The affidavit was filed as an exhibit to Plaintiff's Reply to Defendant's Memorandum in Support

of Motion to Dismiss, filed on the same date. On September 3, 2024, Plaintiff filed the Cover Sheet for Affidavit of Melissa Mack and the Affidavit of Melissa Mack. *See* Exhibit C, attached. The in-person hearing on Defendant's motion for judgment on the pleadings was held on September 5, 2024. The Webex recording system apparently did not record the statements made by Defendant's counsel at the hearing. Counsel has prepared an affidavit regarding the statements she made at the hearing on September 5, 2024 and has attached it to this memorandum. *See* Exhibit D, Affidavit of DuBose.

DISCUSSION

I. The Court's Order is Consistent with Rice v. Doe

Plaintiff's motion for reconsideration misstates the South Carolina Supreme Court's holding in Rice v. Doe, 442 S.C.160, 898 S.E.2d 127 (2024). The decision did not address the contents or sufficiency of the affidavits submitted in that case. 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 decision was based on an order dismissing the case 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 affidavits. The opinion was limited to whether the statute required that the affidavit be filed at the same time

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as the action. [1]

In this matter, the affidavit of Thomas Carswell, Sr. was not merely "filed alongside" the complaint. 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 complaint. *See* Comp., ¶ 8 -14, 16, 18-20 and Aff. of Carswell, Sr, ¶ 6, 8-12, 15-18. The complaint also specifically alleges that the affidavit satisfies the requirements of the statute. (Comp. ¶ 26).

The Rice decision specifically addresses Plaintiff's argument that this Court's decision incentivizes plaintiffs to withhold affidavits. The Court states:

> 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 plaintiff 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).

The affidavit of Thomas Carswell, Sr. is inextricably linked to the complaint and it was proper for this Court to review the filed affidavit that forms the basis of Plaintiff's claim. This Court also correctly held that the affidavit did not satisfy the statutory requirements as discussed more fully in Section III below.

[1] Rice v. Doe held that a witness affidavit may be produced after a lawsuit is filed and a close review of the case filings indicates that is exactly what happened in this matter. Plaintiff did not file the affidavit of Mr. Carswell, Sr. with the complaint. The Summons and Complaint were filed on March 13, 2024, referencing the affidavit as an exhibit and incorporating its factual statements into the complaint. However, the court filings indicate that the affidavit was not filed until April 9, 2024 with a letter from counsel asking that it be attached as an exhibit to the complaint. The affidavit was attached to the complaint when it was served on this party. *See* Exhibit A.

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

II. The Court Did Not Err in Converting Defendant's Motion to a Motion for Summary Judgment

The Court also properly converted Defendant's motion for judgment on the pleadings to a motion for summary judgment under Rule 12(c), SCRCP. Brown v. Leverette, 291 S.C. 364, 353 S.E.2d 697 (1987), cited as support for Plaintiff's argument, is factually distinguishable from the instant matter. In Brown, the defendant moved to dismiss the complaint and submitted affidavits in support of the motion. The trial court did not indicate it was going to consider the affidavits until the order was issued, depriving the plaintiff of a reasonable opportunity to respond to them.

In the instant matter, Plaintiff presented matters outside of the pleadings for the Court's consideration, the matters were not excluded by the Court, and Plaintiff is now objecting to their consideration. The affidavit of Blair Vana was submitted as an exhibit to and discussed in Plaintiff's Reply to Defendant's Memorandum in Support of Motion to Dismiss filed on September 2, 2024. On September 3, 2024, Plaintiff filed the affidavit of Melissa Mack with a cover sheet that states: "The Plaintiff, by and through his counsel of record, submits the following affidavit for inclusion in his case." *See* Exhibit C, attached. At the hearing on September 5, 2024, the Court asked defense counsel if there was any reason not to consider the affidavits of the two additional witnesses and defense counsel consented to their consideration. *See* Exhibit D, Affidavit of DuBose at ¶ 13. Both defense counsel and Plaintiff's counsel discussed the two additional affidavits during their arguments at the hearing. The Court's Form 4 order refers to the Court's review of both "the file" and the "submissions of the parties" as a basis for its ruling, which include the additional affidavits submitted by Plaintiff, and the formal order specifically references the affidavits.

A motion to dismiss is properly converted to a motion for summary judgment where the non-moving party submits documents outside the pleadings in response to the motion, the moving

party does not object to their consideration, and the court considers the documents when issuing its order. *See* Gilbert v. Miller, 356 S.C. 25, 586 S.E.2d 861 (Ct. App. 2003). The Court correctly converted the motion for judgment on the pleadings in this matter to a motion for summary judgment.

III. Summary Judgment was Proper

Plaintiff has failed to satisfy the requirements of a right of action under S.C. Code § 38-77-170 and summary judgment is proper. Plaintiff submitted three independent witness affidavits, none of which meet the statutory requirements. Mr. Carswell, Sr.'s affidavit is fatally deficient because he was not a witness to Plaintiff's accident. This fact was conceded at the hearing. (Transcript of Hearing, p. 10, line 17). Mr. Carswell, Sr.'s affidavit also fails to satisfy § 38-77-170(2)'s requirement that an independent witness must attest to actions of the unknown driver that causally contributed to the accident. *See* Gilliland v. Doe, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004). Although Ms. Vana and Ms. Mack both witnessed the Plaintiff lose control of his motorcycle, their affidavits also do not meet the statutory requirements regarding attesting to a causal connection between the actions of John Doe and the Plaintiff's injuries. Ms. Vana did not attest to any action of John Doe and Ms. Mack, like Mr. Carswell, Sr., did not attest to any facts indicating that the actions of John Doe contributed to the Plaintiff losing control of the motorcycle.

Plaintiff's motion for reconsideration mentions in a footnote that this Court's focus at the hearing was on causation and not the John Doe motorist statute. (Motion for Reconsideration, p. 5, fn. 4). The case law interpreting the statute and its requirements includes an analysis of causation. The issue of causation was raised in Defendant's Memorandum in Support of Motion for Judgment on the Pleadings. (Def. Memo. In Support, pp. 9-10). In Defendant's memorandum, causation was discussed in relation to the John Doe motorist statute and S.C. Code Ann. § 38-77-170(2)'s "the truth of the facts of the accident" requirement. Defendant cited the South Carolina Supreme Court's

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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adoption of the Court of Appeals' interpretation of § 38-77-170(2) as requiring that an 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." Gilliland v. Doe, 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004). After receiving two additional witness affidavits from Plaintiff after the filing of the Defendant's memorandum, defense counsel argued at the hearing that all three of the witness affidavits produced by Plaintiff failed to satisfy this requirement as required by the case law. *See* Exhibit D, Aff. of DuBose, ¶ 10-14.

A footnote in Plaintiff's motion for reconsideration also refers to Tucker v. Doe's citation of Wausau Underwriters Ins. Co. v. Howser regarding the causal connection required for an affidavit as passing the same 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* Motion for Reconsideration, pp. 11-12, fn. 9. The South Carolina Supreme Court has 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).

As discussed at the hearing, none of the affidavits presented in the instant matter establish a causal connection between the Plaintiff's injury and the John Doe vehicle. There is no indication

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

that John Doe's vehicle was an "active accessory" to Plaintiff's accident. John Doe did not swerve in front of Plaintiff, drop an item in the road the Plaintiff swerved to miss, or follow Plaintiff too closely. At most, the complaint and affidavits allege facts that Plaintiff was looking at his father interacting with the John Doe vehicle when he lost control of his motorcycle. In fact, the affidavits and the complaint indicate that, at the time the accident occurred, John Doe's vehicle was not in the vicinity of Plaintiff and was being pursued by Mr. Carswell, Sr. and Plaintiff. Even had Plaintiff satisfied the active accessory requirement, Mr. Carswell, Sr.'s decision to follow John Doe at a tremendous rate of speed to yell at him after their interaction had ended is an act of independent significance that would break any chain under the causation analysis cited by Plaintiff

The Complaint and affidavits submitted by Plaintiff fail to allege a set of facts that support a cause of action against John Doe and this Court correctly granted Defendant summary judgment.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that Plaintiff's motion for reconsideration of the Court's order granting Defendant summary judgment be denied.

s/ Susan Drake DuBose
Susan Drake DuBose, Esquire
SC Bar No.: 11543
BAKER, RAVENEL & BENDER, LLP
Post Office Box 8057
Columbia, SC 29202
Telephone: (803) 799-9091
Facsimile: (803) 779-3423
sdubose@brblegal.com
Attorneys for Markel American Insurance Company, appearing on behalf of John Doe

October 21, 2024

EXHIBIT A

DOI SERVICE LETTER WITH SUMMONS, COMPLAINT AND AFFIDAVIT OF CARSWELL, SR

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South Carolina Department of Insurance

Capitol Center
1201 Main Street, Suite 1000
Columbia, South Carolina 29201

Mailing Address:
P.O. Box 100105, Columbia, S.C. 29202-3105

HENRY McMASTER
Governor

MICHAEL WISE
Director

April 24, 2024

DATE RECEIVED
MAY - 1 2024
LEGAL DEPT.

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
MARKEL AMERICAN INSURANCE COMPANY
10275 W. Higgins Road, Suite 750
Rosemont, IL 60018-0000

Dear Sir:

On April 24, 2024, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-5-70. By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C Code Ann. § 38-77-150. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. The claimant, within this service letter, provided the following additional information regarding this first party claim: Thomas Carswell. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to spurvis@doi.sc.gov. When replying, please refer to File Number 198344, Thomas Carswell Jr. v. John Doe, 2024-CP-23-01585.

By:

Gwendolyn McGriff
General Counsel
(803)737-6732

Sincerely Yours,

Michael Wise
Director
State of South Carolina
Department of Insurance

Attachment

CC: Sam B. Tooker
PO Box 2446
Greenville, SC 29602

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STATE OF SOUTH CAROLINA)) COUNTY OF GREENVILLE)) Thomas Carswell, Jr.,)) Plaintiff,)) vs.)) John Doe, an unidentified motorist,)) Defendant(s).)	IN THE COURT OF COMMON PLEAS FOR THE THIRTEENTH JUDICIAL CIRCUIT C.A. No.: 2024-CP-23-_____ **SUMMONS** (Jury Trial Demanded)

TO: THE DEFENDANT HEREIN:

YOU ARE HEREBY SUMMONED and required to answer the COMPLAINT in this action of which a copy is herewith served upon you, and to serve a copy of your Answer on the subscribers at their office, 1001 East Washington Street, (P.O. Box 2446, 29602), Greenville, South Carolina, 29601, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiff will apply to the Court for relief demanded in the Complaint.

Respectfully Submitted,

/s/ Sam Tooker

Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
1001 East Washington Street (29601)
Post Office Box 2446
Greenville, South Carolina 29602-2446
(864) 271-2636 office
(864) 271-2637 fax
Sam@GreenvilleLegal.com
Attorneys for Plaintiff

Greenville, South Carolina
March 13, 2024

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STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	C.A. No.: 2024-CP-23-_____
)	
Thomas Carswell, Jr.,)	
)	
Plaintiff,)	**COMPLAINT**
)	(Jury Trial Demanded)
vs.)	
)	
John Doe, an unidentified motorist,)	
)	
Defendant(s).)	
)	

Plaintiff complains of the Defendant as follows:

1. At the time of the collision central to this complaint, Plaintiff was a citizen and resident of Greenville County, South Carolina.
2. Plaintiff is presently a citizen and resident of Flagler County, Florida.
3. Defendant John Doe has not been identified, and his whereabouts are unknown.
4. The incident giving rise to this cause of action occurred in Greenville County, South Carolina.
5. South Carolina Code Section 15-7-30 provides that this Court is the appropriate venue to hear Plaintiff's Complaint.
6. Plaintiff has brought this action pursuant to South Carolina Code Section 38-77-180 (1976, as amended). Defendant John Doe has the capacity to be sued as "John Doe" pursuant to this statute.
7. On or about April 26, 2021, Plaintiff was driving a motorcycle with his father in Greenville County, South Carolina.

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

8. 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.
9. According to Plaintiff's father's affidavit, Plaintiff and his father got onto I-385 Southbound from Woodruff Rd.
10. As Plaintiff and his father merged onto I-385, John Doe, driving a dark in color BMW SUV and operating with reckless disregard for the rights and safety of others, came flying up behind Plaintiff and his father in the near lane.
11. The BMW, driven by John Doe, swerved and went to Plaintiff's father's right onto the shoulder of the roadway.
12. The BMW, driven by John Doe, then appeared to intentionally cut back into Plaintiff's father's lane of travel with no regard for any other motorist's safety.
13. Plaintiff's father had to quickly merge into the lane to his left which was free of traffic.
14. The BMW, driven by John Doe, then again merged into Plaintiff's father's lane of travel, almost striking him and forcing him to merge into the lane to his left.
15. It appeared that John Doe was attempting to strike Plaintiff's father with his motor vehicle on purpose.
16. Plaintiff observed all of these events transpire as he was riding immediately behind his father.
17. John Doe and Plaintiff's father rode next to each other after the repeated near-collisions caused by John Doe, accelerating away from Plaintiff in an apparent "road rage" type incident.

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

18. Plaintiff then merged to the far-left lane to observe his father about whose safety Plaintiff was concerned given the driving and behaviors of John Doe.

19. Because Plaintiff was paying attention to the BMW driven by John Doe that nearly killed his father, Plaintiff's motorcycle crashed.

20. Had it not been for the reckless actions of John Doe, Plaintiff would not have been injured.

21. It was foreseeable that John Doe's driving, behavior, and apparent attempt to strike Plaintiff's father with his motor vehicle could result in injuries or damage to other motorists on the roadway.

22. It was a natural and probable consequence of John Doe's driving, behavior, and apparent attempt to strike Plaintiff's father with his motor vehicle that another motorist could be injured.

23. No third party's actions broke the causal chain, and John Doe's actions were such that they would probably cause injury to something or someone.

24. John Doe's actions were abnormally dangerous and created a highly significant risk of harm to others.

25. The collision in this case was reported to appropriate police authorities on the day of the wreck and within a reasonable time after its occurrence in accordance with South Carolina Code Section 38-77-170(1).

26. The affidavit from Plaintiff's father attached as **"Exhibit A"** satisfies the requirements of South Carolina Code Section 38-77-170(2).

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

27. Plaintiff was not negligent in failing to identify the John Doe motorist operating the dark in color BMW SUV that caused Plaintiff's wreck consistent with South Carolina Code Section 38-77-170(3).

28. As a direct and proximate result of the collision, Plaintiff sustained significant bodily injuries and damage to his personal property. Plaintiff underwent surgery and incurred a great deal of scarring.

29. All of the foregoing damages are attributable to the acts and/or omissions of Defendant John Doe.

FOR A FIRST CAUSE OF ACTION
Negligence/Gross Negligence/Recklessness

30. The Plaintiff reiterates and realleges the prior allegations in this Complaint as if repeated herein verbatim.

31. Defendant John Doe was careless, negligent, reckless, and grossly negligent at the time and place above-mentioned in the following particulars:

    a. In failing to keep the Defendant's vehicle under proper control;

    b. In failing to use the degree of care and caution that a reasonable and prudent person would have used under the circumstances then and there existing;

    c. In failing to maintain a proper lookout;

    d. In failing to refrain from attempting to strike another motorist;

    e. In driving at a speed that was greater than reasonable and prudent;

    f. In failing and omitting to exercise proper precautions under the existing circumstances;

    g. In driving unreasonably and imprudently;

    h. In failing to remain on the scene of a collision that Defendant John Doe caused;

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

i. In failing to drive cautiously;

j. In driving recklessly;

k. In driving in a manner that was abnormally dangerous;

l. In engaging in apparent "road rage;"

m. In failing to keep his vehicle under proper control;

n. In violating the laws, statutes, and ordinances of the State of South Carolina; and

o. In failing to exercise the degree and caution that a reasonable prudent person would have executed under the circumstances then and there prevailing.

All of which were the direct and proximate cause of the damages suffered by Plaintiff, said acts being in violation of the statutory laws of the State of South Carolina and the dictates of ordinary prudence.

32. As a direct and proximate result of the willful, wanton, and reckless negligence of Defendant John Doe, Plaintiff suffered physical harm, injury, damage to personal property, and scarring.

33. The Plaintiff is informed and believes that he is entitled to judgment against Defendant John Doe for such an amount of actual and punitive damages as the trier of fact may find, for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

FOR A SECOND CAUSE OF ACTION
Negligence Per Se/Gross Negligence Per Se/Recklessness Per Se

34. The Plaintiff reiterates and realleges the prior allegations in this Complaint as if repeated herein verbatim.

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

35. On or about April 26, 2021, there existed in the State of South Carolina a statute governing a driver of a vehicle's duties to maintain the speed of his vehicle, S.C. Code Ann. § 56-5-1520.

36. S.C. Code Ann. § 56-5-1520 states that "[a] person shall not drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions . . ."

37. S.C. Code Ann. § 56-5-1520 further requires a driver to control his speed "to avoid colliding with a person, vehicle, or other conveyance on . . . the highway in compliance with legal requirements and the duty of a person to use due care."

38. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by driving his vehicle at a speed greater than was reasonable and prudent, and attempting to strike Plaintiff's father, while Plaintiff was directly behind both motorists.

39. On or about April 26, 2021, there existed in the State of South Carolina a statute governing a driver of a vehicle's duties not to follow too closely, S.C. Code Ann. § 56-5-1930.

40. S.C. Code Ann. § 56-5-1930 states that "[t]he driver of a motor vehicle shall not follow another motor vehicle more closely than is reasonable and prudent . . ."

41. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by driving his vehicle in a manner that followed Plaintiff's father's vehicle more closely than was reasonable and prudent, as prohibited by statute.

42. On or about April 26, 2021, there existed in the State of South Carolina a statute governing a driver of a vehicle's duties after being involved in a collision, S.C. Code Ann. § 56-5-1210, et seq.

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

43. S.C. Code Ann. §§ 56-5-1210-1360 provide that a motorist involved in a collision shall remain on the scene of any collision in which he is involved until he has provided his name, address, vehicle registration number, and driver's license number to any other individuals involved in said collision as well as rendering aid to "any person injured."

44. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by failing to remain on scene after causing the wreck that injured Plaintiff. Rather than fulfill this duty, Defendant John Doe fled the scene of the collision he caused to avoid responsibility for his actions.

45. On or about April 26, 2021, there existed in the State of South Carolina a statute stating that it is unlawful to "drive[] any vehicle in such a manner as to indicate either a willful or wanton disregard of the safety of persons or property", S.C. Code Ann. § 56-5-2920.

46. Defendant John Doe, on or about April 26, 2021, violated the above-referenced statute by driving recklessly and indicating a willful and wanton disregard for the safety of other motorists.

47. Defendant John Doe's willful, wanton, and reckless violation of the above-referenced statutes was the direct and proximate cause of the physical injuries, property damages, and lost wages suffered by the Plaintiff.

48. As a direct and proximate result of the willful, wanton, and reckless negligence of Defendant John Doe, Plaintiff suffered physical harm, injury, damage to personal property, and the accrual of medical bills.

49. The Plaintiff is informed and believes that he is entitled to judgment against Defendant John Doe for such an amount of actual and punitive damages as the trier of fact may find,

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

FOR A THIRD CAUSE OF ACTION
Strict Liability for Abnormally Dangerous Activities

50. The Plaintiff reiterates and realleges the prior allegations of this Complaint as if repeated verbatim herein.

51. John Doe's conduct on April 26, 2021, was abnormally dangerous, which exposes John Doe to strict liability for the harm John Doe caused.

52. An activity that is not of common usage and creates a foreseeable and highly significant risk of physical harm to others, even when they exercise reasonable care, constitutes an abnormally dangerous activity. Restatement (Third) of Torts § 20(b) (2009).

53. Upon information and belief, John Doe's decision to attempt to hit a motorcyclist is an abnormally dangerous activity.

54. Upon information and belief, John Doe's decision to engage in "road rage" type behavior is an abnormally dangerous activity.

55. Upon information and belief, John Doe's decision to travel at excess speeds while arguing with Plaintiff's father is an abnormally dangerous activity.

56. Upon information and belief, John Doe's actions while operating his BMW and coming up behind Plaintiff and Plaintiff's father were abnormally dangerous activities.

57. A person found by a court to have carried on an abnormally dangerous activity will be subject to strict liability for physical harm resulting from that activity. Id. § 20(a).

58. Strict liability for abnormally dangerous or "ultrahazardous" activities has been recognized in South Carolina. See: Sherr v. South Carolina Electric & Gas Company, 180 F.Supp.3d 407 (D.S.C. 2016).

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

59. Defendant's decision to drive dangerously around motorcycles, attempt to hit Plaintiff's father, and then speed off, while weaving in and out of traffic, is intrinsically dangerous, not a common activity, and one that created a significant risk of harm to others.

60. Defendant's Doe's driving on April 26, 2021, was not commonly done and was not an activity of common usage.

61. Defendant's driving on April 26, 2021, created a foreseeable and highly significant risk of physical harm even when reasonable care is exercised by all actors.

62. As a direct and proximate result of the abnormally dangerous or ultrahazardous activities of the Defendant, the Plaintiff suffered great physical harm and injury, all of which has caused and will continue to cause Plaintiff to undergo much physical pain and suffering and mental anguish and distress and has caused and will continue to cause Plaintiff to have to spend money for medical services. The Plaintiff has suffered permanent injury as well as loss of enjoyment of life, suffered damage to his property, and has been otherwise damaged.

63. The Plaintiff is informed and believes that he is entitled to judgment against the Defendant for such an amount of actual and punitive damages as the tier of fact may find, for the costs and disbursements of this action, and for such other and further relief as this Court may deem just and proper.

WHEREFORE, Plaintiff prays for judgment against Defendant John Doe for actual and punitive damages in such amount as a jury shall award, together with the costs of this action and any such other and further relief as this Court may deem to be just and proper.

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Mar 13 12:23 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

/s/ Sam Tooker

Samuel Barton Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
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Attorney for the Plaintiff

Greenville, South Carolina
Date: March 13, 2024

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ELECTRONICALLY FILED - 2024 Apr 09 11:00 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

EXHIBIT A

STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**THOMAS S. CARSWELL, SR.**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Thomas S. Carswell, Sr.
2. I am a citizen and resident of Greenville County, South Carolina.
3. I am the father of Thomas S. Carswell, Jr.
4. On or about April 26, 2021, my son, Thomas Carswell, Jr., and I were taking a motorcycle to my house to load it onto a trailer.
5. I was driving my motorcycle, and my son was driving the motorcycle that we were going to load onto the trailer.
6. We both got onto I-385 Southbound from Woodruff Rd.
7. I was in front of my son.
8. As I merged onto I-385, a gray in color BMW SUV came flying up behind me in the near lane.
9. That BMW swerved and went to my right onto the shoulder of the roadway.
10. The BMW then appeared to intentionally cut back into my lane of travel with no regard for my safety.
11. To avoid a collision, I had to quickly merge into the next lane, which was, fortunately, free of traffic.
12. Then, the BMW again merged into my lane of travel almost striking me and forcing me to merge into the lane to my left.

TSC Affiant's Initials

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ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

EXHIBIT A

13. The BMW then drove off from me at a tremendous rate of speed.

14. I kept pace with the BMW and shouted at him for nearly striking me two times.

15. My son observed all of this transpire, but he did not keep pace with me.

16. Instead, my 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.

17. Because he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of his motorcycle and crashed.

18. Had it not been for the reckless actions of the BMW, my son would not have been injured.

19. I am attesting to these facts in this affidavit pursuant to S.C. Code Section 38-77-170.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

6-12-23
Date

Thomas Carswell, Sr.

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before me this the 12th day of June, 2023.

Kimberly Bradley
Notary Public, State of South Carolina
My Commission Expires May 7, 2031

Notary Public
My Commission Expires: MAY 7, 2031

TSC Affiant's Initials

EXHIBIT B
AFFIDAVIT OF BLAIR VANA

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA)
)
)
)
)
)

COUNTY OF GREENVILLE

AFFIDAVIT OF BLAIR VANA

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Blair Vana.
2. I am a citizen and resident of Greenville County, South Carolina.
3. I witnessed a crash involving a motorcycle on or about April 26, 2021 on I-385 Southbound.
4. It is my understanding that the young man who crashed is named Thomas Carswell.
5. The young man and his father were riding their motorcycles ahead of my vehicle.
6. To my understanding, a vehicle nearly struck them and sped off.
7. I witnessed the father drive off.
8. After the father drove off, the son crashed his motorcycle on I-385 and was hurt badly.
9. It was later explained to me that the father drove off after the vehicle that nearly struck him and his son.
10. I am attesting to these facts in this affidavit pursuant to S.C. Code Section 38-77-170.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

8/30/2024
Date

Blair Vana
Blair Vana

BV
Affiant's Initials

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before
me this the 30th day of August, 2024.

Notary Public
My Commission Expires: 7/23/2025

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Sep 02 4:04 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

_____ Affiant's Initials

EXHIBIT C

AFFIDAVIT OF MELISSA MACK

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Sep 03 12:40 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE)	C.A. No.: 2024-CP-23-01585
)	
Thomas Carswell, Jr.,)	
)	
Plaintiff,)	
)	**COVER SHEET FOR**
vs.)	**AFFIDAVIT OF MELISSA MACK**
)	
John Doe, an unidentified motorist,)	
)	
Defendant(s).)	
)	

The Plaintiff, by and through his counsel of record, submits the following affidavit for inclusion in his case.

Respectfully Submitted,

/s/ Sam Tooker

Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
1001 East Washington Street (29601)
Post Office Box 2446
Greenville, South Carolina 29602-2446
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(864) 271-2637 fax
Sam@GreenvilleLegal.com
Attorney for Plaintiff

Greenville, South Carolina
September 3, 2024

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Sep 03 12:40 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**MELISSA MACK**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Melissa Mack.
2. I am a citizen and resident of Lexington County, South Carolina.
3. On or about April 26, 2021, I witnessed a young man on a motorcycle crash on I-385 in Greenville County.
4. Before the young man on the motorcycle crashed, an SUV came flying down the interstate.
5. The SUV was swerving in and out of traffic and going around people at an extremely high rate of speed.
6. That SUV was getting on and off the onramps and offramps to go around vehicles illegally.
7. The SUV was driving recklessly and cut in front of the motorcycle and another motorcycle with which it was traveling.
8. I was behind both motorcycles for the entirety of these events.
9. I witnessed the SUV nearly hit the motorcycles, then I witnessed one motorcyclist attempt to stay with the SUV, while the other motorcyclist stayed in front of me and did not keep pace with the SUV.
10. Shortly thereafter, the motorcycle that did not keep pace with the SUV, apparently focusing on the SUV, crashed.

MM Affiant's Initials

11. I remained on scene and provided my information to law enforcement and told law enforcement what I witnessed.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

9/3/24
Date

Melissa Mack
Melissa Mack

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before me this the 3rd day of Sept, 2024.

Notary Public
My Commission Expires: 7/23/2025

MM Affiant's Initials

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585
ELECTRONICALLY FILED - 2024 Sep 03 12:40 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

EXHIBIT D

AFFIDAVIT OF SUSAN DRAKE DUBOSE

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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

PERSONALLY APPEARED BEFORE ME, Susan Drake DuBose, Esquire, who, being duly sworn, deposes and states that the following is based upon her own knowledge, except as to matters stated on information and belief, and as to matters that she believes them to be true:

1. I am an attorney licensed to practice law in the State of South Carolina with Baker, Ravenel & Bender, LLP located in Columbia, South Carolina.
2. I represent Markel American Insurance Company, a purported uninsured motorist insurance carrier appearing and defending the above-referenced matter in the name of Defendant John Doe.
3. On September 5, 2024 I appeared at the Greenville County Courthouse for an in person hearing before the Honorable G.D. Morgan, Jr. on the motion for judgment on the pleadings I filed on behalf of my client.
4. The hearing notice indicated that the hearing was to be recorded by the Webex system in place of a court reporter.
5. Unbeknownst to me, the microphone at the table I was standing at malfunctioned and the statements I made during the hearing were not recorded by the Webex system.

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

6. I have reviewed the transcript of the hearing provided by counsel for the Plaintiff as an exhibit to his motion for reconsideration in this case and it indicates that my statements are "indiscernible".
7. I am submitting this affidavit to provide a record of the statements that I recall making at the hearing on September 5, 2024.
8. After introducing myself, I stated that the basis of the motion was that, even assuming the truth of the facts alleged in the Plaintiff's Complaint and the attached affidavit of Thomas Carswell, Sr., Defendant was entitled to judgment as a matter of law because Plaintiff did not satisfy the statutory requirements for a right of action or recovery against an uninsured motorist.
9. I stated that this was not a typical John Doe case where John Doe was following too close, cut off a vehicle, dropped an item in the road, or a hit and run. I stated that it was a single vehicle accident and detailed the facts as stated in the memorandum I filed in support of the motion. I stressed that Plaintiff's accident occurred after John Doe's interaction with his father ended while Plaintiff's father was pursuing John Doe and Plaintiff was keeping his father in his sight and wrecked.
10. I discussed the statutory requirements for independent witness affidavits and argued that the affidavit of Thomas Carswell, Sr. did not satisfy them because he was not an eyewitness to the accident as required by the statute and case law.
11. I also argued that, even if he was an eyewitness, his affidavit did not testify to actions of the unknown driver that caused Plaintiff's accident under the test adopted in Gilliland v. Doe I stated that Mr. Carswell, Sr.'s affidavit placed Mr. Carswell, Sr. pursuing John Doe at "a tremendous rate of speed" to yell at him and ahead of the

Plaintiff when Plaintiff allegedly lost control of his motorcycle because he was watching his dad.

12. After discussing the affidavit of Thomas Carswell, Sr. I mentioned the affidavits of the two additional witnesses that were filed after I filed my memorandum in support of my motion.

13. Judge Morgan then asked me whether there was any reason for him not to consider the two additional affidavits submitted by Plaintiff. I stated that Plaintiff's counsel may want to address the affidavits first but I was happy for Judge Morgan to consider them.

14. I stated that the additional affidavits satisfied the eyewitness requirement but did not satisfy the casual connection requirement as set forth in the Supreme Court's Gilliland v.Doe decision. I pointed out that the affidavit of Blair Vana did not attest to any actions she perceived of John Doe. I also stated that the affidavit of Melissa Mack did not satisfy the statutory requirements because she did not testify to any actions of John Doe that caused the Plaintiff to lose control of his motorcycle.

15. Following Plaintiff's counsel argument, Judge Morgan asked me if this was a "totality of the circumstances" issue. I disagreed and replied that the allegations of the complaint and affidavits all showed that the interaction between John Doe and Mr. Carswell, Sr. had thankfully ended without any accident or any injuries when the BMW sped off. I also stated that, after the interaction had ended, Mr. Carswell, Sr. decided to pursue the BMW to yell at him and Plaintiff decided to follow his father.

16. I also argued that this case did not involve a novel issue of law. I stated that the facts were novel but the law is very clear.

17. I referred to the Collins case as stating that one purpose of the affidavit requirement is

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

to provide tangible evidence of a good faith basis for a claim.

18. I disagreed with Plaintiff's reading of Rice v. Doe as only requiring that an affidavit be presented over the "lifespan" of the case and referenced the opinion's language regarding the affidavit being central to the success of the claim and being produced at the earliest opportunity.

19. I stated that the Silva v. Allstate case does not allow the eyewitness requirement to be satisfied by circumstantial evidence.

20. I disagreed with the Plaintiff's interpretation of the Tucker and Gilliland decisions and, upon information and belief, referred to language in the cases regarding witness affidavits attesting to facts showing a causal connection between an unknown vehicle and an injury.

21. I also stated that the complaint did not allege any interaction between John Doe and Plaintiff and that all of the allegations in the complaint related to John Doe's interactions with his father.

22. I ended my statements by requesting that the court grant the motion.

FURTHER AFFIANT SAYETH NOT.

Susan Drake DuBose

Subscribed to and sworn before me

on this 21 day of Oct, 2024

Notary Public for the State of South Carolina,
My Commission Expires: 9/18/2034

ELECTRONICALLY FILED - 2024 Oct 21 2:55 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA
COUNTY OF GREENVILLE
IN THE COURT OF COMMON PLEAS
C.A. NO. 2024-CP-23-01585

THOMAS CARSWELL, JR.

PLAINTIFF,

vs.

JOHN DOE

DEFENDANT.

H E A R I N G
BEFORE THE HONORABLE G.D. MORGAN, JR.

DATE:	SEPTEMBER 5, 2024
TIME:	N/A
LOCATION:	SOUTH CAROLINA CIRCUIT COURT 13
TRANSCRIBED BY:	KELLEY PRIMM

LEGAL EAGLE
Post Office Box 5682
Greenville, South Carolina 29606
864-467-1373
depos@legaleagleinc.com

APPEARANCES:

SAMUEL B. TOOKER, ESQUIRE

DAVID R. PRICE, JR., PA

PO BOX 2446

GREENVILLE, SOUTH CAROLINA 29602

ATTORNEY FOR THE PLAINTIFF,

SUSAN DUBOSE, ESQUIRE

BAKER RAVENEL & BENDER, LLP

PO BOX 8057

COLUMBIA, SOUTH CAROLINA 29202

ATTORNEY FOR THE DEFENDANT.

INDEX

PROCEEDINGS..... 4
CERTIFICATE OF TRANSCRIBER..... 22

EXHIBITS

(NONE MARKED)

(THIS TRANSCRIPT MAY CONTAIN QUOTED MATERIAL. SUCH MATERIAL IS REPRODUCED AS READ OR QUOTED BY THE SPEAKER.)

P R O C E E D I N G S

THE COURT: All right. Next matter of *Carswell versus Doe.* 2024-CP-23-01585. All right. If y'all would identify yourself for the record, and who you represent.

MR. TOOKER: Sam Tooker on behalf of the Plaintiff.

THE COURT: All right. (Indiscernible) motion for (indiscernible) pleadings. I'll hear from you.

MS. DUBOSE: (Indiscernible)

THE COURT: I've read it, but I'll let you, if you want to for the record.

MS. DUBOSE: (Indiscernible)

THE COURT: It's not your classic -- classic John Doe case?

MS. DUBOSE: (Indiscernible)

THE COURT: And (indiscernible) was ahead of Junior, right?

MS. DUBOSE: (Indiscernible)

THE COURT: So they can keep an eye on it and see what's going on?

MS. DUBOSE: (Indiscernible)

THE COURT: Who witnessed it?

MS. DUBOSE: (Indiscernible)

THE COURT: Is there any reason for me not to consider them before I get -- before you get to the issue of whether sufficient?

MS. DUBOSE: (Indiscernible)

MR. TOOKER: I don't know if The Court wants to hear from me on that point, or I'll just wait my turn.

THE COURT: Yeah, just wait.

MS. DUBOSE: (Indiscernible)

THE COURT: All right. Thank you. I'll hear from the Plaintiff.

MR. TOOKER: Yes, sir. Your Honor, May I please The Court? And I'm going to rehash, in essence, what we argued in our reply memorandum. So if at any point I start arguing stuff you've already heard from us via our memorandum, please let me know, and I'll move on.

So first and foremost, and I think you already understand the allegations central to the complaint. We do think these factual circumstances are somewhat unique. And of course, in my memorandum, I cited the case law as it relates to novel issues of law, and how The Court's disfavor of ruling on novel issues of law on motions to dismiss at the stage in litigation, given the necessity of developing a record upon which you could subsequently base some sort of motion and then potentially an appellate case.

First, with regards to the John Doe motorist statute, you know, the purpose of the statute, and this is outlined in the case law, it's in Collins, which defense Counsel cited. It's in Enos v. Doe, which I believe defense Counsel cited.

But there are three primary purposes, the overwhelming or overarching, most important, is fraud prevention. So the idea that The Courts cite over, and over, and over again, is the purpose of our John Doe motorist or phantom driver statute, is that we want to ensure that motorists are not committing fraud on insurance companies by virtue of claiming that third parties who they can not identify, cause collisions, when in reality, the third parties were not present.

And, you know, folks make up the existence of those parties or factual circumstances to subsequently make a claim. Here, that's not the case. I mean, here, it's evident.

And I think that Defense will be loath to argue that John Doe existed, that there was a guy driving like a complete jerk at high rates of speed, that nearly struck motorists on the interstate on the day in question.

I don't think that there is an argument that this has been concocted whole cloth to create, you know, a cause of action when one otherwise did not exist. John Doe is a guy. John Doe was operating a motor vehicle.

That operation of the motor vehicle, we have alleged, is the proximate cause of Plaintiff's injuries. So as it relates to that first issue with fraud prevention, I don't think that there is an issue for The Court to be concerned

about.

That this is something that's been bought -- brought without substantial, factual basis. Second, it's for purposes of affording defense Counsel the ability to cross examine witnesses at trial.

Again, that's cited in that he Enos case. Third, it's for the purpose of putting the defense Counsel on notice of what the facts alleged are by a particular claim. And, of course, other items and documents do that.

That's why there is the police reporting requirement. But those are the three principles -- or three notions that are cited by our appellate courts as being the legislative basis for the affidavit requirement in our John Doe motorist statute.

Now, the thing that I think supersedes all of this, and what makes this motion to dismiss untimely and premature, is *Rice v. Doe*. So *Rice v. Doe* is a 2024 case. And Your Honor, I have all the cases that I cite printed, if you would require them.

I've provided copies to defense Counsel. Okay. So *Rice v. Doe* provides that quote, there is no requirement in SC code section set 38-77-170, that the witness affidavit be filed at the same time the action is filed, end quote.

As quote, the requirement is essential to the success of the claim, quote, at least one affidavit complying with

statute must be submitted during the lifespan of the case, right? So the question is not at the time of filing, is there an affidavit?

It's over the course of litigation, is an affidavit, at least one, submitted, that sufficiently satisfies the requirements of the statute. The Court does provide that if a Plaintiff engages in sort of foul play with discovery, then they are subject to rule 37 motions and rule 55 motions -- or rule 56 motions.

So the notion in Rice is that you won't -- don't want to deprive a Plaintiff against a John Doe of their putative cause of action because of the lack of an affidavit, or because they've only been able to obtain one affidavit or multiple affidavits, if those affidavits are insufficient at the time of the filing of the complaint.

I think the purpose, I mean, the way The Court constructs the statutes, they say is not required. The legislature, if they wanted it, they would have written it in there like they did into medical malpractice, you know, legislation.

Because they didn't, the assumption is it's not required. So Rice is plain that you don't need one in order to survive at this stage. Secondary to the arguments about Rice and the timeliness of the affidavit, I think Plaintiff's father's affidavit, in and of itself, is sufficient to

satisfy both the quote, unquote, witness provision of the of the statute, but also the truth of the matter provision of the statute.

So those are both baked into subsection two. And as it relates to the affidavit, the person has to witness the event, and they have to be able to attest the truth of the matter of the circumstances to which they are attesting.

So defense Counsel argues that to witness a thing, you have to see it. And I don't see that. Witness does not mean, necessarily, eyeball, right? So here, and I'll give you an example. I don't know if The Court is familiar with the movie The Big Lebowski. Ever seen The Big Lebowski, Your Honor?

THE COURT: I don't think I have.

MR. TOOKER: An excellent movie. You should check it out. So in The Big Lebowski, there is a scene where a group of guys, the good guys, fight a group of bad guys. One of the good guys engages in fighting the bad guys, and then behind him is made aware, through his -- his observations of his environment, that one of his buddies has just had a heart attack.

Okay. And that's the scene. I don't think anyone would argue that the person engaged in the fight with the bad guys, who hears his buddy on the ground dying of a heart attack, didn't, in fact, witness those events.

He is a witness to the events. He's a witness to the altercation of the bad guys. He's a witness to the subsequent -- subsequent injuries to his friend. And he's made aware, by virtue of all the incumbent circumstances, that his friend is on the ground behind him dying. Similarly, in this case, Mr. Carswell Senior is aware of his circumstances, and is aware, after pulling off with John Doe, that his son is not there, is then aware of the crash, right? And so their argument is, if you don't eyeball the crash, it doesn't count. And I don't think that's the intent of the ---

THE COURT: You're saying automatically, because the son isn't there, that a crash happened? What if he just pulled off to tie his shoes or something?

MR. TOOKER: So his son's not there. And, I mean, this is now -- I worry about me proffering facts as he would testify to, but his son's not there. And he looks back and his son's down the ground.

He goes back to him, right? So the circumstances are such that all of a sudden, traffic's not keeping up. He's aware that something has changed. He looks back, there's a wreck, he goes back, right?

So, you know, if -- if the notion is fundamentally, we want to be aware of bogus claims and people making fraudulent claims about John Does, who don't exist, that -- that's

obviated ---

THE COURT: What if he just ---

MR. TOOKER: --- by the affidavit.

THE COURT: But what if he just lost control, and that's why he wrecked. And at the time, Senior looks back at him and he's wrecked?

MR. TOOKER: Yes.

THE COURT: So can that be possible? Does he have to -- do you need the statute? By saying, well, that -- he had a wreck, and it was a -- because of the John Doe?

MR. TOOKER: Yeah.

THE COURT: He just had a -- he lost control?

MR. TOOKER: Well, I want to be careful not to conflate two things. So one thing is contributory negligence, right, or comparative fault? Excuse me, not contributory, comparative fault.

So I think they have claims for comparative negligence, and how much negligence my own client bears, as it relates to his ability to maintain his motorcycle, while paying attention to other circumstances on the roadway, right?

That hadn't been said, you know, as it relates to the -- the understanding of why the person crashed. The two cases that we cite, that I think are directly on point in this case are Tucker and Gilliland.

So the Tucker case, it's *Tucker V doe*. It's a court of

appeals decision. The Tucker case, person behind a truck by about 150 feet, says they see the truck appear to swerve and then crash, right?

That was sufficient in that case for The Court of appeals to say yes, that affidavit conforms with the statute. When the trucker himself testified, I swerved to avoid a thing in front of me and crashed.

The person behind him couldn't see what was in front of the trucker. Doesn't know what was in front of the trucker, but he could say he appeared to swerve, right? Similarly, in Gilliland, and Gilliland ---

THE COURT: Wasn't that kind of -- he did see him swerve ---

MR. TOOKER: He saw him swerve and he saw him crash. And you know, the additional affidavits we have, they saw this guy lose it and crash, right?

THE COURT: Did senior actually see him crash, or did he turn around and saw him laying on the ground or whatever?

MR. TOOKER: I mean, you're asking me to proffer facts, but I would proffer that, no, that his eyes are ahead.

THE COURT: No -- what does your complaint -- what does the affidavit say?

MR. TOOKER: So my affidavit says that -- I don't want to quote improperly, but the affidavit says ---

THE COURT: And you're right. We're based on the

pleadings, and that's why I'm asking what the ---

MR. TOOKER: So the affidavit said, instead, my son moved in the far left lane to keep me in his line of sight to make sure that I was okay and did not get hurt. Then it says, because he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of his motorcycle and crashed.

Had it not been for the reckless actions of the BMW, my son would not have been injured, right? So that's what the affidavit says. So you're talking about his awareness of those facts, and I think you would have to testify as to what informed the reasonableness of those beliefs, right?

But I think that the affidavit itself, if you're just taking the words on the page, is sufficient to satisfy the statute. Now, that said, and again, like, just if we're going to have an honest argument, let's have an honest argument.

THE COURT: Well, let me ask you this, on paragraph 17, because he -- this is the affidavit of Senior, because he was paying attention to my interactions with the BMW that nearly killed me, my son lost control of his motorcycle and crashed. Now, how would he know that he was paying attention to his actions with the BMW? How would he know that?

MR. TOOKER: Well, again, I think Your Honor's asking me to proffer.

THE COURT: I mean, it's in his affidavit. So what does he -- well, it's, I'm not asking you to proffer. How would anybody know? Because it is not in there. There's nothing in the affidavit before paragraph 17 that says, I looked back and I saw my son, and he was not paying attention.

And I'm just using his exact -- he was looking left, or he's looking right, or he's looking at -- or he was on his phone, and therefore, I can make that conclusion because he was looking at his phone, looking behind him, he was not paying attention, and -- or he was paying attention to whatever.

I mean, the factual situation -- or the factual -- or the facts in the affidavit, don't seem to be there to support the conclusion in paragraph 17. And that -- would you agree with that?

MR. TOOKER: I wouldn't see that. I mean, I -- again, ---

THE COURT: I didn't think you would, but I thought I'd ask anyway.

MR. TOOKER: Yeah, well, I appreciate the question. The -- what I was about to mention was the Gilliland case. And so the Gilliland case, too, is one that I think is more on point than the two cases cited by defense Counsel and her memorandum.

Gilliland case is a case wherein, Plaintiff contends or

claims that she is being pursued by a group of rowdy young men, and that she is scared because they're pursuing her, and she runs off the roadway and then they leave the scene.

And independent witness says, I saw two pairs of headlights and then I saw one pair of headlights turn around in a field as if to go the opposite direction. And that's the information from the witness in the Gilliland case. That, The Court said was sufficient to corroborate the allegations from the Plaintiff, that the John Doe caused the collision to merit the ultimate successful prosecution in that case.

So the incumbent question for The Court was, is there information making, not making likely, but verifying that these circumstances claimed by the Plaintiff did, in fact, occur. And in that case, the Court held that they did.

I do want to take issue with something that defense Counsel said, because Gillian and Tucker both stand for the proposition that circumstantial evidence -- the affidavits can use circumstantial evidence to corroborate the claims of the Plaintiff.

And we would argue here that the circumstances, incumbent circumstances, as it relates to father's affidavit alone, are sufficient to create that circumstantial evidence necessary to merit the survival of the claim.

That is taking aside from the fact that it doesn't even

have to be before Your Honor at this point, because, again, per Rice, it is not a thing that is required to be submitted at this stage, and that's why, again, -- so, you know, we plead this case, get two additional affidavits, right? Discovery is ongoing, and there are additional witnesses, I imagine, who can provide affidavits that the other two that we've obtained, that are before Your Honor, Ms. Max says specifically, and explicitly, that she watches him, apparently distracted by the interactions between the BMW and his father, crash his bike, right?

So there is not an open factual question. The BMW is driving like a jerk. The dad and BMW go off on the right. The kid gets in the left, gets distracted and busts. I don't think that that is an open factual question, the open factual question is, how much fault would any finder of fact attribute to Plaintiff versus John Doe?

And that, I think, is the legitimate dispute in the case. Having said that, again, the issue in Gillian and Tucker, and both of these touch on -- so defense Counseling or memorandum argues both the, you know, she's says witness requires to see, right?

But the witness element, but then also the truth of the matter element. And in Tucker in particular, they talk about -- The Court talks about the truth of the matter requirement, and they say that it's not -- you don't need,

you know, proof positive of causation or anything.

They say that it is the same test as you would put a case through if you were talking about whether or not something arose in the course and scope of an operation of a motor vehicle.

So in the Tucker case, again, it's a, you know, the guy swerves and hits a concrete, I think, bridge support or divider or something. And the witness from behind said, well, he -- he moved and he hit something.

The witness couldn't say why, right? Similar in Gilliland, the witness couldn't say why the woman wrecked, right? Nope. They couldn't -- they couldn't tell The Court that, nobody could.

The only people who were capable of saying that were the Plaintiffs in those cases. You don't have to, pursuant to the statute, have the witness testify as to causation, and that's actually what the Defendants argued in Tucker.

So in Tucker, the issue that was argued by the Defendants was the same issue the Defense is arguing here, you've got to have every fact buttoned down by independent witness. If you don't, you lose.

And The Court said, no, that's not the requirement. The Court said the requirement is, you need information verifying that a third party was responsible for the collision, and there's a nexus between the third party information, or the

third party activity and the collision, right? That's -- that's the requirement.

THE COURT: All right. Very briefly, Ms. DuBose. Isn't it a totality of the circumstances, is that what the Plaintiff's saying, and is that legitimate? Is that a good argument?

If you just base it on the totality of the circumstances of what happened, the things that transpired before, then some things that transpired at it, isn't that enough? And to get around, which is the basis of John Doe so you don't have fraudulent claims. Is that enough in this case?

MS. DUBOSE: Well, Your Honor, (indiscernible).

THE COURT: There's more of a novel issue of facts. I don't think this -- it's not a -- yeah.

MS. DUBOSE: (Indiscernible)

THE COURT: All right. Mr. Tooker, is the sole reason or so cause in this case, based on your client watching his dad, and that's what caused his accident?

MR. TOOKER: I mean, so those are the factual allegations. So factual allegations are, by virtue, -- and it's not watching his dad.

THE COURT: Yeah. Your affidavit, or your client's -- or the father's affidavit says he was watching -- he was distracted because he was watching me, and that's why he wrecked. So, is the soul cause of this

accident, which precipitates this John Doe action, he's watching his dad, and that's what caused him to wreck?

MR. TOOKER: So we would argue that the -- that the nexus between John Doe's actions and the collision, and I call it a collision, the wreck, ---

THE COURT: But John Doe didn't do anything to Junior. John Doe was doing everything to Senior. My question is, is the sole cause of Junior's wreck, the result of him watching his dad?

MR. TOOKER: The cause of Junior's wreck is Junior's apprehension, given the circumstances that just transpired with the BMW, and then seeing the BMW and his dad up ahead and being concerned.

THE COURT: But again, it's watching John Doe ---

MR. TOOKER: It's been distracted.

THE COURT: --- and he's watching them, and that's what causes him to wreck?

MR. TOOKER: Yes, it is being distracted by virtue of the careless operation by John Doe.

THE COURT: John Doe didn't do anything to Junior.

MR. TOOKER: John Doe ---

THE COURT: John Doe was up there with Senior, right?

MR. TOOKER: With the time that Junior wrecked, John Doe is ahead of him with Senior. This all transpires quickly, very quickly. But he comes over nearly, and defense Counsel

can correct me if I'm wrong here, because now we're again, starting to talk on the facts, but they've deposed my client already that John Doe nearly takes them out, then John Doe comes back, nearly takes dad out again, and then appears to intentionally hit dad, or nearly hit dad, and that's when dad and John Doe go up ahead and client then crashes.

THE COURT: But the allegations in reading the affidavit from Senior is that, he wrecked -- Junior wrecked because he was watching Senior and John Doe up there, and the actions that they were doing, not the John Doe.

John Doe wasn't anywhere near Junior. He was up there with senior, and the actions that they were doing back and forth with each other, and the argument is out -- or the allegations, as I see in reading the affidavit, is that Junior wrecks because he is -- your argument is he was distracted. But let's just assume for argument purposes, that, okay, he was distracted because he was watching Senior, and is that what caused him to ---

MR. TOOKER: He is distracted because the BMW motorist operated his vehicle in a way that was reckless on the day in question. And it was the reckless operation of the BMW that was the nexus for the -- for the ---

THE COURT: That reckless operation was then seen by Junior, and Junior is upset and distracted by seeing what's going on up there in the front, that he wrecks, is that -- I

just want to make sure I'm clear as to what ---

MR. TOOKER: Yeah. So what we alleged in the complaint was that BMW engaged in road rage like behavior, and that road rage like behavior was the thing that distracted Plaintiff and caused him to crash. That's the allegation in the complaint.

THE COURT: All right. All right. I'll take it on advisement. Thank you both.

MR. TOOKER: I was just briefly ---

THE COURT: Very briefly. I've read everything, and I ---

MR. TOOKER: Okay.

THE COURT: --- I'm familiar with the law.

MR. TOOKER: Okay. I was just gonna say Rice and Tucker and Silva don't necessarily stand ---

THE COURT: I ---

MR. TOOKER: --- for the ---

THE COURT: I'm ---

MR. TOOKER: --- things that ---

THE COURT: I'm very familiar with all those cases.

MR. TOOKER: Okay.

THE COURT: Thank you all. Both of you made good arguments. I appreciate it. I'll let you know.

MR. TOOKER: Thank you, sir.

CERTIFICATE OF TRANSCRIBER

I, Kelley Primm, a court-approved transcriber, do hereby certify that the foregoing is a true, accurate and complete Transcript of Record of the proceedings had and evidence introduced in the trial of the captioned case, relative to appeal, in the Circuit Court 13 for Greenville County, South Carolina, on the 5th day of September, 2024.

I do further certify that I am neither of kin, counsel, nor interest to any party hereto.

Kelley Primm

Kelley Primm

September 19, 2024

STATE OF SOUTH CAROLINA)
COUNTY OF Greenville)

IN THE COURT OF COMMON PLEAS
13th Judicial Circuit
CASE NO. 2024CP2301585

Thomas Carswell Jr.,

PLAINTIFF,

v. John Doe, An unidentified motorist,

DEFENDANT.

AFFIDAVIT OF SERVICE

PERSONALLY, appeared before me, the undersigned, James Eskew, who being first duly sworn, states that the following was served:

(X) SUMMONS
(X) COMPLAINT
( ) PLAINTIFF'S INTERROGATORIES AND REQUESTS FOR PRODUCTION
(X) OTHER: Exhibit A

in the action captioned above on, John Doe, An unidentified motorist

( ) By personal delivery to him/her
(X) Statutory Agent for Service: Greenville County Clerk of Court: Laurel Martinez (Administrative Assistant)
( ) By delivery to _____, a person of discretion residing in the same residence and present in such residence at the time of service
( ) By delivery to _____, a person of discretion at his/her employment, and present at such employer at the time of service

and leaving with him/her 1 copy of the same at 305 E. North St Greenville, SC (address) on the 9th day of April, 2024, at 1:00 p.m. and that deponent is not a party to this action.

James Eskew – Server

Sworn to before me this the 9 day of April, 2024

Ashley M. Sanders
Notary Public for the State of SC
My Commission Expires: April 8, 2029

ASHLEY M. SANDERS
Notary Public - South Carolina
My Commission Expires April 8, 2029

ELECTRONICALLY FILED - 2024 Apr 09 2:16 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Jun 10 4:24 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

April 24, 2024

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
MARKEL AMERICAN INSURANCE COMPANY
10275 W. Higgins Road, Suite 750
Rosemont, IL 60018-0000

Dear Sir:

On April 24, 2024, I accepted service of the attached Summons and Complaint on your behalf. I am, hereby, forwarding that accepted process on to you pursuant to the provisions of S.C. Code Ann. § 38-5-70. By forwarding accepted process on to you, I am meeting a ministerial duty imposed upon me by S.C Code Ann. § 38-77-150. I am not a party to this case. The State of South Carolina Department of Insurance is not a party to this case. The claimant, within this service letter, provided the following additional information regarding this first party claim: Thomas Carswell. It is important for you to realize that service was effected upon your insurer on my date of acceptance for service.

You must promptly acknowledge in writing your receipt of this accepted process to spurvis@doi.sc.gov. When replying, please refer to File Number 198344, Thomas Carswell Jr. v. John Doe , 2024-CP-23-01585.

By:

Gwendolyn McGriff
General Counsel
(803)737-6732

Sincerely Yours,

Michael Wise
Acting Director
State of South Carolina
Department of Insurance

Attachment

CC: Sam B. Tooker
PO Box 2446
Greenville, SC 29602

ELECTRONICALLY FILED - 2024 Sep 03 12:40 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	C.A. No.: 2024-CP-23-01585
	)	
Thomas Carswell, Jr.,	)	
	)	
Plaintiff,	)	
	)	**COVER SHEET FOR**
vs.	)	**AFFIDAVIT OF MELISSA MACK**
	)	
John Doe, an unidentified motorist,	)	
	)	
Defendant(s).	)	
	)	

The Plaintiff, by and through his counsel of record, submits the following affidavit for inclusion in his case.

Respectfully Submitted,

/s/ Sam Tooker

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

Greenville, South Carolina
September 3, 2024

STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**MELISSA MACK**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Melissa Mack.
2. I am a citizen and resident of Lexington County, South Carolina.
3. On or about April 26, 2021, I witnessed a young man on a motorcycle crash on I-385 in Greenville County.
4. Before the young man on the motorcycle crashed, an SUV came flying down the interstate.
5. The SUV was swerving in and out of traffic and going around people at an extremely high rate of speed.
6. That SUV was getting on and off the onramps and offramps to go around vehicles illegally.
7. The SUV was driving recklessly and cut in front of the motorcycle and another motorcycle with which it was traveling.
8. I was behind both motorcycles for the entirety of these events.
9. I witnessed the SUV nearly hit the motorcycles, then I witnessed one motorcyclist attempt to stay with the SUV, while the other motorcyclist stayed in front of me and did not keep pace with the SUV.
10. Shortly thereafter, the motorcycle that did not keep pace with the SUV, apparently focusing on the SUV, crashed.

MM Affiant's Initials

ELECTRONICALLY FILED - 2024 Sep 03 12:40 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

11. I remained on scene and provided my information to law enforcement and told law enforcement what I witnessed.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

9/3/24
Date

Melissa Mack
Melissa Mack

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before me this the 3rd day of Sept, 2024.

Notary Public
My Commission Expires: 7/23/2025

MM Affiant's Initials

ELECTRONICALLY FILED - 2024 Sep 03 12:40 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Sep 03 12:41 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	FOR THE THIRTEENTH JUDICIAL CIRCUIT
COUNTY OF GREENVILLE	)	C.A. No.: 2024-CP-23-01585
	)	
Thomas Carswell, Jr.,	)	
	)	
Plaintiff,	)	
	)	**COVER SHEET FOR**
vs.	)	**AFFIDAVIT OF BLAIR VANA**
	)	
John Doe, an unidentified motorist,	)	
	)	
Defendant(s).	)	
	)	

The Plaintiff, by and through his counsel of record, submits the following affidavit for inclusion in his case.

Respectfully Submitted,

/s/ Sam Tooker

Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
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Sam@GreenvilleLegal.com
Attorney for Plaintiff

Greenville, South Carolina
September 3, 2024

ELECTRONICALLY FILED - 2024 Sep 03 12:41 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA	)	COUNTY OF GREENVILLE
	)	
	)	**AFFIDAVIT OF**
	)	**BLAIR VANA**
	)	
	)	

PERSONALLY appeared before me the undersigned, who being duly sworn, deposes and states:

1. My name is Blair Vana.
2. I am a citizen and resident of Greenville County, South Carolina.
3. I witnessed a crash involving a motorcycle on or about April 26, 2021 on I-385 Southbound.
4. It is my understanding that the young man who crashed is named Thomas Carswell.
5. The young man and his father were riding their motorcycles ahead of my vehicle.
6. To my understanding, a vehicle nearly struck them and sped off.
7. I witnessed the father drive off.
8. After the father drove off, the son crashed his motorcycle on I-385 and was hurt badly.
9. It was later explained to me that the father drove off after the vehicle that nearly struck him and his son.
10. I am attesting to these facts in this affidavit pursuant to S.C. Code Section 38-77-170.

I SWEAR OR AFFIRM THAT THE ABOVE AND FOREGOING REPRESENTATIONS ARE TRUE AND CORRECT TO THE BEST OF MY INFORMATION, KNOWLEDGE, AND BELIEF.

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.

8/30/2024
Date

Blair Vana
Blair Vana

BV
Affiant's Initials

State of South Carolina
County of Greenville
SUBCRIBED AND SWORN to before
me this the 30th day of August, 2024.

Notary Public
My Commission Expires: 7/23/2025

ELECTRONICALLY FILED - 2024 Sep 03 12:41 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Oct 15 12:45 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMONS PLEAS

C/A NO.: 2024-CP-23-01585

Thomas Carswell,

Plaintiff,

v.

John Doe, an unidentified motorist,

Defendant.

CERTIFICATE OF SERVICE

I, Kimberly Bradley, do hereby certify that I am the paralegal to Samuel B. Tooker, attorney for the Plaintiff with the firm of David R. Price, Jr., P.A., located in Greenville, South Carolina, and that on October 11, 2024, I sent via regular U.S. mail the foregoing ***Motion for Reconsideration and Exhibits*** to the following addressees:

The Honorable G. D. Morgan, Jr.
Circuit Judge, Greenville County Courthouse
305 E. North Street
Greenville, SC 29601
(via hand delivery and U.S. mail)

Susan Drake Dubose, Esq.
Baker Ravenel & Bender, LLP
PO Box 8057
Columbia, SC 29202

Kimberly Bradley | Paralegal
DAVID R. PRICE, JR., P.A.
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kimberly@greenvillelegal.com

ELECTRONICALLY FILED - 2024 Oct 31 10:30 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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.: _____

Thomas Carswell, Jr.,

Plaintiff,

v.

John Doe, an unidentified motorist,

Defendants,

NOTICE OF APPEAL

Thomas Carswell, Jr., hereby appeals the Order Granting Defendant's Motion for Judgement on the Pleadings of the Honorable G.D. Morgan, Jr., dated and filed with the Clerk of Court on October 1, 2024. Mr. Carswell filed a Motion for Reconsideration of the Court's Order pursuant to Rule 59 of the South Carolina Rules of Civil Procedure on October 11, 2024, which has not yet been adjudicated. However, out of an abundance of caution, Mr. Carswell hereby appeals the Court's Order Granting Defendant's Motion for Judgment on the Pleadings pending resolution of Plaintiff's Motion for Reconsideration

/s/Sam Tooker
Samuel B. Tooker (S.C. Bar # 78999)
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Attorneys for the Appellant Thomas Carswell, Jr.

Greenville, SC
Date: October 31, 2024

Other Counsel of Record:

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Attorney for Markel American Insurance Company, appearing on behalf of John Doe

Michael T. Coulter, Esq.
Clarkson, Walsh, & Coulter, P.A.
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Attorney for Progressive Northern Insurance Company Pursuant to S.C. Code Ann. §38-77-150

ELECTRONICALLY FILED - 2024 Oct 31 10:30 AM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

ELECTRONICALLY FILED - 2024 Nov 01 2:46 PM - GREENVILLE - COMMON PLEAS - CASE#2024CP2301585

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.: _____

Thomas Carswell, Jr.,

Plaintiff,

v.

John Doe, an unidentified motorist,

Defendants,

AMENDED NOTICE OF APPEAL

Thomas Carswell, Jr., hereby appeals the Order Granting Defendant's Motion for Judgement on the Pleadings of the Honorable G.D. Morgan, Jr., dated and filed with the Clerk of Court on October 1, 2024 and the Form 4 Order Denying Plaintiff's Motion for Reconsideration dated and filed with the Clerk of Court on October 31, 2024.

/s/Sam Tooker
Samuel B. Tooker (S.C. Bar # 78999)
DAVID R. PRICE, JR., P.A.
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(864) 271-2637 fax

Sam@GreenvilleLegal.com
Attorneys for the Appellant Thomas
Carswell, Jr.

Greenville, SC
Date: November 1, 2024

Other Counsel of Record:

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Attorney for Markel American Insurance
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150

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Certification of Counsel

The undersigned hereby certifies that the record on appeal contains all materials proposed to be included by any of the parties and not any other materials.

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