THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

W. Jeffrey Young, Circuit Court Judge

Appellate Case No. 2015-002354

Willie Jordan, Appellant,

v.

Jane Doe, Respondent,

INITIAL BRIEF OF APPELLANT

March 9, 2016

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2. Did the trial judge err in expanding upon the requirements of S.C. Code Ann. § 38-77-170(3) as set out by the legislature to additionally require the insured to bring criminal charges for an automobile accident in order to recover under his uninsured motorist policy?

3. Did the trial judge err in his footnote observation regarding Plaintiff's submission of an affidavit pursuant to Section 38-77-170 (2), even where not the basis for the judge's ruling?

STATEMENT OF THE CASE

Plaintiff brought suit against a Jane Doe driver pursuant to his uninsured motorist policy. A hearing on Defendant's Motion for Summary Judgment was held before the Honorable W. Jeffrey Young on March 19, 2015. Appearing to argue the motion were counsel for the Plaintiff and counsel on behalf of the uninsured carrier pursuant to S.C. Code Ann. § 38-77-140. On April 17, 2015, Judge Young granted Defendant's Motion for Summary Judgment upon finding that Plaintiff had failed to prove that he was not negligent in failing to determine the identity of the unknown driver at the time of the accident, as required by § 38-77-140 (3). Plaintiff's Motion for Reconsideration pursuant to Rule 59, SCRCP, was denied by form order served on November 5, 2015; written notice of the entry of the Order denying rehearing was received by Counsel for Appellant on November 9, 2015; Appellant's Notice of Appeal was served and filed on November 10, 2015. This appeal follows.

STATEMENT OF THE FACTS

Mr. Willie Jordan, plaintiff, is a steady and credible 62 year old man; he has been married for 42 years; has four grown children; and he has been employed as a fitter at Owen Steel for 35 years. On the afternoon of April 1, 2011, as he usually did, on his way home from work Plaintiff stopped at the strip mall parking lot on Bluff Road with Tony's Restaurant and the Cricket Party Shop, to pick up a friend in order to give him a ride home from work. (*Jordan Depo.* p. 30). Plaintiff testified, "I knocked off from work and I came down to the store. And I usually pick this guy up....Another guy had called me, and I turned to see what he wanted. He asked me a question, have I seen so and so. Could I see if I could get in touch with him? So I picked my phone out, went to make a call. And the next thing I know of, this woman with this van done backed into me, hit me in the back of my head, knocked me down - - drive me to the ground. And she stopped and

jumped out." (*Jordan Depo.* pp. 29-30). The driver, a black female, stopped and briefly got out of her vehicle with her phone in her hand. Plaintiff testified that she looked at him lying on the ground, partially under her van, and said, "Them damn telephones will get you killed." After this statement, Jane Doe "jumped back in the van and took off;" leaving the parking lot and driving away. (*Jordan Depo.* pp. 29; 42-43). Plaintiff was unable to see the license number as Jane Doe drove away due to the "people crowding around trying to see if I'm all right." (*Jordan Depo.* p. 45). Plaintiff testified, "I said, 'Where did she went? Which way she went?' They said, 'She went that way.'" (*Jordan Depo.* p. 45). Once he was able to crawl up off the ground, Plaintiff tried to see if he could find the car and driver that hit him. He drove around for about 20 minutes trying to find the grey van so that he could get the license tag number. *(Jordan Depo.* p. 13; p. 49).

Unable to find the van, Plaintiff returned to the liquor store where the store clerk confirmed for him that they had a video camera. At his request, the clerk pulled up the video to confirm that it still contained a video photo of the female driver who hit him. *(Jordan Dep.* Page 49 ln 8-21*).* Plaintiff testified, the store clerk pulled up the picture of the lady and said, "This lady right here drive this van." *(Jordan Depo.* pp. 46; 49*).* The store clerk informed Plaintiff that "the lady driving the grey van...came here all the time." (Tr. p. 13, lines 22-25). In pain and dizzy from his injuries, at that point, Plaintiff went home and to bed. (Tr. p. 14).

The next morning, Plaintiff's soreness and aching had become severe pain; he went to the Providence Hospital emergency room seeking medical attention for the injuries to his right shoulder, neck, and back. At the hospital, Mr. Jordan's injuries were treated; he was referred for further treatment; and the police were called. The April 2, 2011, Providence ER report indicates that Plaintiff was "hit by vehicle/pain in both shoulders and neck; ....presents with c/o bilateral shoulder, neck and lower back pain after a van backed into him yesterday causing him to fall on

the ground. He caught himself with his arms extended and now has shoulder pain with decreased movement." (ER report).

Plaintiff was interviewed at the hospital by Officer Brandon Robins of the Richland County Sheriff's Department. Plaintiff submitted the affidavit of Officer Robins, who attached and incorporated his report and investigation of the incident reported by Plaintiff. The Plaintiff gave the officer a description of the vehicle and told him that he could locate a photograph of the female that hit him on the video tape at the liquor store. (*Jordan Depo.* p. 78). Thereafter, Officer Robins obtained pictures of the Jane Doe driver by taking photos of the video which was saved at the request of the Plaintiff. *(Aff. Of Robins).* Officer Robbins reported that he "saw the video of the lady purchasing items and asked them to freeze the frame so that he could take pictures for investigative purposes." (*Robins report*). Officer Robins reports that management allowed pictures to be taken and that the pictures were forwarded to "crimepic." (Robins report).

The Plaintiff's statement to the officer indicated that this was an automobile accident or a negligence incident involving possibly willful and/or reckless driving on the part of Jane Doe. However, Officer Robins wrote up his report as a criminal "Aggravated Assault" incident report rather than as an automobile/traffic incident report. The report indicates that Plaintiff initially indicated to the police officer that he did not want to prosecute the driver for aggravated assault because he was did not know and could not say that Jane Doe had intentionally assaulted him or intentionally run him down with her car. However, the incident report further indicates in the "Additional Narrative" on the second page, "...an unknown subject struck him with a gray and black in color van. Mr. Jordan will prosecute." (Robins Report, p. 2).

At the time of the accident, Plaintiff actively attempted to determine the identity of the Jane Doe driver of the vehicle. Not only did Plaintiff attempt to himself determine the identity of the

vehicle by riding around the vicinity of the accident for some 20 minutes in an effort to get the license plate of her vehicle; but he also spoke with the store owner, requesting that he preserve the video tape showing the Jane Doe driver. It was because of Plaintiff's efforts that Officer Robins was able to preserve a photograph of the responsible driver and the information from the clerk was obtained.

ARGUMENT

I The trial judge erred in granting summary judgment where Plaintiff offered well more than a scintilla of evidence showing that he was not negligent in failing to determine the identity of the Jane Doe driver at the time of the accident; where the judge resolved conflicts in the evidence upon taking the evidence in the light most favorable to the moving party; where further inquiry into the facts is necessary; and where the evidence raised competing inferences, more properly submitted to and decided by a jury.

As established in *Hill v. York County Sheriff's Dep't,* 313 S.C. 303, 305, 437 S.E.2d 179, 180 (Ct.App.1993), when evidence is susceptible to more than one reasonable inference, the issue should be submitted to the jury; *Vaughan v. Town of Lyman,* 370 S.C. 436, 448, 635 S.E.2d 631, 638 (2006). "At the summary judgment stage of the proceedings, it is only necessary for the nonmoving party to submit a scintilla of evidence warranting determination by a jury for summary judgment to be denied." *Hill,* 313 S.C. at 308, 437 S.E.2d at 182; *see also Hancock v. Mid-South Mgmt. Co.,* 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009) (clarifying and reaffirming in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence to withstand a motion for summary judgment); *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct.App. 2009).

It is well settled that in order to obtain summary judgment, the moving party must show that no genuine issue exists as to any material fact and that the moving party is entitled to summary judgment as a matter of law. *Rule 56(c), SCRCP.* In determining whether any triable issues of fact

exist, all inferences from the facts in the record must be viewed in a light most favorable to the party opposing the summary judgment motion. *Hamilton v. Miller,* 301 S.C. 45, 389 S.E.2d 652 (1990); *Trivelas v. S. Carolina Dep't of Transp.,* 348 S.C. 125, 130-31, 558 S.E.2d 271, 273-74 (Ct. App. 2001). Even where there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should not be granted. *Hill,* 437 S.E.2d at 180; *Murphy v. Tyndall, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009).* Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Brockbank v. Best Capital Corp.,* 341 S.C. 372, 534 S.E.2d 688 (2000); *Moriarty v. Garden Sanctuary Church of God,* 334 S.C. 150, 511 S.E.2d 699 (Ct.App.1999), *aff'd,* 341 S.C. 320, 534 S.E.2d 672 (2000). "Because it is a drastic remedy, summary judgment should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." *Carolina Alliance for Fair Employment v. S.C. Dep't of Labor, Licensing, & Regulation, 337 S.C. 476, 485, 523 S.E.2d 795, 799 (Ct.App.1999).*

Ordinarily, the question of negligence is a question of fact for the jury to decide. *Brown v. Smalls,* 325 S.C. 547, 558, 481 S.E.2d 444, 450 (Ct.App.1997). When deciding whether to grant a directed verdict motion, the court must remember that "[c]omparison of a plaintiff's negligence with that of the defendant is a question of fact for the jury to decide. A directed verdict is warranted only if the only reasonable inference that may be drawn from the evidence is that the plaintiff's negligence exceeded fifty percent." *Creech v. South Carolina Wildlife & Marine Resources Dept.,* 328 S.C. 24, 32–33, 491 S.E.2d 571, 575 (1997); *Davenport v. Walker,* 280 S.C. 588 313 S.E.2d 354 (Ct. App. 1984). Here, where the evidence raised competing inferences as to the question of negligence, the judge erroneously disposed of the issue on summary judgment where the question of negligence should have been submitted to and decided by a jury.

The relevant portion of the statute 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: . . . the insured was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident. S.C. Code Ann. § 38-77-170(3). Here, when the evidence and the conclusions and inferences to be drawn therefrom is viewed in the light most favorable to Plaintiff, it is clear that he submitted well more than a scintilla of evidence showing that he made reasonable efforts to determine the identity of the Jane Doe driver and her vehicle at the time of the accident. Nevertheless, the trial judge granted summary judgment upon erroneously finding that Plaintiff had failed to show even a mere scintilla of evidence showing that he was not negligent in failing to identify the Jane Doe driver at the time of the accident.

The judge relied upon the decision in *Hart v. Doe*, 261 S.C. 116, 198 S.E.2d 526 (1973); however, the differences between the cases are striking. The judge noted that in *Hart*, the injured insured remained in her vehicle for 20-30 minutes while the unknown driver also remained on the scene. The unknown driver came to the wrecked car and stayed with the plaintiff until after the ambulance had taken her to the hospital. The unknown driver spoke to Hart and others at the scene, indicating that he was from Texas. Nevertheless, although the insured was informed that the driver was a stranger in town and despite the fact that she had numerous adults in the area who could have assisted her, the insured made no request or any effort to ascertain the identity of the driver or to identify his vehicle. The judge rightly noted that the *Hart* court had determined that, even though she was injured and in pain at the time, Hart's unreasonable inaction and her failure

to make any attempt to identify the driver at the time of the accident constituted negligence barring her from recovery.

In sharp contrast, even though Plaintiff was injured and in pain at the time, he exhibited none of the "unreasonable inaction" or the abject failure to make any attempt to identify the driver at the time of the accident found to constitute negligence as a matter of law by the *Hart* Court. Plaintiff's Jane Doe left the scene immediately after the accident and never gave Plaintiff an opportunity to ask or discover her name at the time of the accident. Unlike Ms. Hart, Plaintiff was not surrounded by responsible adults who could have assisted in identifying the driver - - the driver had left the scene. Nevertheless, through his efforts at the time of the accident, Plaintiff was able to provide a description of the car and driver; the information from the store clerk that Jane Doe was a frequent customer; and the information that a video photo of the driver was being maintained by the liquor store owner. In addition, here, there was no question but that the accident occurred as reported and Plaintiff's injuries were memorialized by the hospital records the next morning. The judge indicated at the hearing, "...we are at the summary judgment stage. I mean, she has got an investigative report from the hospital that would give enough to say he didn't make this up completely." (Tr. p.15; Providence ER report).

However, upon failing to take the inferences and conclusions raised by the evidence in the light most favorable to Plaintiff, the judge erred in granting summary judgment upon concluding that the ultimate failure to identify the Jane Doe driver was due to negligence attributable to Plaintiff. The judge's ruling stresses and concludes that, by indicating to the officer that he did not want to prosecute the driver for the crime of aggravated assault because he thought this was an accident, Plaintiff had "stopped him in his tracks" and prevented further investigation or any effort to identify the Jane Doe driver. Before Judge Young, in support of summary judgment, Counsel

for Defendant conceded that the video photo of the driver was available, but argued that Plaintiff was nevertheless negligent because he did nothing "to take a step further and try to determine who the identity of the Jane Doe driver was." (Tr. p. 9). Defense Counsel noted that Plaintiff had had the clerk of the store show him the video picture of the lady that was driving the van, but complained that "no copy was ever made." (Tr. p. 9). However, to the contrary, as the result of Plaintiff's efforts, a copy *was* made. It is actually undisputed that the Officer Robins memorialized the driver's photo by taking a picture of the video.

Thus, the judge's finding that Plaintiff was negligent in failing to identify the driver at the time of the accident is based solely on his factual surmise and conclusion that, by his telling the officer that he was reluctant to prosecute the driver for aggravated assault on the morning after the accident, Plaintiff had "stopped" the investigation into the identity of the driver. The judge's Order indicates, "Police were dispatched the following day when Plaintiff presented to the hospital, but Plaintiff "shut down their investigating into the matter by instructing them not to pursue charges." First, there is no record support for the judge's conclusion that the officer failed to investigate as the result of Plaintiff's indication that he did not want to press charges for aggravated assault. The record contains only the equivocal incident report indicating both that Plaintiff was reluctant to prosecute and that he would prosecute. There is no testimony from the officer explaining that he failed to investigate or why. Thus, the judge's ruling is unsupported factually.

Further, the judge's conclusion that Plaintiff had the power to "instruct" law enforcement not to pursue charges or the authority to "stop" the investigation of a crime is erroneous as a matter of law. Plaintiff was the victim. The victim of a crime is merely a witness - - the decision whether or not to pursue criminal charges remains with law enforcement. Therefore, the duty to investigate remains with law enforcement and an investigation of a crime is not properly abandoned at the

request of a witness. As former South Carolina Attorney General McMaster has explained, "The myth that an alleged victim can "drop the charges" probably stems from too many crime television shows where a plot twist occurs when the victim "drops the charges. The truth of the matter is it is not the "victim" that files the charges and it is not the "victim" that "drops the charges." A complaining witness can file a complaint with the proper authorities, such as a police officer. The law enforcement agency then takes the complaint and files it with the prosecuting attorney's office. The prosecuting attorney's office then reviews the complaint and makes a determination whether to file charges, and what type of charges to file. It is the prosecuting attorney who then files the charges with the court....Since it is the prosecuting attorney who files the charges, the only person who can "drop the charges" is the prosecuting attorney." Henry McMaster, 2008 WL 4489045, at 3-7 (S.C.A.G. Sept. 19, 2008).

In *State v. Thrift*, 312 S.C. 282, 291-292, 440 S.E.2d 341, 346-347 (1994), the Supreme Court stated, "[b]oth the South Carolina Constitution and South Carolina case law placed the unfettered discretion to prosecute solely in the prosecutor's hands." *In Ex parte Littlefield v. Williams*, 343 S.C. 212, 218-219, 430 S.E.2d 81, 84 (2000), the Supreme Court indicated, "[t]he criminal justice system gives prosecutors, as opposed to victims, broad discretion in deciding which cases to try because prosecutors are less likely to be prejudiced by personal or emotional motives. The South Carolina Constitution and case law place the unfettered discretion to prosecute solely in the prosecutor's hands. Prosecutors may pursue a case to trial, or they may plea bargain it down to a lesser offense or they may simply decide not to prosecute the offense in its entirety." There is no legal authority in South Carolina for the proposition that a victim may instruct law enforcement or determine whether or not a reported crime will be investigated or prosecuted.

Therefore, the judge's finding that Plaintiff had "stopped" the investigation when he "instructed" law enforcement not to pursue aggravated assault charges is erroneous as a matter of law.

In addition, while initially Plaintiff indicated that he did not want to 'prosecute' for aggravated assault because he was did not know that Jane Doe had intentionally tried to assault him or run him down with her car; the incident report further indicates on the second page, "...an unknown subject struck him with a gray and black in color van. **Mr. Jordan will prosecute**." (emphasis added). Thus, the incident report actually indicated both that Mr. Jordan did not want to prosecute and also that he would prosecute, so that the actual parameters of Mr. Jordan's reluctance to prosecute are unclear and further development of the facts is necessary if this is a relevant factual inquiry. Therefore, the judge erred in granting summary judgement where the evidence raises more than one inference or the inference is doubtful and also because further inquiry into the facts may be necessary.

The judge further erred in concluding that Plaintiff's indication that he did not seek to prosecute the driver for aggravated assault was unreasonable and constituted negligence at the time of the accident, resulting in the failure to identify Jane Doe. To the contrary, having taken reasonable measures at the time of the accident to discover and preserve evidence of the identity of the driver for further investigation, the next day, Plaintiff was apparently willing to prosecute, but he honestly informed the officer that he did not know that the driver should be prosecuted criminally for aggravated assault because he did not know and could not say that she had intentionally run him down with her van. The judge errs in characterizing this thoughtful, careful, response as somehow "negligent." Further, the indication that Plaintiff did not want to prosecute for assault was made to the officer the day after and not at the time of the accident. The trial judge

plainly erred in concluding that Plaintiff was negligent in his efforts to identify the driver at the time of the accident.

At the time of the accident, Plaintiff had taken all reasonable measures possible to identify the driver. The next day, he reported the accident to the proper authorities. If, as the judge concluded, the officer for whatever reason decided not to investigate the crime Plaintiff had reported, his decision should not be attributed to any negligence on the part of Plaintiff. Clearly, this is a question plaintiff should have been allowed to present to a jury rather than its being decided by the judge on summary judgment. "Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues." *BPS, Inc. v. Worthy, supra.* The trial court must deny the motion when the evidence yields more than one inference or its inference is in doubt." *id.* Here, the trial judge erred as a matter of law in granting summary judgment where the evidence yielded more than one reasonable inference or its inference is in doubt; where genuine issues of material fact remain to be decided; where further inquiry into the facts is necessary; and where the judge erroneously resolved conflicts in evidence in the light most favorable to the moving party. The Court should reverse the grant of summary judgment and remand for trial.

II. The trial judge erred in expanding upon the requirements of S.C. Code Ann. § 38-77-170(3) as set out by the legislature to additionally require the insured to bring criminal charges for an automobile accident in order to recover under his uninsured motorist policy.

The Supreme Court observed in *Gilliland v. Doe*, 357 S.C. 197, 199-202, 592 S.E.2d 626, 627-29 (2004), "The Legislature first enacted a 'John Doe' statute in 1963, recognizing an insured's right to receive uninsured motorist coverage for injuries caused by unknown drivers. Since the statute's enactment, the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent "John Doe" actions." Thus, Section S.C. Code Ann. § 38-77-

170 was enacted in order to protect insured drivers from damages caused by unknown drivers while maintaining safeguards against fraudulent claims. Our Supreme Court has instructed that legislative intent must be construed only after reading statutes contained in the same act together. *Burns v. State Farm Mut. Auto. Ins. Co.,* 297 S.C. 520, 522, 377 S.E.2d 569, 570 (1989). This court has noted "the uninsured motorist legislation 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." *Franklin v. Devore,* 327 S.C. 418, 421, 489 S.E.2d 651, 653 (Ct.App.1997).

Our Supreme Court has recognized ambiguities in § 38–77–170 and has urged a liberal construction. *Wausau Underwriters Ins. Co. v. Howser,* 309 S.C. 269, 275 422 S.E.2d 106, 110, (1992); *Gilliland v. Doe,* 357 S.C. 197, 201, 592 S.E.2d 626, 628 (2004). In *Gilliland,* the Court noted, "... the provision in question here is arguably ambiguous .... therefore, a strict interpretation of § 38-77-170(2) would undermine the statute's purpose. *See Kiriakides v. United Artists Communications, Inc.,* 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). Here, Section 38–77–170, subsection (3) is likewise, arguably ambiguous and should be interpreted liberally in favor of coverage. However, rather than interpreting the statute liberally in favor of coverage, the trial judge read into the statute a requirement not included by the legislature.

In drafting Section 38-77-170, subsection (3), to allow recovery under his insurance policy only where the insured is able to establish that he was "not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident," the legislature was apparently well aware of the competing interests it sought to protect. Therefore, the legislature drew a fine line, balancing the right of the insured to recover under his policy against the right of insurers to be protected from fraudulent claims. While placing the responsibility to reasonably attempt to determine the identity of the driver at the time of the accident upon the

insured, the legislature chose to stop well short of requiring an inured to successfully identify a hit and run driver before he is able to proceed under the statute. The statute explicitly provides not that the insured must succeed in identifying the unknown driver, but only that he show that he was not negligent in failing to determine the identity at the time of the accident.

However, the trial judge has added a new requirement - - that after the accident, the insured must press charges against the Jane Doe driver so that law enforcement will proceed with its investigation of the crime reported, presumably leading to the eventual identification of the driver. Thus, the trial judge has erroneously placed a burden on the insured which is not contemplated by or contained in the language of the statute. The judge's ruling modifies the statute, expanding the time period during which the insured must act reasonably to identify the driver well beyond "the time of the accident," and placing an additional burden on the insured, despite the fact that the legislature had apparently carefully balanced the rights and obligations of the insured and insurer in drafting the statute.

"All rules of statutory construction are subservient to the one that legislative intent must prevail if it can be reasonably discovered in the language used, and that language must be construed in light of the intended purpose of the statute." *McClanahan v. Richland Cnty. Council,* 350 S.C. 433, 438, 567 S.E.2d 240, 242 (2002); *S. Carolina Prop. & Cas. Ins. Guar. Ass'n v. Brock*, 410 S.C. 361, 367, 764 S.E.2d 920, 922 (2014). "[T]he 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.'" *Unisun Ins. Co. v. Schmidt*, 339 S.C. 362, 366, 529 S.E.2d 280, 282 (2000)(*quoting Gunnels v. Am. Liberty Ins. Co.,* 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968)); *Enos v. Doe*, 380 S.C. 295, 312-13, 669 S.E.2d 619, 627-28 (Ct. App. 2008).

Here, the intended purpose of Section 38-77-170, subsection (3) is two-fold - - to provide for an insured's right to receive uninsured motorist coverage for injuries caused by unknown drivers while also safeguarding against fraudulent "John Doe" actions." However, the trial judge's construction of the statute to include a requirement that the insured prosecute the unknown driver serves neither of the statute's purposes. Of course, the judge's construction of the statute to place an additional burden on the insured does not further the right of the insured to recover for injuries caused by an unknown driver; in addition, the judge's requiring this insured to press charges against the unknown driver serves no conceivable fraud prevention purpose.

As indicated, there is not a breath of fraud in this incident - - no one doubts that Plaintiff was struck by an unknown driver or that he sustained injuries as the result. When Plaintiff indicated that he did not want to prosecute the next day at the hospital, the accident had taken place, he was being treated for his injuries, and information useful in identifying the driver had been provided to law enforcement. There is no conceivable fraud prevention benefit which could be served by requiring the insured to agree that he would press questionable charges against the driver for aggravated assault. Instead, the only purpose this new requirement could conceivably serve is to enlist the assistance of law enforcement on behalf of the insurer in its efforts to identify the driver. Therefore, again, the judge erred in unjustifiably expanding the requirements of the statute without reference or attention to the legislature's purpose in enacting the statute.

The evidence showing that Plaintiff provided a description of the car and driver; that, despite his injuries, he immediately instituted a search in an effort to locate and identify the vehicle; and that Plaintiff made sure that video evidence of the driver's identity was maintained and provided to law enforcement, constituted at least a scintilla of evidence and sufficiently created a question of fact to be decided by the jury as to any conceivable negligence on the part of Plaintiff

at the time of the accident. Therefore, the judge erred in granting summary judgment. The Court should reverse the grant of summary judgment and remand for trial.

III. The trial judge erred in his footnote observation regarding Plaintiff's submission of an affidavit pursuant to Section 38-77-170 (2), even where not the basis for the judge's ruling.

Included in the trial judge's Order granting summary judgment is a footnote indicating, "While not the basis for my ruling, the evidence and testimony in this case also show that Plaintiff failed to obtain an affidavit from any party - - let alone a proper party - - until more than four years after the accident and almost one year after filing the Complaint." (Order p. 2). Appellant believes that, as a matter of law, such a non-finding has no effect on the ruling or on the resolution of this appeal. However, in perhaps an overabundance of caution, and in deference to the two issue rule as recently discussed in *Wofford v. City of Spartanburg ex rel. S. Carolina Mun. Ins. Trust*, 415 S.C. 152, 157-58, 781 S.E.2d 146, 149 (Ct. App. 2015), *reh'g denied* (Jan. 21, 2016), Plaintiff nonetheless feels constrained to include an appeal from the judge's erroneous observation by footnote.

While Plaintiff submitted in evidence an affidavit signed by bystanders who had witnessed the accident in the Cricket Party Shop parking lot, the affidavit was submitted for evidentiary purposes and for use at trial and not to comply with Section 38-77-170 (2). Section 38-77-170, subsection (2), applies only in those cases involving an unknown driver and an automobile accident in which there is no contact alleged with the uninsured vehicle. Where there is no contact with the uninsured vehicle, an insured may proceed under the statute only if he submits a proper affidavit from a third party who witnessed the accident. In *Chestnut v. S. Carolina Farm Bureau Mut. Ins. Co.*, 298 S.C. 151, 155, 378 S.E.2d 613, 615 (Ct. App. 1989), the Court held that the legislature

revised the statute to provide an alternate method of satisfying the second condition by affidavit, "This condition can now be met by either evidence of physical contact with the unknown vehicle or evidence provided by an independent witness to the accident." Where Plaintiff submitted evidence showing that there was contact with the uninsured vehicle and that contact with the vehicle caused his injuries, there was no requirement that he also submit a witness affidavit in order to proceed under the statute. Therefore, the judge's observation implying that Plaintiff's submission of an affidavit was not timely is erroneous and irrelevant to resolution of this appeal.

Appellant raises this non-issue only in light of the Court's recent discussion in *Wofford v. City of Spartanburg ex rel. S. Carolina Mun. Ins. Trust* of the "law of the case" and the application of the "two issue rule" in appeals: "Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case." *Jones v. Lott,* 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010); "It should be noted that although cases generally have discussed the 'two issue' rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts." *Anderson v. S.C. Dep't of Highways & Pub. Transp.,* 322 S.C. 417, 420 n. 1, 472 S.E.2d 253, 255 n. 1 (1996). For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the 'two issue' rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance. *Id."* *Wofford v. City of Spartanburg ex rel. S. Carolina Mun. Ins. Trust*, 415 S.C. 152, 157-58, 781 S.E.2d 146, 149 (Ct. App. 2015), *reh'g denied* (Jan. 21, 2016).

As indicated, the judge's observation by footnote is irrelevant and erroneous; it is explicitly not made a basis for his summary judgment ruling; and the footnote referencing an untimely

affidavit is not properly considered an alternate basis for the judge's ruling or an available, alternative, basis appearing in the record for affirmance of the ruling. The Court should reverse the grant of summary judgment and remand for trial.

CONCLUSION

For all the forgoing reasons the Court should reverse the grant of summary judgment and remand for trial.

Respectfully submitted:

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March 9, 2016

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THE STATE OF SOUTH CAROLINA
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Jane Doe, Respondent,

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant along with the Designation of Matter to Be Included in the Record on Appeal on counsel for Defendant by depositing a copy of it in the United States Mail, postage prepaid, on March 9, 2016, addressed to the following:

Andrew L. Richardson, Jr., Esquire
McAngus, Goudelock & Courie
P.O. Box 12519
Columbia, SC 29211

Helen F. Hiser, Esquire
PO Box 650007
Mount Pleasant, SC 29465

Elizabeth Kolb

Elizabeth Kolb, Paralegal to
Pamela R. Mullis
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Pamela R. Mullis | **J. Marvin Mullis, Jr.** 1940-2012 | **Joseph M. Epting, Jr.**

March 9, 2016

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
Columbia, South Carolina 29211

RE: Willie Jordan, Appellant v. Jane Doe, Respondent
Case No.: 2014-CP-40-1654

Dear Ms. Kitchings:

Please find enclosed the Original and one copy of the Initial Brief of Appellant along with the original and one copy of the Designation of Matter to Be Included in the Record on Appeal and proof of service.

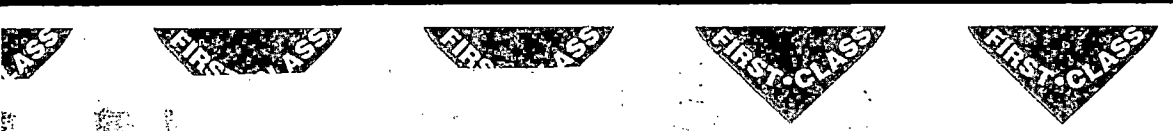
Sincerely,

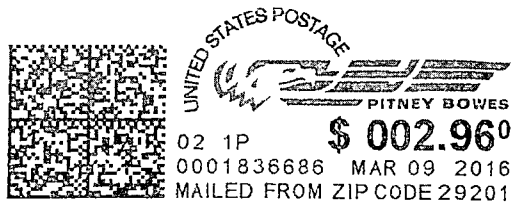
Pamela R. Mullis

ATTORNEY FOR THE APPELLANTS

OTHER COUNSEL OF RECORD:

Andrew L. Richardson, Jr., Esquire
Helen F. Hiser, Esquire





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SC Court of Appeals

The Honorable Jenny Abbott Kitchings
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