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 REPLY BRIEF OF APPELLANT

April 28, 2016

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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.**

Respondent points to the trial judge's "key" finding that "simply informing police officers one day later that there may be footage is not sufficient to meet the "high burden of the statute." (Brief of Respondent p. 13). Indeed, the trial judge ruled and Respondent argues that the legislature placed a "high burden" on the insured through S.C. Code Ann. Section 38-77-170 (3). However, the legislature did not actually place a "high" burden on an insured with the language of 38-77-170 (3). The legislature did not require the insured to actually succeed in identifying the unknown driver; did not require him to take extraordinary measures to investigate or discover the identity of the driver; did not require him to advertise for witnesses or to hire an investigator; and did not require him to press charges against the driver after reporting the accident to the police. Instead, the South Carolina legislature placed upon a victim of a hit and run driver the relatively low burden of merely proving that he was "not negligent" in failing to determine the identity of the driver "at the time of the accident." Thus, in South Carolina a victim need only prove that he acted reasonably under all the circumstances. This third requirement must be interpreted liberally in favor of coverage and not strictly against the victim of a hit and run. Such interpretation is consistent with the balance of the statute and harmonizes with the legislature's overall statutory scheme.

The purpose of the uninsured motorist statute is "to provide benefits and protection against the peril of injury or death by an uninsured motorist to an insured motorist...." *Ferguson v. State Farm Mut. Auto. Ins. Co.,* 261 S.C. 96, 100, 198 S.E.2d 522, 524 (1973); *Unisun Ins. Co. v.*

Schmidt, 339 S.C. 362, 368, 529 S.E.2d 280, 283 (2000). 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. *Enos v. Doe,* 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008); *Auto Owners v. Rollison, 378 S.C. 600, 663 S.E.2d 484 ((2008); Franklin v. Devore*, 327 S.C. 418, 489 S.E.2d 651 (Ct. App. 1997); *Gunnels v. American Liberty,* 251 S.C. 242, 161 S.E.2d 822 (1968).

In ascertaining the legislature's intent, statutes that are part of the same act must be read together. *Burns v. State Farm Mut. Auto. Ins. Co.,* 297 S.C. 520, 377 S.E.2d 569 (1989). "A court should not consider a particular clause in a statute as being construed in isolation, but should read it in conjunction with the purpose of the whole statute and the policy of the law." *Doe v. Roe,* 353 S.C. 576, 578 S.E.2d 733 (Ct.App.2003), *cert. denied; Jones v. State Farm Mut. Auto. Ins. Co.,* 364 S.C. 222, 232, 612 S.E.2d 719, 724 (Ct. App. 2005). However, Respondent argues that this particular section of the uninsured motorist act should not be interpreted liberally to effect its purpose or for the benefit of the injured insured. Respondent bases her theory on cases requiring that the mandatory requirements of § 38–77–170 be strictly enforced. However, while our Courts have held that strict compliance with § 38–77–170 is a prerequisite to maintaining a cause of action under the statute, such holdings do not call into question the proper interpretation and construction of the uninsured motorist act liberally to effect its remedial purpose.

Our Courts have insisted that the requirements the legislature placed in the statute not be ignored or interpreted away by judicial decision; however, where construction is necessary, the Act is interpreted in favor of the insured and for his protection and relief. Courts enforcing the clear terms and requirements of the statute did not interpret or construe the Act in favor of the insurer; against the insured; or for the purpose of depriving the insured of relief. Instead those

Courts merely required compliance with the clear mandate and requirements of the statute. For example, in *Collins v. Doe*, 352 S.C. 462, 471, 574 S.E.2d 739, 743 (2002), the Supreme Court held that the insured had failed to comply with the requirement of the statute in failing to submit an affidavit where it was admitted that there was no contact with the unknown vehicle. Similarly, in *Morehead v. Doe*, 324 S.C. 559, 561-62, 479 S.E.2d 817, 818 (Ct. App. 1996), the Court held that the insured had failed to comply with the reporting requirement of § 38-77-170 (1) where the insured delayed reporting the accident to the authorities for eight months. The Court held that a delay of eight months was not reasonable and, further, that the insured's reporting the accident to the insurer did not suffice where a reasonably timely report to the authorities was mandated by the statute. The Court explained, "The statute plainly bottoms this right of action on a report "of the accident to some police authority." However, neither the *Collins* nor the *Morehead* Courts reached these conclusions as the result of construction or interpretation of the statute in favor of the insurer and against the injured insured. Instead, these Courts simply required compliance with the plain language of the statute.

Even where the statute's requirements are strictly enforced, the uninsured motorist act was promulgated to provide relief for insured victims of hit and run drivers. The Act has consistently been construed and interpreted as being remedial in nature, enacted for the benefit of injured persons, and properly construed liberally in favor of the injured insured so that the purpose intended may be accomplished. Respondent has referenced no authority suggesting that this particular section of the uninsured motorist act must be construed differently and against the remedial intent of the statute.

In carefully balancing the rights of their primary beneficiaries, victims of uninsured drivers, against its interest in protecting insurers from fraudulent claims, our legislature first placed upon

an insured victim the burden to report the accident to the police according to § 38-77-170 (1). In this first requirement, while the legislature absolutely required that the accident be reported to the police, the legislature made room in the reporting requirement for leeway and missteps on the part of the insured victim. The victim can report the accident himself or someone else can report for him; the legislature requires only that he report to "some appropriate" police authority; the time limit is far from strict; with our legislature requiring only that the accident be reported "within a reasonable time, under all the circumstances, after its occurrence."

In subsection (2), *either* the injury or damage must have been 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. This subsection clearly exemplifies the legislature's sensitivity to the competing needs of the insured victim and the insurers. Originally, the legislature had required that the injury to a person or damage to a car be caused by physical contact with the unknown vehicle. However, in 1987, the statute was amended to loosen this requirement so as to allow more victims to make claims by providing an alternate affidavit procedure whereby a witness's affidavit was considered to be sufficient safeguard against fraud where there is no contact; however, the legislature further required that an explicit warning be placed on that affidavit so that the witness would be aware that their statement subjected them to criminal prosecution. Consistent with the legislature's overall approach in this statute, the legislature eased a strict requirement on the insured while simultaneously providing additional protection against fraud for the insurers.

The Court should assume that the third subsection to § 38-77-170 was also drafted with the goal of protecting both the interests of the insured victim and the insurer in mind. As argued,

Subsection (3) does not place a high burden on the insured victim, requiring only that the insured show that he acted reasonably under the circumstances of the hit and run to identify the driver and vehicle at the time of the accident. He need only show that he used reasonable care and reasonably took advantage of the information available to him at the time of the accident. Thus, in *Hart*, where the insured had several avenues which she could have pursued to determine the identity of the driver at the time of the accident, but she took no such actions and made no effort whatsoever to ascertain the identity of the driver, her inexplicable inaction was found to constitute negligence as a matter of law. *Hart v. Doe*, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973). Where the hit and run driver in *Hart* actually did not hit and run, but instead he hit and hung around the accident scene for an extended period of time, the Court pointed out numerous opportunities Hart could and reasonably should have pursued in order to determine the identity of the driver and vehicle at the time of the accident. However, the Court did not find that any one, or even a couple of Hart's obvious lapses was sufficient to show that she was negligent as a matter of law. Instead, the *Hart* Court found that Hart was barred from relief under the statute as the result of her complete failure to make any effort whatsoever, despite having the present ability to do so at the time of the accident, to determine the identity of the driver.

In contrast, Appellant's hit and run driver did hit and run, so that by the time he could react, she was gone. However, Appellant was not inactive; once he got up from the concrete, he immediately went into action - - asking those crowding around him about the driver and, upon only learning that she went that way, he followed; driving around the area for some 20 minutes looking for the car. When he was unsuccessful, Appellant next went back to the scene where he asked the store manager if they had video of the woman; viewed the video depiction of Jane Doe; and spoke to the manager, discovering that Jane Doe was a frequent customer. However, the

manager either did not know or she did not tell Appellant Jane Doe's actual name. At that point, Appellant was achy, woozy, and upset from being hit by a car; therefore, this sixty year old man went home and to bed. Appellant is eager for the opportunity to show a jury that his actions at the time of the accident were imminently reasonable and certainly not negligent.

In fact, the only actions Appellant failed to take which Respondent or the judge have identified as constituting negligence under the statute are that Appellant was (1) "aware of the existence of video tapes and security footage from the location of the accident yet he did not *act to recover that evidence or even choose to view the evidence*;" (2) he "failed to *follow up* with the store manager to determine the identity of the driver;" and (3)"Police were dispatched....but Plaintiff shut down their investigation into the matter *by instructing them not to pursue charges.*"

Taking these criticisms in order, while, at the time of the accident, Appellant made sure that the store had the video of the woman who hit him, he, of course, had no ability to "recover" the videotape evidence from the convenience store. There is no evidence or any reason to believe that the convenience store would have turned over their security footage to Willie Jordan; instead, the store was willing to show the footage to him but did not offer to give it to him. The judge wrongly found that Appellant did not even look at the video. However, in fact, appellant testified that he did look at the video footage showing Jane Doe when the store owner pulled it up. Appellant testified that "she showed me the picture of the lady that was driving the van," explaining that he went into the store and asked the manager, "the woman, that a van hit me out there and she pulled it up on the camera and said, 'This lady right here drive this van.'" (Depo. p. 46, lines 1-3; 19-21; p. 49, lines 17-21).

As for Plaintiff's failing to ask for a copy of the footage at the time of the accident, he had no ability or need to obtain a personal copy of the screen shot of the woman because he already

knew what she looked like. He was paying attention when the woman who hit him stood over and yelled at him as he lay partially under her van in the parking lot. At the time of the accident, Appellant did not need to obtain the footage for himself; he merely needed to confirm that the store had and would maintain the security footage which showed the woman who hit him. Appellant testified that he had no ability at the time of the accident to "recover" the security footage, but that the officer was able to preserve the photo of Jane Doe the next day. (Depo. p. 78).

The judge gave no explanation or description of how any "follow up" with the store manager was to take place or what further information reasonably could have been gleaned from such "follow up" at the time of the accident. While, at the time of the accident, Appellant was able to find out from the store manager that Jane Doe was a frequent customer, the manager either did not know or she chose not to tell Appellant Jane Doe's actual name. The same manager was interviewed by the Officer, yet she provided no further identification or information to the officer about her customer. Clearly, neither Appellant's failure to himself "recover" the security footage or his failing to "follow up" with the store manager would even suggest, much less establish as a matter of law, that he was negligent in failing to determine the identity of the driver at the time of the accident.[1]

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[1] Respondent now argues that Appellant failed to ask the onlookers and the store manager if they knew Jane Doe's actual identity. Although Appellant has not testified explicitly that he questioned the onlookers and the manager as to Jane Doe's identity, the circumstances fully support the reasonable conclusion that he did. Respondent had not raised this criticism before; however, taking the light most favorable to the Appellant, the clear inference arises from the evidence that, of course, as he was responding to being hit by a car and asking concerned onlookers and the manager about the driver, Appellant, of course, asked them if they knew her. Unfortunately no one did; informing Appellant only of the colors of her vehicle and which way she went. The manager informed Appellant that the lady was a customer and showed him a video, but did not identify the driver. Respondent's current assertion that Appellant must not, therefore, have asked the manager if she knew the driver makes no more sense than if Respondent were suggesting that the officer, having failed to learn the driver's identity from the manager, must not have asked.

This new complaint was not made below; it was not the basis for the judge's ruling; and it should be disregarded. *See Wilder Corp. v. Wilke,* 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.").

Thus, Appellant and the Court can only reasonably assume that the judge's finding that the only reasonable inference which could arise from the evidence was that Appellant was negligent in failing to determine the identity of the driver at the time of the accident as a matter of law, could only rest on his factual surmise and conclusion that, by his telling the officer the next morning that he was reluctant to prosecute the driver for aggravated assault, Appellant had "stopped" the investigation into the identity of the driver. The judge found that, through his reluctance to prosecute, Appellant had "stopped the investigation in its tracks" and negated any benefit that could have been obtained from the officers' investigation. (Order p. 3).

As argued, there is no record support for the judge's conclusion that the officer failed to investigate; that he failed to investigate as the result of Appellant's indication that he did not want to press charges for aggravated assault; or that such a result was a predictable result of Appellant's reluctance to prosecute. The record contains only the equivocal incident report indicating both that Appellant was reluctant to prosecute and also that he would prosecute. Respondent now argues that in order to proceed, an officer must have a "complaining witness" and that, because Appellant indicated he was reluctant to prosecute, there was no "complaining witness," necessitating that the investigation be abandoned by the officer. To the contrary, in contacting the police and providing information to the officer which was entered in the incident report, Appellant did serve as a complaining witness. However, more to the point, there is actually no testimony from the officer explaining that he failed to investigate or why. From the summary judgement record, for all we know, despite Appellant's reluctance, the officer investigated diligently and searched but was unable to find Jane Doe. Thus, the judge's ruling that Appellant was negligent in failing to determine the identity of the driver or the vehicle at the time of the accident is unsupported factually and as a matter of law.

At the hearing, Counsel for Appellant explained to the judge why Appellant had not wanted to press criminal charges for aggravated assault, i.e., because he did not know that Jane Doe struck him intentionally or tried to run him down with her car. On brief, Appellant additionally pointed out that while the trial judge specifically relied upon the Incident Report in reaching his conclusions; the Incident Report contains both the officer's initial indication that Appellant did not want to prosecute Jane Doe for aggravated assault and his further reported indication that Appellant would prosecute. However, Respondent now argues that Appellant should not be permitted to point out that the incident report was equivocal because Appellant did not stress to the trial judge that the report contained inconsistent indications as to whether Appellant would prosecute. To the contrary, Counsel for Appellant argued that the Incident Report did not support the charge of negligence and the Incident Report was presented to the trial judge in its four-page entirety, indicating both that Appellant initially told the officer that he did not want to prosecute and also that he indicated that he would prosecute.

Incredibly, Respondent now argues that the trial judge did not rule that it was by his indicating that he did not want to press charges that Appellant was negligent and that the trial judge did not require Appellant to press charges in order to make a claim under § 38-77-170(3). Respondent insists that no such requirement appears in the Order and also that no such requirement can reasonably be read into the Order. (Brief of Respondent p. 16). To the contrary, it is crystal clear from the judge's Order that he determined that because Appellant indicated to the officer that he did not want to press charges, he had thereby instructed the officers not to investigate and, by that action, he negligently failed to make reasonable efforts to identify Jane Doe of her vehicle at the time of the accident. The judge's Order granting summary judgment concludes by explicitly indicating, "Instructing those....officers not to pursue the case negates any benefit that could be

obtained from their investigation. Appellant's own actions resulted in a failure to obtain the identity of the vehicle and/or driver. These actions constitute negligence pursuant to S.C. Code Ann. Section 38-77-170(3)." Plainly, the judge did rule that by his action in telling the officer that he did not want to press charges for aggravated assault the day after the accident, Appellant was negligent as a matter of law in failing to determine the identity of the driver at the time of the accident.

Notably, Respondent argues, "Appellant had the ability to uncover additional information regarding Jane Doe's identity, *i.e.*, a description of the van and knowledge that the beverage shop had a video of Jane Doe and the store manager's statement that she came there all the time, but he failed to take any further steps to determine her identity. (Brief of Respondent p. 18). In fact, the additional information listed by Respondent consists of facts which Appellant *was* able to discover and which he did report to the officer. Critically, Respondent has yet to identify or suggest any reasonable additional steps Appellant *should have taken,* at the time of the accident and under the circumstances, which he did not take and Respondent has failed to identify any information Appellant could reasonably have discovered at the time of the accident that he failed to discover.

The very strict interpretation of the statute against this insured victim and the requirement that he not only report the accident to the proper authorities but that he then enthusiastically agree to press criminal charges against the driver, is not borne out by the plain language of the statute and any such approach is completely inconsistent with the balance and purpose of the statute. Respondent has offered no explanation for why the legislature would have been so careful to balance the competing interests and not to place unreasonable burdens on the insured victim in subsections (1) and (2) but then included in the third subsection a very strict requirement with no leeway for circumstances or judgment.

Most notably, *had* our legislature intended to require an insured victim to press charges or be found negligent, it would surely have said so. It would have been logical for the legislature to simply indicate in subsection (1) that the insured victim must, in order to bring a claim, show that he reported the accident to the appropriate authorities and that he agreed to press criminal charges. Of course, it should be up to the legislature to decide whether such agreement to press criminal charges must be without equivocation, or whether it can be reluctant and grudging, under the circumstances. The legislature should also, if it determines that such a requirement is needed or appropriate, explain whether the criminal charges which the insured must pursue must be reasonable under the circumstances or apparently supported by probable cause. Of course, our legislature has, to date, not included any such requirement in the statute. As argued, that requirement has been erroneously read into and added to the explicit requirements of the statute by the trial judge at the urging of Respondent.

Respondent concedes that issues of negligence are matters for the fact finder and not appropriate for resolution on summary judgment; however, Respondent nevertheless argues that where the evidence admits only one reasonable inference, it becomes a matter of law for determination of the court. Respondent's argument that, here, the only reasonable conclusion that can be drawn from the evidence is that Appellant was negligent in failing to determine the identity of Jane Doe or her vehicle at the time of the accident, is unsupported by the evidence. Instead, the evidence showing that Appellant 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; that he spoke to the store manager, making sure that the video evidence of the driver's identity was maintained and discovering that the driver was a frequent customer so that he was able to provide that information to the officer, sufficiently created a question of fact to be decided by a jury as to

any conceivable negligence on the part of Appellant in failing to identify the driver at the time of the accident. The evidence constituted *at least* the scintilla of evidence Respondent concedes was necessary to avoid summary judgment. Therefore, the judge erred in granting summary judgment. 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.

Respondent's misconstruction of Section 38-77-270 (3) is apparently due to Respondent's refusing to recognize that the South Carolina statute serves dual purposes; that our statute places a much lower burden on an insured victim than the statutes Respondent relies upon from other jurisdictions; and also due to Respondent's refusal to understand that our legislature required only that the insured not be negligent in determining the identity of the driver and the vehicle *at the time of the accident.*

Purpose of the statute

Respondent argues that the legislature's sole purpose and goal in promulgating Section 38-77-270 was fraud prevention. To the contrary, as argued, § 38-77-270 must be interpreted in favor of coverage and for the benefit of the insured driver. Respondent's current argument that the balance of the statute should be interpreted according to the pronouncements of our courts as remedial in nature, enacted for the benefit of injured persons, and liberally construed so that the purpose intended may be accomplished, but that subsection (3) should be interpreted differently and strictly against the insured, in the interest of fraud prevention, violates the rules of statutory interpretation and is inconsistent with the decisions of our appellate courts. In fact, the initial and primary purpose of this particular statute was to provide relief for those injured by hit and run drivers. It was only later that the legislature added further "safeguards" to prevent fraudulent

claims. Thus, the legislature was pursuing dual purposes in drafting Section 38-77-170; the legislature balanced the competing interests of an insured to recover under his policy against the interest of insurers in protection from fraudulent claims. *See Shealy v. Doe*, 370 S.C. 194, 201, 634 S.E.2d 45, 49 (Ct. App. 2006)(Section 38-77-170 demonstrates a policy decision by the legislature which balances the interest of parties injured in accidents with unknown drivers, with the interest of insurance companies in preventing fraudulent claims. Where the legislature determines policy and promulgates a clear rule of law, there is no room for the courts to alter that decision.").

At the time of the accident

Respondent now, for the first time, argues that § 38-77-270 (3) does not identify the time period during which an insured's efforts to determine the identity of the unknown driver are judged as being "at the time of the accident." Respondent argues that the statute's requirement in subsection (3) that 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,**" actually does not refer to the insured's efforts to identify the other driver which may be judged for negligence take place *at the time of the accident.* To the contrary, the plain language of Section 38-77-270 (3) establishes that the legislature identified the time period during which an insured's efforts to identify the unknown driver will be judged for negligence as being "at the time of the accident." "Where the language of the statute is plain and unambiguous and conveys a clear and definite meaning, as here, there is no occasion for resorting to the rules of statutory interpretation, and the court has no right to look for or impose another meaning." ." *Wynn v. Doe, 255 S.C. 509, 180 S.E.2d 95 (1971); Harling v. Board of Commissioners, 354* 205 S.C. 319, 31 S.E.2d 913 (1944).

Here, the language and the meaning of the statute are plain. The legislature required that the insured not be negligent in failing to determine the identity of the other vehicle and driver. The

legislature further identified the time period during which the insured's efforts are judged as "at the time of the accident." Respondent actually now argues that the phrase "at the time of the accident" does not modify or refer to the time period during which the insured's actions are judged for negligence as "at the time of the accident," but instead, that "at the time of the accident" modifies and refers to "to the identity of the other vehicle and the driver of the other vehicle." (Brief of Respondent p. 18). This suggestion, which was never made to the trial judge, is nonsensical and inconsistent with the plain meaning and language of the statute. Notably, in § 38-77-270, subsection (2), the legislature also referenced the "unknown vehicle," but did not feel it necessary to refer to it as "the unknown vehicle at the time of the accident." Plainly, there is only one unknown vehicle and only one driver of the unknown vehicle relevant to the statute's provisions and there is no need for the legislature to have further specified that it was talking about the unknown vehicle *at the time of the accident.* Respondent's suggestion that the legislature's language does not identify the time in which the insured must not be negligent as "at the time of the accident," ignores the words and the plain meaning of the statute. In fact, according to the plain language of the statute, our legislature requires only that an insured not be negligent in failing to determine the identity of the other driver and vehicle *at the time of the accident.*

The phrase "at the time of the accident" is not defined in the statute; therefore, the term should be given its ordinary meaning, within reason. The legislature obviously did not mean to require an insured victim to act reasonably to determine the identity of the driver in the instant of the accident. Therefore, the legislature apparently meant to focus on the time period from the instant of the accident and including a reasonable time thereafter, under the circumstances. Presumably the legislature intended to include the time period directly after the accident and the hours thereafter - - but not a matter of days or weeks after the accident. By the plain language of

the statute, our legislature actually and specifically placed no requirement on the insured that he determine the identity of the unknown vehicle and driver in the distant time period after the time of the accident. Respondent argues that Appellant is expanding upon the meaning of the statute and that it would be absurd to assume that the legislature did not mean to apply the negligence standard to all acts and investigations instituted by the insured over the days and weeks following the accident. In fact, our legislature apparently did not contemplate or require that an insured would thereafter pursue an independent investigation on his own and it is absurd to suggest that it did.

There is nothing in the statute which suggests that our legislature intended to require the insured victim to conduct interviews of witnesses or to follow-up leads and clues unless those witnesses and clues were apparent and he had the apparent ability to discover further information *at the time of the accident*. Instead, the legislature requires the insured only to report the accident to the police and, otherwise, the legislature focused only on whether the insured's efforts to identify the driver at the time of the accident were reasonable or negligent. Respondent's suggestion that our legislature actually meant to require that an insured victim pursue an independent investigation of his own into the identity of the unknown driver in the "days and weeks" following an accident and that he show that his investigation was not negligent is completely unsupported by the statute and it should be disregarded by the Court. (See Brief of Respondent p. 18).

Other jurisdictions with different requirements

Respondent's misinterpretation of our statute may be due to her reliance upon decisions from other states with what Respondent mistakenly calls "similar requirements." (Brief of Respondent p. 10). Respondent argues that our statute, like those other states' statutes, requires that the insured take all reasonable measures to identify the driver and unknown vehicle, not just

at the time of the accident, but in the days and weeks after the accident. Respondent cites as support for this proposition a case from Maryland. However, in Maryland, an insured may sue under his policy only where "All reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator thereof and either that the identity of the motor vehicle and the owner and operator thereof cannot be established, or that the identity of the operator, who was operating the motor vehicle without the owner's consent, cannot be established." The Maryland law does not limit the relevant time period to the "time of the accident." In fact, in *Grady* the Court explained that "'Reasonable efforts' will differ according to the facts and circumstances of each case, and it is not a term which is easily defined or delineated." The *Grady* Court considered but did not decide whether it would have been reasonable under the circumstances of the case to require the insured, Grady, place an advertisement in a newspaper in an effort to locate potential witnesses or to personally interview the residents of the homes in the area." *Grady v. Unsatisfied Claim & Judgment Fund Bd.*, 259 Md. 501, 506-07, 270 A.2d 482, 485 (1970). Certainly no such investigation would be expected of an insured victim in South Carolina "at the time of the accident." Plainly, the Maryland statute places a higher and far more onerous burden upon its insured victims than does the South Carolina's statute.

Similarly, while Respondent has cited an Alabama case as applying "similar requirements," the law in Alabama is very different. In Alabama, the insured has the initial burden to show that the driver was uninsured and, upon his carrying that burden, the burden shifts to the insurer to establish whether the driver was uninsured. An insured must prove that, from the time of the accident, he had used reasonable diligence to ascertain whether the alleged tortfeasor was uninsured and such information was unobtainable, then the burden shifts to the insurer to prove that the alleged tortfeasor was insured. *Motors Ins. Corp. v. Williams*, 576 So. 2d 218 (Ala. 1991);

Ogle v. Long, 551 So.2d 914 (Ala.1989). In *Purcell v. Alfa Mut. Ins. Co.,* 824 So. 2d 763, 764 (Ala. Civ. App. 2001), the Alabama court discussed evidence of a reasonably diligent investigation sufficient under Alabama law to raise a presumption that the driver was uninsured and to cast upon the insurer the burden of going forward with the evidence by showing that the driver or the owner of the automobile was, in fact, insured. The *Purcell* Court ruled that the insured's failing to have his investigator follow up leads as to the driver's nickname, and his failing to make discovery requests to officials and employees of the racetrack where the hit and run occurred, was insufficient under the Alabama statute. *Purcell v. Alfa Mut. Ins. Co.,* 824 So. 2d 763 (Ala. Civ. App. 2001). Alabama's requirements are plainly not similar to those imposed by the South Carolina law.

Finally, Respondent cites to the New York law as being "similar." To the contrary, New York's insurance law, MVAIC, § 5218, requires that a New York insured prove that at some point after the accident and before trial, "(5) all reasonable efforts have been made to ascertain the identity of the motor vehicle and of the owner and operator and either the identity of the motor vehicle and the owner and operator cannot be established, or the identity of the operator, who was operating the motor vehicle without the owner's consent, cannot be established;...." N.Y. Ins. Law § 5218 (McKinney). Plainly, there is a significant difference between requiring an insured to prove that after the accident, "all reasonable efforts" were made to ascertain the identity of the driver and the standard in South Carolina, requiring an insured to show only that he was not negligent at the time of the accident.

The New York standard is clearly very different. In *Flores v. Motor Vehicle Acc. Indemnification Corp.,* 32 Misc. 2d 884, 886, 225 N.Y.S.2d 481, 484 (Sup. Ct. 1962), the Court held, "the applicant has been furnished with the information that a likely suspect might be Mr. Softee Ice Cream Company located in the Bronx. No effort has been made by the applicant or any

one on his behalf to pursue this information, which could be obtained by an examination before trial in order to frame issues for a complaint. Therefore this application is denied without prejudice to a renewal thereof upon a proper showing that the applicant has made a reasonable effort to ascertain whether Mr. Softee Ice Cream Company is or is not in fact the owner of the truck involved in the alleged incident." Thus, the New York requirement is that the insured must show that in the time between the accident and trial, "all reasonable efforts were made to determine the identity of the driver. Also s*ee Person v. Motor Vehicle Acc. Indemnification Corp. (2 Dept. 1976)* 54 A.D.2d 580, 387 N.Y.S.2d 148, (failure of petitioner, who sought leave to commence action against MVAIC to recover damages for injuries, to conduct an investigation of his own, based upon information possessed by witnesses listed in police report and by detective who conducted police investigation, compelled conclusion that petitioner had not made all reasonable efforts to ascertain identity of said vehicle and its owner and operator, as required.)

In *Yi Song He v. Motor Vehicle Accident Indemnification Corp.* 128 A.D.3d 525, 9 N.Y.S.3d 53, (1 Dept. 2015), a bicyclist injured when he was struck by a motor vehicle failed to make all reasonable efforts to ascertain the identity of motor vehicle and owner and operator thereof. The New York Court found that the bicyclist's failure was in not conducting an investigation of his own; where the police accident report reflected that two license plates were identified as belonging to the offending motor vehicle, the fact that one plate was identified as "possible plate" meant that investigation was required. The Court noted that the bicyclist had failed to show that all reasonable efforts had been made, and thus, the bicyclist was required to exhaust his remedies in his personal injury action against the owner of the vehicle, and only if the personal action ultimately failed due to lack of proof of the identity of the owner and/or operator could the court consider granting leave to sue MVAIC; the Court noted that at the time of trial, an

investigation had disclosed the identity of the vehicle's registered owner. Thus, in New York, the issue of the identity of a hit and run driver and unknown vehicle and the question of the insured's reasonable efforts to identify may remain an open issue up to and including the time of trial. A New York insured must prove that all reasonable efforts have been taken from the time of the accident until the time of trial. There is clearly no such burden on South Carolina insureds who are victims of a hit and run.[2]

In fact, Respondent has not cited to any other jurisdiction with a statute *similar* to ours which requires that an insured show only that he was not negligent in failing to determine the identity of the hit and run driver at the time of the accident. Under the plain language of the South Carolina statute, an insured victim need only show that he was not negligent at the time of the accident and there is no requirement that he pursue an independent investigation or press charges thereafter. The trial judge erred in granting summary judgement only upon expanding upon the requirements of the statute to impose further and more onerous burdens on the insured victim, not contemplated by the legislature.

III. An insured victim is not required to provide an affidavit pursuant to the statute where the injury was caused by physical contact between the unknown vehicle and the injured party.

Respondent includes as her third Issue on Appeal, "Whether the Circuit Court properly held that Appellant failed to provide an affidavit from a witness until over four years after the accident and almost a year after the Complaint was filed which serves as an alternative basis to

[2] Given Respondent's reliance upon New York as having a "similar" law, Appellant would note that the New York law applies to pedestrian accidents. *See Garcia v. Motor Vehicle Accident Indemnification Corp.*, 6 Misc. 3d 194, 195, 787 N.Y.S.2d 818, 819 (Sup. Ct. 2004)(pedestrian on Second Avenue, in the City of New York, was struck and knocked down by a motor vehicle, which then left the scene of the accident. The pedestrian was entitled to make a claim pursuant to MVAIC; there was no argument that the New York statute would not apply to pedestrian accidents.)

affirm summary judgment." (Brief of Respondent, p. v). First of all, the trial judge did not "hold" that summary judgment was warranted on the basis that Appellant had failed to timely provide an affidavit. In fact, the judge clearly indicated by his Order that his observation was *not* the basis for his ruling. The judge actually commented by footnote, "***While not the basis for my ruling***, the evidence and testimony in this case also show that Appellant 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, emphasis added). As argued, this observation was an aside, critical of Appellant's not filing an affidavit until time to submit evidence for trial, but not finding any basis to grant summary judgment on that ground.

Respondent argued to the trial judge that summary judgment was warranted because Appellant had not submitted a timely witness affidavit pursuant to Subsection (2). The statute explicitly provides that an insured may make a claim where "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. . . . *S.C. Code Ann. § 38-77-170 (2).* Appellant responded to Respondent's argument below, pointing out that the plain language of the statute required no such affidavit in a case where there was injury caused by contact with the unknown vehicle. Apparently not seeing any way around the plain language of the statute, the judge correctly made no ruling on this basis.

Appellant agrees with Respondent that the legislature imposed the requirement of "contact" as a safeguard to prevent fraudulent John Doe actions, and then provided an alternative method of proof through a witness affidavit in order to expand the number of injured insureds who could benefit under the statute. Respondent further asserts that the problems of proving and disproving a hit and run accident "virtually disappear with the requirement of physical contact" because proof

that a hit and run vehicle did in fact exist is then clearly available for, as physical contact almost invariably produces visible evidence of impact, the possibility of a 'phantom' hit and run driver becomes minimal." (Brief of Respondent p 21). However, Respondent assumes that only a car vs. car contact will produce evidence of the impact. Thus, Respondent next asserts that even in a case where there *is* contact with the unknown vehicle, an affidavit is nevertheless required if the unknown vehicle came into contact with and caused injuries to the body of a pedestrian, rather than coming into contact with and causing damage to his car. There is no support for this contention in the language of the statute.

The statute plainly requires that either the "injury or damage" be due to contact with the unknown vehicle - - these requirements are in the alternative; thus, either the injury to the person must result from contact with the unknown vehicle or damage to the insured's vehicle must result from contact with the unknown vehicle. There is no requirement in the statute that the contact must be between the unknown vehicle and the vehicle of the insured. In fact, in *Sapp v. State Farm Auto. Ins. Co.,* 272 S.C. 301, 303, 251 S.E.2d 745, 746 (1979), the Court held, "We affirm the lower court in its holding that the insured is not entitled to recover under the terms of the statute or the policy. Clearly, "physical contact with the unknown vehicle" requires that *something* touch or be touched by that vehicle. The parties have agreed that there was no such touching." Had the *Sapp* Court construed the statute to apply only to cases involving contact between two vehicles, the Court would not have indicated that the requirement was actually only that "something" touch or be touched by that vehicle. Similarly, in *Coker v. Nationwide Insurance Co.,* 251 S.C. 175, 161 S.E.2d 175 (1968), the Supreme Court pointed out that condition (2) on the right to recover under the uninsured motorist provision as stated in Section 38-77-170, as it existed prior to the amendment of 1987, had as "a prerequisite to coverage" that there had been "some physical

contact" with an unidentified vehicle. In 1987, the legislature added the language "or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle." The purpose of this addition, the Supreme Court said, was expand the pool of eligible insureds while also assuring adequate proof that the accident involved an unknown vehicle.

In *Franklin v. Devore*, *supra*, the Court noted that, "prior to its repeal in 1987, S.C. Code Ann. § 56–9–850 (1976) required that, in order to maintain a John Doe action under an uninsured motorist provision, the Appellant's injury had to be caused by "physical contact with the unknown vehicle." Act No. 312, § 6, 1963 S.C. Acts 526. Now, under S.C. Code Ann. § 38–77–170 (Supp.1996), physical contact with the unknown vehicle is not necessary where the accident was witnessed by "someone other than the owner or operator of the insured vehicle." In *Franklin*, the Court noted, "It is apparent that the legislature, in recodifying our state's uninsured motorist law in 1987, merely failed to alter the language of its John Doe service statute, § 38–77–180 (formerly § 56–9–860 (1976)), to reflect the loosening of the conditions necessary to support a John Doe action under an uninsured motorist provision. Because we do not believe the legislature intended to expand the class of plaintiffs who can maintain a John Doe action but leave those plaintiffs with no method with which to serve their defendants, we find the "physical contact" referred to in § 38–77–180 need not be with the unknown vehicle."

The plain language of the statute now states there is no right of recovery, unless . . . "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 who must provide an affidavit; *S.C. Code Ann. § 38-77-170 (2).* There must be contact or, in the alternative, an affidavit must be filed. Appellant argued below that the Defendant had misinterpreted subsection two to require an affidavit here, even though Appellant's injuries were indisputably the

result of physical contact with the unknown vehicle. Under the plain terms of the statute, where "the injury to the Plaintiff, was caused by physical contact with the unknown vehicle," no affidavit is required. Here, the injury to this plaintiff was caused by physical contact with the unknown vehicle; therefore, no affidavit was required as a matter of law.

Respondent has provided no support for her contention that S.C. Code Ann. § 38-77-170 applies to provide relief for the injured insured in cases of vehicle vs. vehicle accidents, but provides no relief to a victim of a pedestrian vs. vehicle accident. Although Counsel for Respondent informed the trial judge, "essentially, your Honor, there has been a litany of cases that have determined this statute and the necessity of filing an affidavit," that litany of cases included only vehicle v. vehicle accidents and there are no reported cases in South Carolina involving a pedestrian accident. (Tr. p. 5, lines 20-22). Respondent relies upon several of those decisions as support for her argument; however, Respondent acknowledges that the cases cited involved questions of whether there was no contact between the unknown vehicle and the insured vehicle. Clearly, the Courts in those cases were not presented with the question of contact between the vehicle and a pedestrian where none of those cases involved a pedestrian accident; therefore, the Courts' indications that in those cases the question presented under § 38-77-170 was whether there was contact between two vehicles are inapplicable and unpersuasive in this case involving contact between the unknown vehicle and a pedestrian.

There is no reason to think from the statute or common sense that our legislature intended to provide an avenue of relief for insured victims whose car is hit by an unknown vehicle but no such relief for pedestrians struck and injured by a hit and run driver. Instead, where in most cases vehicle vs. pedestrian accidents involve very serious injuries for the pedestrian victim and, given the plain language of the statute, there is no reasonable basis to assume that only insured victims

who are injured through contact between the unknown vehicle and their car are entitled to recover under their policy. Again, the uninsured motorist legislation is remedial in nature, enacted for the benefit of injured persons, and it is to be liberally construed so that the remedial purpose intended may be accomplished.

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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