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AUG 16 2018

SC Court of Appeals

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

Peter Rice,

Plaintiff(s),

Civil Action No. 2016 CP 20-011

vs.

MOTION FOR RECONSIDERATION

John Doe,

Defendant(s).

TO: THE HONORABLE DANIEL DEWITT HALL, CIRCUIT COURT JUDGE, Sixteenth Judicial Circuit, Moss Justice Center, 1675-1J York Highway, York, South Carolina 29745; and

CARRIE H. O'BRIEN, ESQ., WALKER ALLEN, 225 E. Worthington Avenue, Charlotte, North Carolina 28203;

COMES NOW the Plaintiff, Peter Rice, and, pursuant to the South Carolina Rules of Civil Procedure, Rule 59, make his Motion to Reconsider as follows:

PROCEDURAL HISTORY

This matter came before this Honorable Court on June 20, 2018 pursuant to a Complaint filed by this Plaintiff on or about January 12, 2016 against Defendants Bobby Rae Dye and John Doe. Defendant John Doe was served through the Department of Insurance on September 15, 2016 with the filing of an Affidavit of Service received by this Court on September 22, 2016. Plaintiff's counsel agreed to a 30-day extension for John Doe to file his Answer. On November 18, 2016, Plaintiff executed an Affidavit pursuant to the requirements of S.C. Code §38-77-170 (Exhibit A) which was emailed by Plaintiff's counsel to John Doe's counsel with a hard copy sent by mail on November 21, 2016. On November 21, 2016, Defendant John Doe filed an Answer which included a motion to dismiss alleging that Plaintiff failed to comply with S.C. Code §38-77-170.

A hearing on John Doe's Motion to Dismiss was scheduled for a hearing on January 5, 2017 at 9:30 a.m. On January 4, 2017, counsel for John Doe sent an email indicating that the motion to dismiss was

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being removed (Exhibit B) and counsel would be advising the clerk's office of this the following morning. The morning of January 5, 2017, a paralegal from the office of John Doe's counsel sent an email following up with the clerk that the motion hearing was being removed. (Exhibit C). The clerk's office marked the official hearing roster that the motion was "resolved" (Exhibit D).

On September 26, 2017, Plaintiff signed an Affidavit which included the same sworn testimony as the November 18, 2016 Affidavit with the addition of two paragraphs (#9 and #10) and a statement at the bottom of the affidavit indicating the affiant's understanding of the ramifications of making a false statement. This September 26, 2017 Affidavit was mailed to John Doe's counsel on October 9, 2017. On October 19, 2017, Defendant John Doe filed a Motion for Summary Judgment alleging that Plaintiff failed to satisfy the terms of S.C. Code §38-77-170. During the pendency of the case, Defendant Bobby Rae Dye settled with Plaintiff and a Stipulation of Dismissal With Prejudice was filed on November 8, 2017. On March 14, 2018, John Doe filed a Memorandum of Law in Support of its Motion for Summary Judgment. (Exhibit E).

On March 14, 2018, John Doe's Motion for Summary Judgment was heard before the Honorable Roger E. Henderson. Judge Henderson denied Doe's Motion for Summary Judgment from the bench. On April 13, 2018, the Order Denying John Doe's Motion for Summary Judgment was filed with the clerk. This matter was set for trial the week of June 18, 2018 and was called for trial on June 20, 2018. During the SCRC 16(a) Pre-trial Conference, both parties' Motions in Limine were heard. John Doe requested that her Motion to Dismiss be heard at this time prior to striking a jury. John Doe's motion to dismiss was heard and granted on a Form 4. The Plaintiff hereby files their Motion for Reconsideration within ten (10) days from the date of receipt of the Order in this matter.

QUESTIONS PRESENTED

- I. Did the Court err in determining John Doe's Motion to Dismiss during the SCRC 16(a) Pre-Trial Conference was properly ripe for adjudication?
- II. Did the Court err in finding that, the affidavit requirement of S.C. Code §38-77-170(2) is a condition precedent to filing a lawsuit involving a John Doe vehicle where there was no contact?

FACTUAL STATEMENT OF THE CASE

This action arises out of a motor vehicle collision that occurred on April 17, 2015 in Fairfield County, SC. Plaintiff Peter Rice ("Rice") was a passenger in a vehicle driven by Bobby Rae Dye. Non-party, Derrick McCrorey, was also a passenger in the vehicle driven by Mr. Dye. While traveling South on Hwy 901, Plaintiff alleges that an unknown vehicle traveling North on Hwy 901 came across the center line, causing Mr. Dye to leave the highway and strike a tree, thereby injuring Plaintiff Rice. The owner and operator of the John Doe vehicle remains unknown. It is undisputed that there was no contact between the John Doe vehicle and the vehicle driven by Bobby Rae Dye.

During the pendency of the case, Plaintiff's claim against Mr. Dye was resolved and he has been dismissed with prejudice from the lawsuit. Written discovery has been exchanged between the parties, Plaintiff Rice has been deposed twice and Bobby Rae Dye has been deposed once.

ARGUMENT

I. Did the Court err in hearing and ultimately granting John Doe's Motion to Dismiss?

Defendant John Doe raised a Motion to Dismiss in his Answer filed on November 21, 2016 alleging that Plaintiff failed to comply with S.C. Code §38-77-170. A hearing on this motion was scheduled for January 5, 2017. The day before the scheduled hearing, counsel for John Doe sent counsel for all parties involved in the lawsuit an email indicating that the motion to dismiss was being removed. (Exhibit B). The morning of January 5, 2017, a paralegal from the office of John Doe's counsel sent an email following up with the clerk that the motion hearing was being removed. (Exhibit C). The clerk's office marked the official hearing roster that the motion was "resolved" (Exhibit D).

On June 20, 2018, during the SCRCP 16(a) Pre-Trial Conference, counsel for John Doe requested that the Motion to Dismiss be heard. Plaintiff's counsel argued against this motion being heard claiming that it was not properly before the Court due to it being withdrawn and never having been re-filed or noticed. Plaintiff counsel's contention that the Motion to Dismiss was not properly before the Court was disputed by counsel for John Doe. South Carolina Rules of Civil Procedure Rule 7(b)(1) provides that "an

application to the court for an order shall be by motion which, unless made during a hearing or trial in open court with a court reporter present, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought. The requirement of writing is fulfilled if the motion is stated in a written notice of the hearing of the motion.” Plaintiff submits that the Motion to Dismiss was never re-filed or re-noticed after being removed in early 2017.

The Court of Appeals encountered a similar situation in Summer Place of Myrtle Beach Homeowner's Ass'n, Inc. v. Knight et al., 379 S.E.2d 724, 298 S.C. 241 (S.C. App., 1989). In that case, the trial court granted a summary judgment motion during a SCRCP 16(a) Pre-Trial Conference that was not pending. In reversing the trial court, the Court of Appeals held, “because there were no motions for summary judgment pending at the time of the pre-trial hearing, there was no motion before the court to grant.” (Id. at 729). While South Carolina Rules of Civil Procedure Rule 16(a)(7) allows for the disposition of pending motions during the Pre-Trial Conference, since Doe’s Motion to Dismiss was not filed or noticed after being removed on January 5, 2017, it was not pending before this Court on June 20, 2018 and was not ripe for adjudication.

Plaintiff further asserts that the issue ultimately ruled upon in Defendant’s Motion to Dismiss had already been determined in Doe’s Summary Judgment Motion. On March 14, 2018, Circuit Court Judge Roger Henderson denied Defendant Doe’s Motion for Summary Judgment from the bench and entered a Form 4 Order. The formal Order denying Defendant Doe’s Motion for Summary Judgment was filed on April 13, 2018. (Exhibit F). Following the denial of the summary judgment, there was no motion for reconsideration filed by Defendant.

The Order specifically states, “after reviewing the written submissions and hearing oral argument, this Court denies Defendant Doe’s Motion.” (Exhibit F, p.1)(emphasis added). The only written submission from the parties during the hearing was Defendant’s Memorandum (Exhibit E). The first argument contained in the Defendant’s memorandum, under Section 1.A. is that there was no affidavit prior to filing suit. The memorandum cites the Collins v. Doe, 352 S.C. 462 (2002) case to advance their argument that the filing of an affidavit is a condition precedent to filing suit.

During the June 20, 2018, hearing on Defendant Doe's Motion to Dismiss, Plaintiff's counsel raised the issue that the argument being advanced by Defendant Doe had already been heard and decided at the summary judgment stage by Judge Henderson. The arguments made during Defendant Doe's Motion to Dismiss considered matters outside of the pleadings, namely the Affidavits submitted by Plaintiff, deposition testimony of Plaintiff and Bobby Rae Dye, prior Defendant Dye's acknowledgment of liability via deposition testimony and his denial of liability in the settlement agreement he entered into with Plaintiff. South Carolina courts have long held that a Motion to Dismiss under SCRPC Rule 12 converts into a Motion for Summary Judgment under SCRPC 56 when matters outside of the pleadings are considered.

This Court ultimately granted Defendant Doe's Motion to Dismiss on the ground that the filing of an affidavit was a condition precedent under S.C. Code §38-77-170. Plaintiff respectfully requests this Court to reconsider its position on its granting Defendant Doe's Motion to Dismiss in that: 1) the motion was not properly pending before the Court and therefore not ripe for adjudication; and 2) the motion to dismiss was ultimately turned into a summary judgment motion due to the introduction of matters outside of the pleadings. The procedural avenue to re-hear this singular issue initially raised and ruled upon by Judge Henderson at the summary judgment hearing and again at the June 20, 2018 motion to dismiss is either by way of reconsideration of the summary judgment ruling or at the directed verdict stage of the case.

II. Did the Court err in finding that, the affidavit requirement of S.C. Code §38-77-170(2) is a condition precedent to filing a lawsuit involving a John Doe vehicle where there was no contact?

Defendant Doe's motion is based upon the grounds that the Plaintiff has failed to satisfy the terms of S.C. Code §38-77-170(2), namely due to alleged defects with the timeliness of the filing of his affidavit.

In a situation where there is no physical contact with an unknown vehicle, S.C. Code §38-77-170 (2) requires that "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." There is also an endorsement that must be displayed on the

affidavit stating, "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".

From the plain reading of S.C. Code §38-77-170, there is no requirement that the affidavit be filed with the Court. In Collins v. Doe, 352 S.C. 462 (2002), our Supreme Court noted that "the sworn affidavit requirement fulfills a notice function; providing, upon request, the defendant-insurer with information relating to the validity of Plaintiff's case." (Collins at 470). Upon request via email on November 7, 2016, counsel for Defendant Doe requested the affidavit be provided to her. Exhibit A confirms that counsel for Defendant Doe was provided with Plaintiff's Affidavit on November 18, 2016 via email, which email was responded to, prior to the filing of Doe's Answer on November 21, 2016. Plaintiff's first affidavit was filed with the clerk's office on November 22, 2016. This Court based its granting of Defendant Doe's Motion to Dismiss on the grounds that the Affidavit was not filed prior to Defendant Doe filing his Answer, where no such statutory requirement exists.

The Collins case is factually distinguishable from the instant case. In Collins, there was no affidavit filed by a witness and the court determined that witness testimony could not act as the functional equivalent of the affidavit requirement of S.C. Code §38-77-170(2). Two years after the Supreme Court decided Collins, it heard Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d 626 (S.C., 2004), another no-contact John Doe case which dealt with challenges to the requirements of S.C. Code §38-77-170(2). In reversing the Court of Appeals, the Supreme Court stated:

In Collins, this Court strictly interpreted § 38-77-170(2). This Court held that while the purpose of the affidavit requirement of § 38-77-170(2) could have been met by witness testimony, the statute specifically required that the plaintiff provide an affidavit of an independent witness.

Here, § 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, Collins suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to Collins, is not); 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)("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")

The net result of this interpretation results in Plaintiff losing his ability to have his claim against John Doe heard by the jury. Both affidavits were executed by Plaintiff, well in advance of the expiration of the statute of limitations. If an affidavit were found to be a condition precedent to filing a John Doe action, that result could have been attained by Plaintiff dismissing his case without prejudice and simply re-filing it at any point from when Defendant Doe's initial Motion to Dismiss was raised on November 22, 2016 until the statute of limitations expired on April 17, 2018. Defendant Doe was afforded the opportunity to depose the Plaintiff and the driver of the Plaintiff's vehicle, Mr. Dye. The concerns of fraud prevention of the legislature involving single-vehicle accidents have been met. Defendant Doe and his insurer have not been prejudiced due to a lack of notice or an opportunity to further investigation this claim, as this litigation has spanned nearly two years. In sum, the resulting prejudice to Plaintiff rises to the level that is so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intent.

Finally, due to the delay of the determination of John Doe's hearing on his Motion to Dismiss from when it was initially filed in November of 2016 until it's hearing in June of 2018, the Plaintiff respectfully requests that the Court consider the equitable remedy of equitable tolling of the statute of limitations due to these exceptional circumstances.

WHEREFORE, the Plaintiffs pray that the Court reconsider its judgment in the above matter as requested above and amend and reissue the Order in this matter accordingly.

[signatures on next page]

Respectfully Submitted,

/s/ S. Hampton Eadon, III
S. HAMPTON EADON, III
Attorney for Plaintiff
SC Bar No. 76158
HARRIS AND GRAVES, P.A.
P.O. Box 11566
Columbia, SC 29211
(803) 799-2911
she@harrisgraves.com

AND

/s/ Jonathan M. Goode, Jr.
JONATHAN M. GOODE, JR.
Attorney for Plaintiff
SC Bar No. 79064
P.O. Box 120
Winnsboro, SC 29180
(803) 635-396
jonathan@thegoodelawyer.com

Columbia, South Carolina
Dated: June 29, 2018

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

2016 NOV 22 AM 10:11
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

IN THE COURT OF COMMON PLEAS

Peter Rice,
Plaintiff,

Civil Action No. 2016CP20011

vs.

AFFIDAVIT OF PETER RICE

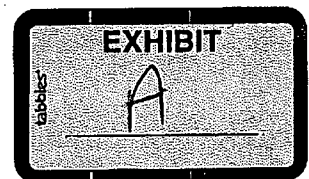
Bobby Rae Dye and John Doe,
Defendant.

PERSONALLY APPEARED before me, Peter Rice, who, being first duly sworn, deposes and says that:


1. I am over the age of 18 and otherwise qualified to give sworn testimony;
2. I am a citizen and resident of Chester County, South Carolina;
3. I am the Plaintiff in the above-referenced legal action;
4. I was a passenger in a vehicle being driven by Bobby Rae Dye, traveling on Highway 901 in Fairfield County, South Carolina on April 17, 2015;
5. As we approached a slight curve of the roadway, I observed two headlights traveling in the oncoming lane of travel;
6. I was able to determine that the headlights were those of a pick-up truck;
7. As the vehicle driven by Mr. Dye approached the truck, Mr. Dye steered his vehicle to the right in what I believe to be an effort to avoid colliding into the pick-up truck;
8. In making this maneuver, Mr. Dye lost control of the vehicle I was riding in and went off of the roadway, striking a tree.
9. The truck that was traveling in the oncoming lane never stopped and I was unable to determine the identity of the truck or it's driver.

FURTHER AFFIANT SAYETH NOT

(Signature page to follow)



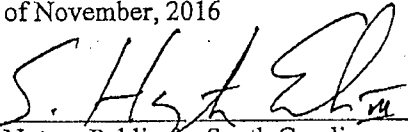
Date: November 18, 2016



PETER RICE

Sworn To Before me this 18th day

of November, 2016



Notary Public for South Carolina
My Commission Expires: 1-13-2021

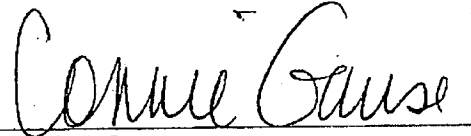
CERTIFICATE OF SERVICE

Connie Gause says that (s)he is the Paralegal for the Attorney for the Plaintiff, with offices at 1518 Richland Street, Columbia, SC, and that on November 21, 2016, (s)he mailed in a sealed envelope, postage prepaid, a copy of Affidavit of Peter Rice to:

Michael T. Coulter, Esq.
CLARKSON, WALSH & TERRELL, P.A.
PO Box 6728
Greenville, SC 29606

Carrie H. O'Brien, Esq.
Willson-Jones Carter & Baxley, PA
6701 Carmel Road, Ste. 475
Charlotte, NC 28226

NOV 22 4PM 10 11
FAIRFIELD COUNTY
CLERK OF COURT
BETH JO BECKHAM



Connie I. Gause

Hampton Eadon

Subject: FW: Peter Rice vs. Bobby Rae Dye and John Doe 16-5250933:

From: Carrie H. O'Brien [<mailto:chobrien@wjlaw.net>]
Sent: Wednesday, January 4, 2017 6:07 PM
To: Hampton Eadon <she@harrisgraves.com>; Connie Gause <cgause@harrisgraves.com>
Cc: 'mcoulder@clarksonwalsh.com' <mcoulder@clarksonwalsh.com>; 'thammett@clarksonwalsh.com' <thammett@clarksonwalsh.com>; Mandy B. Given <abgiven@wjlaw.net>
Subject: Peter Rice vs. Bobby Rae Dye and John Doe 16-5250933:

All,

I am removing my Motion to Dismiss.

The Motion to Amend Answer is as to John Doe and I have let Mike know I have no objection, previously.

I am notifying Court as to both first thing in morning.

Feel free to call my cell, 704-577-4261, with questions.

Thanks,

WJC&B

Willson Jones Carter & Baxley, P.A.

Carrie Hailman O'Brien, Attorney
chobrien@wjlaw.net
6701 Carmel Road, Suite 475
Charlotte, North Carolina 28226
Phone: (704) 247-9679
Fax: (704) 544-1719
wjclaw.com

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Connie Gause

From: Durham, Tammy <Tammy.Durham@fairfield.sc.gov>
Sent: Thursday, January 5, 2017 10:09 AM
To: Mandy B. Given
Subject: RE: Peter Rice vs. Bobby Rae Dye and John Doe 16-5250933:

I will note the roster. Thanks for the update

Tammy

From: Mandy B. Given [mailto:abgiven@wjlaw.net]
Sent: Thursday, January 05, 2017 9:34 AM
To: Durham, Tammy
Cc: 'mcoulter@clarksonwalsh.com'; 'thammett@clarksonwalsh.com'; 'she@harrisgraves.com'; 'cgause@harrisgraves.com'; Carrie H. O'Brien
Subject: Peter Rice vs. Bobby Rae Dye and John Doe 16-5250933:

Tammy,

Per our telephone conversation this morning, Attorney O'Brien's Motion to Dismiss has been removed, and you have noted that she consents to the Motion to Amend. Do not hesitate to contact me with any questions.

Thank you,



Mandy Given, Paralegal to Carrie Hailman O'Brien
abgiven@wjlaw.net
6701 Carmel Road, Suite 475
Charlotte, North Carolina 28226
Phone: (704) 247-9687
Fax: (704) 544-1719
wjclaw.com

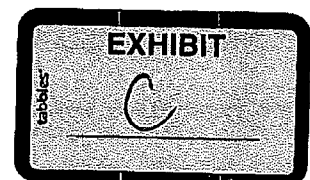
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To: abgiven@wjlaw.net [Remove this sender from my allow list](#)
From: tammy.durham@fairfield.sc.gov

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Fairfield County Sixth Judicial Circuit - Roster Details
 Motion Roster for January 5, 2017 @ 9:30 AM

Court/Agency	Common Pleas	Judge	Benjamin	Roster Id	46
Roster Type	Motion Roster	Roster Begin Date	01/05/2017	Roster End Date	01/05/2017

Number of motions = 16

#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
3	01/05/2017	9:30 AM	0:4	Motion/Summary Judgment	Broad River Campground Llc-PLT	08/22/2016	2014CP2000349 Broad River Campground Llc VS Jenkinsville Water Co Inc	Premises Liab 330	Glenn E. Bowens (803) 714-7766	Reginald Wayne Belcher (803) 254-2200	CONF.
4	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss Pl's NO	Pruithealth-Ridgeway LLC-DEF	04/13/2016	2016NI2000005 Fraggy Twiny Gals Plaintiff et al VS Pruithealth-Ridgeway LLC defendant et al	Notice/Med Mal/230	Daniel Nathan Hughey (843) 881-8644	Joshua Steven Whitley (843) 606-5635	resolved
5	01/05/2017	9:30 AM	0:4	Motion/Dismiss Pl's Notice of Intent	Pruithealth-Ridgeway LLC-DEF	08/15/2016	2016NI2000002 Sheila Per Rep Hall VS Pruithealth-Ridgeway LLC defendant, et al	Notice/Med Mal/230	Daniel Nathan Hughey (843) 881-8644	Joshua Steven Whitley (843) 606-5635	resolved
6	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss Plaintiffs Notice of Intent	Pruithealth-Ridgeway LLC-DEF	11/10/2016	2016NI2000004 Denise H. Pomeroy Plaintiff et al VS Pruithealth-Ridgeway LLC defendant et al	Notice/Med Mal/230	Lee Deer Cope (803) 943-2111	Joshua Steven Whitley (843) 606-5635	resolved
7	01/05/2017	9:30 AM	0:4	Motion/Refer to Special Referee	William Jr Russell-PLT	11/07/2016	2015CP2000223 William Jr Russell plaintiff, et al VS Betty R Ginyard Pr	Special-Comp/Oth 699	Debra A. Matthews (803) 635-6000 Kenneth B. Wingate (803) 256-2233	Thomas Jefferson Goodwyn Jr. (803) 251-4517 E. Crosby Lewis Sr. (803) 635-1920	Resolved
8	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss Plaintiffs Notice of Intent	Pruithealth-Ridgeway LLC-DEF	11/10/2016	2016NI2000003 Denise H. Pomeroy Plaintiff et al VS Pruithealth-Ridgeway LLC defendant et al	Notice/Med Mal/230	Lee Deer Cope (803) 943-2111	Joshua Steven Whitley (843) 606-5635	Resolved
9	01/05/2017	9:30 AM	0:4	Motion/Dismiss/Answer	John Doe-DEF	11/21/2016	2016CP2000011 Peter Rice VS Bobby Rae Dye	Motor Veh Accid 320	Sherod Hampton Eadon III (803) 799-2911	Michael T. Coulter (864) 232-4400 Carrie H. O'Brien (704) 247-9679	Resolved
10	01/05/2017	9:30 AM	0:4	Motion to Amend Answer	Bobby Rae Dye-DEF	09/12/2016	2016CP2000011 Peter Rice VS Bobby Rae Dye	Motor Veh Accid 320	Sherod Hampton Eadon III (803) 799-2911	Michael T. Coulter (864) 232-4400 Carrie H. O'Brien (704) 247-9679	CONSENT ORDER TO COME
11	01/05/2017	9:30 AM	0:4	Motion/Sanctions	Detra K Johnson Pr -PLT	11/18/2016	2016CP2000159 Detra K Johnson Pr , plaintiff, et al VS Bruce Femell Johnson defendant, et al	Wrongful Death 360	Shane Morris Burroughs (803) 268-9800 David C. Marshall (803) 268-9800	Curtis Lyman Ott (803) 724-1713 D. Cravens Ravenel (803) 799-9091	Requested conf.
12	01/05/2017	9:30 AM	0:4	Notes/Motion/Summary Judgment	Christopher L. Savelly-PLT	10/24/2016	2016CP2000243 Christopher Savelly VS Daniel S. Friedman	Foreclosure 420	Robert Nicholas C. Falk (843) 818-2171 K. B. B. (803) 208-2020	Michael K. Hatch (803) 366-3388	removed
13	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss and Compel Arbitration	Pruithealth-Ridgeway Llc-DEF	09/19/2016	2016CP2000298 Cassandra Phillips Poa VS Pruithealth-	Medical Malpract 220	Arthur Stuart Hudson (843) 881-8644	Monteith Powell Todd (803) 231-7837	



STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

2018 MAR 14 AM 9:09
IN THE COURT OF COMMON PLEAS
Civil Action No.: 2016-CP-20-011
FAIRFIELD COUNTY
CLERK OF COURT
JUDY M BONDS

Peter Rice,

Plaintiff,

vs.

Bobby Rae Dye and John Doe

Defendants.

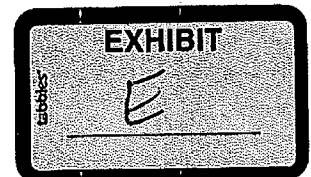
MEMORANDUM OF LAW IN SUPPORT
OF UNNAMED DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

NOW COMES the Unnamed Defendant, Progressive Insurance Company, by and through undersigned counsel, and hereby submits the following memorandum of law in support of its Motion for Summary Judgment as follows:

BACKGROUND

This action arises out of a motor vehicle accident that occurred on April 17, 2015 in Fairfield County, SC. Plaintiff Peter Rice alleges that he was a passenger in a vehicle driven by Defendant Bobby Rae Dye. Non-party Derrick McCrorey was also a passenger in the vehicle. As they were traveling south on Hwy 901, Plaintiff alleges that an unknown vehicle traveling north on Hwy 901 swerved across the center line, causing Defendant Dye to veer off the highway and strike a tree. The owner and operator of the other vehicle remain unknown.

Plaintiff filed this action against Defendant Dye and John Doe on January 12, 2016. Plaintiff has asserted a claim for Uninsured Motorists benefits, pursuant to Defendant Dye's policy of insurance with the Unnamed Defendant, Progressive Insurance Company. Written discovery



has been exchanged and the Plaintiff has been deposed. The Unnamed Defendant noticed the deposition of McCrorey, but he did not appear. The parties have been unable to take the deposition of Defendant Dye. The Unnamed Defendant now moves for summary judgment on the grounds that the Plaintiff has failed to satisfy the terms of S.C. Gen. Stat. §38-77-170.

ARGUMENT

I. THE PLAINTIFF HAS FAILED TO COMPLY WITH THE TERMS OF S.C. GEN. STAT. §38-77-170 REGARDING HIS CLAIM FOR UNINSURED MOTORIST BENEFITS. THEREFORE, HIS CLAIM MUST BE DISMISSED.

Plaintiff is making a claim for uninsured motorist benefits as the result of a “phantom” vehicle that allegedly ran the vehicle in which he was a passenger off the road. In order for a claimant to prevail on an uninsured motorist claim where there was no direct contact between vehicles, he must comply with the relevant statutes. Specifically, the claimant must satisfy the following:

SECTION 38-77-170. Conditions to sue or recover under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown.

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 was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident.

The following statement must be prominently displayed on the face of the affidavit provided in item (2) above:

A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

Plaintiff filed this action on January 12, 2016. On November 18, 2016 he executed an affidavit in support of his claim. (Exhibit 1) Plaintiff was deposed on August 17, 2017. (Exhibit 2) He executed a second affidavit on September 26, 2017. (Exhibit 3) Paragraphs 1-9 of the two affidavits are identical. However, the 2017 affidavit contains two additional paragraphs that state there was no contact between Mr. Dye's vehicle and the phantom vehicle and that law enforcement was called to the scene of the accident to investigate. Additionally, the 2017 affidavit contains the following language above the signature line: "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."

A. No Affidavit Prior to Filing Suit

Per the language of SC Gen. Stat. §38-77-170, a plaintiff seeking uninsured motorist coverage where there was no physical contact between vehicles must produce an affidavit that complies with the statute's terms *as a condition precedent to filing suit*. The Plaintiff did not produce any affidavit until over 10 months after he filed this action. For purposes of pursuing a claim for uninsured motorist benefits, this affidavit was required prior to filing suit.

In Collins v. Doe, 352 S.C. 462 (2002), the South Carolina Supreme Court held that strict compliance with §38-77-170 is required as a *prerequisite* to maintaining a cause of action under the statute. In Collins, the plaintiff filed suit against a John Doe for purposes of pursuing an

uninsured motorist claim. No witness affidavit was ever produced, as required by the statute, but the plaintiff did produce a witness at trial who testified that a vehicle driven by John Doe caused the accident. The trial court granted a directed verdict on the grounds that the plaintiff had failed to produce the required affidavit. Plaintiff argued that the witness' testimony was sufficient to satisfy the statute's requirements. The Court of Appeals reversed the trial court and the Supreme Court again reversed, holding that the trial court was correct in its dismissal of the plaintiff's action for failure to comply with the terms of the statute.

The Collins court found that the legislature was clear and unambiguous in identifying the "requirements necessary to support a plaintiff's right of action" and found that "Without a sworn affidavit, a plaintiff has no right of action." The court went on to hold that "In other words, without the affidavit, she has no right to bring her case to court." Id. The Court further stated that "Most courts take a liberal view when dealing with the question of coverage; however, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover." Id. By stating that without an affidavit there is no right of action, the Court is making clear that the affidavit is a condition precedent to filing suit and that no suit may be initiated without first fulfilling the statutory requirement.

In an earlier decision the Supreme Court held that "proof of physical contact, a requirement in the predecessor statute to Section 38-77-170, was a *condition precedent* to a plaintiff's right of action against an unknown Joe Doe defendant." Wynn v. Doe, 255 S.C. 509 (1971). (emphasis added) Here, the Court explicitly held that the requirements of the statute were conditions precedent to filing suit. Again, no suit may be filed without first complying with the terms of the statute. Because the Plaintiff failed to do this, his suit must be dismissed.

B. November 18, 2016 Affidavit did not Comply with Statute

Even if the court deems the Plaintiff's November 18, 2016 statute as timely, the affidavit did not comply with the requirements of the statute. Specifically, subsection 3 of S.C. Gen. Stat. §38-77-170 required that any such affidavit contain the following statement, "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," and be prominently displayed on the face of the affidavit. No such statement appeared on the 2016 affidavit, making it non-compliant with the statute. As previously noted, the procedural obligations that the insured must discharge in order to recover, since they are prescribed by statute, are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover." Collins v. Doe, 352 S.C. 462 (2002). The Plaintiff's affidavit did not comply, therefore no right to bring suit existed. His suit must therefore be dismissed.

C. Plaintiff's Affidavits Contradict Deposition Testimony

Plaintiff made clear in his deposition testimony on August 17, 2017 that he did not see the phantom vehicle in his lane of travel at any time. He testified that he said he heard Dye say "Oh, the truck coming at me" (Ex. 2, page 48, line 9) and that it was "coming towards us." (Ex. 2, page 49, line 16). When asked to clarify whether Dye simply stated that a vehicle was approaching them or approaching them in their lane, Rice testified "I can only tell you what he said." (Ex. 2, page 49, line 12) Rice was then asked specifically if he ever saw the other vehicle in his lane, and he testified "No, I didn't see it." (Ex. 2, page 49, line 19) He further clarified that he didn't see the vehicle because "Actually, I was – on the phone." (Ex. 2, page 49, lines 20-23) He testified once more that he never saw the phantom vehicle in his lane of travel. (Ex. 2, page 50, lines 8-10)

The Plaintiff then presented an affidavit on September 26, 2017 that states "I observed two headlights traveling in the oncoming lane of travel." (Ex. 3, paragraph 5) To begin with, the statement in the affidavit is somewhat confusing. If this is to be interpreted as meaning that the headlights were in the opposite lane of travel, then the Plaintiff has failed identify any vehicle illegally traveling in his lane that might have caused the accident. If this is interpreted as meaning that the headlights were in the Plaintiff's lane of travel, then it is in contradiction with the Plaintiff's prior deposition testimony, as described in the preceding paragraph. It is well established that a party cannot provide an affidavit that conflicts with prior testimony for the purpose of avoiding summary judgment. See: Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d. 629, 633 (2004) (holding that "a court may disregard subsequent affidavit as a 'sham,' that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict the party's own prior sworn statement")

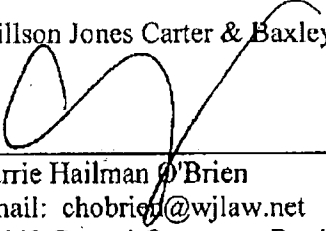
In addition to the Plaintiff's testimony that he did not see the phantom vehicle in his lane of travel, there is no statement from McCrorey about a phantom vehicle crossing the center line, as he did not show up for his deposition and has not executed any affidavits. Defendant Dye has also not provided any testimony in the form of an affidavit or deposition. In sum, there is no evidence from anyone that John Doe was negligent or causing the subject accident, and no testimony sufficient to comply with the terms of SC Gen. Stat. §38-77-170.

CONCLUSION

For the foregoing reasons, the Plaintiff has failed to comply with the express terms of SC Gen. Stat. §38-77-170 in regard to his claim for uninsured motorist benefits. As such, the Plaintiff's claims against John Doe, and his claim for uninsured motorist benefits must be dismissed.

THIS THE 13TH DAY OF MARCH, 2018.

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**ATTORNEYS FOR THE UNNAMED
DEFENDANT**

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing document, Memorandum of Law in Support of the Unnamed Defendant's Motion for Summary Judgment, was served upon all counsel of Record:

- as an attachment to an electronic correspondence
- by depositing a copy of the same in an official depository of the United States mail in a postage-paid envelope
- via facsimile, or
- by hand delivery

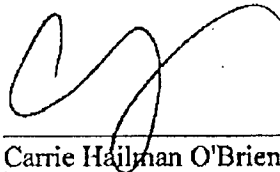
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2018 MAR 14 AM 9:09
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ATTORNEYS FOR THE UNNAMED DEFENDANT

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

2018 APR 13 AM 11:18

IN THE COURT OF COMMON PLEAS

Peter Rice,

FAIRFIELD COUNTY
CLERK OF COURT
JUDY M BONDS

Civil Action No. 2016CP20011

Plaintiff(s),

vs.

**ORDER DENYING JOHN DOE'S
MOTION FOR SUMMARY JUDGMENT**

John Doe,

Defendant(s).

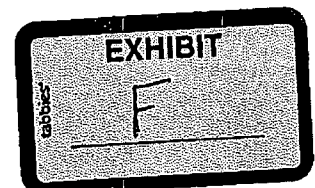
This matter came before the Court upon a Motion for Summary Judgment filed by Defendant John Doe ("Doe"). The Court heard arguments from counsel on March 14, 2018, at the Fairfield County Courthouse. Plaintiff was represented by S. Hampton Eadon III. Defendant Doe was represented by Carrie H. O'Brien. After reviewing the written submissions and hearing oral argument, this Court denies Defendant Doe's Motion.

FACTUAL BACKGROUND

This action arises out of a motor vehicle collision that occurred on April 17, 2015 in Fairfield County, SC. Plaintiff Peter Rice ("Rice") was a passenger in a vehicle driven by Bobby Rae Dye. Non-party Derrick McCrorey was also a passenger in the vehicle driven by Mr. Dye. While traveling south on Hwy 901, Plaintiff alleges that an unknown vehicle traveling north on Hwy 901 came across the center line, causing Mr. Dye to leave the highway and strike a tree, thereby injuring Plaintiff Rice. The owner and operator of the John Doe vehicle remains unknown. It is undisputed that there was no contact between the John Doe vehicle and the vehicle driven by Bobby Rae Dye.

Plaintiff filed this action against Defendant Doe and Bobby Rae Day on January 12, 2016. During the pendency of the case, Plaintiff's claim against Mr. Dye has been resolved and he has been dismissed from the lawsuit. Written discovery has been exchanged and Plaintiff Rice has been deposed twice and Bobby Rae Dye has been deposed once.

Handwritten initials and number:
REDA
#1



STANDARD

"[I]n cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330 (2009). "Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." B&B Liquors, Inc. v. O'Neil, 361 S.C. 267, 270 (Ct. App. 2004). "Moreover, summary judgment is a drastic remedy which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues." Id.

DISCUSSION

Defendant Doe's motion is based upon the grounds that the Plaintiff has failed to satisfy the terms of S.C. Code §38-77-170, namely due to alleged defects with the affidavit requirement. Defense counsel's oral argument in support of their Motion alleged two deficiencies in the affidavit requirement. The Court will address each argument in turn.

In a situation where there is no physical contact with the unknown vehicle, S.C. Code §38-77-170 (2) requires that "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." There is also an endorsement that must be displayed on the affidavit stating, "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".

Mr. Dye was the owner/operator of the insured vehicle and as such, would not be qualified to sign an affidavit pursuant to S.C. Code §38-77-170 (2). Plaintiff Rice qualifies as a witness able to provide the statutorily required affidavit, as he was not an owner or operator of the insured vehicle. Plaintiff Rice executed an Affidavit on November 18, 2016 based upon his personal observations from the night of the wreck. On September 26, 2017, Plaintiff Rice executed a second affidavit, which contained the identical language from the first affidavit along with two additional paragraphs stating that there was no contact

between Mr. Dye's vehicle and the John Doe vehicle and that the wreck was reported to law enforcement. The September 2017 affidavit also contained the required statement of S.C. Code §38-77-170 concerning the implications of making a false statement.

I.

Defense counsel argued that Mr. Rice's affidavit of November 18, 2016 did not contain the required statutory language of S.C. Code §38-77-170 (2) and the suit must therefore be dismissed.

In Tucker v. Doe, 413 S.C. 389, 776 S.E.2d 121 (S.C. App., 2015), the Court dealt with a similar challenge to the sufficiency of the witness affidavit, where the witness executed two affidavits. In Tucker, the John Doe action was filed on May 14, 2010. On July 14, 2010, the Plaintiff (Tucker) filed a witness affidavit from Anthony Bernardo that did not include the statutorily required language. On March 3, 2011, Plaintiff (Tucker) filed a second affidavit from Bernardo that included the required statutory language. The Court disagreed with Doe's contention that the affidavit did not satisfy the statute because it failed to suggest the driver of the unknown vehicle proximately caused the accident and held that the statutory affidavit requirement was met. The Court further reasoned that in applying the analysis of Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d. 626 (S.C. 2004), we hold the affidavit complied with section 38-77-170. (Id. at 399)

I find that the September 26, 2017 affidavit submitted by Mr. Rice satisfies the affidavit requirements of S.C. Code §38-77-170 (2).

II.

Defendant Doe next contends that Plaintiff Rice's affidavit contradicts his deposition testimony. At issue in this contention is paragraph 5 of the affidavit. The Rice affidavit states, "As we approached a slight curve of the roadway, I observed two headlights traveling in the oncoming lane of travel" (Rice Affidavit ¶ 5). In his deposition taken on August 17, 2017, Mr. Rice testified (p. 48, L17):

Q: And did you see the truck coming at you?

A: I'd seen the headlights.

Q: All right. Where were the headlights?

A: Coming towards us.

Q: Okay. Were they in front of you, to the left of you, to the right of you?

A: Well they would be to the left of me.

During his first deposition taken on September 12, 2016, Plaintiff Rice testified as follows to a similar line of questioning (p. 20, L13):

Q: Okay. Do you have any information as to the identity of that other vehicle that came into your lane?

A: No, sir. I was in the back so I couldn't—all I seen was --

Q: What kind of truck was it? Was it like a semi truck or a--

A: It was headlights. I couldn't -- I was in the back so I...

The owner/operator of the vehicle, Bobby Rae Dye was deposed on March 7, 2018. Mr. Dye testified as to the existence of the John Doe vehicle as well as its location on the roadway. Mr. Dye testified (p.10, L.13):

Q: When you first saw the other vehicle who you are saying his, was he in your lane or was he in his own lane?

A: He was in my lane. Two--about--I'd say about two of his tires were over in my lane.

(P.11, L.4) Q: Were you able to determine that other vehicle, whether it was a truck or a car or an 18 wheeler or anything like that?

A: It was -- it was a truck, a four wheel truck. It was a truck.

Q: Like a pick up truck?

A: Yes, sir.

(P.14, L.13) Q: If you would have stayed in your lane of travel, based on your observation, would you have hit that other vehicle?

A: Yeah. He would have hit the driver's side.

Q: Okay. So you--did you feel like you had any--any option other than to do what you did?

A: That, yes, what I had to do. Get out of the road. Get out of his way.

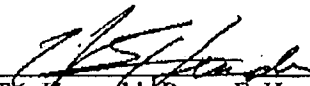
Our Supreme Court dealt with a similar factual scenario in the case of Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d. 626 (S.C. 2004). In Gilliland, the witness, Gayle Norris, testified that she saw the lights of two cars as the cars came around the curve. She also testified that after the accident, she saw the lights of the car behind the Petitioner/Plaintiff "arc through a field" as if it were making a U-turn. The witness never saw the unknown vehicle, other than its headlights. In reversing the Court of Appeals, the Supreme Court held the witness's testimony "contained circumstantial evidence that supports Petitioner's testimony that an unknown driver contributed to her accident. Norris's testimony that she saw the lights of an unknown car that was turning around and fleeing the scene of the accident sufficiently corroborates Petitioner's testimony creating a question of fact as to causation for the jury." Id. at 202.

The Court of Appeals in Tucker addressed an alleged insufficiency of the witness's testimony (Bernardo) relative to the issue of proximate cause. The Court stated, "Bernardo described how Tucker "suddenly veered to the left as if to avoid something in the roadway and in doing so struck a cement pillar supporting the overpass." While this statement did not provide direct evidence as to the involvement of an unknown driver, it amounted to sufficient circumstantial evidence that supported Tucker's testimony and the other evidence in the record suggesting an unknown driver contributed to the accident." Tucker at 401.

In applying the Supreme Court's reasoned decision in Gilliland and the Court of Appeal's decision in Tucker, I find that the Rice affidavit creates circumstantial evidence of the John Doe vehicle's involvement in the wreck and is supported and corroborated by Mr. Dye's testimony such that a genuine question of material fact exists that must be determined by a jury.

CONCLUSION

Based upon the foregoing, this Court DENIES Defendant John Doe's Motion for Summary Judgment.


The Honorable Roger E. Henderson
Presiding Circuit Court Judge

Chesterfield, South Carolina

April 6, 2018

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