THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Honorable Daniel D. Hall, Presiding Judge, Sixth Judicial Circuit

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Case No. 2018-001508

Peter Rice

Appellant,

v.

John Doe

Respondent.

INITIAL BRIEF OF APPELLANT

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2. DID THE COURT ERR IN DETERMINING JOHN DOE'S MOTION TO DISMISS DURING THE SCRCP 16(A) PRE-TRIAL CONFERENCE WAS PROPERLY RIPE FOR ADJUDICATION GIVEN THAT THE ISSE HAD ALREADY BEEN DECIIDED BY ANOTHER CIRCUIT COURT JUDGE AN GIVEN THAT THE MOTION TO DISMISS WAS NO LONGER PENDING?

STATEMENT OF THE CASE

On January 12, 2016, Peter Rice, Appellant, brought this action against Bobby Rae Dye and John Doe, as an unknown driver pursuant to uninsured motorist coverage afforded to him under S.C. Code §38-77-150, S.C. Code §38-77-170 and S.C. Code §38-77-180. Mr. Rice, a passenger in Mr. Dye's vehicle alleged that Mr. Dye and Respondent were negligent in the operation of their respective vehicles resulting in a wreck. Respondent John Doe was served through the Department of Insurance on September 15, 2016 with the filing of an Affidavit of Service received by the Fairfield County Clerk of Court on September 22, 2016. Appellant's counsel agreed to a 30-day extension for Respondent Doe to file its Answer. On November 18, 2016, Plaintiff executed an Affidavit pursuant to S.C. Code §38-77-170(2) which was emailed to Respondent Doe's counsel with a hard copy sent by mail on November 21, 2016. On November 21, 2016, Respondent Doe filed an Answer with a general denial which included a motion to dismiss alleging that Appellant failed to comply with S.C. Code §38-77-170. On November 22, 2016, Appellant Rice filed the November 18, 2016 Affidavit with the Fairfield County Clerk of Court.

A hearing on Respondent 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 Respondent Doe sent an email indicating that the motion to dismiss was being removed and counsel would be advising the clerk's office the following morning. The morning of January 5, 2017, a paralegal from the office of Respondent Doe's counsel sent an email following up with the clerk that the motion hearing was being removed. The clerk's office marked the official hearing roster that the motion was "resolved".

On September 26, 2017, Appellant 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 Respondent's counsel on October 9, 2017. On October 19, 2017, Respondent filed a Motion for Summary Judgment alleging that Appellant failed to satisfy the terms of S.C. Code §38-77-170. During the pendency of the case, Bobby Rae Dye settled with Appellant and a Stipulation of Dismissal with Prejudice was filed on November 8, 2017 as to Bobby Rae Dye. On March 14, 2018, Respondent filed a Memorandum of Law in Support of its Motion for Summary Judgment.

On March 14, 2018, Respondent's Motion for Summary Judgment was heard before the Honorable Roger E. Henderson. Judge Henderson denied Respondent's Motion for Summary Judgment finding that Appellant's Affidavit of September 26, 2017 satisfied the requirements of S.C. Code §38-77-170(2). On April 13, 2018, the Order Denying Respondent's Motion for Summary Judgment was filed with the Fairfield County Clerk of Court. This matter was set for trial the week of June 18, 2018 and was called for trial on June 20, 2018 before the Honorable Daniel D. Hall. During the SCRCP 16(a) Pre-trial Conference, Respondent requested that its Motion to Dismiss be heard prior to selecting a jury. Respondent's Motion to Dismiss was heard and granted on a Form 4, which was filed on June 20, 2018 dismissing Appellant' s case. Appellant timely filed a Motion for Reconsideration on June 29, 2018. Appellant's Motion for Reconsideration was denied on a Form 4 filed July 17, 2018. Appellant filed a Notice to Appeal on August 16, 2018 and served it upon Respondent. The Appellant hereby files this brief in support of that Appeal.

STATEMENT OF THE FACTS

This personal injury action arises out of a motor vehicle collision that occurred on April 17, 2015 in Fairfield County, SC. Appellant was a passenger in a vehicle driven by Bobby Rae Dye. While traveling South on Hwy 901, Appellant 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 Appellant. The owner and operator of the Respondent's vehicle never stopped at the scene and remains unknown. It is undisputed that there was no contact between the Respondent's vehicle and the vehicle Appellant was a passenger in.

ARGUMENT

I. THE CIRCUIT COURT ERRED IN FINDING THAT, THE FILING OF AN AFFIDAVIT PURSUANT TO 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 PRIOR TO THE EXPIRATION OF THE STATUTE OF LIMITATIONS

South Carolina authority for "John Doe" actions in order to sue and recover uninsured motorist benefits are contained within S.C. Code of Laws. §38-77-170.

> **§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 subitem (2) above: A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW.

From the plain reading of S.C. Code §38-77-170, there is no requirement that the affidavit be filed with the Court. The trial court ultimately granted Respondent's Motion to

Dismiss on the ground that the filing of an affidavit was a condition precedent for filing suit under S.C. Code §38-77-170(2). In so holding, the trial court stated, "I find that the—that the motion to dismiss is granted because of the failure to file an affidavit until after an answer was filed in this case, and so that's the basis for the Court's ruling." (Transcript p. 39, lines 10-14). However, a plain reading of the language of the statute at issue contains no requirement that the Affidavit needs to be filed, nor that it needs to be filed prior to Respondent's filing its Answer.

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, emphasis added). Upon request via email on November 7, 2016, counsel for Respondent requested the affidavit be provided. Email receipts confirm that counsel for Respondent was provided with Appellant's Affidavit on November 18, 2016 via email. This email was responded to, prior to the filing of Respondent's Answer on November 21, 2016. Appellant's first affidavit was filed with the clerk's office on November 22, 2016.

The Collins case is factually distinguishable from the instant case. In Collins, there was no affidavit filed by any 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).

The Court in Gilliland did allow recovery to Ms. Gilliland. The reasoning was based upon a seeming disagreement between Wausau Ins. Co. v. Howser, 309 S.C. 269, 422 S.E.2d 106 (1992) and Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002). Howser seemed to

liberally interpret §38-77-170(2) while Collins more strictly interpreted the statute with regard to the requirement of a witness affidavit versus court testimony from a witness.

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 the trial court's interpretation of the case at bar that the filing of an affidavit as a condition precedent results in Appellant losing his ability to have his claim against Respondent decided by the jury. Both affidavits were executed by Plaintiff, unquestionably in advance of the expiration of the statute of limitations.

If the trial court determined that an affidavit being filed was in fact a condition precedent to filing a John Doe, no-contact action, the end result could have been cured in a timely fashion by Appellant dismissing his case without prejudice and simply re-filing it at any point from when Respondent's initial Motion to Dismiss was raised on November 22, 2016 until the statute of limitations expired on April 17, 2018, approximately one and a half years later. Respondent was afforded the opportunity to depose the Appellant and the driver of the Appellant's vehicle, Mr. Dye. The concerns of fraud prevention of the legislature involving single-vehicle accidents have been satisfied. Respondent 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 over two years. In sum, the resulting prejudice to Appellant 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.

In Hooper v. Ebenezer Sr. Services, 687 S.E.2d 29, 386 S.C. 108 (S.C., 2009), the South Carolina Supreme Court adopted the remedy of equitable tolling. "Equitable tolling is a nonstatutory tolling theory which suspends a limitations period." Ocana v. Am. Furniture Co., 135 N.M. 539, 91 P.3d 58, 66 (2004), cited by Hooper at 33.. The remedy of equitable tolling is to be used "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." 54 C.J.S. Limitations of Actions § 115 (2005). The Hooper court held, "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." Hausman v. Hausman, 199 S.W.3d 38, 42 (Tex.App.2006). Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use. Hooper at 33.

Due to the delay in hearing Respondent's Motion to Dismiss from when it was initially filed in November of 2016, due to its removal from the motion roster in January of 2017 led to this motion not being heard until June 20, 2018, the day the case was set for trial. The consequence of the timing of the hearing granting Respondent's Motion to Dismiss rendered Appellant's claim expired due to the running of the statute of limitations. This result seems patently unfair given that, in the light most favorable to Appellant, he filed an Affidavit which

met all requirements of S.C. Code §38-77-170(2) on February 5, 2018, at the latest, well before the statute of limitations on his claim expired on April 17, 2018. Appellant respectfully requests that the Court consider the remedy of equitable tolling of the statute of limitations due to these exceptional circumstances.

II. THE CIRCUIT COURT ERRED IN HEARING AND ULTIMATELY GRANTING JOHN DOE'S MOTION TO DISMISS AS THE ISSUE WAS NOT RIPE FOR ADJUDICATION

This appeal emanates from the Circuit Courts granting of Respondent's Motion to Dismiss on the eve of trial of this case. Appellant contends that based upon South Carolina law, the Motion should not have been heard an if heard, should have been denied and seeks reversal by the Appellate Court.

Respondent raised a Motion to Dismiss in its Answer filed on November 21, 2016 alleging that Appellant 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 motion hearing, counsel for Respondent sent counsel for all parties an email indicating that the motion to dismiss was being removed. The morning of January 5, 2017, a paralegal from the office of Respondent's counsel sent an email to the clerk that the motion was removed. The clerk's office marked the official hearing roster that the motion was "resolved".

On June 20, 2018, during the SCRCP 16(a) Pre-Trial Conference, Respondent requested that the Motion to Dismiss be heard. Appellant'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. 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 on January 4, 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 that was not pending during a SCRCP 16(a) Pre-Trial Conference. 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 Respondent's Motion to Dismiss was not filed or noticed after being removed on January 5, 2017, it was not pending before the trial court on June 20, 2018 and was not ripe for adjudication.

Appellant asserts that the issue ultimately ruled upon in Respondent's Motion to Dismiss had already been determined in Respondent's Summary Judgment Motion by Judge Henderson.

The Order denying Summary Judgment specifically states, "after reviewing *the written submissions* and hearing oral argument, this Court denies Defendant Doe's Motion." (emphasis added). The only written submission Judge Henderson reviewed was Respondent's Memorandum in Support as it was the only written submission submitted to the Court. The first argument contained in the Respondent's memorandum in support of its Motion for Summary Judgment, under Section 1.A. is that there was no affidavit prior to filing suit. The memorandum cites Collins v. Doe, 352 S.C. 462, 574 S.E.2d 739 (2002) to advance Respondent's arguments that the filing of an affidavit is a condition precedent to filing a lawsuit against an unknown driver pursuant to S.C.

Code §38-77-170. Following Judge Henderson's denial of Respondent's Motion for Summary Judgment here was no motion for reconsideration filled by Respondent.

The arguments made during Respondent's Motion to Dismiss on June 20, 2018 considered matters outside of the pleadings, namely the Affidavits submitted by Appellant. South Carolina courts have long held that a Motion to Dismiss under SCRCP Rule 12 converts into a Motion for Summary Judgment under SCRCP 56 when matters outside of the pleadings are considered. During the June 20, 2018, hearing on Respondent's Motion to Dismiss, counsel for Appellant raised the issue that the argument being advanced by Respondent had already been heard and decided at the summary judgment stage by Judge Henderson.

Once the matter had been decided by Judge Henderson it was improper to have it reheard by Judge Hall pursuant to Graham v. Town of Loris, 272 S.C. 442 248 S.E.2d 594 (S.C. 1978). In essence, Judge Hall was asked to decide whether the filing of an affidavit was a condition precedent under S.C. Code §38-77-170(2) in a John Doe action involving no contact. The condition precedent argument was raised in the Respondent's written submissions and considered by Judge Henderson prior to issuing his ruling denying Respondent's Motion for Summary Judgment over 3 months prior.

In discussing the interplay of different circuit court judges being asked to adjudicate the same issue without new facts or evidence being presented, the Graham court cited In Steele v. C., C. & A. Railroad Co., 14 S.C. 324 (1880), the Court stated:

> The Court of Common Pleas is a unity, although its jurisdiction is administered by a number of judges who are, in some sense, the exponents of the court. When one of these judges makes a decision upon the merits of a matter within his jurisdiction, that is not merely the personal opinion of the judge, but a judgment of the Court of Common Pleas, which exhausts the power of the court upon that subject and must stand until reversed Or set aside in the manner prescribed by law. There is no appeal from one Circuit Judge to another. All are of equal dignity and have the same right to pronounce the

> judgments of the court. One Circuit Judge Upon the same state of facts, has no power to change, alter or reverse a decision of a brother judge of the same Circuit.

Appellant respectfully requests this Court to reverse the trial court's grant of Respondent's Motion to Dismiss because: 1) the motion was not properly pending before the trial 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 which had already been ruled upon by Judge Henderson.

CONCLUSION

The Respondent's Motion to Dismiss was not ripe for hearing as the aforementioned motion was previously removed from the motions roster and had already been decided by another judge. At no time from January 5, 2017 until the hearing date of June 20, 2018 was there any mention or notice of an intent to have Respondent's Motion to Dismiss calendared or set for a hearing. Assuming that this Court finds that Respondent's Motion to Dismiss was properly before the trial court, the plain language of S.C. Code of Laws §38-77-170 does not require the filing of an affidavit. It requires that an Affidavit must be completed pursuant to the terms of the statute. Case law cites concerns of fraud prevention an issue which is inapplicable here, as evidenced by the years spent litigating the case. The trial court's ruling, if allowed to stand, allows a procedural loophole to create an absurd result outside of the legislature's intent if strictly applied to the facts in this case. When a lawsuit is filed, properly served and required affidavits are provided prior to the expiration of the statute of limitations, surely the net result of that claim being dismissed is a result so absurd that it runs counter to the legislative intent of this, or any, statute. The Circuit Court's granting of the Motion to Dismiss was in error and should be

reversed or equitable tolling should be applied so this controversy may proceed with the issues to be fairly determined by a jury.

RESPECTFULLY SUBMITTED,

HARRIS AND GRAVES, P.A.

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Dated: 10/29/18

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Honorable Daniel D. Hall, Presiding Judge, Sixth Judicial Circuit

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Case No. 2018-001508

Peter Rice

Appellant,

v.

John Doe

Respondent.

CERTIFICATE OF SERVICE

Connie Gause says that (s)he is the Paralegal for the Attorney for the Appellant, with offices at 1518 Richland Street, Columbia, SC, and that on October 29, 2018, (s)he mailed in a sealed envelope, postage prepaid, a copy of Appellant's Initial Brief and Designation of Matter to be Included in the Record of Appeal to:

Carrie O'Brien, Esquire
WALKER ALLEN GRICE AMMONS & FOY
225 E. Worthington Ave, Suite 200
Charlotte, NC 28203

Connie Gause

Connie I. Gause

SHIRLEY G. BROOM
16TH CIRCUIT COURT REPORTER
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September 27, 2018

Mr. S. Hampton Eadon, III
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Re: Peter Rice vs. Bobby Rae Dye and John Doe
2016-CP-20-00011

ORIGINAL TRANSCRIPT OF PROCEEDINGS OF 06/20/2018

40 PAGES @ $3.25 PER PAGE	$130.00
PRIORITY MAIL	6.70
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Matter ID	Client	Invoice No.	Description	Amount
201548015	Rice, Peter	201548015	AR/CG - Transcript	136.70