IN 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

Case No. 2018-001508

Appellate Case No.

Peter Rice — Appellant,

v.

John Doe — Respondent.

INITIAL BRIEF OF RESPONDENT JOHN DOE

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February 28, 2019

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STATEMENT OF THE CASE

On January 12, 2016, Appellant Peter Rice sued Respondent John Doe and Defendant Bobby Rae Dye seeking damages for alleged injuries he sustained as a passenger as a result of a motor vehicle accident that occurred on April 17, 2015. Appellant asserted a claim for uninsured motorists benefits pursuant to Defendant Dye's policy of insurance, claiming an unknown vehicle crossed the center line, causing Defendant Dye to drive off the roadway. Appellant did not execute, deliver, or file an affidavit attesting to the truth of the facts of the accident prior to filing and serving his Summons and Complaint.

On November 21, 2016, John Doe filed an answer reserving a motion to dismiss for failure to comply with S.C. Code § 38-77-170. On November 22, 2016, Appellant filed an affidavit. (Pl. Aff., Nov. 22, 2016). On January 4, 2017, John Doe withdrew the motion to dismiss from the motion's roster without comment as to its resolution.

On October 19, 2017, John Doe filed a Motion for Summary Judgment. On February 5, 2018, Appellant filed a second affidavit containing identical information as the November 2016 affidavit, with the addition of two paragraphs. (Pl. Aff., Feb. 5, 2018). On March 14, 2018, Judge Henderson ruled that Appellant's affidavit, filed February 5, 2018, satisfied the language and

content requirements set forth by S.C. Code § 38-77-170(2). The Order, prepared by Appellant's counsel, was filed on April 13, 2018.

The case was called for trial on June 20, 2018. Judge Hall directed the attorneys, pursuant to Rule 16(a), SCRCP, to appear before the court for a pre-trial hearing. After hearing arguments from counsel, Judge Hall dismissed Appellant's case for failure to file an affidavit as required by S.C. Code § 38-77-170(2) prior to initiating this lawsuit. Appellant's Motion for Reconsideration was denied on July 17, 2018.

This appeal follows.

ARGUMENTS

The issue is this case is whether Judge Hall properly heard and granted John Doe's Motion to Dismiss during a pre-trial hearing on grounds that Appellant had not met the "conditions to sue or recover" with a sufficient affidavit as required by S.C. Code § 38-77-170. This Court should affirm his ruling.

I. THE TRIAL JUDGE CORRECTLY DETERMINED THAT APPELLANT FAILED TO SATISFTY THE AFFIDAVIT REQUIREMENT OF S.C. CODE § 38-77-170(2) AS A CONDITION PRECEDENT TO FILING HIS LAWSUIT AGAINST JOHN DOE

To recover uninsured motorist benefits where there is no contact between vehicles, one must first comply with every condition set forth in S.C. Code § 38-77-170 – notably entitled "*Conditions to sue or recover* under uninsured motorist provision when owner or operator of motor vehicle causing injury or damage is unknown." *Id.* (emphasis added). The statute reads as follows:

> 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.

S.C. Code Ann. § 38-77-170 (Supp. 1999) (emphasis added).

Courts have repeatedly interpreted the law to require strict compliance with the statute's terms as a condition precedent for creating a right of action for a plaintiff seeking uninsured motorist benefits. *See Wynn v. Doe*, 255 S.C. 509, 180 S.E.2d 95 (1971) (holding that a previous version of the statute required proof of physical contact as a condition precedent to a right to recover uninsured motorist benefits); *Morehead v. Doe*, 324 S.C. 559, 479 S.E.2d 817 (Ct. App. 1996) (holding timely reporting of the accident to law enforcement was a condition precedent to recover uninsured motorist benefits).

In *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 290, 188 S.E.2d 459, 462 (1972), the Supreme Court construed a prior version of the subject statute and explained that an insured's "right to sue and collect" from uninsured motorist benefits "is a creature of the legislature". The Court continued its analysis, stating: "[o]ne must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of the law." *Id.* The Court reasoned

that "[i]t is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier." *Id.* The statute sets forth "the procedural obligations that the insured must discharge in order to recover . . ., [and] are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover." *Id.*

As it pertains to the affidavit requirement, courts have repeatedly analyzed the language of the statute and applied the rule that "where a statute is clear and unambiguous, courts do not apply rules of statutory construction." *See Enos v. Doe,* 380 S.C. 295, 669 S.E.2d 619 (Ct. App. 2008) (wherein the court of appeals strictly construed the affidavit requirement of §38-77-170 stating there was "no room for statutory construction" where its terms were clear and unambiguous); *Chestnut v. South Carolina Farm Bureau Mut. Ins. Co.*, 298 S.C. 151, 378 S.E.2d 613 (Ct. App. 1989) (wherein the court of appeals applied the plain-meaning rule to prior version of §38-77-170); *Miller v. Doe*, 312 S.C. 444, 441 S.E.2d 319 (1994) (wherein the Supreme Court strictly construed the language of the affidavit requirement to allow an injured passenger to provide the affidavit); *Silva v. Allstate Prop. & Cas. Ins. Co.*, 424 S.C. 512, 818 S.E.2d 753 (2018) (wherein the Supreme Court held the rules of statutory interpretation were not needed because the statute was unambiguous in requiring an affidavit from a witness who observed the accident).

The South Carolina Supreme Court held in *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002), that strict compliance with S.C. Code § 38-77-170(2) is required as a prerequisite to maintaining a cause of action under the statute. In *Collins*, the plaintiff failed to produce a witness affidavit at any time prior to trial. Although a witness at trial testified that an unknown vehicle caused the accident, the Supreme Court affirmed the trial court's grant of John Doe's motion for directed verdict on grounds that the plaintiff had failed to satisfy the statute's requirement that he produce a witness affidavit and therefore, no right to sue existed. *Id.*

The plaintiff in *Collins* argued that a witness's testimony at trial was sufficient to satisfy the statute's purpose to prevent false statements, and that to strictly construe the statute would, as Appellant argues in the subject appeal, "lead to a result so plainly absurd that it could not possibly have been intended by the Legislature . . . ." The Court of Appeals agreed with the plaintiff and stated that affirming the directed verdict would "elevate form over substance" and reasoned that the purpose of the statute should "prevail over the literal import of the words." *See Collins v. Doe*, 343 S.C. 119, 124, 539 S.E.2d 62, 64 (Ct. App. 2000) (*citing South Carolina Second Injury Fund v. American Yard Products*, 330 S.C. 20, 496 S.E.2d 862 (1998), *citing Liberty Mut. Ins. Co. v. South Carolina Second Injury Fund*, 318 S.C. 516, 518, 458 S.E.2d 550, 551 (1995)).

The Supreme Court disagreed. It found the language of the statute conveys a "clear and definite meaning" such that the court has "no right to look for or impose another meaning". *Collins*, 352 S.C. at 465-66, 574 S.E.2d at 740-41. The Court held that according to the plain language of the statute, "without the affidavit, [plaintiff] has *no right to bring her case to court,*" and that "strict compliance with § 38-77-170 is a *prerequisite* to maintaining a cause of action under the statute." *Collins*, 352 S.C. at 467, 471, 574 S.E.2d at 741, 743 (both emphases added). It is, therefore, clear that the Court considers a witness affidavit as a condition precedent to filing suit and that no suit may be initiated without first fulfilling the statutory requirement.

Appellant muddies the water in an attempt to obscure facts fatal to his cause of action by arguing that there is no "filing" requirement set forth in the statute and that an affidavit was eventually provided "upon request". (App. Br. p. 5-6). Regardless of whether an affidavit must be filed or simply provided, the fact remains: no affidavit existed before Appellant brought this case to court. Appellant failed to fulfill the prerequisites required by §38-77-170(2) and had no right of action when filing and serving his Summons and Complaint.

Appellant argues *Collins* is distinguishable from this case because he did, eventually, file an affidavit with the court, and therefore there can be no concerns of fraud prevention or lack of notice. (App. Br. p. 5-6). However, the Supreme Court has made clear that the conditions set forth in S.C. Code § 38-77-170 are absolute and must be fulfilled as a prerequisite to filing. Indeed, allowing an affidavit to be filed after serving the summons and complaint defeats the statute's purpose for providing notice to the insurer. *See Collins*, 352 S.C. at 470, 574 S.E.2d at 743 ("Without the affidavit, and without the opportunity to interview the witness, the insurer is deprived of valuable factual information with which to assess and evaluate the claim."; "The majority reasons that a sworn affidavit accomplishes three objectives: fraud prevention, meaningful cross-examination, and prior notice to the insurer for purposes of claim evaluation.").

Appellant's argument that there would be no prejudice to the insurer in allowing affidavits after initiating a law suit and would produce an "absurd result" is misplaced and aligns with the plaintiff's failed argument in *Collins*. In practice, it would be illogical for the statute to be interpreted liberally and allow a claimant to withhold providing a witness affidavit – which the legislature requires for purposes of notice and fraud prevention – until after commencement of an action. Under Appellant's line of reasoning, a plaintiff could theoretically appear on the day of trial with an affidavit – a scenario clearly not envisioned or intended by the legislature, as such would not serve the purposes of the statute. *See Shealy v. Doe*, 370 S.C. 194, 201, 634 S.E.2d 45, 49 (Ct. App. 2006) (the statute "demonstrates a policy decision by the legislature which balances the interest of the 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 courts to alter that decision."). Additionally, had the legislature intended to create a right of action provided an insured produces a witness

affidavit *at any time*, the statute would say as much. Instead, the legislature explicitly provided, and the *Collins* court confirmed, that no right of action exists until the insured fulfills all "conditions to sue".

Finally, Appellant seeks to apply a prejudice analysis to this matter and asks this Court to relax the statutory interpretation as discussed in *Gilliland v. Doe*, 357 S.C. 197, 592 S.E.2d 626 (2004).[1] However, *Gilliland* is not applicable to the case at hand, as the court was tasked with analyzing the *sufficiency* of the affiant's statements, not the *existence* of the affidavit at the time the case was brought. *See id.* at 201, 628 (discussing the fair interpretation of "the ambiguous *fact requirement* of §38-77-170(2)" as opposed to the unambiguous affidavit requirement) (emphasis added); *see also Shealy*, 370 S.C. at 204, 634 S.E.2d at 50 (wherein the court discussed the holding of *Gilliland*, stating "[t]he linchpin of the court's ruling was its determination that the witness affidavit contained circumstantial evidence corroborating Gilliland's testimony that an unknown vehicle contributed to her accident.").

Appellant's argument that the resulting prejudice he has incurred as a result of the trial court's order is so severe that it could not have been intended by the legislature is, likewise, misplaced. The statute does not provide a prejudice element such that claimants can escape the affidavit requirement. *See Collins*, *supra* ("Without the affidavit, [plaintiff] has no right to bring her case to court."). The court in *Collins* did not evaluate the plaintiff's prejudice in having her case dismissed mid-trial for failing to abide by the affidavit requirement, and this Court should not

[1] To the extent Appellant argues *Gilliland* stands for the proposition that the affidavit requirement, if strictly construed, would "lead to a result so plainly absurd that it could not possibly have intended by the Legislature," Respondent notes that the basis of the court's holding was that there was sufficient evidence to fulfill the statute's requirements; not that finding the witness's testimony insufficient would lead to an absurd result. *Id.*

evaluate prejudice to Appellant. As stated in *Shealy*, "the result is lamentable to the injured party, but mandated by the statute." *Shealy*, 370 S.C. at 201, 634 S.E.2d at 49.

Appellant failed to comply with the explicit statutory requirements outlined by S.C. Code §38-77-170(2). Therefore, his suit was rightfully and correctly dismissed by the Honorable Daniel D. Hall.

II. THE TRIAL JUDGE DID NOT ERR IN HEARING JOHN DOE'S MOTION TO DISMISS DURING THE RULE 16, SCRCP, PRE-TRIAL HEARING

John Doe's Motion to Dismiss for Appellant's failure to comply with pre-suit statutory requirements was properly before the court at the Rule 16, SCRCP, pre-trial hearing. Judge Hall's dismissal of Appellant's case for failure to comply with S.C. Code § 38-77-170 did not overrule Judge Henderson's Order, which spoke solely to the sufficiency of Appellant's second filed affidavit. Furthermore, the motion did not require Judge Hall to consider any materials outside of the Complaint such that it would be converted to a motion for summary judgment. If this Court were to consider the motion to have been converted, it was harmless error, as Appellant presented his affidavits and supportive case law and analysis of the affidavits was not required to find Appellant failed to comply with the statute.

A. Motion to Dismiss Properly Before the Trial Court

John Doe's Motion to Dismiss for failure to comply with pre-suit statutory requirements was reserved in his Answer to Appellant's Complaint. As an initial matter, John Doe submits that because the motion was reserved in the Answer and had not been ruled upon, it was properly "pending" before the court. Despite initially withdrawing the motion[2], John Doe was not

[2] Respondent further notes that withdrawing a motion from a roster does not foreclose his ability to seek a ruling at a later date. Furthermore, the clerk's notation that the motion was "resolved" had no dispositive effect. *See Innovative Waste Mgmt. Inc. v. Crest Energy Partners GP, LLC,*

foreclosed from having the motion heard at any point during the litigation, including during the pre-trial hearing. Additionally, the motion was made during the Rule 16, SCRCP, pre-trial hearing[3] in open court with a court reporter present. *See* Rule 7(b)(1), SCRCP ("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...") (emphasis added). The purpose of the hearing is to dispose of motions, simplify issues, and generally allow the court to consider "[s]uch other matters as may aid in the disposition of the action." *See* Rule 16(a), SCRCP.

Appellant relies on *Summer Place of Myrtle Beach Homeowner's Ass'n, Inc. v. Knight et al.*, 298 S.C. 241, 379 S.E.2d 724 (Ct. App. 1989), for the proposition that John Doe's Motion to Dismiss, if not "refiled", was not pending and could not be heard during the hearing. *Summer Place* is distinguishable to the present case because defendants made their motion in the judge's chambers and without a court reporter present, which would have required a filed and pending motion pursuant to Rule 7(b)(1), SCRCP. *Summer Place*, therefore, supports a finding in this case that John Doe's motion was properly before the court, as it was made in open court with a court reporter.

Finally, the motion was properly raised and heard at the trial pursuant to Rule 12(h)(2), SCRCP, which permits a party to raise a defense of failure to state a claim upon which relief can be granted or otherwise state a legal defense to a claim at trial. *See e.g. Inman v. Kenn Hyatt Chrysler Plymouth, Inc.*, 294 S.C. 240, 363 S.E.2d 691 (1988) (holding trial judge erred in denying

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423 S.C. 611, 614, 815 S.E.2d 780, 782 (Ct. App. 2018) ("The tasks of the clerk of court are ministerial, always subject to judicial control and the rules of court.").

[3] The Note to Rule 16, SCRCP, specifically addresses the pre-trial session as a "hearing" rather than a "conference", such that it would comply with the Rule 7(b)(1), SCRCP, requirement that a motion be raised during a "hearing." *See* Rule 16, SCRCP, advisory note; Rule 7(b)(1), SCRCP.

as untimely defendant's motion to dismiss raised at trial as permitted by Rule 12(h)(2), SCRCP).

B. The Motion was Not Previously Ruled On

Appellant contends Judge Hall improperly ruled on John Doe's Motion to Dismiss, and in doing so, overruled Judge Henderson's previously filed Order. However, Judge Henderson's Order denied John Doe's Motion for Summary Judgment exclusively on grounds of the affidavits' sufficiency. Appellant relies on *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978), for the proposition that Judge Hall could not hear or decide whether Appellant failed to fulfill the affidavit requirement before filing this cause of action because Judge Henderson considered John Doe's Memorandum in Support of Summary Judgment and made a blanket denial of the motion. Interestingly, the *Graham* court ultimately affirmed the ability of one judge to vacate the order for summary judgment of another pursuant to a statute that no longer exists and therefore, does not support Appellant's position. The court's reasoning was that the second judge was ruling on a different issue than the first judge – namely, the factors set forth by statute that would support vacating the prior order for summary judgment. *See id.*

Judge Hall properly reviewed Judge Henderson's previous Order and found that there had been no ruling on Appellant's ability to sue without having satisfied the prerequisite conditions enumerated in S.C. Code § 38-77-170. Therefore, Judge Hall properly ruled on an issue that Judge Henderson had not addressed. Regardless of the language Judge Henderson utilized in his Order, John Doe was not foreclosed from raising the Motion to Dismiss at trial for purposes of obtaining a ruling. *See McLendon v. S.C. Dep't of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 (1994) ("Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings.").

C. The Motion Was Not Converted

Appellant argues that because Judge Hall considered Appellant's affidavits, he improperly converted John Doe's Motion to Dismiss into a Motion for Summary Judgment. Judge Hall's dismissal was ultimately based on Appellant's failure to produce or file an affidavit prior to filing a Complaint, as required by S.C. Code § 38-77-170. While the parties discussed the sufficiency of the affidavits for additional grounds for the motion to dismiss, Judge Hall ruled on the motion based on the law and the Complaint, without considering or relying on any extraneous materials:

> I'm going to grant the motion to dismiss, and here are the reasons why. It appears that summons and complaint were filed on June the 12th, 2016. At that time there was no affidavit as required by 38-77-170 either served on the defendant or filed and made part of the initial complaint. Indeed it appears that the defendant filed an answer on November the 21st, 2016 that included the motion to dismiss in their answer . . . the Court is persuaded by the language – the Supreme Court case of I' v. Doe, the language that the Supreme Court spelled out in there about – whether the nature of this particular statute that a strict compliance with that statute is required and the affidavit – and I'm not even going to into the sufficiency of the affidavit or the sufficiency of any evidence that might have been presented later on. 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 the case, and so that's the basis of the Court's ruling.

(Tr. p. 37, line 20 – 38, line 3; p. 39, lines 3-14). Therefore, there is no indication Judge Hall converted John Doe's motion to dismiss into a motion for summary judgment.

Even if the motion were converted to a Rule 56, SCRCP, motion, there was no prejudice to Appellant. Analysis of the affidavits were not necessary for Judge Hall to find Appellant failed to comply with S.C. Code 38-77-170. *See Shealy v. Doe*, 370 S.C. 194, 198, 634 S.E.2d 45, 47 (Ct. App. 2006) (wherein trial court converted John Doe's motion to dismiss to a motion for summary judgment because it considered plaintiff's affidavit and a letter in finding the affidavit did not contain the necessary evidentiary support required by the statute, although affidavit was properly attached and incorporated within plaintiff's complaint); *Higgins v. Med. Univ.*, 326 S.C.

592, 605, 486 S.E.2d 269, 275 (Ct. App. 1997) (holding that the conversion error was harmless inasmuch as dismissal was justified pursuant to Rule 12(b)(6), SCRCP, without reference to matters extrinsic to the pleadings); Rule 12(b), SCRCP (providing a motion asserting failure to state facts sufficient to constitute a cause of action, the motion shall be treated as one for summary judgment if matter outside the pleading are presented to and not excluded by the court). As in *Shealy*, the affidavit should properly have been contained within the Complaint. Failure to even reference the required affidavit or its contents was evidence Appellant failed to comply with S.C. Code § 38-77-170.

Appellant failed to file the affidavit which met all requirements of the claim for which relief was sought pursuant to S.C. Code § 38-77-170(2) until February 5, 2018, nearly three years after Appellants alleged date of injury, and nearly fifteen months after Respondent filed an Answer to Appellant's Complaint. Again, no suit may be filed without first complying with the terms of the statute. Because the Appellant failed to do this, Appellant failed to state a claim upon which relief may be granted. Therefore, his suit was rightfully and correctly dismissed by the Honorable Daniel D. Hall.

III. THE AFFIDAVITS FILED AFTER JOHN DOE'S ANSWER WERE NOT SUFFICIENT TO SATISFY THE REQUIREMENTS SET FORTH BY S.C. CODE § 38-77-170

Respondent raises as an additional sustaining ground the insufficiency of the affidavits Appellant filed after John Doe filed his Answer. A respondent may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons were presented to or ruled on by the lower court. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000); *see also* Rule 220(c), SCACR ("The appellate court may affirm a ruling, order, decision, or judgment upon any ground(s) appearing in the Record on

Appeal.").

Should this Court find the affidavit requirement is not a condition precedent to filing a John Doe lawsuit, Respondent submits the trial court's grant of John Doe's pre-trial motion to dismiss should be affirmed because the affidavits filed did not meet the three criteria required in S.C. Code § 38-77-170.

Appellant failed to file any affidavit until November 22, 2016 – one day after Respondent filed the aforementioned Answer to Appellant's Complaint. Appellant executed a second affidavit filed on February 5, 2018. Paragraphs one through nine of the two affidavits are identical; however, the February 5, 2018 affidavit contains two additional paragraphs that state there was no contact between Defendant Dye's vehicle and the phantom vehicle and that law enforcement was called to the scene of the accident to investigate. Additionally, the February 5, 2018 affidavit contains the following required 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."

The November 22, 2016 affidavit failed to specify or speak to whether the accident had been timely reported to an appropriate police authority as required by S.C. Code § 38-77-170(1). The affidavit is void of a statement that the injury or damage was witnessed by someone other than the owner or operator of the insured vehicle as required by S.C. Code § 38-77-170(2). The affidavit also fails to include a statement indicating the insured was not negligent in failing to determine the identity of the other driver as required by S.C. Code § 38-77-170(3). Finally, the November 22, 2016 affidavit does not contain any statement about steps Appellant or some other person may have taken to discover the identity of John Doe and did not contain the required "false statement"

language on the face of the affidavit. For these reasons, the November 22, 2016 affidavit fails to satisfy S.C. Code § 38-77-170 requirements.

The February 5, 2018 affidavit, in addition to not being timely, fails to include a statement indicating the insured was not negligent in failing to discover John Doe's identity as required by S.C. Code § 38-77-170(3), and therefore, cannot be found sufficient for Appellant to bring this cause of action or recover uninsured motorist benefits. *See Shealy, supra* ("An insured cannot recover uninsured motorist coverage unless the three conditions under § 38-77-170 are met.") (*quoting Miller v. Doe*, 312 S.C. 444, 446, 441 S.E.2d 319, 320 (1994)).

CONCLUSION

For the reasons stated above, this Court should affirm the trial judge's ruling.

Respectfully submitted.

The 28th Day of February, 2019

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IN 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

Case No. 2018-001508

Appellate Case No.

Peter Rice Appellant,

v.

John Doe Respondent.

PROOF OF SERVICE

I hereby certify that I did serve a copy of the forgoing Respondent John Doe's Initial Brief and Designation of Matter to be Included in the Record on Appeal upon the Appellant and counsel this, the 28th day of February, 2019 by United States mail, postage prepaid, properly addressed to their last known address as follows:

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February 28, 2019

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Peter Rice vs. Bobby Ray Dye & John Doe
Case No.: 2018-001508

Dear Sir or Madam:

Enclosed please find the original and one copy of respondent John Doe's, initial brief and designation of matter to be included in the record on appeal in the above referenced case, along with a proof of service for the same. We would appreciate your filing the original and returning a clocked copy to us in the envelope provided.

Thank you for your time and attention to this matter.

WALKER ALLEN GRICE AMMONS & FOY LLP

s/Carrie Hailman O'Brien

Carrie Hailman O'Brien

CHO/acw

Enclosures

cc: S. Hampton Eadon, *Attorney for Appellant*