THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable W. Jeffrey Young, Circuit Court Judge

Case No. 2014-CP-40-1654

Willie Jordan, ... Appellant,

v.

Jane Doe ..... Respondent.

BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

Appellant Willie Jordan filed suit in Richland County against Jane Doe alleging he had been injured by an unidentified female motorist on April 1, 2011. (Complaint, filed March 13, 2014, R. pp. 8-13). The Complaint was properly served on the Department of Insurance on March 28, 2014, and forwarded to 21st Century North America Insurance Company on the same date.

A timely Answer was filed on behalf of Jane Doe alleging, among other defenses, that Appellant failed to comply with the provisions of Section 38-77-170, in particular that there was no affidavit attesting to the facts of the accident and that Appellant had been negligent in failing to ascertain the identity of the "Jane Doe" driver of the vehicle at the time of the accident. (Answer, filed April 17, 2014, R. pp. 14-18).

Following discovery, Jane Doe moved for summary judgment. The parties were heard on March 19, 2015, after which the Circuit Court issued its Order Granting Defendant's Motion for Summary Judgment ("Order"). (Order, filed April 28, 2015, R. pp. 1-7). Appellant moved for reconsideration, (Plaintiff's Motion for Reconsideration of Order Granting Defendant's Motion for Summary Judgment, dated May 1, 2015, R. pp. 19-23) ("Motion for Reconsideration"), which was denied.

Appellant timely appealed to this Court.

STATEMENT OF FACTS

Appellant testified that, on April 1, 2011, he had gotten off work and was waiting I n the parking lot of a strip mall, where the Cricket Party Shop is located, for someone he was going to give a ride to. Another acquaintance who was in the parking lot, Tommy

Dee, called to Appellant to ask whether he had seen another individual and/or did he know how to get in touch with the other person. Appellant pulled out his phone and was looking at it. The next thing he knew, a woman in a van backed into him and knocked him to the ground. Appellant's back was to the van. Several individuals "on a wall" told Appellant that the unidentified woman, Jane Doe, had been in the beverage store. (R. p. 77, lines 12-24) (R. p. 80, line 23 – p. 82, line 14) (R. p. 88, line 7 – p. 89, line 25). Appellant testified that "lots of people was out there," and they told him where Jane Doe had been parked. (R. p. 89, line 22 – p. 90, line 3).

Appellant testified that, after Jane Doe hit him, "she got out of the van. Come around and looked. And she said, 'Them damn telephones will get you killed,' and she jumped in the van and pulled off." (R. p. 90, lines 10-22). Appellant said he did not have a chance to say anything to Jane Doe and, because so many people crowded around him to see if he was ok, he was unable to see the license number. (R. p. 91, lines 2-3) (R. p. 93, lines 17-20) (R. p. 128, lines 3-6).

He asked the people around him which way Jane Doe had driven and, after he got up, he got into his car and drove off to see if he could find her. After driving around for about 20 minutes, he returned to the beverage store to speak with the clerk. (R. p. 93, line 14 – p. 94, line 3). Appellant asked the clerk if they had a video camera:

Q: Okay. Okay. Then what happened?

A: And she said, "Yeah, I have a camera." And I said, "Well they said this lady drive a gray van." And she said, "She come here all the time. She come here all the time." And she pulled it up and said, "This her. This her."

Q: That was it?

A: Yeah.

Q: Okay. And from there, where did you go?

A: I left and went home.

(R. p. 97, lines 16-25). Appellant did not ask for a copy of that video and does not know if it still exists. (R. p. 93, line 20 – p. 96, line 6).

Appellant testified that the following day he went to the emergency room. A health care provider at the hospital told Appellant that he had to call the police who later talked with Appellant. (R. p. 102, line 11 – p. 103, line 2). After Appellant spoke with the police, Officer Brandon Robins went to the Cricket Party Shop and was able to take a picture of the web camera photo with his phone. (R. p. 126, lines 4-14).

The police report states that, "Mr. Jordan stated that the only reason he called law enforcement is because on today when visiting the hospital, hospital employees told him to. Mr. Jordan did not want law enforcement to be involved. Mr. Jordan stated that he did not want to prosecute. Mr. Jordan stated that he did not know if it was intentional or unintentional." On another page of the Report, it states, "Mr. Jordan will prosecute." Appellant advised the police that there was a video camera at the Cricket Party Shop. (Incident Report of Officer Brandon Robins, R. pp. 44-46) ("Incident Report").

After speaking with Appellant, Officer Robins went to the Cricket Party Shop where he was able to watch the live-feed video of Jane Doe. He asked the clerk to freeze the frame so that he could take pictures for investigative purposes.[1] The Incident Report indicates that the pictures were forwarded to CrimePic. However, the Incident Report states that it "is for documentation purposes only." (Incident Report, R. p. 45).

[1] Although Appellant's recitation of the facts states that "Officer Robins obtained pictures of the Jane Doe driver by taking photos of the video which was saved at the request of the Plaintiff," and that Appellant requested that the shop clerk "preserve the video tape showing the Jane Doe driver," (App. Br. p. 4-5), there is no evidence whatsoever that Appellant asked either the Cricket Party Shop clerk or Officer Robins to save the video tape or to preserve a picture of Jane Doe.

STANDARD OF REVIEW

"Summary judgement is proper where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." *Carolina Alliance for Fair Empl. v. South Carolina Dept. of Labor, Lic., and Reg.*, 337 S.C. 476, 484, 523 S.E.2d 795, 799 (Ct. App. 1999). Appellate courts apply the same standard that governs the trial court. *Vaughan v. Town of Lyman*, 370 S.C. 436, 440, 635 S.E.2d 631, 633 (2006). Therefore, "[o]n appeal, all ambiguities, conclusions, and inferences arising in and from the evidence must be viewed in a light most favorable to the non-moving party." *Id.*, 635 S.E.2d at 634. "However, when plain, palpable, and indisputable facts exist on which reasonable minds cannot differ, summary judgment should be granted." *Moriarty v. Garden Sanctuary Church of God*, 334 S.C. 150, 155-156, 511 S.E.2d 699, 702 (Ct. App. 1999). Furthermore, "[t]he requirement that the testimony shall be considered in a light most favorable to the plaintiff does not by some legerdemain serve as a substitute for evidence, nor is it of sufficient potency in itself to create and generate evidentiary matter." *Hart v. Doe*, 261 S.C. 116, 119, 198 S.E.2d 526, 527 (1973).

"The plain language of Rule 56(c), SCRCP, mandates the entry of summary judgment, after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Carolina Alliance*, 337 S.C. at 485, 523 S.E.2d at 800. Where the burden of proof below is preponderance of the evidence, a non-moving party need only present a scintilla of evidence in order to withstand summary judgment. *Murphy v. Tyndall*, 384 S.C. 50, 54, 681 S.E.2d 28, 30 (Ct. App. 2009). However, "[w]hilst adhering to the scintilla rule, this court has

recognized a rule supplemental to the scintilla rule, which is ... [i]f it be conceded that there may be deduced by a process of unusual finesse of reasoning that there is a scintilla of evidence ... nevertheless there is another rule, more founded upon common sense and reason, to the effect that when only one reasonable inference, not just one inference, but one reasonable inference, can be deduced from the evidence, it becomes a question of law for the court, and not a question of fact for the jury." *Hart*, 261 S.C. at 120, 198 S.E.2d at 528.

ARGUMENTS

I. The Circuit Court properly held that Appellant was negligent in failing to determine the identity of Jane Doe.

Based on the facts in and the law applicable to this case, the Circuit Court correctly determined that Appellant was negligent in failing to determine the identity of Jane Doe. Under the facts of this case, it is patently and unarguably unreasonable for Appellant to have information that might allow him to identify Jane Doe but not take any further step to ascertain her identity. In order for Appellant to recover under or even bring an action against his own policy for damages caused by an uninsured motorist, he must first meet certain requirements.

Under the definition of "uninsured motor vehicle," a "motor vehicle is considered uninsured if the owner or operator is unknown. However, recovery under the uninsured motorist provision is subject to the conditions set forth in this chapter." S.C. Code Ann. § 38-77-30(14). The uninsured motorist provisions are clear that, "[a]n insured cannot recover uninsured motorist coverage unless the three conditions under § 38-77-170 are met." *Miller v. Doe*, 312 S.C. 444, 446, 441 S.E.2d 319, 320 (1994).

The three requirements set forth in Section 38-77-170 serve as conditions precedent to a plaintiff bringing suit in an uninsured motorist claim. That section provides that:

> 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 (emphasis added).

The "plain language of *Section 38-77-170* requires ... that all three conditions following the word 'unless' be met before an insured may recover under the insured's insured motorist coverage." *Chestnut v. South Carolina Farm Bur. Mut.*, 298 S.C. 151, 154, 378 S.E.2d 613, 615 (Ct. App. 1989). Fulfilling the three requirements in Section 38-77-170 is "necessary to support a plaintiff's 'right of action.'" *Collins v. Doe*, 352 S.C. 462, 466, 574 S.E.2d 739, 741 (2002). Unless the plaintiff fulfills all three

requirements, he has no right to bring his case. *Id.* at 467, 574 S.E.2d at 741. Because the "right to sue and collect from one's own liability insurance carrier in case of a loss caused by a hit-and-run driver or other driver of an uninsured automobile is a creature of the legislature," courts strictly construe the John Doe statute. *Collins*, 352 S.C. at 467-469, 574 S.E.2d at 741-742.

As such, Section 38-77-170 embodies dueling concerns. While it allows an insured to recover from his or her own insurance for an accident caused by a Jane Doe, *Gunnels v. American Lib. Ins. Co.*, 251 S.C. 242, 247, 161 S.E.2d 822, 824 (1968), provisions have been added to protect the insurance company from unreported, fraudulent or uninvestigated claims. *See Morehead v. Doe*, 324 S.C. 559, 479 S.E.2d 817 (Ct. App. 1996); *Shealy v. Doe*, 370 S.C. 194, 200-201, 634 S.E.2d 45, 48 (Ct. App. 2006); *Hart*, 261 S.C. at 121-122, 198 S.E.2d at 528-529. "Since the statute's enactment, the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent 'John Doe' actions." *Gilliland v. Doe*, 357 S.C. 197, 199, 592 S.E.2d 626, 627 (2004).

Specifically, Section 38-77-170(3) requires a plaintiff to prove, by a preponderance of the evidence, that he "was not negligent in failing to determine the identity of the other vehicle and the driver of the other vehicle at the time of the accident." S.C. Code Ann. § 38-77-170(3). The only South Carolina case dealing directly with this provision is *Hart v. Doe*. In *Hart*, the plaintiff swerved her car in order to avoid an oncoming vehicle and ran into a field where she suffered serious injuries. Following the accident, the plaintiff remained at the scene of the accident for 20 or 30 minutes until she was removed by ambulance. The unidentified driver stayed with the

plaintiff until the ambulance took her to the hospital. The plaintiff was able to describe in detail the physical characteristics of the unidentified man, who told her he was from Texas and that he was a stranger to the neighborhood. Although she was in sufficient possession of her senses to direct the other occupants of her vehicle to go get her husband and a wrecker, and to instruct the wrecker driver, who she knew, to go get another person, she "made no effort to ascertain the identity of the man from Texas or to ask any of her family or acquaintances upon the scene to ascertain any information about him or the vehicle he was driving." 261 S.C. at 121-122, 198 S.E.2d at 528-529. The Supreme Court upheld the trial court's determination that the plaintiff failed to demonstrate that she was not negligent in failing to determine the identity of the unidentified driver or his vehicle. 261 S.C. at 122-123, 198 S.E.2d at 529.

Here, Appellant had a brief conversation with Jane Doe after she backed into him and knocked him to the ground. He testified that he did not have an opportunity to either ask for her identification or record her license plate. After she drove off, he asked bystanders which direction she had driven and got into his car and drove around for 20 minutes. (R. p. 91, lines 2-3) (R. p. 93, line 14 – p. 94, line 3) (R. p. 128, lines 3-6). He returned to the Cricket Party Shop and spoke with the clerk, who told him they have a video camera. Although the clerk pulled up the video of Jane Doe and told Appellant, "She come here all the time. She come here all the time," Appellant did nothing further to follow up. He did not ask the clerk to save or download the video tape. He did not question the clerk further regarding Jane Doe's identity despite the fact that the clerk told him Jane Doe came into that shop all the time. He did not question the other people who

had been in the parking lot and had seen the alleged accident occur. He simply went home. (R. p. 97, lines 16-25).

The following day, when Appellant was at the emergency room, he told officer Robins about the video tape, but also told him, he did not want the police involved and did not want to prosecute because he did not think Jane Doe hit him intentionally. (Incident Report, R. p. 44). Although Officer Robins obtained a photo of the video-feed of Jane Doe, the Report indicates that it "is for documentation purposes only." (Incident Report, R. p. 45).

Appellant's attempt to distinguish the facts in *Hart* from this case falls short. Like the plaintiff in *Hart*, Appellant was surrounded by people, some of whom he knew. (R. p. 81, lines 9-14) (R. p. 93, lines 17-21) (Affid. of S. Sims, R. pp. 47-48). He asked them which way Jane Doe went, (R. p. 93, lines 20-21), but there is no evidence he asked anyone if they knew who she was, or whether anyone had seen even part of the van's license plate number, or anything else that might lead to her identification.

In *Hart*, the plaintiff found out the physical characteristics of the unidentified man, who told her he was from Texas and that he was a stranger to the neighborhood, but failed to obtain information that would lead to his identity. 261 S.C. at 121-122, 198 S.E.2d at 528-529. Like the plaintiff in *Hart*, Appellant obtained some information, such as that Jane Doe is a black female, her van is gray and black and the beverage shop had a video of her, but stopped short of using any of that information to identify Jane Doe. The Circuit Court properly analogized the instant case to *Hart* and was correct in reaching the same result.

Although Appellant suggests that the Incident Report is ambiguous in that it also states, "Mr. Jordan will prosecute," (App. Br. p. 9), there is no dispute that any investigation, either by Appellant or the police ended there. The page of the Incident Report on which Appellant relies, with page "4 of 4" hand written at the bottom, appears to be a draft of the final report, as it contains some but not all of the verbiage contained on pages "2 of 4" and "3 of 4." Those pages clearly state that Appellant did not want police involved, would not prosecute, and the report was "for documentation purposes only."

Furthermore, Appellant has presented no case law supporting his suggested theory that the police have any obligation under Section 38-77-170(3) to investigate the identity of Jane Doe on Appellant's behalf. Instead, it is Appellant's burden to take reasonable steps to identify Jane Doe in order to recover under the uninsured motorist provisions. *Hart*, 261 S.C. at 122, 198 S.E.2d at 529.

Other states with similar requirements are in accord. *See Grady v. Unsatisfied Claim & Judgment Fund Board*, 270 A.2d 482 (Md. 1970) (finding "an unfruitful cursory police investigation" does not satisfy a plaintiff's obligation to make all reasonable efforts to ascertain the identity of the unidentified driver and vehicle); *Chance v. Motor Vehicle Accid. Indem. Corp.*, 29 A.D.2d 654 (N.Y. App. Div. 1968) (plaintiff's failure to pursue partial information regarding unidentified driver "necessitates the conclusion that reasonable efforts were not made to ascertain the identity of the vehicle and its owner and operator ..."); *Flores v. Motor Vehicle Accid. Indem. Corp.*, 225 N.Y.S.2d 481 (N.Y. Spec. Term 1962) (plaintiff's failure to follow up on information regarding a likely suspect did not meet the requirement to make all reasonable efforts to identify the

unknown driver or vehicle); *Purcell v. Alfa Mut. Ins. Co.*, 824 So.2d 763 (Ala. 2001) (finding plaintiff failed to exercise "reasonable diligence" in identifying the unknown driver where, although an investigator spent "numerous hours" interviewing a list of potential witnesses, he failed to follow up on the plaintiff's son's deposition testimony that the unknown driver went by the nickname "T-bone").

These tests are consistent with the test applied in *Hart*, where the South Carolina Supreme Court held that "negligence is the failure to use due care; that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances. The burden was upon the plaintiff here to prove that she did, in fact, exercise due care to determine the identity of the other vehicle and the driver thereof." 261 S.C. at 122, 198 S.E.2d at 529. In fact, in *Esposito v. Maryland Auto. Ins. Fund*, 337 A.2d 411 (Md. 1975), Maryland's highest court acknowledged that, while what constitutes "reasonable efforts" will vary from case to case depending on the facts of each, a general guideline had emerged from prior Maryland cases. The Court ruled, "that, at a minimum, vigorous good faith efforts are required to identify the tortfeasor, *the same efforts one would expect an injured party to exert if he knew there would be no recovery unless he actually located the driver*." 337 A.2d at 412 (emphasis in original).

Appellant asserts that, because he gave a cursory description of Jane Doe and the vehicle,[2] told Officer Robins that the beverage shop had a camera, and Officer Robins was able to make a photograph from the video, Appellant was not negligent in identifying Jane Doe or her vehicle. (App. Br. pp. 4-5, 9, 15). However, just as filing an accident report with the insurance company was "not a substitute for a report of the accident by

[2] Officer Robins' report states only that Appellant told him "the suspect was a B/F but he didn't give a description" and the vehicle was "grey and black in color." (Incident Report, R. pp. 44-45).

the insured to the police," that would satisfy the requirements of Section 38-77-170(1), *Morehead*, 324 S.C. at 562, 479 S.E.2d at 818, here, providing the police with cursory information they might use in their criminal investigation, even disregarding the fact that Appellant told Officer Robins he did not want the police involved and he did not want to prosecute, does not absolve Appellant from the requirement of making reasonable efforts to discover Jane Doe's identity.

In fact, Appellant wants to have it both ways. He wants to argue that he took reasonable steps to identify Jane Doe by telling the police the Cricket Party Shop had a video camera and Officer Robins did, in fact, make a copy of the video still-frame image of Jane Doe, (App. Br. pp. 4-5, 9, 15), while at the same time, disclaiming the effect his statement that he did not want the police involved and did not want to prosecute had on that very investigation. Appellant's lengthy discussion of whether he had the authority to shut down an active investigation, (App. Br. pp. 9-12), misses the point. As noted above/below, the burden to comply with Section 38-77-170(3) is Appellant's burden to meet, not the police's burden. Furthermore, *Ex parte Littlefield v. Williams*, 343 S.C. 212, 540 S.E.2d 81 (2000), dealt with the extent of victims' rights under the South Carolina Victims' Bill of Rights within the criminal justice system. *State v. Thrift*, 312 S.C. 282, 440 S.E.2d 341 (1994) dealt with whether a circuit court could dismiss indictments and the interplay between the judicial branch and the Attorney General's office within the executive branch.[3] None of the cases relied on by Appellant indicate that a plaintiff can meet his burden of complying with the requirements of Section 38-77-

[3] The quote from the South Carolina Attorney General's office reveals that what starts the criminal investigation process is that a "complaining witness" files a complaint with the proper authorities. (App. Br. p. 10). Here, that is precisely what the Incident Report shows Appellant was reluctant to do. (Incident Report, R. p. 44).

170(3) by reporting an accident and providing cursory information about a Jane or John Doe to the police, while at the same time telling the police he does not want them involved and will not prosecute. While Appellant may be applauded for his "thoughtful, careful, response" in not wanting to bring criminal charges where he was unsure whether Jane Doe's actions were intentional, it does nothing to allay his burden of proving he took reasonable steps to determine her identity.

Furthermore, contrary to Appellant's assertions, the Circuit Court did not conclude that Appellant's "indication that he did not seek to prosecute the driver for aggravated assault was unreasonable and constituted negligence at the time of the accident," or that Appellant's "thoughtful, careful, response [w]as somehow 'negligent.'" (App. Br. p. 11). What the Circuit Court held was that Appellant himself failed to take steps or make any effort to preserve the video evidence of Jane Doe and, when he provided some information to the police, he at the same time "shut down their investigation into the matter by instructing them not to pursue charges." (Order, R. p. 3). It is undisputed that Appellant told Officer Robins that he "did not want law enforcement to be involved," and "that he did not want to prosecute." (Incident Report, R. p. 44). The key finding by the Circuit Court is that, "[s]imply informing police officers one day later that there may be footage is not sufficient to meet the high burden of the statute. Additionally, instructing those same officers not to pursue the case negates any benefit that could be obtained from their investigation." (Order, R. p. 3). In other words, pointing to the fact that he gave the police a cursory description of Jane Doe and telling them there was a "video camera at the incident location," does not meet Appellant's burden under Section 38-77-170(3). Even if it did, Appellant told Officer Robins he did

not want police involved and did not want to prosecute, which "negates any benefit that could be obtained from their investigation." (Order, R. p. 3).

What's more, Appellant represented to the Circuit Court that, "he did not want to 'prosecute' the individual criminally, because he was not aware Jane Doe intentionally tried to hit him – or run him down with her car," and that he "did not want the police instituting a man hunt for someone as he told the officer he did not believe Jane Doe intentionally ran him down." (Motion for Reconsideration, R. p. 21). Now, on appeal, he asserts that the police report is "ambiguous," and that perhaps he *was* willing to prosecute; however, this is the first time Appellant has made any such suggestion. At the Circuit Court, his argument was solely that his efforts to identify Jane Doe were reasonable because: 1) he drove around for 20 minutes trying to find her van; 2) he talked with the store clerk and saw the video;[4] and 3) he reported the incident to the police who went to the Cricket Party Shop and took a photo of the video of Jane Doe. (Motion for Reconsideration, R. pp. 20-22). At no point did he suggest, let alone assert, that he wanted to or was willing to prosecute Jane Doe. Instead, he vociferously argued that "he did not want to prosecute," and he "did not want the police instituting a manhunt" for Jane Doe. (Motion for Reconsideration, R. p. 21) (Incident Report, R. p. 44).

This Court can and should dismiss Appellant's argument that the issue of whether he was willing to prosecute is ambiguous. An argument raised on appeal that is based on different grounds from the argument presented to the trial court is not preserved for

[4] Although both Appellant's Brief to this Court and his Motion for Reconsideration assert that Appellant took steps to "maintain" or "preserve" the video tape of Jane Doe, (App. Br. p. 15) (Motion for Reconsideration, R. p. 22), his deposition testimony does not support this assertion. Instead, Appellant merely viewed the video and then went home without taking any steps to preserve that evidence. (R. p. 97, lines 16-25).

appeal. *See Jackson v. Speed*, 326 S.C. 289, 305, 486 S.E.2d 750, 758 (1997) ("a party may not argue one ground at trial and an alternate ground on appeal"). This Court routinely rejects parties' attempts to argue inconsistent positions on appeal. *See, e.g.*, *King v. Daniel Int'l Corp.*, 278 S.C. 350, 354, 296 S.E.2d 335, 337 (1982) (rejecting appellant's exception on appeal where it was inconsistent with its statement at trial); *see also Vaughan v. Kalyvas*, 288 S.C. 358, 362, 342 S.E.2d 617, 619 (Ct. App. 1986) (declining to allow the appellant to assert a position on appeal that is contrary to the position taken below). Because Appellant argued to the Circuit Court that he did not want the police to pursue their investigation of Jane Doe, he cannot take the opposite position on appeal.

Even if the police Incident Report is ambiguous about whether Appellant would or would not prosecute, and that the police investigation was shut down for some unknown reason, those assumptions still do not create an issue of material fact because, as is noted above, it is not law enforcement's role or obligation to meet the requirements of Section 38-77-170(3).[5] Instead, the burden is Appellant's to meet and he has no evidence to show that he was not negligent in identifying Jane Doe. He took one random and ineffective attempt at locating her van by driving around for 20 minutes. He spoke with the beverage store clerk and, despite seeing a video of Jane Doe and being informed that she came into that shop "all the time," made no further efforts to identify her. The

[5] Appellant appears to acknowledge this point, stating that "the parameters of Mr. Jordan's reluctance to prosecute are unclear and further development of the facts is necessary *if* this is a relevant factual inquiry." (App. Br. p. 11) (emphasis added). However, on appeal, even Appellant does not and cannot dispute that he told Officer Robins that he did not want the police involved and "that he did not want to prosecute." (Incident Report, R. p. 44). Given these undisputed statements, and given that the duty to make reasonable efforts to determine Jane Doe's identity was Appellant's, not the police's, the actual parameters of his reluctance to prosecute do not constitute a material fact that can defeat summary judgment.

police were called the next day because health care staff at the hospital insisted on it. While Appellant relayed basic information regarding Jane Doe to Officer Robins, he also expressed an intent that a criminal investigation/prosecution not proceed. Officer Robins obtained a still photograph of Jane Doe from the video feed. There is no evidence that Appellant asked for a copy of that photograph, interviewed anyone else, or took any constructive steps to identify Jane Doe.

While issues of negligence are ordinarily matters for the fact finder, where "the evidence admits only one reasonable inference, it becomes a matter of law for the determination of the court." *Creech v. South Carolina Wildlife & Marine Res. Dept.*, 329 S.C. 24, 33, 491 S.E.2d 571, 575 (1997); *see also Morehead*, 324 S.C. at 563, 479 S.E.2d at 819 (finding as a matter of law that reporting an alleged John Doe accident to the police eight months after it occurred was unreasonable). Here the only reasonable conclusion that can be drawn from the facts of this case is that Appellant was negligent in failing to determine Jane Doe's identity or identify her vehicle.

This Court should uphold the Circuit Court's ruling on this issue.

II. The Circuit Court did not expand on the requirements of Section 38-77-170(3).

Contrary to Appellant's assertions, the Circuit Court did not require him to press charges and did not expand on the requirements of Section 38-77-170(3). Appellant's argument fails on many levels.

First, the Circuit Court did not require Appellant to press charges against Jane Doe in order to meet his burden of showing he was not negligent in determining Jane Does' identity. Such a requirement does not appear in the Order anywhere and cannot reasonably be read into it. Instead, Appellant himself relied on his report to the police to

argue that he had taken reasonable steps to identify Jane Doe. (R. p. 38, lines 10-23) (App. Br. pp. 4-5, 9, 15).[6] In the end, and as pointed out by the Circuit Court, Appellant's argument that he met his burden by telling the police about the video tape falls short when he himself told the police he did not want them involved and did not want to press charges.

Second, as explained above, even if Appellant did not tell the police he did not want to prosecute and they stopped their investigation for some other reason, the burden remained on Appellant to make reasonable efforts to identify the Jane Doe. It simply is not the police's job to satisfy that burden for Appellant.

Third, Appellant's assertion that, just because courts have found one part of Section 38-77-170(2) arguably ambiguous, "subsection (3) is likewise, arguably ambiguous and should be interpreted liberally in favor of coverage," has no basis in law or logic. Section 38-77-170(2)'s affidavit requirement is unarguably strictly construed. *Collins*, 352 S.C. at 470-471, 574 S.E.2d at 743. It is only the "ambiguous fact requirement of § 38-77-170(2)" that the Court addressed in *Gilliland*, finding that circumstantial evidence supporting a plaintiff's testimony regarding a Jane or John Doe's causal relationship to an accident is sufficient to meet the statutory requirement. 357 S.C. at 201-202, 592 S.E.2d at 628-629.

No South Carolina court has held that Section 38-77-170(3) should be interpreted liberally in favor of coverage.[7] Instead, the provisions of Section 38-77-170 were enacted precisely to protect insurance companies from fraudulent claims. *E.g., Collins*,

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[6] When his counsel was asked at the motions hearing about the significance of Appellant "shutting down" the police investigation, her response simply was that Appellant had "filed the claim with his insurance company." (R. p. 40, line 23 – p. 41, line 2).

[7] The same is true for Section 38-77-170(1). *See Morehead*, 324 S.C. at 562, 479 S.E.2d at 818.

352 S.C. at 470, 574 S.E.2d at 743; *Shealy*, 370 S.C. at 200-201, 634 S.E.2d at 48. Furthermore, our Supreme Court "has historically required strict compliance with the statute allowing an insured to sue her own insurer where damages are caused by an unknown driver." *Collins*, 352 S.C. at 467, 574 S.E.2d at 741.[8] The only South Carolina case to consider Section 38-77-170(3) found no ambiguity at all, but instead, explained that, as a condition to a plaintiff's right to recover under the John Doe provisions, "the burden rested upon [the plaintiff] to prove by a preponderance of the evidence" that she complied with all of the provisions of Section 38-77-170. *See Hart*, 261 S.C. at 121, 198 S.E.2d at 528. As was the case in *Hart*, here Appellant had the ability to uncover additional information regarding Jane Doe's identity, *i.e.*, a description of the van and knowledge that the beverage shop had a video of Jane Doe and the clerk's statement that she came there all the time, but he failed to take any further steps to determine her identity.

Fourth, Appellant argues that the only time frame that is relevant in determining whether he was negligent in investigating the identity of Jane Doe is what he did at "the time of the accident." (App. Br. p. 14). The phrase "at the time of the accident" modifies the phrase, "the identity of the other vehicle and the driver of the other vehicle," and does not set a time frame during which a plaintiff must exert reasonable efforts to identify Jane Doe. Appellant's interpretation would lead to absurd results, focusing only on a

[8] Neither of the cases on which Appellant relies for the proposition that the entire uninsured motorist statute should be liberally construed in favor of injured plaintiffs considered the requirements of Section 38-77-170. *Unisun Ins. Co. v Schmidt*, 339 S.C. 362, 529 S.E.2d 280 (2000), considered whether the term "uninsured" in the motor vehicle statute included a vehicle for which the insurer successfully had denied coverage, while *Gunnels*, 251 S.C. at 245-246, 161 S.E.2d at 823-824, allowed recovery where the defendant's insurance company became insolvent after a verdict had been rendered in favor of the plaintiff. Therefore, they do not support his position that Section 38-77-170 should be liberally construed in favor of coverage.

plaintiff's actions immediately following an accident and ignoring any meaningful investigation that might take place in the days or weeks following an accident. *Miller v. Aiken*, 364 S.C. 303, 307, 613 S.E.2d 364, 366 (2005) (courts will reject a statutory construction that produces an absurd result); *Kiriakides v. United Artists Commc'ns*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994) (where possible, courts will "construe [a] statute so as to escape the absurdity and carry the intention into effect").

Finally, Appellant suggests summary judgment should be reversed because "there is not a breath of fraud in this incident." (App. Br. p. 15). However, that is not the test. As was the case in *Collins*, where the plaintiff failed to produce an affidavit but, instead, produced a witness at trial to testify as to the facts of the accident, 380 S.C. at 464-465, 574 S.E.2d at 740, or in *Hart*, where there was no question that the accident was caused by an unknown driver from Texas, 261 S.C. at 121-122, 198 S.E.2d at 528-529, proof or suspicion of fraud is not the test or even part of the test. *Shealy*, 370 S.C. at 201, 634 S.E.2d at 49 (strictly applying the 3-part test even where "the result is lamentable to the injured party ..."). A plaintiff seeking to recover under the John Doe provisions must strictly comply with all three provisions of Section 38-77-170. *E.g., Collins*, 352 S.C. at 469-470, 574 S.E.2d at 742-743.

This Court should reject Appellant's argument that the Circuit Court expanded the requirements of Section 38-77-170(3).

III. The Circuit Court properly held that Appellant failed to provide an affidavit from a witness until over four years after the accident and almost a year after the Complaint was filed, which serves as an alternative basis to affirm summary judgment.

As the Circuit Court noted in a footnote, Appellant did not file an affidavit by a witness until over four years after the accident and almost a year after he filed his

Complaint. (Order, R. p. 4 n.1). Therefore, Section 38-77-170(2) has not been satisfied in this case and serves as an additional ground on which to uphold the grant of summary judgment in Respondent's favor. Satisfying all three requirements of Section 38-77-170 is a prerequisite for Appellant to bring a Jane Doe action against his own insurer. *Collins*, 352 S.C. at 466-467, 574 S.E.2d at 741; *Chestnut*, 298 S.C. at 154 S.E.2d at 615. Having failed to meet the requirement of Section 38-77-170(2), Appellant had no right to bring this action.

Appellant asserts that the Circuit Court's "observation" is erroneous. (App. Br. p. 17). However, he fails to show how any of the observations in the footnote are erroneous. It is completely accurate that Appellant "failed to obtain an affidavit from any party – let alone a proper party – until more than four years after the accident and almost one year after filing the Complaint." (Order, R. p. 4 n.1).[9]

Although the Court did not base its decision on this failure, it serves as an additional basis for affirming the grant of summary judgment in Respondent's favor, which this Court should do. "A respondent 'may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court.'" *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 904 (2010). Furthermore, an appellate court may affirm on any ground appearing in the record. *Wright v. Bi-Lo, Inc.*, 314 S.C. 152, 150, 442 S.E.2d 186, 191 (Ct. App. 1994); Rule 220(c), SCACR (same).

[9] Respondent notes that, in any event, the Sims Affidavit asserts that "Mr. Jordan was walking Up to [the] store and the lady Was backing up and struck Mr. Jordan." (Sims Affid.). This version of events conflicts with Appellant's testimony that he was standing in the parking lot looking at his phone when Jane Doe backed into him. (R. p. 77, lines 12-24 (R. p. 80, line 23 – p. 82, line 14) (R. p. 88, line 25 – p. 89, line 9).

No South Carolina case has addressed application of Section 38-77-170(2) where there is an alleged contact between a car driven by an alleged Jane Doe and an individual standing in a parking lot. Instead, all of the South Carolina cases applying what is now Section 38-77-170(2) have addressed claims where there was no contact between the John or Jane Doe *vehicle* and the *vehicle* the plaintiff was in. *See, e.g., Gilliland*, 357 S.C. at 198-199, 592 S.E.2d at 627; *Collins*, 352 S.C. at 467-468, 574 S.E.2d at 741-742; *Davis v. Doe*, 283 S.C. 538, 540, 331 S.E.2d 352, 353 (1985); *Enos v. Doe*, 380 S.C. 295, 311, 669 S.E.2d 619, 627 (Ct. App. 2008); *Chestnut*, 298 S.C. at 154, 378 S.E.2d at 615; *see also Coker v. Nationwide Ins. Co.*, 251 S.C. 175, 179, 161 S.E.2d 175, 177 (1968), *superseded by statute* (discussing the limitation in what is now *Section 38-77-170(2)* to require physical contact between the "the unknown vehicle and any vehicle involved in the accident ..."); *Pulliam v. Doe*, 246 S.C. 106, 108, 142 S.E.2d 861, 862 (1965), *superseded by statute* (discussing the requirement in the Motor Vehicle Safety Responsibility Act which denied recovery against an unknown driver "unless there was physical contact between the insured's vehicle and that of the unknown motorist").

As noted above, the Supreme Court explained that, since the enactment of the uninsured motorist statute, "the Legislature placed safeguards within the statute to prevent citizens from bringing fraudulent 'John Doe' actions. The initial safeguard was a requirement that the unknown vehicle make *'physical contact' with the plaintiff's car*." *Gilliland*, 357 S.C. at 99, 592 S.E.2d at 627 (emphasis added). This is because "[t]he assertion of a hit and run accident is a proposition easy to allege and difficult to disprove." *Coker*, 251 S.C. at 180, 161 S.E.2d at 177. "The problem, however, virtually disappears with the requirement of 'physical contact.' Proof that a hit and run vehicle did

in fact exist is then clearly available for, as 'physical contact' almost invariably produces visible evidence of impact the possibility of a 'phantom' hit and run driver becomes minimal." *Id.* at 180, 161 S.E.2d at 178. While the Legislature has revised Section 38-77-170(2) to allow a plaintiff to submit a sworn affidavit by a witness attesting to the alleged hit and run, the logic behind requiring an affidavit is as strong, if not stronger, where the plaintiff is a pedestrian hit by a vehicle backing up as it is for a vehicle run off the road by another vehicle – while in both cases, there is damage (either to the plaintiff or the plaintiff's vehicle), the affidavit attests to the *cause* of the injury – *i.e.*, the presence and causal relationship of the alleged Jane Doe. Just as there are many ways a single car accident can occur, from the driver falling asleep to the driver being forced off the road by an unidentified driver, so can physical injuries sustained in a parking lot come from different causes – such as an altercation where someone is shoved to the ground or being back up into by an unidentified vehicle. In both cases, Section 38-77-170(2) requires an affidavit before a plaintiff has any right of action.

The expansion Appellant would urge on this Court would allow recovery under the uninsured motorist provision for any hit-and-run accident involving a pedestrian, which is what Appellant was at the time of his accident, without any proof other than the plaintiff's say so that there was contact with an uninsured/unidentified vehicle. Such an approach would loosen the protections contained in Section 38-77-170(2) when the plaintiff is a pedestrian, without any logical justification, and cannot be what the Legislature intended. *Miller v. Aiken*, 364 S.C. at 307, 613 S.E.2d at 366 (courts reject statutory interpretations that "lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention");

Kiriakides, 312 S.C. at 275, 440 S.E.2d at 366 (where possible, courts will "construe [a] statute so as to escape the absurdity and carry the intention into effect"). There is no evidence in the uninsured motorist statute or its legislative history that suggests it was meant to allow plaintiffs who are pedestrians to recover without reliable proof that an uninsured/unidentified motorist caused his injuries.

At the hearing, the Circuit Court suggested that the emergency room notes might fulfill this section. (R. p. 39, lines 8-24). However, those notes were taken the day following the alleged accident, are based solely on statements made by Appellant to medical staff, and are not sworn or verified in any manner. They do not provide proof of causal contact with Jane Doe's vehicle. They do not qualify as an affidavit. *Collins*, 352 S.C. at 470-471, 574 S.E.2d at 743 (requiring strict compliance with the affidavit requirement contained in Section 38-77-170(2)). If sworn trial testimony does not fulfill the requirements of Section 38-77-170(2), unsworn hospital notes based on a version of the incident as relayed by the party claiming injury certainly do not.

This Court should hold that Appellant's failure to timely file an affidavit, where there was no physical contact between his vehicle and Jane Doe's vehicle, serves as an additional reason to affirm the Circuit Court's grant of summary judgment.

CONCLUSION

For all the reasons stated herein, this Court should affirm the Circuit Court's grant of summary judgment and dismiss this appeal.

Respectfully submitted,

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June 2, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Honorable W. Jeffrey Young, Circuit Court Judge

Case No. 2014-CP-40-1654

Willie Jordan, ... Appellant,

v.

Jane Doe ..... Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Brief of Respondent Jane Doe complies with Rule 211(b), SCACR. The undersigned also certifies that this Brief of Respondent Jane Doe complies with the South Carolina Supreme Court's April 16, 2014 Order re: Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings.

June 2, 2016

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