

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM FAIRFIELD COUNTY

Daniel Dewitt Hall, Circuit Court Judge

RECEIVED
MAY 24 2019
SC Court of Appeals

Peter Rice,Appellant,

v.

John Doe,Respondent.

RECORD ON APPEAL

Sherod Hampton Eadon, III, Esquire

PO Box 11566

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Attorney for Appellant

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ORDERS

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

2018 APR 13 AM 11:18
FAIRFIELD COUNTY
CLERK OF COURT
JUDY M BONDS

IN THE COURT OF COMMON PLEAS

Peter Rice,

Plaintiff(s),

Civil Action No. 2016CP20011

vs.

John Doe,

Defendant(s).

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

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

FACTUAL BACKGROUND

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

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

REB
#1

STANDARD

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

DISCUSSION

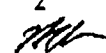
Defendant Doe's motion is based upon the grounds that the Plaintiff has failed to satisfy the terms of S.C. Code §38-77-170, namely due to alleged defects with the affidavit requirement. Defense counsel's oral argument in support of their Motion alleged two deficiencies in the affidavit requirement.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

In a situation where there is no physical contact with the unknown vehicle, S.C. Code §38-77-170 (2) requires that "the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit." There is also an endorsement that must be displayed on the affidavit stating, "A false statement concerning the facts contained in this affidavit may subject the person making the false statement to criminal penalties as provided by law".

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

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language from the first affidavit along with two additional paragraphs stating that there was no contact

2


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

I.

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

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

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

II.

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

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

A: I'd seen the headlights.

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[Signature]

Q: All right. Where were the headlights?

A: Coming towards us.

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

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

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

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

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

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

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

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

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

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

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

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

Q: Like a pick up truck?

A: Yes, sir.

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

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

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

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

ROA 006

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


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

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

CONCLUSION

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

5



The Honorable Roger E. Henderson
Presiding Circuit Court Judge

Chesterfield, South Carolina

April 6, 2018

JUDGMENTS

STATE OF SOUTH CAROLINA
 COUNTY OF FAIRFIELD
 IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
 CASE NUMBER 2016CP2000011

Peter Rice 2017 NOV 16 PM 3:46 Bobby Rae Dye John Doe

FAIRFIELD COUNTY
 CLERK OF COURT

PLAINTIFF(S) DEFENDANT(S)
 Submitted by: Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
- ACTION DISMISSED (CHECK REASON): Rule 12(b), SCRPC; Rule 41(a), SCRPC (Vol. Nonsuit);
 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

ORDER INFORMATION

This order ends does not end the case.
 Additional information for the Clerk: motion dismissed FTP

INFORMATION FOR THE JUDGMENT INDEX

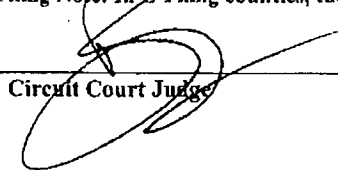
Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.


 Circuit Court Judge

2168
 Judge Code

11/16/2017
 Date

For Clerk of Court Office Use Only

This judgment was entered on November 16, 2017, and a copy mailed first class or placed in the appropriate attorney's box on November 16, 2017, to attorneys of record or to parties (when appearing pro se) as follows:

Sherod Hampton Eadon III PO Box 11566 Columbia, SC
29211

Michael T. Coulter PO Box 6728 Greenville, SC 29606
Carrie H. O'Brien 11440 Carmel Commons Blvd Suite 206
Charlotte, NC 28226

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Judy M. Bonds

Court Reporter

Judy M. Bonds - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

ROA 011

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2016CP2000011

Peter Rice *2018 MAR 14 PM 3:50* Bobby Rae Dye John Doe

FAIRFIELD COUNTY
CLERK OF COURT
JUDY M BONDS

PLAINTIFF(S) DEFENDANT(S)
Submitted by: Attorney for: Plaintiff Defendant
 Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. See Page 2 for additional information.
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 Rule 43(k), SCRPC (Settled); Other: _____
- ACTION STRICKEN (CHECK REASON): Rule 40(j) SCRPC; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; Other: _____
- STAYED DUE TO BANKRUPTCY
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
 Affirmed; Reversed; Remanded; Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order; (formal order to follow) Statement of Judgment by the Court:

This order ends does not end the case.

Additional information for the Clerk: *Motion for Summary Judgment denied*
Ray Eason to prepare order

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.

Note: Title abstractors and researchers should refer to the official court order for judgment details.

E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

[Signature]
Circuit Court Judge

2754
Judge Code

3-14-18
Date

For Clerk of Court Office Use Only

This judgment was entered on *March 14, 2018* and a copy mailed first class or placed in the appropriate attorney's box on *March 14, 2018* to attorneys of record or to parties (when appearing pro se) as follows:

Sherod Hampton Eadon III PO Box 11566 Columbia, SC
29211

Michael T. Coulter PO Box 6728 Greenville, SC 29606
Carrie H. O'Brien 11440 Carmel Commons Blvd Suite 206
Charlotte, NC 28226

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Judy M. Bonds

Court Reporter

Judy M. Bonds - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filterers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

Peter Rice
PLAINTIFF(S)

Bobby Rae Dye et al
DEFENDANT(S)

DISPOSITION TYPE (CHECK ONE)

- JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
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 Other
- ACTION STRICKEN (CHECK REASON):** Rule 40(j), SCRCP; Bankruptcy;
 Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
 Other
- STAYED DUE TO BANKRUPTCY**
- DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):**
 Affirmed; Reversed; Remanded;
 Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: See attached order (formal order to follow) Statement of Judgment by the Court:

Formal order not required.

ORDER INFORMATION

This order ends does not end the case.

See Page 2 for additional information.

For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 06/20/2018 .

Kevin Bruner Sandifer

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Fileers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2018 Jun 20 3:18 PM - FAIRFIELD - COMMON PLEAS - CASE#2016CP2000011



Fairfield Common Pleas

Case Caption: Peter Rice VS Bobby Rae Dye , defendant, et al

Case Number: 2016CP2000011

Type: Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2018-06-20 15:00:14 page 3 of 3

ROA 016

Court Reporter:

E-Filing Note: The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ELECTRONICALLY FILED - 2018 JUL 17 10:59 AM - FAIRFIELD - COMMON PLEAS - CASE#2016CP2000011



Fairfield Common Pleas

Case Caption: Peter Rice VS Bobby Rae Dye , defendant, et al
Case Number: 2016CP2000011
Type: Order/Electronic Form 4

So Ordered

s/Daniel D. Hall 2753

Electronically signed on 2018-07-17 10:38:38 page 3 of 3

ELECTRONICALLY FILED - 2018 Jul 17 10:59 AM - FAIRFIELD - COMMON PLEAS - CASE#2016CP2000011

ROA 019

PLEADINGS

LAW OFFICES
HARRIS AND GRAVES, P.A.

"Our mission is to provide exceptional personal and professional service to our clients"

MITCHELL J. WILLIAMS
STEVEN D. HAYMOND
ROBERT F. McMAJIAN, JR.
MICHAEL S. SWINDELL
EDWIN L. TURNAGE
S. HAMPTON EADON, III*

*Also Licensed in North Carolina

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TELEPHONE: 803-799-2911
FAX: 803-252-4838

OFFICES
COLUMBIA
GREENVILLE
CONWAY
FLORENCE
ROCK HILL
SPARTANBURG

OF COUNSEL
E. WESLEY GRAVES, III

RETIRED
SHIPP D. HARRIS

January 7, 2016

Fairfield County Clerk of Court
P.O. Drawer 299
Winnsboro, SC 29180

RE: *Peter Rice vs. Bobby Rae Dye and John Doe*
Our File #: 201548015

Dear Sir/Madam:

Enclosed please find the original and copies of a Summons and Complaint regarding the above-referenced matter which I would appreciate your having appropriately filed. I would also appreciate your returning to us clocked copies of these pleadings in the envelope provided for your convenience. Our check in the amount of \$150.00 is enclosed as filing fee.

We appreciate your cooperation.

Very truly yours,

Connie Gause

Connie I. Gause
Litigation Paralegal

Enclosures

2016 JAN 12 PM 9:35
FAIRFIELD COUNTY
CLERK OF COURT
BENNY J. WILSON

COUNTY OF FAIRFIELD

CIVIL ACTION COVER SHEET

Peter Rice,

2016 JAN 12 AM 9 32
Plaintiff(s), FAIRFIELD COUNTY
CLERK OF COURT
CLERK OF COURT
2016 - CP - 20 - 011

vs.

Bobby Rae Dye and John Doe,

Defendant(s)

(Please print)

Submitted By: S. Hampton Eadon, III

Address:

P.O. Box 11566

Columbia, SC 29211

SC Bar #: 76158

Telephone #: (803) 799-2911

Fax #:

Other:

E-mail: she@harrisgraves.com

NOTE: The cover sheet and the information contained herein neither replaces nor supplements the filing and service of pleadings or other papers as required by law. This form is required for the use of the Clerk of Court for the purpose of docketing. It must be filled out completely, signed and dated. A copy of this cover sheet must be served on the defendant(s) along with the Summons and Complaint.

DOCKETING INFORMATION (Check all that apply)

*If Action is Judgment/Settlement do not complete

- JURY TRIAL demanded in complaint.
- This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.
- This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NON-JURY TRIAL demanded in complaint.

This case is subject to ARBITRATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

This case is subject to MEDIATION pursuant to the Court Annexed Alternative Dispute Resolution Rules.

This case is exempt from ADR. (Proof of ADR/Exemption Attached)

NATURE OF ACTION (Check One Box Below)

- | | | | |
|--|--|---|--|
| <input type="checkbox"/> Contracts
<input type="checkbox"/> Constructions (100)
<input type="checkbox"/> Debt Collection (110)
<input type="checkbox"/> Employment (120)
<input type="checkbox"/> General (130)
<input type="checkbox"/> Breach of Contract (140)
<input type="checkbox"/> Other (199) | <input type="checkbox"/> Torts - Professional Malpractice
<input type="checkbox"/> Dental Malpractice (200)
<input type="checkbox"/> Legal Malpractice (210)
<input type="checkbox"/> Medical Malpractice (220)
<input type="checkbox"/> Notice/ File Med. Mal. (230)
Previous Notice of Intent Case #
20 -CP-
<input type="checkbox"/> Notice/File Med Mal (230)
<input type="checkbox"/> Other (299) | <input type="checkbox"/> Torts - Personal Injury
<input type="checkbox"/> Assault/Slander/Libel (300)
<input type="checkbox"/> Conversion (310)
<input checked="" type="checkbox"/> Motor Vehicle Accident (320)
<input type="checkbox"/> Premises Liability (330)
<input type="checkbox"/> Products Liability (340)
<input type="checkbox"/> Personal Injury (350)
<input type="checkbox"/> Wrongful Death (360)
<input type="checkbox"/> Other (399) | <input type="checkbox"/> Real Property
<input type="checkbox"/> Claim & Delivery (400)
<input type="checkbox"/> Condemnation (410)
<input type="checkbox"/> Foreclosure (420)
<input type="checkbox"/> Mechanic's Lien (430)
<input type="checkbox"/> Partition (440)
<input type="checkbox"/> Possession (450)
<input type="checkbox"/> Building Code Violation (460)
<input type="checkbox"/> Other (499) |
| <input type="checkbox"/> Inmate Petitions
<input type="checkbox"/> PCR (500)
<input type="checkbox"/> Mandamus (520)
<input type="checkbox"/> Habeas Corpus (530)
<input type="checkbox"/> Other (599) | <input type="checkbox"/> Judgments/Settlements
<input type="checkbox"/> Reinstate Drv. License (800)
<input type="checkbox"/> Judicial Review (810)
<input type="checkbox"/> Relief (820)
<input type="checkbox"/> Permanent Injunction (830)
<input type="checkbox"/> Forfeiture - Petition (840)
<input type="checkbox"/> Forfeiture - Consent Order (850)
<input type="checkbox"/> Other (899) | <input type="checkbox"/> Administrative Law/Relief
<input type="checkbox"/> Death Settlement (700)
<input type="checkbox"/> Foreign Judgment (710)
<input type="checkbox"/> Magistrate's Judgment (720)
<input type="checkbox"/> Minor Settlement (730)
<input type="checkbox"/> Transcript Judgment (740)
<input type="checkbox"/> Lis Pendens (750)
<input type="checkbox"/> Transfer of Structured Settlement Payment Rights
<input type="checkbox"/> Confession of Judgment
<input type="checkbox"/> Petition for Workers Compensation Settlement Approval (780)
<input type="checkbox"/> Other (799) | <input type="checkbox"/> Appeals
<input type="checkbox"/> Arbitration (900)
<input type="checkbox"/> Magistrate - Civil (910)
<input type="checkbox"/> Magistrate - Criminal (920)
<input type="checkbox"/> Municipal (930)
<input type="checkbox"/> Probate Court (940)
<input type="checkbox"/> SCDOT (950)
<input type="checkbox"/> Workers' Comp (960)
<input type="checkbox"/> Zoning Board (970)
<input type="checkbox"/> Employment Security Comm. (991)
<input type="checkbox"/> Other (999) |
| <input type="checkbox"/> Special/Complex/Other | | | |
| <input type="checkbox"/> Environmental (600)
<input type="checkbox"/> Automobile Arb. (610)
<input type="checkbox"/> Medical (620)
<input type="checkbox"/> Other (699) | <input type="checkbox"/> Pharmaceuticals (630)
<input type="checkbox"/> Unfair Trade Practices (640)
<input type="checkbox"/> Out-of State Depositions (650)
<input type="checkbox"/> Motion to Quash Subpoena in an Out-of-County Action (660)
<input type="checkbox"/> Sexual Predator (510) | | |

Submitting Party Signature: S. Hampton Eadon Date: 1-5-16

Note: Frivolous civil proceedings may be subject to sanctions pursuant to SCRCP, Rule 11, and the South Carolina Frivolous Civil Proceedings Sanctions Act, S.C. Code Ann. § 15-36-10 et. seq.

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

2016 JAN 12 AM 9 32

Peter Rice,

FAIRFIELD COUNTY
CLERK OF COURT
PLAINTIFF(S)

Civil Action No. 2016-CP-20-011

vs.

Bobby Rae Dye and John Doe,

Defendant(s).

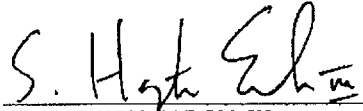
SUMMONS

Jury Trial Requested

TO: THE DEFENDANT(S) ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is hereby served upon you, and to serve a copy of your Answer to the said Complaint on the subscribers at their office, Columbia, SC, within thirty (30) days after service thereof exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, judgment by default will be rendered against you for the relief demanded in the Complaint.

HARRIS AND GRAVES, P.A.



S. HAMPTON EADON, III
Attorney for Plaintiff
SC Bar No. 76158
P.O. Box 11566
Columbia, SC 29211
(803) 799-2911
sha@harrisgraves.com

Columbia, South Carolina

Dated: 1-5-16

STATE OF SOUTH CAROLINA

COUNTY OF FAIRFIELD

Peter Rice,

2016 JAN 12 AM 9 32
FAIRFIELD COUNTY
CLERK OF COURT
TECHNICAL

IN THE COURT OF COMMON PLEAS

Civil Action No. 2016-CP-20-011

vs.

Bobby Rae Dye and John Doe,

Defendant(s).

COMPLAINT

Jury Trial Requested

The Plaintiff would respectfully show unto the Court that:

1. The Plaintiff is a citizen and resident of Chester County, South Carolina.
2. The Plaintiff is informed and believes that Defendant Bobby Rae Dye (Hereinafter "Dye") is a citizen and resident of Chester County, South Carolina.
3. The Plaintiff is unaware at this time of the identity of the driver of the vehicle who crossed the center line causing Defendant Dye to lose control, swerve and hit a tree. Thus, this Defendant shall be named as John Doe at this time pursuant to §33-77-180 of the SC Code of Laws.
4. On or about April 17, 2015, Plaintiff was a passenger in vehicle being driven by Defendant Dye traveling South on Hwy. 901 in Fairfield County, SC, when Defendant Dye swerved and lost control of his vehicle when Defendant John Doe, who was traveling north on Hwy 901 crossed the center line into the path of Defendant Dye. Defendant John Doe left the scene. As a result of Defendant Dye's vehicle leaving the roadway and striking a tree, Plaintiff suffered severe and painful injuries and damages.
5. Venue is proper in Fairfield County pursuant to S.C. Code §15-7-30 (B), S.C. Code §15-7-30 (C)(2) and S.C. Code §15-7-30 (D)(1) as the most substantial part of the alleged acts and/or omission giving rise to the cause of action occurred in Fairfield County.
6. As a result of the collision, the Plaintiff sustained the following injuries and damages:
 - a. extensive pain, mental anguish and discomfort;

- b. total disability for a period of time;
- c. money spent for medical care and treatment;
- d. inability to carry on normal activities;
- e. loss of enjoyment of life; and
- f. time and wages from Plaintiff's job .

FIRST CAUSE OF ACTION
(NEGLIGENCE OF DEFENDANT DYE)

7. Plaintiff repeats and realleges paragraphs one through six above as if each were set forth here again in their entirety.

8. The injuries and damages incurred by the Plaintiff were directly and proximately caused by the careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts of Defendant Dye in one or more of the following particulars:

- a. In failing to keep the vehicle he was operating under control;
- b. In failing to apply the brakes and/or maintain them in working order;
- c. In failing to keep a proper lookout;
- d. In failing to use a degree of care that a prudent person should use under the existing conditions and circumstances;
- e. In operating the vehicle in such a manner as to indicate either unlawful or wanton disregard for the safety of other personal or property.

SECOND CAUSE OF ACTION
(NEGLIGENCE OF DEFENDANT DOE)

9. Plaintiff repeats and realleges paragraphs one through eight above as if each were set forth here again in their entirety.

10. The injuries and damages incurred by the Plaintiff were directly and proximately caused by the careless, negligent, grossly negligent, willful, wanton, reckless and unlawful acts of Defendant John Doe in one or more of the following particulars:

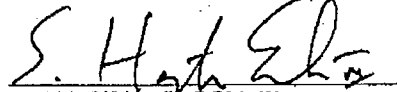
- a. In failing to stop at the scene of a collision involving bodily injury in violation of S.C. Code §56-5-1210;
- b. In failing to keep the vehicle he was operating under control;
- c. In failing to apply the brakes and/or maintain them in working order;
- d. In failing to keep a proper lookout;
- e. In operating the vehicle left of the center line, in direct violation of S.C. Code §56-5-1810 and S.C. Code §56-5-1830, constituting negligence *per se*;
- f. In failing to use the degree of care that a reasonable and prudent person should have exercised under the existing conditions and circumstances;
- g. In operating the vehicle in such a manner as to indicate either unlawful or wanton disregard for the safety of other personal or property.

11. The acts and omissions of Defendant Dye combining and concurring with the acts and omissions of Defendant John Doe were the direct and proximate cause of the accident and resulting injuries and damages suffered by Plaintiff.

12. The Plaintiff is informed and believes that he is entitled to judgment against the Defendants, jointly and severally, for actual and punitive damages in an appropriate amount.

WHEREFORE, the Plaintiff prays judgment against the Defendants, jointly and severally, for actual and punitive damages in an appropriate amount, the costs of this action, and for such other and further relief as the Court may deem just and proper.

HARRIS AND GRAVES, P.A.



S. HAMPTON BADON, III

Attorney for Plaintiff

SC Bar No. 76158

P.O. Box 11566

Columbia, SC 29211

(803) 799-2911

she@harrisgraves.com

Columbia, South Carolina

Dated: 1-6-15

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH ATLANTA

Carrie Hailman O'Brien
Direct (704) 247-9679
Fax (704) 544-1719
chohrien@wjlaw.net

6701 Carmel Road, Suite 475
Charlotte, NC 28226
www.wjclaw.net

November 16, 2016

Betty Jo Beckham
Fairfield County Clerk of Court
P.O. Drawer 299
Winnsboro, SC 29180

Re: Peter Rice vs. Bobby Rae Dye and John Doe
Case No.: 2016-CP-20-011
Claim No.: 16-5250933

2016 NOV 21 AM 11 45
FAIRFIELD COUNTY
CLERK OF COURT
BETTY JO BECKHAM

Dear Clerk:

Enclosed are the original and one copy of Unnamed Defendant's Answer and Motion to Dismiss in the above-captioned matter. Please file the original with the Court, and return the copy, stamped "filed", in the enclosed self-addressed, stamped envelope.

Thank you for your time and attention to this matter.

WILLSON JONES CARTER & BAXLEY, P.A.

/s/ Carrie Hailman O'Brien

Carrie Hailman O'Brien

CHO/abg

Enclosures

cc: Peter Majewski, The Progressive Group of Insurance Companies
Hampton Eadon, Attorney for Plaintiff
Michael Coulter, Attorney for Defendant Dye

ROA 027

FIRST CAUSE OF ACTION
(Negligence Defendant Dye)

7. This answering Defendant incorporates Paragraphs 1-6 as if fully set forth herein.
8. The answering Defendant is without sufficient information to form a belief as to truth or veracity of said allegations; therefore said allegations are denied.

SECOND CAUSE OF ACTION
(Negligence Defendant Doe)

9. This answering Defendant incorporates Paragraphs 1-8 as if fully set forth herein.
10. Denied.
11. Denied.
12. Denied.

FOR A SECOND DEFENSE

Any injuries and damages sustained by the Plaintiff as set forth in the Complaint were due to and caused by the sole negligence, recklessness, willfulness and wantonness of the Plaintiff in one or more of the following particulars:

- a) In failing to apply the brakes;
- b) In traveling too fast for conditions;
- c) In over correcting;
- d) In failing to keep a proper lookout and observe conditions existing at the time; and
- e) In such other particulars as may be shown by the evidence at trial.

FOR A THIRD DEFENSE

The Summons and Complaint fail to state facts sufficient to state a cause of action.

FOR A FOURTH DEFENSE

The Defendant would allege that upon information and belief that the claims of the Plaintiff are barred or partially barred by virtue of the Plaintiff's failure to mitigate Plaintiff's alleged damages.

FOR A FIFTH DEFENSE

Such injuries and damages as were allegedly sustained by the Plaintiff at the time and place alleged in the Complaint, if any, upon information and belief, were due to, directly and proximately caused by the gross negligence, recklessness, willfulness, and wantonness of the Plaintiffs in one or more of the particulars heretofore set forth in the Second Defense herein, which allegations are realleged and incorporated herein by reference, which negligence, recklessness, willfulness, and wantonness, combining and concurring with that of the Defendant, if any, contributed to Plaintiff's alleged injuries and damages as a proximate cause thereof and without which the same would not have occurred, and therefore this Defendant pleads the contributory negligence and contributory willfulness of the Plaintiff as a complete bar and defense to this action.

FOR A SIXTH DEFENSE

Plaintiffs' claims, if any, are barred or should be reduced by Plaintiffs' comparative negligence.

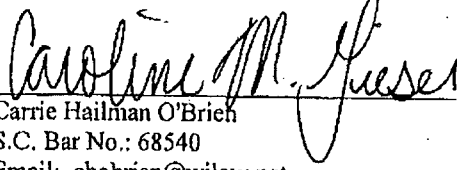
FOR AN SEVENTH DEFENSE

Punitive damages are unconstitutional fifth (5th), eighth (8th) and fourteenth (14th) amendments of the United States Constitution and some of the provisions of the South Carolina Constitution.

WHEREFORE, having truly answered the Complaint of the Plaintiff, Unnamed Defendant prays that the complaint be dismissed, with costs assessed to Plaintiff, and for such and further relief as the Court may deem proper.

THIS THE 16TH DAY OF NOVEMBER, 2016.

Willson Jones Carter & Baxley, P.A.



for
CHO

Carrie Hailman O'Brien
S.C. Bar No.: 68540
Email: chobrien@wjlaw.net
6701 Carmel Road, Suite 475
Charlotte, NC 28226
(704) 247-9679 (phone)
(704) 544-1719 (fax)

ATTORNEYS FOR UNNAMED DEFENDANT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Unnamed Defendant's Answer to Plaintiff's Complaint was served upon all counsel of Record as follows:

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

addressed as follows:

S. Hampton Eadon, III, Esquire
Harris & Graves, P.A.
P.O. Box 11566
Columbia, SC 29211
(803) 799-2911
Attorney for Plaintiff
Peter Rice

2016 NOV 21 AM 11 45
FIELD COURT
CLERK OF COURT
BETTY JO BECKHAM

Michael T. Coulter, Esquire
Clarkson, Walsh, Terrell & Coulter, P.A.
P.O. Box 6728
Greenville, SC 29606-6728
(864) 232-4400/(864) 235-4399 (F)
Attorney for Defendant
Bobby Rae Dye

This the 16th day of November, 2016.

Caroline M. Graves for
Carrie Hailman O'Brien CHO

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

2016 NOV 22 AM 10 11
FAIRFIELD COUNTY
CLERK OF COURT
GETTY JO BECKWITH

IN THE COURT OF COMMON PLEAS

Peter Rice,

Plaintiff,

Civil Action No. 2016CP20011

vs.

AFFIDAVIT OF PETER RICE

Bobby Rae Dye and John Doe,

Defendant.

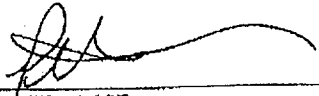
PERSONALLY APPEARED before me, Peter Rice, who, being first duly sworn, deposes and says that:

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

FURTHER AFFIANT SAYETH NOT

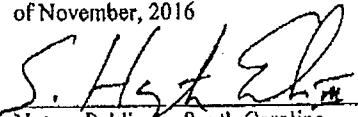
(Signature page to follow)

Date: November 18, 2016



PETER RICE

Sworn To Before me this 18th day
of November, 2016



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


CERTIFICATE OF SERVICE

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

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

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

2016 NOV 22 10 11 AM
FURNITURE COUNTY
CLERK OF COURT
BETTY JO BECKWITH


Connie I. Gause

LAW OFFICES
HARRIS AND GRAVES, P.A.

"Our mission is to provide exceptional personal and professional service to our clients"

MITCHELL J. WILLIAMS
STEVEN D. HAYMOND
ROBERT F. McMAHAN, JR.
MICHAEL S. SWINDELL
EDWIN L. TURNAGE
S. HAMPTON EADON, III*

*Also Licensed in Ninth Carolina

THE MAXCY GREGG HOUSE
1518 RICHLAND STREET
P.O. BOX 11566
COLUMBIA, SC 29211
TELEPHONE: 803-799-2911
FAX: 803-252-4838

OFFICES
COLUMBIA
GREENVILLE
CONWAY
FLORENCE
ROCK HILL
SPARTANBURG

November 21, 2016

Honorable Betty Jo Beckham
Fairfield County Clerk of Court
P.O. Drawer 299
Winnsboro, SC 29180

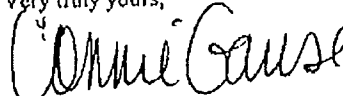
RE: *Peter Rice vs. Bobby Rae Dye and John Doe*
Civil Action #: 2016CP20011
Our File #: 201548015

Dear Mrs. Beckham:

I am enclosing Affidavit of Peter Rice which I would appreciate your filing in this case. So that our files might be complete, please stamp the enclosed copy with the date and time of filing and return it to me in the envelope provided for your convenience.

Thank you for your time and assistance in this matter.

Very truly yours,



Connie Gause
Litigation Paralegal
cgause@harrisgraves.com

Enclosures

CC: Carrie O'Brien, Esq.
Michael Coulter, Esq.

OF COUNSEL
E. W. GRAVES, III

RETIRED
D. HARRIS

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

STATE OF SOUTH CAROLINA 2018 FEB -5 AM 9:39 IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD

Peter Rice,

Plaintiff,

vs.

Bobby Rae Dye and John Doe,

Defendant.

Civil Action No. 2016CP20011

AFFIDAVIT OF PETER RICE

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

1. I am over the age of 18 and otherwise qualified to give sworn testimony;
2. I am a citizen and resident of Chester County, South Carolina;
3. I am the Plaintiff in the above-referenced legal action;
4. I was a passenger in a vehicle being driven by Bobby Rae Dye, traveling on Highway 901 in Fairfield County, South Carolina on April 17, 2015;
5. As we approached a slight curve of the roadway, I observed two headlights traveling in the oncoming lane of travel;
6. I was able to determine that the headlights were those of a pick-up truck;
7. As the vehicle driven by Mr. Dye approached the truck, Mr. Dye steered his vehicle to the right in what I believe to be an effort to avoid colliding into the pick-up truck;
8. In making this maneuver, Mr. Dye lost control of the vehicle I was riding in and went off the roadway, striking a tree.
9. The truck that was traveling in the oncoming lane never stopped and I was unable to determine the identity of the truck or it's driver.
10. There was no physical contact between Mr. Dye's vehicle and the pick-up truck.


ROA 037

11. The collision was reported to law enforcement authorities and Trooper T.M. McNeace with the South Carolina Highway Patrol responded to the scene of the collision to investigate.

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.

FURTHER AFFIANT SAYETH NOT.

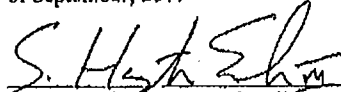
Date: 9/26/17



PETER RICE

Sworn To Before me this 26th day

of September, 2017



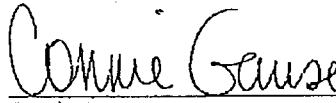
Notary Public for South Carolina
My Commission Expires: 1-13-2021

CERTIFICATE OF SERVICE

Connie I. Gauso says that (s)he is the Paralegal for the Attorney for the Plaintiff, with offices at Columbia, South Carolina, and that on January 30, 2018, (s)he mailed in a sealed envelope, postage prepaid, a copy of Affidavit of Peter Rice to:

Carrie O'Brien, Esquire
Willson Jones Carter & Baxley, P.A.
6701 Carmel Road, Ste. 475
Charlotte, NC 28226

the name and address of counsel for the defendant(s).



Connie Gauso

2018 FEB -5 AM 9:39
FARGO
ND

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF FAIRFIELD) AM ID: 28 JUDICIAL DISTRICT

2017 OCT 19
FAIRFIELD COUNTY
CLERK OF COURT

C/A No.: 2016-CP-20-011

Peter Rice,

Plaintiff,

vs.

Bobby Rae Dye and John Doe,

Defendants.

UNNAMED DEFENDANT'S MOTION
FOR SUMMARY JUDGMENT

NOW COMES the Unnamed Defendant, Progressive Insurance Company, by and through undersigned counsel, pursuant to South Carolina Rule of Civil Procedure 56, and hereby moves for summary judgment on the grounds that the Plaintiff has failed to satisfy the terms of SC Gen. Stat. §38-77-170. In support of this motion, the Unnamed Defendant relies upon the pleadings, discovery responses, relevant statutes and all depositions taken in this litigation.

WHEREFORE, the Unnamed Defendant hereby prays the Court for an Order finding that there are no genuine issues of material fact and that the Unnamed Defendant is entitled to judgment in its favor as a matter of law.

THIS THE 13TH DAY OF OCTOBER, 2017.

Willson Jones Carter & Baxley, P.A.



Carrie Hailman O'Brien
S.C. Bar No.: 68540
Email: chobrien@wjlaw.net
6701 Carmel Road, Suite 475
Charlotte, NC 28226
(704) 247-9679 (phone)
(704) 544-1719 (fax)

ATTORNEYS FOR UNNAMED DEFENDANT

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

IN THE COURT OF COMMON PLEAS

Peter Rice,

Civil Action No. 2016 CP 20-011

Plaintiff(s),

vs.

MOTION FOR RECONSIDERATION

John Doe,

Defendant(s).

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

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

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

PROCEDURAL HISTORY

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

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

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

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

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

QUESTIONS PRESENTED

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

FACTUAL STATEMENT OF THE CASE

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

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

ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

In a situation where there is no physical contact with an unknown vehicle, S.C. Code §38-77-170 (2) requires that "the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit." There is also an endorsement that must be displayed on the

affidavit stating, "A false statement concerning the facts contained in this affidavit may subject the person making the false statement to criminal penalties as provided by law".

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

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

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

Here, § 38-77-170(2) provides that an independent witness must attest to "the truth of the facts of the accident." On one hand, Collins suggests that we should not apply standards that are not specifically set forth in the statute. On the other hand, the provision in question here is arguably ambiguous (while the affidavit requirement, according to Collins, is not); therefore, a strict interpretation of § 38-77-170(2) would undermine the

statute's purpose. See *Kiriakides v. United Artists Communications, Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994)("However plain the ordinary meaning of the words used in a statute may be, [we] will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have intended by the Legislature or would defeat the plain legislative intention.")

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

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

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

[signatures on next page]

Respectfully Submitted,

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Columbia, South Carolina
Dated: June 29, 2018

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Daniel D. Hall, Presiding Judge, Sixth Judicial Circuit

Case No. 2016-CP-20-011

2018 AUG 11 AM 11:05
FAIRFIELD COUNTY
CLERK OF COURTS
JUDITH BORDS

Peter Rice

Appellant,

v.

John Doe

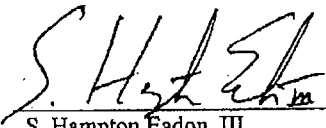
Respondent.

NOTICE OF APPEAL

Peter Rice appeals the order of the Honorable Daniel D. Hall dated July 17, 2018 on Appellant's Motion to Reconsider. Appellant received written notice of entry of this order on July 18, 2018.

Date

8/16/18


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ROA 050

TRANSCRIPT

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
) SIXTH JUDICIAL CIRCUIT
COUNTY OF FAIRFIELD) 2016-CP-20-00011

PETER RICE)
)
vs.) TRANSCRIPT OF RECORD
)
BOBBY RAE DYE AND JOHN)
DOE)

JUNE 20, 2018
WINNSBORO, SOUTH CAROLINA

BEFORE THE HONORABLE DANIEL D. HALL

APPEARANCES:

S. HAMPTON EADON, III, ESQUIRE
COLUMBIA, SOUTH CAROLINA

ATTORNEY FOR THE PLAINTIFF

ALSO PRESENT: PETER RICE

CARRIE O'BRIEN, ESQUIRE
COLUMBIA, SOUTH CAROLINA

ATTORNEY FOR THE DEFENDANT

ALSO PRESENT: LAURA MASEL

* * * * *

ORIGINAL TRANSCRIPT OF PROCEEDINGS PROVIDED TO S. HAMPTON
EADON, III

ALL FEES PURSUANT TO RULE 607 (h) (i), SCACR -
COPIES AVAILABLE UPON REQUEST FROM COURT REPORTER

SHIRLEY BROOM
16TH Circuit Court Reporter

I-N-D-E-X

WITNESSES:

(NO TESTIMONY TAKEN)

E-X-H-I-B-I-T-S

<u>NO.</u>	<u>DESCRIPTION</u>	<u>ID.</u>	<u>EV.</u>
NO EXHIBITS			

1 (WHEREUPON, THE FOLLOWING MATTERS ARE HEARD IN
2 THE JURY ROOM OUTSIDE THE PRESENCE OF THE JURY POOL.)

3 THE COURT - All right, we're on the record in the
4 matter of Peter Rice vs. Bobby Dye. This is a Fairfield
5 County civil case, 2016-CP-20-00011. We are in -- in a
6 jury room outside the main courtroom with the court
7 reporter present, the parties all present. We are set to
8 begin this trial. The courtroom's being -- is full of
9 potential jurors in this case. We have some motions that
10 we need to take up outside their presence and trying to
11 make this as efficient as we can. We have -- I think
12 everybody's agreed to be back here as far taking care of
13 these pre-trial motions.

14 Is that correct, attorneys?

15 MS. O'BRIEN - Yes, sir, Your Honor.

16 MR. EADON - Yes, sir.

17 THE COURT - All right, let me do this. Would the
18 attorneys for the record just introduce themselves and your
19 clients.

20 MR. EADON - My name is Hampton Eadon and I
21 represent Peter Rice, and just -- Judge, just for
22 clarification, the case going forward is Rice v. Doe. Mr.
23 Dye has been dismissed with prejudice.

1 THE COURT - All right, and Mr. Doe is an unnamed
2 defendant or an unknown unnamed defendant in the case.

3 All right, and ---

4 MR. GOODE - I'm Jonathan Goode, also represent
5 Mr. Rice.

6 MS. O'BRIEN - Carrie O'Brien representing John
7 Doe.

8 THE COURT - And also present in the room with us
9 is Ms. ---

10 MS. MASEL - Masel.

11 THE COURT - --- Masel, an adjuster for
12 Progressive Insurance.

13 So let's do this, we had discussed in chambers a
14 couple of pending motions I believe the defense had. So,
15 Ms. O'Brien, we'll start with you.

16 MS. O'BRIEN - Thank you, Your Honor. I have a
17 motion to dismiss that was filed at the time the complaint
18 was filed that I would like to have heard initially.

19 THE COURT - All right, and from the defense, is
20 there any basis by which the Court should not hear the
21 motion to dismiss?

22 MR. EADON - Your Honor, our position is the
23 motion to dismiss as indicated and the answer is based on
24 the failure to comply, the alleged failure to comply with
25 the plaintiff with South Carolina Statute 38-77-170. It's

1 our position, Judge, that this is the same argument that
2 was made in summary judgment that has already been heard by
3 Judge Henderson and denied.

4 THE COURT - All right, well, let's do this, then
5 let me hear from Ms. O'Brien, her basis for a motion and
6 what she's asking for the Court to do, the legal basis for
7 that, and then I'll be glad to hear from you, y'all and
8 your responses.

9 MS. O'BRIEN - Your Honor, the motion to dismiss
10 is based upon the fact that the plaintiff in this case has
11 failed to comply with statute 38-77-170. Specifically,
12 Your Honor, in 2012 the Chapter 77 Subsection 170 is
13 entitled Condition to sue or recover under uninsured
14 motorist provision when the owner or operator of a motor
15 vehicle causing injury or damage is unknown. In this case
16 the plaintiff has alleged that there is a phantom vehicle
17 that contributed to the accident, and with respect to the
18 statute, it specifically says that a condition to sue is
19 that the statute has to -- that the -- that the plaintiff
20 or some witness has to fill out an affidavit and there are
21 three different specific criteria that has to be met with
22 respect to the affidavit, and then there also has to be a
23 statement that is displayed on the affidavit that says that
24 a false statement concerning the facts contained in this
25 affidavit may be subject to the person making the false

1 statement to criminal penalties is provided by law.
2 Specifically, Your Honor, the Collins v. Doe case which is
3 a 2002 Supreme Court case actually dealt with whether the
4 statute has to be strictly complied with or whether it can
5 be interpreted. And, Your Honor, under Collins v. Doe, the
6 Supreme Court held -- and I'm quoting -- is written,
7 section 38-77-170 contains requirements necessary to
8 support a plaintiff's, quote, right of action, and then the
9 Supreme Court went on to define what a right of action is
10 and says that's the right to bring a specific case to
11 Court, a right that can be enforced by legal action, and it
12 says that without a sworn affidavit a plaintiff has no
13 right of action. Supreme Court said, in other words,
14 without the affidavit that in this case, the plaintiff, Ms.
15 Collins, had no right to bring her case to Court. This
16 case was filed in January of 2016. When the case was filed
17 in January of 2016, no affidavit was filed with the summons
18 and complaint. And if you read the Collins v. Doe case,
19 the Court said that -- it defined what right of action is,
20 defined that without an affidavit that you cannot bring
21 your case to Court. And in this situation, no affidavit
22 was filed in January, therefore, there is a condition
23 precedent to bringing the action to Court; that was not
24 met. The case then goes on to further state that the
25 statute must be strictly complied with and that an

1 affidavit is -- affidavit requirement is mandatory. In
2 this case I filed my answer, and after my answer was filed
3 and the motion to dismiss was filed, then the plaintiff
4 filed an affidavit, and in this case, Your Honor, if you
5 look at the affidavit on its face, which is part of the
6 Court record, the affidavit when it was initially filed
7 there are three specific conditions that must be met,
8 number one ---

9 THE COURT - When was that affidavit filed?

10 MS. O'BRIEN - Can you look in the Court file,
11 Hampton, and see the actual date that it was filed? ---

12 THE COURT - I -- I can ---

13 MS. O'BRIEN - --- because I was never provided
14 with a filed copy of the affidavit. All I know is ---

15 MR. EADON - There's one on November the 18th of
16 2016, Judge.

17 MS. O'BRIEN - Is that --

18 MR. EADON - That's the first one.

19 THE COURT - I think -- is that the date that the
20 affidavit was signed or was that the date it was filed?

21 MS. O'BRIEN - That's the date it was signed.

22 That's not the date it was filed.

23 THE COURT - That was my question is when was it
24 filed:

25 MS. O'BRIEN - Yeah.

1 MR. EADON - If I have a filed copy, Judge, I'll
2 be happy to let you know. (Pause) It was filed on November
3 22nd, 2016.

4 MS. O'BRIEN - And my answer was filed November
5 21st, 2016.

6 So, Your Honor, the affidavit by Mr. Rice was
7 filed after the answer was filed, after the motion to
8 dismiss was properly before the Court, and it's our
9 position that based upon Collins v. Doe, number one, that
10 the affidavit was not timely filed, that the condition
11 precedent per the statute, the condition to sue is that the
12 affidavit has to be drafted, that the affidavit has to meet
13 the three different criterias that are specifically listed
14 under subsection one, two and three and then contain a
15 statement that says a false statement was not made. If you
16 get past the point of the condition precedent, which I
17 would argue would not be appropriate, but if you get past
18 that, specifically the affidavit has to say, number one,
19 the insured or someone on his behalf has reported the
20 accident to some appropriate police authority within a
21 reasonable time under all the circumstances after its
22 occurrence. If you look at the affidavit that was filed on
23 November 22nd, 2016, it completely omits subsection number
24 one. There is nothing that addresses subsection one in any
25 way. With respect to condition number two, there has to be

1 a statement that the injury or damage was caused by
2 physical contact with the unknown vehicle, or the accident
3 must've been witnessed by someone other than the owner or
4 operator of the insured vehicle; provided however, the
5 witness must sign an affidavit attesting to the truth of
6 the facts of the accident contained in the affidavit. With
7 respect to subsection number two, the affidavit in
8 paragraph seven says that the defendant, Mr. Dye, tried to
9 avoid colliding with the pickup truck -- and I want to read
10 specifically -- it says in number five: "As we approached
11 a slight curve on the roadway, I observed two headlights
12 traveling in the on-coming lane of travel." Paragraph six:
13 "I was able to determine that the headlights were those of
14 a pickup truck." Number seven: "As the vehicle driven by
15 Mr. Dye approached the truck, Mr. Dye steered his vehicle
16 to the right in what I believe to be an effort to avoid
17 colliding into the pickup truck." Number eight: "In
18 making this maneuver, Mr. Dye lost control of the vehicle I
19 was riding in and went off the roadway striking a tree."
20 So with respect to subsection two of 38-77-170, we believe
21 that based upon the affidavit that was filed after the
22 answer that they have met condition number two. With
23 respect to condition number three, the insured was not
24 negligent in failing to determine the identity of the other
25 vehicle and the driver of the other vehicle at the time of

1 the accident, meaning that there must be some statement in
2 the affidavit that Mr. Dye, who was the insured in this
3 case, was not negligent in failing to determine the
4 identity of the vehicle and the driver of the other
5 vehicle. Mr. Rice's affidavit does not contain any
6 statement that deals in any way with condition number
7 three. Additionally, Your Honor, there is a requirement
8 per the statute that there has to be a statement that is
9 displayed on the affidavit dealing with the false
10 statement. Nowhere is that contained on the face of the
11 affidavit. So with respect to, again, Collins v. Doe,
12 Collins v. Doe specifically goes through and outlines in
13 the Supreme Court case that -- and in this case Ms. Collins
14 did not have an affidavit, and then she tried to come to
15 Court and have someone testify as to all of these issues,
16 and the Supreme Court held that without the affidavit
17 containing each of the three conditions and also having the
18 false statement displayed on the face of the affidavit,
19 that she had failed to comply with 38-77-170 in that her
20 failure to have an affidavit that specifically listed all
21 of the conditions under 38-77-170 meant that her case was
22 not properly before the Court and the -- should not have
23 been heard and directed verdict should've been granted.

24 Also, Your Honor, after we deposed Mr. Dye and
25 Mr. Rice, I notified the plaintiff's attorney that his

'1 affidavit did not comply with the statute. He then sent
2 another affidavit to be filed with the Court, and I
3 received the affidavit some time after January 30th of
4 2018, so less than six months ago.

5 And, Hampton, can you tell me -- because I did
6 not get a filed copy of that affidavit either -- the date
7 that the second affidavit was filed?

8 MR. EADON - I'll look for it. It was signed on
9 September 26th of '17. I don't have a filed copy in my
10 records.

11 MS. O'BRIEN - What do you mean in your records?
12 You mean in the Court file?

13 MR. EADON - I don't have the Court file, Carrie.
14 I ---

15 THE COURT - I can pull up the Court file.

16 All right, go ahead. We'll -- we'll resolve that
17 issue.

18 MS. O'BRIEN - So, Your Honor, with respect to the
19 second affidavit that was filed, it would be our position
20 that the affidavit, again, was not properly filed at the
21 time that this action was brought. It was not a condition
22 to suing, and if you look at the second affidavit, the
23 second affidavit adds -- it's identical except for it adds
24 two paragraphs. Paragraph number ten specifically says
25 there was no physical contact between Mr. Dye's vehicle and

1 the pickup truck. Paragraph number eleven says, the
2 collision was reported to law enforcement authorities and
3 that Trooper T.M. McNeace with the South Carolina Highway
4 Patrol responded to the scene of the collision to
5 investigate. So it now meets condition number one, which
6 is that it was reported to some appropriate police
7 authority. Condition number three is still missing where
8 there is a statement that the insured, again, Mr. Dye, was
9 not negligent in failing to determine the identity of the
10 vehicle and the driver of the vehicle. So it would be our
11 position that condition number three has not been met and
12 the affidavit does not comply with the statute under 38-77-
13 170. In addition to the two paragraphs, the additional
14 affidavit contains the statement that is also required to
15 be on the face of the affidavit that the witness is not
16 making a false statement concerning the facts in the
17 affidavit and may be subject, the person making the false
18 statement, to criminal penalties as provided by law.

19 So, Your Honor, our position is that based upon
20 the statute, based upon the Supreme Court case, Collins vs.
21 Doe, that is still current law in South Carolina from 2002,
22 that in order for the plaintiff to bring a right of action
23 to the Court and have the case before the Court, that the
24 plaintiff has to have an affidavit that is filed with the
25 complaint. The affidavit cannot be filed after the

1 complaint. The affidavit cannot be filed after there has
2 been an answer in this case that has been filed where a
3 motion to dismiss is properly before the Court. Again, if
4 you believe that a condition precedent of filing the
5 affidavit at the time of the lawsuit is not required, the
6 affidavit -- the first affidavit fails to meet criteria in
7 38-77-170 of subsection one and three and fails to contain
8 the statement that must be on the face of the affidavit.
9 The subsequent affidavit that was filed some time in 2018
10 and had to have been after January 30 of 2018, also fails
11 to comply with subsection three, and based upon Collins v.
12 Doe, Your Honor, it's our position that the plaintiff has
13 not complied with 38-77-170 and the Supreme Court requires
14 strict compliance, and there is no testimony that is to be
15 allowed based upon 38-77-170 as a substitute for the
16 affidavit based upon Collins v. Doe.

17 THE COURT - All right, thank y'all. And when
18 y'all -- I may be reading and have my head down when y'all
19 are talking. I don't mean to show y'all, Mr. Dye, (sic)
20 any disrespect. I'm listening at the same time.

21 All right, so Mr. Eadon, I'll be glad to hear
22 your response to the motion to dismiss.

23 MR. EADON - Judge, I don't have a whole lot to
24 add, because that's the exact same argument that was
25 advanced at summary judgment. Judge Henderson heard all of

1 the same arguments. He rendered a decision at that time.
2 There's no new information that's been brought before the
3 Court. It's the same argument under a different name. And
4 in his decision he evaluated all of the case law. He
5 evaluated all of the arguments that were advanced just a
6 moment ago. In his order he specifically found that the
7 affidavit satisfied the affidavit requirements of 38-77-
8 170, and I -- I certainly don't want to be in a position
9 where I'm saying a Judge can't do something, because that's
10 certainly not my place, but, you know, this motion of
11 dismissal was filed with an answer, what, two years ago,
12 and we're sitting here literally the eve of trial to hear
13 this, this motion to dismiss after a motion for summary
14 judgment has been denied. If there is any -- if there was
15 any relief of granting a motion to dismiss, it should've
16 been done prior to this point, because the statute of
17 limitations had not expired. Obviously as we sit here --
18 this wreck happened in April of 2015. The statute has
19 expired. The statute of limitations has expired, but I'll
20 be happy to rehash all the arguments that I made at summary
21 judgment.

22 THE COURT - Well, let me -- you don't need to
23 that. I mean it does -- what I would like you to -- hear
24 is that -- his order -- and I have a copy of his order here
25 in the clerk's file before me -- he says that I find that

1 the September the 26th, 2017 affidavit submitted by Mr.
2 Rice satisfies the affidavit requirements of South Carolina
3 Code Section 38-77-170 (2) -- subsection two and if I
4 understand defenses' argument that -- her -- the argument
5 for the motion to dismiss probably goes beyond just
6 subsection two.

7 MS. O'BRIEN - Correct.

8 THE COURT - All right, so -- so I'll be glad to
9 hear you -- or at least that's the way the Court sees it.
10 Mr. Eadon, let me hear from you and then I'll come back to
11 you.

12 MR. EADON - Yes, sir. And, Judge, if you'll just
13 give me a moment, again, we didn't have -- I don't have all
14 my case law. It's in there as it relates to --

15 THE COURT - You want to go get it?

16 MR. EADON - If you don't mind.

17 THE COURT - Yeah. We'll -- yeah, go get ---

18 MR. EADON - Okay, thank you. Make sure I have
19 everything so that we can be on the same page.

20 (WHEREUPON, BRIEF PAUSE)

21 MR. EADON - Thank you, Your Honor.

22 THE COURT - And let me do this. I'm satisfied
23 that the -- I mean I'm not here to -- I'm satisfied that
24 Judge Henderson's order on the summary judgment is the law
25 of the case, and so we really don't need to rehash the --

1 the compliance with the statute as far as -- it appeared to
2 me -- and when I read through the file that what Judge
3 Henderson ordered was that even though the initial
4 affidavit did not have the required language stating about
5 the potential penalties and then the subsequent affidavit
6 did, that the law appeared to be -- and I think obviously I
7 believe he was correct -- and that that did not mean that
8 the affidavit was not sufficient. So that's -- it does not
9 appear to be the issue before the Court or that I'm going
10 to consider whether that affidavit ended up being
11 sufficient. What appears that defense is arguing that is -
12 - was not argued as part of the motion is this -- is the
13 broader concept of that the filing of an affidavit -- and
14 it appears that the case law that I looked at -- and you
15 can correct me if I'm wrong -- all dealt with cases where
16 there was not an issue of the timeliness of the affidavit,
17 it was more of the sufficiency of the affidavit that, you
18 know, I guess we must assume were all timely filed, and it
19 appears what the defense is arguing is that as a condition
20 -- well, now she is arguing -- as a condition precedent to
21 the bringing -- actually filing the suit, then an affidavit
22 must've been filed, so that's what I'd like to hear from
23 you, Mr. Eadon, on that particular issue.

24 MR. EADON - Okay. As to -- I'm sorry, the last
25 part as to whether this a condition precedent to ---

1 THE COURT - Yes. Yes. In other words, you filed
2 a lawsuit and what she's arguing -- at least is the way the
3 Court is interpreting it -- filed a lawsuit, filed the
4 complaint, you got to have the affidavit -- an affidavit
5 filed at the time of the action for it to be a proper
6 action.

7 MR. EADON - Okay.

8 THE COURT - The cases that dealt with the summary
9 judgment it appeared that affidavits were timely filed, but
10 you -- then you had this disagreement over whether the
11 language requiring the notice of a criminal penalty and it
12 appears to this Court that our -- our Courts have said,
13 hey, look, even if they file one later on and it has the
14 language on there, then that's fine, so -- do you
15 understand my question?

16 MR. EADON - Yes, sir. So you're wanting us to
17 address ---

18 THE COURT - The condition ---

19 MR. EADON - The condition precedent.

20 THE COURT - --- being a condition precedent ---

21 MR. EADON - Sure.

22 THE COURT - --- in this case factually an
23 affidavit -- and there doesn't appear to be a factual
24 dispute that the affidavit was not filed until a day after
25 the ans -- the defenses' answer was filed.

1 MR. EADON - Yes, sir.

2 THE COURT - Am I right factually?

3 MR. EADON - Yes, sir. Yes, sir, that's correct.

4 THE COURT - Okay.

5 MR. EADON - And, Judge, that's -- that's part of
6 the argument that was advanced at summary judgment and we
7 submitted a case and, again, I don't have all of the case
8 law from that argument which was done months ago, but
9 there's a Tucker v. Doe case that was decided by the Court
10 of Appeals where the sufficiency of an affidavit was tested
11 and ---

12 THE COURT - And she -- defense has just handed me
13 a copy of Tucker v. Doe.

14 MR. EADON - Okay. And, you know, in that case,
15 Judge, the affidavits were filed after the lawsuit was
16 initiated, and the Court in that case held that the
17 affidavit complied with the section, and our position would
18 be if the -- if the Court found that it was a true
19 condition precedent, then that case should've been
20 dismissed as Ms. O'Brien is asking this Court to do on Mr.
21 Rice's case. You know, our -- our other position is that
22 the legislature in writing laws is clear of what they want,
23 and the medical malpractice arena, South Carolina Code 15-
24 79-125, they create a true condition precedent, and the way
25 they do that is they say the subject of this statute is

1 notice of intent to file suit as a prerequisite to filing
2 an action. Subsection one -- or Subsection A says prior to
3 filing or initiating a civil action alleging injury or
4 death as a result of medical malpractice, the plaintiff
5 shall contemporaneously file a notice of intent to file
6 suit and an affidavit of an expert witness. So our
7 position is when the legislature intends for something to
8 be a true condition precedent in order to bring a case to
9 Court or to be able to recover from a uninsured claim, then
10 it should mirror the language that they've used in this
11 medical malpractice statute. The heading of the uninsured
12 statute is conditions to sue or recover under uninsured
13 motorist provisions. So our position is that if the
14 legislature specifically intended that the filing of this
15 affidavit be a true condition precedent as being argued
16 this morning, they should've specifically stated it as they
17 did in the med mal statute, and, you know, otherwise the
18 statute has been satisfied per Judge Henderson's summary
19 judgment order. I mean I'm happy to ---

20 THE COURT - All right, and -- I mean would you
21 agree that -- and I'll be glad to hear you on this -- that
22 the summary judgment order did not contain any language
23 that dealt with the issue of it being a condition
24 precedent?

1 MR. EADON - I would have to go back through it,
2 because quite frankly I haven't reviewed it since ---

3 THE COURT - Okay, all right. Well, take a look
4 at it, because I'm going to take a -- I'm going to do a
5 little bit of research before I rule.

6 MR. EADON - Okay. I know -- I know for a fact
7 that that argument was advanced at the hearing. I do
8 recall that.

9 MS. O'BRIEN - No, it wasn't, and there's nowhere
10 in the order ---

11 THE COURT - Well, I mean -- we're --

12 MS. O'BRIEN - --- that it deals with that.

13 THE COURT - That's all right. That's all right.
14 We're bound by the order.

15 MS. O'BRIEN - Right. The order does not address
16 that at all.

17 THE COURT - All right. Let me do this, so we're
18 back to you ---

19 MS. O'BRIEN - Your Honor, and I'm going to ---

20 THE COURT - --- defense.

21 MS. O'BRIEN - --- hand up Collins v. Doe. And,
22 Your Honor, I have highlighted specifically what Collins v.
23 Doe on the second page specifically says and deals with the
24 -- and it says that, you know, the requirements are
25 necessary to support a plaintiff's right of action, and it

1 defines right of action and goes on to say -- Your Honor,
2 it's the -- actually the other case. It specifically says
3 that without a sworn affidavit, a plaintiff has no right of
4 action. It also goes on to say that -- that a plaintiff's
5 strict compliance with the affidavit requirement is
6 mandatory. The case also in Collins v. Doe talks about
7 that under the rules of statutory interpretation the use of
8 words such as shall or must indicates the legislature's
9 intent to enact a mandatory requirement. The statute
10 specifically says that this must -- the affidavit must
11 contain and must be filed and it defines as when it must be
12 filed. It is a condition precedent. The statute even
13 says, it is a condition to sue. That is the heading of the
14 statute. So they -- it's the defenses' position that they
15 have failed on that. With respect to the fact that the
16 affidavit was filed later, if you read the Tucker v. Doe
17 case, the Tucker v. Doe case never addresses that issue.
18 In fact, the Court says that it was not preserved because
19 it was not raised until it was on the appellate level, so
20 therefore they did not address that at all. There has been
21 no case law that I have been able to find that shows that
22 when an affidavit is filed after the complaint or after the
23 answer that it is sufficient. All of the case law -- no
24 one has raised that argument. No one has dealt with it,
25 and if you look at Tucker v. Doe and read through the case

1 -- and I went through it again, because in the order Mr.
2 Eadon argued that Tucker v. Doe stands for the proposition
3 that you can file an affidavit anytime you want. Tucker v.
4 Doe does not say that anywhere in the case law. It wasn't
5 addressed; it wasn't raised, and therefore, the appellate
6 court said that they could not deal with it because the
7 first time it had been raised was on the appellate level,
8 and therefore, it failed.

9 Your Honor, the condition precedent is one issue.
10 The other issue that will have to be dealt with -- and if
11 you look at the order, it specifically says that the only
12 thing that was addressed with respect to the affidavit was
13 subsection two. Your Honor, subsection three requires that
14 the insured has to -- it has to be in the affidavit -- the
15 insured wasn't negligent in failing to determine the
16 identity of the vehicle and the driver of the vehicle.
17 Both affidavits do not deal in any way with 38-77-170
18 paragraph three. And, Your Honor, it's our position that
19 the affidavit that was filed in 2018 does not address
20 subsection three. The affidavit that was filed on November
21 22nd, 2016 does not address subsection three. Statute of
22 limitations has expired in this case and no affidavit can
23 now be filed, and no testimony can come in to correct the
24 deficiencies in the affidavit.

1 THE COURT - All right, Mr. Eadon, I'll give you
2 the last word.

3 MR. EADON - Yes, sir, Your Honor. I mean I don't
4 have a whole heck of a lot to add to be honest with you due
5 to the fact that this -- we weren't -- in truthful, we
6 weren't prepared to come and argue something that our
7 position has been heard on the case. Some of the things
8 that Ms. O'Brien has argued I don't necessarily agree with.
9 There has been testimony by way of video depo -- or by way
10 of video -- by deposition that there was no way for them to
11 determine. Mr. Dye testified that there's no way for him
12 to determine the vehicle that ran them off the roadway as
13 it didn't hit the brakes -- and I'm paraphrasing. I'm not
14 directly quoting -- but that the vehicle did not stop. The
15 individual did not come to where they were down in the
16 trees after they ran off, and he is here and he will
17 testify to that fact. Mr. Rice is in a position where he
18 is unable to say that they were able to find out and
19 determine the identity of the individual who ran them off
20 the road. The law enforcement, the highway patrolman who
21 showed up in his -- in his accident report does not show
22 the identity of the other driver. The other driver just
23 kept going and there will be testimony today in trial from
24 Mr. Rice and from Mr. Dye that there is no way for them to
25 be able to determine who that driver was, because he didn't

1 stop, and it's not anything that they did or didn't do that
2 led to that. It's just the facts of this case, and there's
3 a case -- I do remember in researching this months and
4 months ago -- in Orangeburg where an unnamed driver caused
5 a wreck and then fled the scene and the Court essentially
6 in listening to deposition -- or testimony at trial that
7 that person was negligent in failing to identify that
8 driver. That driver came up to the door of the plaintiff,
9 spoke to them and then took off. And if memory serves me,
10 it was somebody with a Texas license plate. The Court
11 ultimately decided that that person -- the plaintiff was
12 negligent in failing to identify the John Doe driver who
13 left the scene. This case is factually distinguishable and
14 different in that they're down in a grove of trees, the
15 other car never stops, continues going; it was reported to
16 law enforcement. There will be testimony to that, and
17 there's already been deposition testimony to that, that
18 there was -- there's nothing else that could be done to
19 determine the identity under subsection three.

20 THE COURT - All right.

21 MS. O'BRIEN - Your Honor, the only thing I want
22 to say is, Collins v. Doe specifically addresses the issue
23 as to whether a witnesses' testimony at trial is the
24 functional equivalent of the affidavit requirement, and
25 Collins v. Doe says that even if you have testimony at

1 trial that can correct the -- that can support the
2 affidavit, that could deal with the deficiencies of the
3 affidavit, that that testimony cannot be used in lieu of
4 making sure that you have met the statutory requirements.

5 THE COURT - I'll take a look at those. All
6 right, any other motions?

7 MR. EADON - To that issue, Judge, I would hand up
8 Gilliland v. Doe, which is a 2004 ---

9 THE COURT - And I have -- I've pulled it up. I
10 have looked at it a little bit earlier, but I'll take a
11 look at that again.

12 MR. EADON - And the only response to that is that
13 in that case the Court discussed witness testimony from
14 Gayle Norris whose testimony actually supported the claim
15 by the plaintiff, and so to the -- in deciding a case after
16 the Collins' decision, this Court essentially said that her
17 testimony does corroborate and support and provide
18 circumstantial evidence to the issue that this is a John
19 Doe.

20 THE COURT - All right.

21 MS. O'BRIEN - But there's a difference, because
22 there was an affidavit in Gilliland v. Doe, so there ---

23 THE COURT - All right. I'll look at Gilliland v.
24 Doe ---

1 MS. O'BRIEN - Yeah. Yeah, Gilliland v. Doe does
2 not stand ---
3 THE COURT - Anything other issues ---
4 MS. O'BRIEN - --- for that proposition.
5 THE COURT - Anything other issues we need to take
6 up?
7 MR. EADON - I have a motion in limine, Judge.
8 THE COURT - All right, and what does that
9 involve?
10 MR. EADON - I'll be happy to hand it up.
11 (WHEREUPON, DOCUMENT HANDED TO THE COURT)
12 MR. EADON - The majority of it, Judge, is a
13 traditional motion in limine dealing with evidentiary
14 matters.
15 (WHEREUPON, DOCUMENT HANDED TO MS. O'BRIEN)
16 MS. O'BRIEN - Thank you.
17 MR. EADON - You're welcome.
18 Here's a memorandum in support of the motion in
19 limine.
20 Judge, the first one, and I don't know if Ms.
21 O'Brien intends to get into this or not on this particular
22 case, but it's asking that the Court direct that there be
23 no questioning along the lines of when Mr. Rice hired
24 counsel. I don't believe that was a question in the

1 deposition but I don't think it's proper for the reasons
2 contained in this motion in limine.

3 THE COURT - Ms. O'Brien, do you want to be heard
4 on the timing of hiring of counsel?

5 MS. O'BRIEN - Yeah, none of the cases cited are
6 South Carolina cases. That's not South Carolina case law.
7 South Carolina case law doesn't deal nor address with the
8 timing of hiring counsel, so yeah, that doesn't -- I'd like
9 to see some South Carolina case law that supports that.

10 THE COURT - Well, I'm going to grant that motion.
11 I'm not going to allow you if we go to trial to go into the
12 timing of counsel.

13 How about prior settlement of Bobby Rae Dye?

14 MR. EADON - Yes, sir, Judge. This is -- we've
15 eluded to this and discussed this earlier. Mr. Dye was an
16 original defendant in this case. He entered into a
17 settlement agreement with Mr. Rice months ago; a release
18 was signed. The release specifically states that -- that
19 liability is expressly denied contrary to some positions
20 taken earlier. A stipulation of dismissal was entered with
21 prejudice as it relates to Bobby Rae Dye, and then the
22 memorandum that I have attached discusses South Carolina
23 law specifically as it relates to this issue of settlement
24 agreements and the admissibility of settlement agreements.

1 It talks about -- I don't want to waste the Court's time
2 reading something that the Court can read, but ---

3 THE COURT - Well, let me hear where -- what the
4 defense position is to ---

5 MS. O'BRIEN - Your Honor, -- yeah, our position
6 is not that we are going to admit the settlement agreement,
7 but Mr. Dye has admitted liability in this case. Mr. Dye
8 paid money to the plaintiff admitting that he had caused
9 injury to him and the jury has a right to know that Mr. Dye
10 had -- and I have a right to question him as to the fact
11 that he has admitted that he injured the plaintiff as a
12 result of this accident.

13 THE COURT - Well, that doesn't go to any
14 settlement. I mean do you have an objection to her being
15 able to ---

16 MR. EADON - Yes, sir, I do, and -- because I
17 think that -- I mean this is the release that was signed by
18 Mr. Rice, and providing to Progressive, Ms. O'Brien's
19 client, it specifically states, Bobby Dye, which liability
20 was and is expressly denied. There is no -- I mean yeah,
21 they -- I mean just like any ---

22 THE COURT - Well, how do we know -- well, then
23 what you're telling me is that there's some information or
24 at least the defense is arguing there's some information
25 that he has admitted liability.

1 MR. EADON - Not in the -- and my understanding of
2 defenses' argument is that by settling he has admitted
3 liability. This release just like any other release that
4 I've seen expressly denies liability.

5 THE COURT - All right, well, that's -- I'll --
6 I'm going to grant the motion in limine if we get to that
7 point of his -- just because he settled the case it appears
8 to the Court that he has not -- it appears as part of their
9 negotiations he denied liability. Certainly if he takes
10 the stand, that will be a factual issue for the jury to
11 determine. I mean a jury's got to decide what -- if -- I
12 mean that may be their defense that he's liable. I mean
13 there's -- he still has a -- they still have a right to
14 examine him if he's a witness on what he did or didn't do.

15 MR. EADON - Okay, but not -- but not the fact
16 that he was involved in the lawsuit or that any other ---

17 THE COURT - Right.

18 MS. O'BRIEN - Why not? I have a right to -- the
19 -- I have a right to question the plaintiff on the
20 pleadings, and the pleadings are -- the pleadings are
21 evidence in this case, and I can pull up the specific case
22 that says that I have a right to question the plaintiff on
23 the pleadings in this case ---

24 THE COURT - And ---

1 MS. O'BRIEN - --- and the fact that he alleged
2 that Bobby Rae Dye caused this accident. Absolutely. And
3 I ---

4 THE COURT - Well, let's -- hold on a minute.

5 MS. O'BRIEN - Yeah.

6 THE COURT - I'm not necessarily -- I don't -- I
7 don't believe that the settlement precludes you from
8 examining him about the facts of the case and then -- and --
9 - I don't know how he's going to answer the question. We
10 don't know how he's going to answer the question, but we'll
11 -- we'll deal with that if and when Mr. Dye takes the
12 stand. We'll revisit that. How about collateral source?

13 MS. O'BRIEN - We agree on collateral source.

14 THE COURT - All right. How about ---

15 MR. EADON - And, Judge, as to discuss prohibiting
16 the discussion of any write-offs, any agreements as it
17 relates to the medical bills that have been incurred in
18 this case, just so we're on the same page. Right?

19 MS. O'BRIEN - Yeah.

20 THE COURT - And then four, use of documentary
21 evidence without proper foundation. That's a rule the
22 Court -- I don't know that -- I mean certainly the Court
23 will enforce whatever appropriate evidentiary rules as far
24 as proper admission of evidence.

25 Number five?

1 MR. EADON - Judge, this -- this really kind of
2 goes hand-in-hand with number six. Mr. Rice was involved
3 in a motor vehicle collision in November of 2014 I believe,
4 which was about six months prior to this one. All
5 indications in his testimony that I'm aware of is that he
6 went and got checked out, didn't have any further
7 treatment. You know, it's our position is that that is
8 irrelevant to this case that's being judged on these facts,
9 that it's not a pre-existing type continual injury that has
10 anything to do with his one ER visit in this case, as well
11 as there was a subsequent motor vehicle collision that
12 doesn't have anything to do with this case.

13 THE COURT - Well, I would say that we need to
14 deal with five and six if and when Mr. Dye testifies and
15 once he testifies before cross examination we'll revisit
16 that, because it goes to the issue of what she's allowed to
17 ask on cross. Isn't that right?

18 MR. EADON - Yes, sir.

19 THE COURT - All right, we'll revisit those.
20 We'll see how -- what happens at trial.

21 All right, seven?

22 MR. EADON - I don't know if that's something that
23 Ms. O'Brien intends to get into, but -- and I'll be honest
24 with you, as long as there's no claim that John Doe is
25 somebody who can't pay a judgment, which I don't think Ms.

1 O'Brien's going to do. I don't think we need to address
2 seven?

3 THE COURT - All right, eight, failure to call
4 witnesses?

5 MR. EADON - That's just asking that there be no -
6 - no mention of somebody that's equally available to both
7 parties, and in this case there's a passenger that's gone
8 AWOL, Derrick McCrorey, who Mr. Dye -- I mean Mr. Rice nor
9 us nor Ms. O'Brien's been able to find. We've all tried to
10 notice him and serve him subpoenas, tried to get him
11 deposed and he's been uncooperative to everybody.

12 THE COURT - Ms. O'Brien, you want to be heard on
13 that?

14 MS. O'BRIEN - Absolutely. I have a right to
15 discuss the fact that there was an additional passenger in
16 the vehicle who has never testified and never made a
17 statement that the -- there was a phantom vehicle or that
18 it caused this accident. I have a right to cross examine
19 the plaintiff about that. I have a right to cross examine
20 the plaintiff about the fact that there's no medical
21 provider that has supported that he was injured as a result
22 of this accident, and that goes to a directed verdict
23 motion ---

24 THE COURT - I'll deny that motion.

25 Criminal history?

1 MR. EADON - There -- Mr. Rice has testified to
2 some misdemeanors in his deposition. I don't know if
3 defense intends to get into any of that, but this is just a
4 blanket motion in limine to -- to ask that no criminal
5 history that Mr. Rice may have been involved in ---

6 THE COURT - Well, that will be dependent upon
7 what he -- how he answers and testifies at trial. We'll
8 revisit that one.

9 MR. EADON - All right, and I believe that's it,
10 Judge.

11 THE COURT - All right.

12 MS. O'BRIEN - Your Honor, the only motion that we
13 have is that there be no mention of insurance by any party
14 or any witness.

15 THE COURT - I assume that everybody's willing to
16 abide that ---

17 MR. EADON - Yes, sir.

18 Don't say the word insurance. Okay?

19 THE COURT - All right, anything else we need to
20 take up?

21 MS. O'BRIEN - And I would also ask if Mr. Dye
22 testifies that he not mention insurance and be instructed
23 by the plaintiff not to mention insurance.

24 THE COURT - That'll be left up to them.
25 Hopefully they will ---

1 MR. EADON - I will -- I will tell him.

2 THE COURT - All right, let's go in -- y'all take
3 your places in the courtroom and get yourself settled and
4 then I'm going to take a ---

5 (WHEREUPON, BRIEF PAUSE WHILE PARTIES TAKE THEIR
6 POSITIONS IN THE COURTROOM)

7 (WHEREUPON, BRIEF RECESS TAKEN.)

8 (WHEREUPON, HEARING CONTINUES IN THE COURTROOM.)

9 THE COURT - All right, plaintiffs ready to
10 proceed?

11 MR. EADON - Yes, sir, Your Honor.

12 THE COURT - Defense?

13 MS. O'BRIEN - Yes, sir, Your Honor.

14 THE COURT - All right.

15 Ladies and gentlemen of the jury, we've got some
16 issues that we need to take up outside of your presence.
17 I'm going to release you for lunch. If you would call at
18 1:00 o'clock, call the number that you have at 1:00
19 o'clock. The clerk will leave a message on when you'll
20 need -- when you'll be needed next, so I'm going to allow
21 you to leave for lunch. It is twenty til 12:00, but call
22 at 1:00 o'clock and you will have instructions about what
23 to do next.

24 THE COURT - All right, everybody be seated while
25 this jury panel ---

1 (WHEREUPON, JURY POOL EXITS THE COURTROOM.)

2 THE COURT - All right, we're back on the record
3 and this is 2016-CP-20-00011, Peter Rice vs. Bobby Dye and
4 John Doe. Bobby Dye is no longer a party to this action,
5 so this is Peter Rice vs. John Doe. The Court has heard a
6 motion to dismiss on the record outside the presence of the
7 jury in another area of the courtroom, also went through
8 some motions in limine is also on the record, motion from -
9 - the motions in limine brought by the defense and the
10 Court had taken under advisement the motion to dismiss.
11 We're back in the courtroom to deal with that motion first.
12 Is there anything else that you want to put on the record
13 as far as the motion to dismiss from the defense?

14 MS. O'BRIEN - Other than the case law that was
15 handed to Your Honor a few minutes ago by plaintiff's
16 attorney in chambers, Jordan v. Doe. The Jordan v. Doe
17 case stands for the proposition of whether there was
18 sufficiency of evidence that dealt with subsection three in
19 statute 38-77-170, and, Your Honor, we are not arguing
20 whether there is sufficient evidence with respect to
21 subsection three. Our position has been and we maintain is
22 that the affidavit doesn't address in any way subsection
23 number three, either the affidavit that was filed on
24 November 22nd, 2016 or the affidavit that was filed in
25 2018, and based upon Collins v. Doe and the case stands for

1 the proposition that the statute is a strict requirement
2 that it must contain the three provisions along with a
3 statement on the face, that it must contain about the
4 falsity and it has not been made under false pretenses, our
5 position is is not whether there's sufficient evidence, it
6 is whether there was any evidence whatsoever with respect
7 to subsection three on the affidavit, and our position is
8 that the plaintiff has not complied in that statutory
9 requirement under subsection three.

10 THE COURT - All right, thank you.

11 Mr. Eadon, anything on behalf of the plaintiff?

12 MR. EADON - Nothing from the plaintiff, Your
13 Honor, other than we believe the light -- all the arguments
14 that have been advanced in the light most favorable to Mr.
15 Rice that the -- and in light of Judge Henderson's ruling
16 on the summary judgment, that the affidavit requirements
17 have been met in this case and the case should move forward
18 to a jury trial.

19 THE COURT - All right, thank you.

20 Well, here's what I'm going to do. I'm going to
21 grant the motion to dismiss, and here are the reasons why.
22 It appears that summons and complaint were filed on June
23 the 12th, 2016. At that time there was no affidavit as
24 required by 38-77-170 either served on the defendant or
25 filed and made a part of the initial complaint. Indeed it

1 appears that the defendant filed an answer on November the
2 21st, 2016 that included the motion to dismiss in their
3 answer and it was on November the 28th was when the ---

4 MS. O'BRIEN - It was the 22nd, Your Honor.

5 THE COURT - I'm sorry, it was November the 22nd,
6 one day later the first affidavit -- the first affidavit
7 was filed by the plaintiff. That affidavit did not include
8 the language required by 38-77-170, however, subsequent
9 affidavit was filed on -- it was actually filed on February
10 the 8th, 2018 containing that language. It appears that --
11 that the summary judgment motion, which is the law of the
12 case, that was ordered -- or the order of the summary
13 judgment by Judge Henderson dealt with 38-77-170 subsection
14 two, which dealt with the language that -- but had to be
15 added to an affidavit and certainly the case law supports
16 Judge Henderson's ruling on that that even though an
17 affidavit that's properly filed does not include that
18 language. I believe the case -- that the case law was
19 clear that subsequent remedies are proper and that, so,
20 therefore, the summary judgment motion was -- that the
21 Court agree -- whatever it's worth, the Court agrees with
22 Judge Henderson on that, however, the issue on the motion
23 to dismiss goes to the -- and the defense argued that at
24 the time of the filing of the complaint as a condition
25 precedent for the right to sue or have a cause of action

1 that -- that the affidavit had to have been the basis of
2 which under 38-77-170, that that was a necessary condition
3 to sue or recover and so -- and I am -- the Court is
4 persuaded by the language -- the Supreme Court case of
5 Collins v. Doe, the language that the Supreme Court spelled
6 out in there about -- whether the nature of this particular
7 statute that a strict compliance with that statute is
8 required and the affidavit -- and I'm not even going to go
9 into the sufficiency of the affidavit or the sufficiency of
10 any evidence that might have been presented later on. I
11 find that the -- that the motion to dismiss is granted
12 because of the failure to file an affidavit until after an
13 answer was filed in the case, and so that's the basis for
14 the Court's ruling. Thank you.

15 MS. O'BRIEN - Thank you, Your Honor.

16 MR. EADON - Thank you, Your Honor.

17 THE COURT - I can do that on a form -- Well, I'll
18 do a form four. If you would like to submit a more formal
19 order, Ms. O'Brien then do that. Certainly run it by your
20 counterparts and then send that to me and I'll review it,
21 and if I need to make that part of the file, I'll sign it.

22 MS. O'BRIEN - Okay. Thank you.

23 THE COURT - However, I will sign a form four.

24 Thank y'all.

25 MR. EADON - Thank you, Judge.

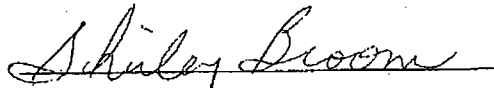
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(END OF TRANSCRIPT)

C E R T I F I C A T E

I, Shirley Broom, Official Court Reporter for the Sixteenth Judicial Circuit for the State of South Carolina, do hereby certify that the foregoing 40 pages is a true and accurate Transcript of Record of the proceedings had and the evidence introduced in the proceedings of Peter Rice vs. Bobby Rae Dye and John Doe, as taken by me in The Court of Common Pleas for the Sixth Judicial Circuit on June 20th, 2018, and provided by me this the 27th day of Sept., 2018.

I do further certify that I am neither of kin, counsel, nor interest to any party herein.



Shirley Broom, CVR-M
Official Court Reporter,
Certified Verbatim Reporter, In and
for the State of South Carolina

Exhibits In Plaintiff's Motion to Reconsider

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

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

IN THE COURT OF COMMON PLEAS

Peter Rice,

Plaintiff,

Civil Action No. 2016CP20011

vs.

AFFIDAVIT OF PETER RICE

Bobby Rae Dye and John Doe,

Defendant.

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

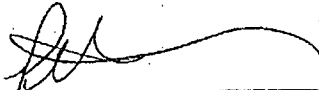
1. I am over the age of 18 and otherwise qualified to give sworn testimony;
2. I am a citizen and resident of Chester County, South Carolina;
3. I am the Plaintiff in the above-referenced legal action;
4. I was a passenger in a vehicle being driven by Bobby Rae Dye, traveling on Highway 901 in Fairfield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

FURTHER AFFIANT SAYETH NOT

(Signature page to follow)



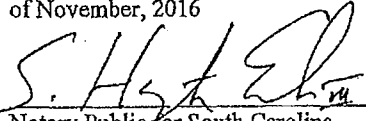
Date: November 18, 2016



PETER RICE

Sworn To Before me this 18th day

of November, 2016



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

ELECTRONICALLY FILED - 2018 Jun 29 11:36 PM - FAIRFIELD - COMMON PLEAS - CASE#2016CP2000011

CERTIFICATE OF SERVICE

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

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

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

NOV 22 10 11 AM
FAIRFIELD COUNTY
CLERK OF COURT
BETH JO BECKWITH

Connie Gause
Connie I. Gause

Hampton Eadon

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

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

All,

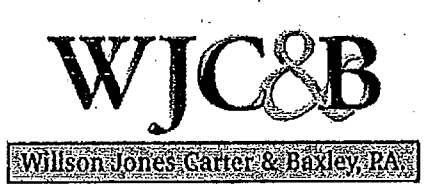
I am removing my Motion to Dismiss.

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

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

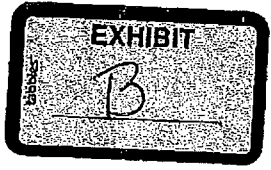
Feel free to call my cell, 704-577-4261, with questions.

Thanks,



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

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Connie Gause

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

I will note the roster. Thanks for the update

Tammy

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

Tammy,

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

Thank you,



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

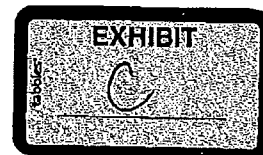
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From: tammy.durham@fairfield.sc.gov

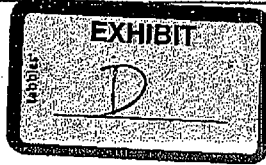
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Fairfield County Sixth Judicial Circuit - Roster Details
Motion Roster for January 5, 2017 @ 9:30 AM

Court/Agency		Common Pleas		Judge		Benjamin		Roster Id		46	
Roster Type		Motion Roster		Roster Begin Date		01/05/2017		Roster End Date		01/05/2017	
Number of motions = 16											
#	Date	Time	hr:mn	Description	Filing Party	Filed Date	Case	Sub Type	Plaintiff Attorney	Defendant Attorney	Notes
3	01/05/2017	9:30 AM	0:4	Motion/Summary Judgment <i>X16/449 to be heard PRO - Denied</i>	Broad River Campground Llc-PLT	08/22/2016	2014CP2000349 Broad River Campground Llc VS Jenkinsville Water Co Inc	Premises Liab 330	Glenn E. Bowers (803) 714-7766	Reginald Wayne Belcher (803) 254-2200	CONF.
4	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss Plaintiff's Motion	Fruitheath-Ridgeway LLC-DEF	01/16/2017	2016NI2000005 Fruitheath Ridgeway LLC VS Plaintiff et al	Notice/Med Mal/230	Daniel Nathan Hughey (843) 881-8644	Joshua Staven Whitley (843) 606-5635	
5	01/05/2017	9:30 AM	0:4	Motion/Dismiss Plt's Notice of Intent	Fruitheath-Ridgeway LLC-DEF	08/15/2016	2016NI2000002 Sheila Per Rep Hall VS Fruitheath-Ridgeway LLC - defendant, et al	Notice/Med Mal/230	Daniel Nathan Hughey (843) 881-8644	Joshua Staven Whitley (843) 606-5635	resolved
6	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss Plaintiff's Notice of Intent	Fruitheath-Ridgeway LLC-DEF	11/10/2016	2016NI2000004 Daniel Per Rep Hall VS Fruitheath-Ridgeway LLC - defendant, et al	Notice/Med Mal/230	Debra A. Matthews (803) 635-6000	Joshua Staven Whitley (843) 606-5635	
7	01/05/2017	9:30 AM	0:4	Motion/Refer to Special Referee	William Jr Russell-PLT	11/07/2016	2015CP2000223 William Jr Russell , plaintiff, et al VS Betty R Ginyard Pr	Special-Comp/Oth 699	Debra A. Matthews (803) 635-6000 Kenneth B. Wingate (803) 256-2233	Thomas Jefferson Goodwyn Jr (803) 251-4517 E. Crosby Lewis Sr. (803) 635-1920	Resolved
8	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss Plaintiff's Notice of Intent	Fruitheath-Ridgeway LLC-DEF	11/10/2016	2016NI2000004 Daniel Per Rep Hall VS Fruitheath-Ridgeway LLC - defendant, et al	Notice/Med Mal/230	Debra A. Matthews (803) 635-6000	Joshua Staven Whitley (843) 606-5635	Resolved
9	01/05/2017	9:30 AM	0:4	Motion/Dismiss/Answer	John Doe-DEF	11/21/2016	2016CP2000011 Peter Rice VS Bobby Rae Dye	Motor Veh Accid 320	Sherod Hampton Eadon III (803) 799-2911	Michael T. Couffer (864) 232-4400 Came H. O'Brien (704) 247-9679	Resolved
10	01/05/2017	9:30 AM	0:4	Motion/Recommend Answer	Bobby Rae Dye-DEF	01/12/2017	2016CP2000011 Peter Rice VS Bobby Rae Dye	Motor Veh Accid 320	Sherod Hampton Eadon III (803) 799-2911	Michael T. Couffer (864) 232-4400 Came H. O'Brien (704) 247-9679	CONSENT ORDER TO COME
11	01/05/2017	9:30 AM	0:4	Motion/Sanctions	Debra K Johnson Pr -PLT	11/18/2016	2016CP2000159 Debra K Johnson Pr, plaintiff, et al VS Bruce Fernell Johnson defendant, et al	Wrongful Death 360	Shane Morris Burroughs (803) 268-9800 David C. Marshall (803) 268-9800	Curtis Lyman Olt (803) 724-1713 D. Cravens Ravenel (803) 799-9091	Requested Conf.
12	01/05/2017	9:30 AM	0:4	Notice/Motion/Summary Judgment	Christina J. Staveland-PLT	10/24/2016	2016CP2000243 Christina J Staveland VS Daniel S Federman	Foreclosure 420	Arthur Stuart Hudson (843) 881-8644	Montelth Powell Todd (803) 231-7837	Resolved
13	01/05/2017	9:30 AM	0:4	Notice/Motion/Dismiss and Compel Arbitration	Fruitheath-Ridgeway Llc-DEF	09/19/2016	2016CP2000298 Cassandra Phillips Poa VS Fruitheath-	Medical Malpract 220	Arthur Stuart Hudson (843) 881-8644	Montelth Powell Todd (803) 231-7837	

ROA 097



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

ARGUMENT

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

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

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

If the owner or operator of any motor vehicle which causes bodily injury or property damage to the insured is unknown, there is no right of action or recovery under the uninsured motorist provision, unless:

(1) the insured or someone in his behalf has reported the accident to some appropriate police authority within a reasonable time, under all the circumstances, after its occurrence;

(2) the injury or damage was caused by physical contact with the unknown vehicle, or the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit;

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

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

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

Plaintiff filed this action on January 12, 2016. On November 18, 2016 he executed an affidavit in support of his claim. (Exhibit 1) Plaintiff was deposed on August 17, 2017. (Exhibit 2) He executed a second affidavit on September 26, 2017. (Exhibit 3) Paragraphs 1-9 of the two affidavits are identical. However, the 2017 affidavit contains two additional paragraphs that state there was no contact between Mr. Dye's vehicle and the phantom vehicle and that law enforcement was called to the scene of the accident to investigate. Additionally, the 2017 affidavit contains the following language above the signature line: "A FALSE STATEMENT CONCERNING THE FACTS CONTAINED IN THIS AFFIDAVIT MAY SUBJECT THE PERSON MAKING THE FALSE STATEMENT TO CRIMINAL PENALTIES AS PROVIDED BY LAW."

A. No Affidavit Prior to Filing Suit

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

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

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

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

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

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

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

C. Plaintiff's Affidavits Contradict Deposition Testimony

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

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

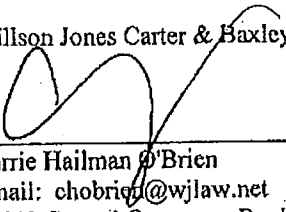
In addition to the Plaintiff's testimony that he did not see the phantom vehicle in his lane of travel, there is no statement from McCrorey about a phantom vehicle crossing the center line, as he did not show up for his deposition and has not executed any affidavits. Defendant Dye has also not provided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

CONCLUSION

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

THIS THE 13TH DAY OF MARCH, 2018.

Willson Jones Carter & Baxley, P.A.



Carrie Hailman O'Brien
Email: chobrien@wjlaw.net
11440 Carmel Commons Boulevard
Suite 206
Charlotte, NC 28226
(704) 247-9679 (phone)
(704) 544-1719 (fax)

**ATTORNEYS FOR THE UNNAMED
DEFENDANT**

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CERTIFICATE OF SERVICE

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

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

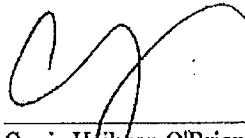
addressed as follows:

S. HAMPTON EADON, III, ESQUIRE
 HARRIS & GRAVES, P.A.
 P.O. BOX 11566
 COLUMBIA, SC 29211
 (803) 799-2911
 ATTORNEY FOR PLAINTIFF
 PETER RICE

2018 MAR 14 AM 9:03
 FAIRFIELD COUNTY
 CLERK OF COURT
 JUDY H. BONES

MICHAEL T. COULTER, ESQUIRE
 CLARKSON, WALSH, & COULTER, P.A.
 P.O. BOX 6728
 GREENVILLE, SC 29606-6728
 (864) 232-4400/(864) 672-7102/(864) 235-4399 (F)
 ATTORNEY FOR DEFENDANT
 BOBBY RAE DYE

This the 13th day of March, 2018.



Carrie Hallman O'Brien
 Email: chobrien@wjlaw.net
 11440 Cannel Commons Boulevard
 Suite 206
 Charlotte, NC 28226
 (704) 247-9679 (phone)
 (704) 544-1719 (fax)

ATTORNEYS FOR THE UNNAMED DEFENDANT

STATE OF SOUTH CAROLINA
COUNTY OF FAIRFIELD

2018 APR 13 AM 11:18
FAIRFIELD COUNTY
CLERK OF COURT
JUDY M BONDS

IN THE COURT OF COMMON PLEAS

Peter Rice,

Plaintiff(s),

Civil Action No. 2016CP20011

vs.

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

John Doe,

Defendant(s).

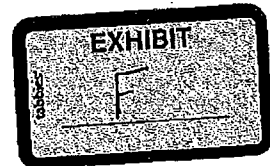
This matter came before the Court upon a Motion for Summary Judgment filed by Defendant John Doe ("Doe"). The Court heard arguments from counsel on March 14, 2018, at the Fairfield County Courthouse. Plaintiff was represented by S. Hampton Eadon III. Defendant Doe was represented by Carrie H. O'Brien.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

FACTUAL BACKGROUND

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

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

*HEA
#1*



STANDARD

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

DISCUSSION

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

In a situation where there is no physical contact with the unknown vehicle, S.C. Code §38-77-170 (2) requires that "the accident must have been witnessed by someone other than the owner or operator of the insured vehicle; provided however, the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit." There is also an endorsement that must be displayed on the affidavit stating, "A false statement concerning the facts contained in this affidavit may subject the person making the false statement to criminal penalties as provided by law".

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

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

I.

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

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

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

II.

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

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

A: I'd seen the headlights.

3
[Signature]

Q: All right. Where were the headlights?

A: Coming towards us.

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

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

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

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

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

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

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

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

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

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

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

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

Q: Like a pick up truck?

A: Yes, sir.

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

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

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

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

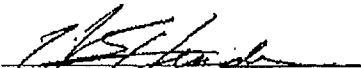
Our Supreme Court dealt with a similar factual scenario in the case of Gilliland v. Doe, 357 S.C. 197, 592 S.E.2d. 626 (S.C. 2004). In Gilliland, the witness, Gayle Norris, testified that she saw the lights of two cars as the cars came around the curve. She also testified that after the accident, she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

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

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

CONCLUSION

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


The Honorable Roger E. Henderson
Presiding Circuit Court Judge

Cherter Field, South Carolina

April 6, 2018

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THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM FAIRFIELD COUNTY

Daniel Dewitt Hall, Circuit Court Judge

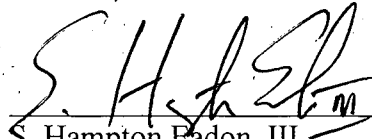
Peter Rice,Appellant,

v.

John Doe,Respondent.

CERTIFICATE OF COMPLIANCE

I, S. Hampton Eadon, III, as attorney for Appellant, do hereby certify that the Record on Appeal filed on 5/24/2019 in the within matter complies with Rule 210(c), SCACR.



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May 24, 2019