

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

**RECEIVED**  
**Jul 08 2021**  
**SC Court of Appeals**

APPEAL FROM FAIRFIELD COUNTY  
Court of Common Pleas

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

Case No. 2016-CP-20-0011

Appellate Case No. 2018-001508

Peter Rice

Appellant,

v.

John Doe

Respondent.

---

RESPONDENT'S PETITION FOR REHEARING

---

Sarah Rand-McDaniel  
S.C. Bar No.: 101340  
Seth McDaniel  
S.C. Bar No.: 100689  
WALKER ALLEN GRICE AMMONS & FOY,  
LLP.  
S.C. Bar No.: 68540  
P.O. Box 1068  
Mt. Pleasant, SC 29465  
(854) 829-0595 (phone)  
(843) 637-3463 (fax)  
**ATTORNEYS FOR RESPONDENT**

Respondent, John Doe, hereby petitions this Honorable Court for a rehearing pursuant to Rule 221(a), SCACR, in connection with its decision entered herein on June 23, 2021 reversing the Circuit Court's grant of Respondent's Motion to Dismiss for Appellant's failure to contemporaneously file a witness affidavit as required by S.C. Code Ann. § 38-77-170. (R. p. \_\_\_). Respondent respectfully submits that the Court erred in reversing Judge Hall's Order granting dismissal on grounds that he "did not have the authority to overrule Judge Henderson's previous rejection of Doe's timeliness argument."<sup>1</sup> Respondent submits the following points have been overlooked or misapprehended by the Court and requests review and affirmation on all remaining issues brought on appeal.

#### ARGUMENT

This Court erred in determining that Judge Henderson "ruled upon" whether section 38-77-170 required Appellant to file, or at least provide, a John Doe affidavit contemporaneously with the Complaint. Despite stating he "review[ed] the written submissions and [heard] oral argument,"

---

<sup>1</sup> It appears, as well, that the Court finds this issue was not properly preserved in noting in its opinion that Respondent did not file a Rule 59(e), SCRCPC, motion asking Judge Henderson to address the contemporaneous affidavit requirement. Respondent respectfully submits that a finding on one hand that Judge Hall's dismissal served to "overrule" Judge Henderson's determination on timeliness of Appellant's affidavits conflicts with the notion that Doe was required to seek a ruling on the same issue after the fact.

Error preservation principles are intended to enable the trial court to rule after it has considered all relevant facts, law, and arguments. The rationale for the rule is that until the trial court considers the matter and makes a ruling, an appellate court is unable to find error. Issue preservation rules are designed to give the trial court a fair opportunity to rule on issues, and thus provide [an appellate court] with a platform for meaningful appellate review.

*Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 628 S.E.2d 902 (Ct. App. 2006).

Judge Henderson's Order spoke solely to the sufficiency of Appellant's second filed affidavit. (R. pp. 3-8). This Court overlooked that there was no acknowledgment, interpretation, analysis, and thus no ruling on whether Appellant's affidavits (as sufficient in content as they may have been) existed to fulfill the contemporaneous filing requirement.

This Court correctly states that the contemporaneous filing requirement involves the interpretation of a statute and is a question of law. Appellant's ability to present his case to a jury relied upon a ruling by the lower court with regard to whether the affidavits were a condition precedent to instituting this action – a purely legal question. A review of Judge Henderson's Order reveals plainly that no such determination was made. To the contrary, the Order makes a specific finding that summary judgment was improper because “a genuine question of material fact exists that must be determined by a jury.” (R. p. 7).

This Court cites *Spence v. Wingate* for the proposition that Judge Henderson's Order was a “general ruling” that included a determination on Respondent's theory that the affidavits were untimely. *Spence v. Wingate*, 381 S.C. 487, 674 S.E.2d 169 (2009). *Spence* is inapposite to the issue facing this Court. In *Spence*, the trial judge's ruling focused on a single *legal* issue – whether a duty existed. The Supreme Court found that the losing party's alternative theory that she was owed a duty *as a prior client* involved the precise issue raised by respondent's motion for summary judgment. The theory was encompassed within the ruling. *Id.* In this case, Judge Henderson's ruling that Appellant's second affidavit included sufficient content and created a jury question is wholly distinct from the issue of whether Appellant was required by statute to submit an affidavit at the time the Complaint was filed.

Respondent's Answer reserved his Motion to Dismiss, and the issue was appropriately raised during Judge Hall's Rule 16 pre-trial conference. The Supreme Court has found that issues

left unresolved by one judge are properly considered by another. *See, e.g., Brandt v. Gooding*, 368 S.C. 618, 626, 630 S.E.2d 259, 263 (2006) (finding the trial court had authority to determine an issue left unresolved by a prior judge.). Additionally, this Court’s opinion appears to conflict with the Supreme Court’s opinion in *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978). Appellant initially cited the case for the proposition that Judge Hall could not hear or decide whether Appellant failed to fulfill the affidavit requirement before filing this cause of action because Judge Henderson considered John Doe’s Memorandum in Support of Summary Judgment and made a blanket denial of the motion. However, the *Graham* court affirmed the ability of one judge to overrule the findings of another pursuant to a statute that no longer existed. The court’s reasoning was that the second judge was ruling on a different issue than the first judge – namely, the factors set forth by statute that would support vacating the prior order for summary judgment. *Id.*

Judge Hall properly reviewed Judge Henderson’s previous Order and found that there had been no ruling on Appellant’s ability to sue without having satisfied the prerequisite conditions enumerated in S.C. Code § 38-77-170. (R. p. 64, line 21 – p. 66, line 7; p. 66, line 11 – p. 67, line 23). Therefore, Judge Hall properly ruled on an issue that Judge Henderson had not addressed. Regardless of the language Judge Henderson utilized in his Order, John Doe was not foreclosed from raising the Motion to Dismiss at trial for purposes of obtaining a ruling. *See McLendon v. S.C. Dep’t of Highways & Pub. Transp.*, 313 S.C. 525, 526 n.2, 443 S.E.2d 539, 540 (1994) (“Like the denial of a motion for summary judgment, the denial of a motion to dismiss does not establish the law of the case and the issue raised by the motion can be raised again at a later stage of the proceedings.”).

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

Respondent respectfully asks this Court for rehearing, that it consider and affirm on all remaining issues left unaddressed pursuant to *Futch v. McAllister Towing of Georgetown, Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1991), including Respondent's additional sustaining ground regarding the insufficiency of the subsequently filed affidavits addressed in Respondent's Final Brief.

### **CONCLUSION**

For the reasons stated above, Respondent respectfully requests that the Court grant a rehearing and affirm the Circuit Court's Order Grant of Defendant's Motion to Dismiss.

Respectfully submitted.

The 8<sup>th</sup> Day of July, 2021.

(SIGNATURE ON FOLLOWING)

**WALKER ALLEN GRICE AMMONS & FOY LLP**

s/ Sarah Rand-McDaniel

Sarah Rand-Mc-Daniel

S.C. Bar No.: 101340

Seth McDaniel

S.C. Bar No.: 100689

WALKER ALLEN GRICE AMMONS & FOY,  
LLP.

S.C. Bar No.: 68540

P.O. Box 1068

Mt. Pleasant, SC 29465

(854) 829-0595 (phone)

(843) 637-3463 (fax)

**ATTORNEYS FOR RESPONDENT**

**RECEIVED**  
**Jul 08 2021**  
**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM FAIRFIELD COUNTY  
Court of Common Pleas

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

Case No. 2016-CP-20-0011

Appellate Case No. 2018-001508

Peter Rice

Appellant,

v.

John Doe

Respondent.

---

PROOF OF SERVICE

---

The undersigned attorney hereby certifies that a true copy of Respondent's Petition for Rehearing has been served on this date upon opposing counsel by e-mailing a copy of the e-mail address provided in the Attorney Information System in accordance with the South Carolina Supreme Court Order dated March 20, 2020. A copy of the e-mail is attached.

S. Hampton Eadon, III, Esquire  
Harris & Graves, P.A.  
[she@harrisgraves.com](mailto:she@harrisgraves.com)

s/ Sarah Rand-McDaniel  
Attorney for Respondent

July 8, 2021  
Mt. Pleasant, South Carolina

**From:** [Sarah McDaniel](#)  
**To:** [Hampton Eadon](#)  
**Cc:** [Seth McDaniel](#); [Cass Lambert](#); [Jeff Ammons \(jeff@walkerallenlaw.com\)](#)  
**Subject:** Rice v. Doe appeal  
**Date:** Thursday, July 8, 2021 11:21:00 PM  
**Attachments:** [Petition for Rehearing COA 7.8.21.pdf](#)

---

Hampton,

Attached for service upon your client is Respondent's Petition for Rehearing dated today, July 8, 2021, for filing in Appellate Case No. 2018-001508 entitled Peter Rice v. John Doe. Pursuant to the Supreme Court Order regarding Appellate Court Operations during the Covid-19 Crisis dated March 20, 2020, I will attach this email to the Proof of Service for this filing. All documents are being filed via the South Carolina Judicial Branch online filing portal utilizing OneDrive for Business as directed by the Supreme Court's April 9, 2020 announcement.

Due to an earlier announcement on sccourts.org regarding a temporary issue with the courts' e-filing system, I will also e-mail the Petition and the Proof of Service to the Court of Appeals.

I hope you are doing well. Should you have any questions or concerns, please do not hesitate to contact me.

Regards,

Sarah Rand-McDaniel  
Attorney at Law



Walker, Allen, Grice, Ammons & Foy, LLP  
503 Wando Park Blvd, Suite 200  
P.O. Box 1068 (29465)  
Mount Pleasant, SC 29464  
Office: 854-529-0595 ext. 102  
Cell: 843-302-2331  
Fax: 843-657-3463

CONFIDENTIAL & PRIVILEGED

Unless otherwise indicated or obvious from the nature of the above communication, the information contained herein may be an attorney-client privileged and confidential information/work product. The communication is intended for the use of the individual or entity named above. If the reader of this transmission is not the intended recipient, you are hereby notified that any dissemination, distribution, or copying of this communication is strictly prohibited.

Walker Allen is now using email Office 365 encryption to comply with Federal and State privacy laws. Use of encryption will help ensure the privacy and confidentiality of client information and our communications with those outside our firm by fully encrypting email content and attachments. Emails will arrive in your inbox in the customary manner with simple instructions and options for easy login. After login, you will be able to view the message and attachments. Thank you.