THE STATE OF SOUTH CAROLINA

IN THE SUPREME COURT

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 Respondent,

v.

John Doe Petitioner.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that a Petition for Rehearing was made and finally ruled upon by the Court of Appeals on July 20, 2021.

QUESTIONS PRESENTED

I. DID THE COURT OF APPEALS ERR IN FINDING THE TRIAL JUDGE'S ORDER FOR DISMISSAL IMPROPERLY OVERRULED A PRIOR TRIAL COURT ORDER DENYING SUMMARY JUDGMENT?

II. DID THE TRIAL JUDGE PROPERLY FIND THAT PLAINTIFF FAILED TO SATISFY THE AFFIDAVIT REQUIREMENT OF S.C. CODE § 38-77-170 AS A CONDITION PRECEDENT TO FILING A LAWSUIT INVOLVING A JOHN DOE VEHICLE WHERE THERE WAS NO CONTACT?

III. WERE THE AFFIDAVITS FILED AFTER JOHN DOE'S ANSWER SUFFICIENT TO SATISFY THE REQUIREMENTS SET FORTH IN S.C. CODE § 38-77-170?

STATEMENT OF THE CASE

This appeal arises from the trial court's dismissal of Respondent Rice's negligence action against John Doe for failure to contemporaneously provide a "John Doe affidavit" at or before the lawsuit was filed pursuant to section 38-77-170 of the South Carolina Code (2015).

On January 12, 2016, Respondent Peter Rice sued Petitioner John Doe and Defendant Bobby Rae Dye seeking damages for injuries he sustained as a passenger in Dye's vehicle on April 17, 2015. (App. p. 25-27). Specifically, Rice asserted a claim for uninsured motorists benefits pursuant to Dye's policy of insurance, alleging a phantom oncoming vehicle crossed the center line causing Dye to drive off the roadway and strike a tree. (App. p. 25). Because there was no contact between Dye's vehicle and the alleged Doe vehicle, the action is governed by section 38-77-170 entitled, "Conditions to sue or recover under uninsured motorist provision when owner or

operator of motor vehicle causing injury or damage is unknown." S.C. Code Ann. § 38-77-160 (2015). The statute (also known as the "John Doe statute"), reads as follows:

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

Id. (emphasis added). Rice did not execute, deliver, or file an affidavit attesting to the truth of the facts of the accident prior to filing and serving his Summons and Complaint. (App. p. 34).

Doe filed an answer on November 21, 2016 reserving as a first defense a motion to dismiss for failure to comply with section 38-77-170. (App. p. 29). The next day, Rice filed his first affidavit. (App. p. 34). The affidavit did not contain information about efforts to determine John Doe's identity and it failed to include the required "false statement" attestation. *Id*. On January 4, 2017, John Doe withdrew the motion to dismiss from the motions roster without comment as to its resolution. (App. p. 97).

On October 19, 2017, Doe moved for summary judgment. (App. pp. 41-42). On February

5, 2018, Rice filed a second affidavit containing identical information as the November 2016 affidavit, with the addition of two paragraphs and the required attestation. (App. pp. 38-39). On March 13, 2018, Doe filed a Memorandum of Law in Support of Unnamed Defendant's Motion for Summary Judgment. (App. pp. 101-104). A hearing was held before Judge Henderson on March 14, 2018.[1] Judge Henderson denied Doe's motion for summary judgment and ruled that Rice's second affidavit, filed February 5, 2018, satisfied the language and content requirements set forth by section 38-77-170(2). (App. pp. 4-9). The Order denying summary judgment, prepared by Respondent's counsel, was filed on April 13, 2018. *Id.*

Judge Hall called the case for trial on June 20, 2018. (App. p. 52). During the Rule 16(a), SCRCP, pre-trial hearing, Doe sought a determination on the motion to dismiss reserved in her Answer. (App. p. 57, ll. 15-18). Rice argued, in part, that Judge Henderson's order denying summary judgment precluded Judge Hall from hearing Doe's motion to dismiss. (App. pp. 57, l. 22 – 58, l. 3).

After hearing arguments from counsel and reviewing the Order Denying Summary Judgment, Judge Hall concluded Judge Henderson's order solely addressed whether the affidavit's content was sufficient in the context of section 38-77-170(2). (App. pp. 68, l. 22 – 69, l. 23; p. 90, ll. 10-22). Judge Hall agreed that Judge Henderson had not examined or ruled upon whether Rice had submitted an affidavit meeting the timing requirement of section 38-77-170. *Id*. Judge Hall found that, despite Judge Henderson's ruling that the second affidavit fulfilled the substantive requirements, it nonetheless did not satisfy the timing requirement. *Id*. Therefore, Judge Hall dismissed Rice's case for failure to provide an affidavit as required by section 38-77-170(2) prior to initiating this lawsuit. (App. pp. 15-17; 55-90). Rice's Motion for Reconsideration was denied

[1] A transcript of this hearing was not included in the Record on Appeal.

on July 17, 2018. (App. pp. 18-20).

Rice filed a Notice of Appeal on August 16, 2018. (App. p. 51). On appeal, Rice first argued the trial court erred in ruling the John Doe affidavit is a condition precedent to filing a lawsuit pursuant to section 38-77-170. (App. pp. 124-28). Second, Rice argued Judge Hall erred in hearing Doe's Motion to Dismiss pre-trial for lack of proper notice (App. pp. 128-29) and because the motion had been ruled on by Judge Henderson's April 13, 2018 order denying summary judgment. (App. pp. 129-31).

In an unpublished *per curiam* opinion filed June 23, 2021, the Court of Appeals reversed the trial court's dismissal and remanded the case for trial, holding Judge Hall's order dismissing the lawsuit improperly overruled Judge Henderson's prior order. (App. pp. 152-56). It found Judge Henderson's order denying summary judgment constituted a "general ruling" as to the timing requirement, despite the fact that the order itself did not address the issue. (App. p. 155).

The Court of Appeals did not examine whether the subject action, or any John Doe action, can be instituted in the absence of an affidavit compliant with section 38-77-170 at or before the time of filing a lawsuit. The court declined to address Rice's issues concerning the withdrawal of a motion and equitable tolling. The Court of Appeals, likewise, did not review whether Judge Henderson erred in finding the affidavits contained the required content to satisfy the statute.

Petitioner filed a Petition for Rehearing on July 8, 2021, requesting reconsideration of the court's holding that Judge Hall had improperly entered an order overruling Judge Henderson's order and sought examination of the remaining issues left unaddressed. The Court of Appeals denied rehearing by order filed July 20, 2021. (App. 157; 165).

This Petition follows.

ARGUMENT

The Court of Appeals committed reversible error in determining that Judge Hall improperly overruled Judge Henderson's order when he found Rice failed to comply with the contemporaneous filing requirement of section 38-77-170. Judge Henderson had not ruled upon the sufficiency of Rice's affidavits with regard to the contemporaneous filing requirement. The Court of Appeals additionally erred in holding Judge Hall lacked authority to hear Doe's Motion to Dismiss. This Court should review the opinion of the Court of Appeals, reverse its holdings, and either modify the opinion or remand to the Court of Appeals for a determination on the insufficiency of Rice's affidavits to comply with the John Doe statute.

I. Judge Henderson did not rule on whether Respondent satisfied the contemporaneous filing requirement of section 38-77-170.

The Court of Appeals relied exclusively on the following single phrase to determine Judge Henderson ruled on the contemporaneous filing requirement: "After reviewing the written submissions and hearing oral argument . . . ." (App. p. 155). However, "factual statements of counsel, whether made during oral argument or in written briefs or memoranda ordinarily may not be considered" in determining whether a genuine issue of material fact exists. *Gilmore v. Ivey*, 290 S.C. 53, 58, 348 S.E.2d 180, 183 (Ct. App. 1986) (internal citation omitted). There is no evidence in the Record that Judge Henderson either reviewed or was provided any materials by which he could have considered the contemporaneous filing requirement issue.

Judge Henderson's order was not intended to address the contemporaneous filing requirement. To the contrary, the Record provides ample evidence from which to conclude Judge Henderson's order was not ruling on the contemporaneous filing requirement. There is no reference made that an affidavit had not been produced prior to November 18, 2016. There is no

reference to *Collins v. Doe* or *Wynn v. Doe* – the only two cases cited in Doe's memorandum. There exists no transcript to determine whether the issue was examined at the hearing. Even in quoting the John Doe statute, Judge Henderson's order omits the preamble's key language, "there is no right of action or recovery under the uninsured motorist provision, unless. . . ."

As both the Court of Appeals and Rice have acknowledged, the order was devoid of any finding relevant to the affidavits' timing. When Judge Hall asked whether Rice agreed that Judge Henderson's order did not address the contemporary filing requirement, Rice was unable to identify any such finding. (App. pp. 72, l. 20 – 73, l. 14). Judge Henderson's order reads, "Defense counsel's oral argument in support their (sic) Motion alleged *two deficiencies* . . . that Mr. Rice's affidavit of November 18, 2016 did not contain the required statutory language . . . [and] Rice's affidavit contradicts his deposition testimony." (App. pp. 110-11) (emphasis added). Such a summary suggests Judge Henderson declined to hear the third deficiency, or was not asked to contemplate the issue. Alternatively, it suggests that trial counsel chose to withdraw the issue as a basis for summary judgment.

The Court of Appeals correctly stated that the contemporaneous filing requirement involves the interpretation of a statute and is a question of law. (App. p 155). Rice'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 legal determination was made. Indeed, the order made a specific finding that summary judgment was improper because "a genuine question of material fact exists that must be determined by a jury." (App. p. 8). There is no dispute Rice failed to produce an affidavit before filing suit or before Doe filed her answer and motion to

dismiss. (App. pp. 70, l.22 – 71, l.1). Had Judge Henderson's order ruled on the contemporaneous filing requirement, the existence of the material fact referenced in his order would be irrelevant.

The Court of Appeals cited *Spence v. Wingate* for the proposition that Judge Henderson's Order was a "general ruling" that included a determination on Doe'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 the 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 Rice's second affidavit included sufficient content to create a jury question is wholly distinct from the issue of whether Rice was required to submit an affidavit at the time the Complaint was filed. As a result, the Court of Appeals erred in finding a "general ruling" finally determined the contemporaneous filing requirement.

II. Judge Hall possessed the authority to hear and decide Petitioner's Motion to Dismiss.

The Court of Appeals erred in ruling Judge Hall did not have the authority to dismiss the action. Assuming, *arguendo*, Judge Henderson's Order denied summary judgment as to the contemporaneous affidavit issue, such a denial did not preclude Doe from raising her motion to dismiss or divest Judge Hall of the authority to consider the same at trial. A denial of a motion for summary judgment is not the law of the case. As stated by this Court in *Ballenger v. Bowen*, "the denial of summary judgment does not finally determine anything about the merits of the case and does not have the effect of striking any defense since that defense may be raised again later in the proceedings." *Ballenger v. Bowen*, 313 S.C. 476, 477, 443 S.E.2d 379, 380 (1994); *see also 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."). Regardless of the language Judge Henderson utilized in his Order, John Doe was not foreclosed from seeking a ruling on the Motion to Dismiss at trial.

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

The Supreme Court has also 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 present to and left unresolved by a prior judge.). In this case, Judge Hall deferred to Judge Henderson's clear rulings related to the affidavit's compliance with 38-77-170(2) and the conflicting deposition testimony. Whether the affidavit complied with the contemporary filing requirement was left unaddressed, allowing Judge Hall to consider the same.

The Court of Appeals opinion appears to conflict with this Court's opinion in *Graham v. Town of Loris*, 272 S.C. 442, 248 S.E.2d 594 (1978). Rice initially cited the case for the proposition that Judge Hall could not hear or decide whether Rice 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

in a narrow context. 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.*

III. Rice failed to comply with each of the three explicit statutory requirements outlined by S.C. Code § 38-77-170.

The November 22, 2016 affidavit, in addition to being untimely, failed to specify whether the accident had been timely reported to an appropriate police authority as required by S.C. Code § 38-77-170(1). (App. pp. 34-36). The affidavit is void of a statement that the injury or damage was witnessed by someone other than the owner or operator of the insured vehicle as required by S.C. Code § 38-77-170(2). *Id.* The affidavit also fails to include a statement indicating the insured was not negligent in failing to determine the identity of the other driver as required by S.C. Code § 38-77-170(3). *Id.* Finally, the November 22, 2016 affidavit does not contain any statement about steps taken to discover the identity of John Doe and did not contain the required "false statement" attestation. *Id.* For these reasons, the November 22, 2016 affidavit fails to satisfy S.C. Code § 38-77-170 requirements.

Likewise, the February 5, 2018 affidavit fails to comply with each of the requirements of the John Doe statute. In addition to not being timely, the second affidavit failed to include a statement indicating the insured was not negligent in failing to discover John Doe's identity as required by S.C. Code § 38-77-170(3), and therefore, is not sufficient for Rice to bring this cause of action or recover uninsured motorist benefits. *Shealy,* 370 S.C. 194, 199, 634 S.E.2d 45, 48 ("An insured cannot recover uninsured motorist coverage unless the three conditions under § 38-77-170 are met.") (quoting *Miller v. Doe*, 312 S.C. 444, 446, 441 S.E.2d 319, 320 (1994)).

Issuance of a writ of certiorari is necessary in this matter to review and uphold the dismissal of Rice's action, thereby ensuring the requirements of the John Doe statute are not

misconstrued to allow late production of a John Doe affidavit after suit is filed. Such a precedent directly conflicts with the well-established case law developed by this Court requiring strict compliance with the John Doe statute.

In *Criterion Ins. Co. v. Hoffmann*, 258 S.C. 282, 188 S.E.2d 459 (1972), this Court construed a prior version of the subject statute and explained that an insured's "right to sue and collect" from uninsured motorist benefits "is a creature of the legislature". The Court continued its analysis, stating: "[o]ne must look to the terms of the uninsured motorist statute and policy endorsements and comply therewith to get the benefit of the law." *Id.* The Court reasoned that "[i]t is the province of the lawmakers to create a right of action, to provide for process and to declare the procedure for collecting from one's own insurance carrier." *Id.* The statute sets forth "the procedural obligations that the insured must discharge in order to recover . . ., [and] are viewed by the courts as mandatory, and strict compliance with them is a prerequisite to recover." *Id; see also, Collins*, 352, S.C. at 470, 574 S.E.2d at 743.

The practical effect of a remand from the Court of Appeals for trial likely leaves the outcome unchanged. As Rice acknowledged, Doe would have the opportunity at trial to move for a directed verdict. (App. p. 47). For this reason, and for judicial economy, Petitioner seeks certiorari in order for the Court to additionally determine the sufficiency of the affidavits as applied to the John Doe statute, or in the alternative, to direct the Court of Appeals to do so.

CONCLUSION

This case warrants review because the Court of Appeals' decision improperly analyzed the respondent's issues on appeal and incorrectly disposed of substantive procedural and statutory issues of great import. Therefore, Petitioner requests this Court grant this petition for a writ of certiorari to review the Court of Appeal's decision below.

Respectfully submitted.

The 19th day of August, 2021.

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