THE STATE OF SOUTH CAROLINA

In the Supreme Court of South Carolina

RECEIVED

Sep 17 2021

S.C. SUPREME COURT

APPEAL FROM FAIRFIELD COUNTY
Court of Common Pleas

Honorable Daniel D. Hall, Circuit Court Judge

Case No. 2016- CP- 20- 011

Appellate Case No. 2021-000894

Peter Rice

Respondent,

v.

John Doe

Petitioner.

RETURN TO PETITION FOR WRIT OF CERTIORARI

S. Hampton Eadon, III
HARRIS & GRAVES, PA
1518 Richland Street
PO Box 11566 (29211)
Columbia, SC 29201
(803) 799-2911
Attorney for Respondent

STATEMENT OF ISSUES ON APPEAL

I. Whether the Court of Appeals correctly found that the trial judge's order for dismissal improperly overruled a prior trial court order on a purely legal issue.

II. Whether the trial judge erred in finding that Plaintiff failed to satisfy the affidavit requirement of S.C. Code §38-77-170(2) as a condition precedent to filing a lawsuit involving a John Doe vehicle where there was no contact.

III. Whether Rice's affidavit(s) were sufficient to satisfy the requirements set forth in S.C. Code §38-77-170.

STATEMENT OF THE CASE

On April 17, 2015, Respondent Peter Rice was a passenger in a vehicle being driven by Bobby Ray Dye that was involved in a motor vehicle collision involving an unknown vehicle that ultimately led to Mr. Dye's vehicle striking a tree. On January 12, 2016, Respondent Peter Rice, brought this action against Bobby Rae Dye and Petitioner John Doe, as an unknown driver pursuant to uninsured motorist coverage afforded to him under S.C. Code §38-77-150, S.C. Code §38-77-170 and S.C. Code §38-77-180. Rice alleged that Mr. Dye and Petitioner Doe were negligent in the operation of their respective vehicles resulting in a wreck injuring Respondent Rice. (App. pp. 25-27). Respondent Rice executed an Affidavit pursuant to S.C. Code §38-77-170(2) dated November 18, 2016 which was emailed to Respondent Doe's counsel with a hard copy sent by mail on November 21, 2016. (App. pp. 34-37). On November 21, 2016, Respondent Doe filed an Answer with a general denial which included a Motion to Dismiss alleging that Rice failed to comply with S.C. Code §38-77-170. (App. pp. 28-33). Rice's November 18, 2016 Affidavit was filed with the Fairfield County Clerk of Court on November 22, 2016. (App. p. 34).

Petitioner Doe's Motion to Dismiss was scheduled for a hearing on January 5, 2017 at 9:30 a.m. On January 4, 2017, Doe's counsel sent an email indicating that the motion to dismiss was being removed and counsel would be advising the clerk's office the following morning. (App. p. 98). On the morning of January 5, 2017, a paralegal from the office of Petitioner Doe's counsel sent an email to the clerk that Doe's motion hearing was being removed. (App. p. 99). The clerk's office marked the official hearing roster that the motion was "resolved". (App. p. 100).

On September 26, 2017, Rice signed a second Affidavit which included the same sworn testimony as the initial 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. (App. pp. 38-40). On October 19, 2017, Doe filed a Motion for Summary Judgment alleging that Rice failed to satisfy the terms of S.C. Code §38-77-170. (App. pp. 40-42). On March 14, 2018, Petitioner Doe filed a Memorandum of Law in Support of its Motion for Summary Judgment. (App. pp.101-108)

On March 14, 2018, Petitioner Doe's Motion for Summary Judgment was heard before the Honorable Roger E. Henderson. In an Order filed on April 13, 2018, Judge Henderson denied Doe's Motion for Summary Judgment, after reviewing written submissions and considering oral arguments, finding that Rice's Affidavit satisfied the requirements of S.C. Code §38-77-170(2). (App. pp. 109-114). Petitioner Doe did not ask Judge Henderson to reconsider his order or elaborate further on his ruling. This matter was called for trial on June 20, 2018 before the Honorable Daniel D. Hall.

During the SCRCP 16(a) Pre-trial Conference, counsel for Petitioner Doe requested that its Motion to Dismiss be heard prior to selecting a jury. Judge Hall initially asked Respondent Rice if there was any basis by which the Court should not hear the Motion to Dismiss, to which Rice's counsel responded "This is the same argument that was in summary judgment that has already been heard by Judge Henderson and denied." (App. pp. 57-58 ll. 1-3). During the hearing, Judge Hall stated, "I'm satisfied that Judge Henderson's order on the summary judgment is the law of the case, and so we really don't need to rehash the compliance with the statute as far as – it appeared to me--and when I read through the file that what Judge Henderson ordered was that even though the initial affidavit did not have the required language stating about

the potential penalties and then the subsequent affidavit did, that the law appeared to be -- and I think obviously I believe he was correct --and that that did not mean that the affidavit was not sufficient." (App. pp. 68 L.23 – p.69 l. 8). Judge Hall further stated, "It appears that what the defense is arguing is arguing is that as a condition—well, now she is arguing—as a condition precedent to the bringing—actually filing the suit, then an affidavit must've been filed." (App. p. 69 ll. 18-22). Further discussion ensued as to whether Judge Henderson's Order Denying Summary Judgment considered Petitioner Doe's condition precedent argument relative to Doe's motion to dismiss:

> THE COURT: All right, and – I mean would you agree that -- and I'll be glad to hear you on this—that the summary judgment order did not contain any language that dealt with the issue of it being a condition precedent?
>
> MR. EADON: I would have to go back through it, because quite frankly, I haven't reviewed it since ---
>
> THE COURT: Okay, alright. Well, take a look at it, because I'm going to take a – I'm going to do a little bit of research before I rule.
>
> MR. EADON: Okay. I know—I know for a fact that that argument was advanced at the hearing, I do recall that.
>
> MS. O'BRIEN: No, it wasn't, and there's nowhere in the order—
>
> THE COURT: Well, I mean—we're—
>
> MS. O'BRIEN: --- that it deals with that.
>
> THE COURT: That's all right. That's all right. We're bound by the Order.
>
> MS. O'BRIEN: Right. The order does not address that at all.

(App. pp. 72 l. 20 – 73 l. 16).

Petitioner Doe's Motion to Dismiss was granted on a Form 4, which was filed on June 20, 2018 dismissing Rice's case. (App. pp.15-17). Rice timely filed a Motion for Reconsideration which was denied on a Form 4. (App. pp. 18-20). Rice filed a Notice to Appeal on August 16, 2018. (App. p. 51).

On appeal, Rice first argued the trial court erred in ruling that the filing of a John Doe affidavit is a condition precedent to filing a lawsuit pursuant to S.C. Code § 38-77-170. (App. pp. 124-128). Second, Rice argued Judge Hall erred in hearing Doe's Motion to Dismiss pre-trial for lack of proper notice (App. pp. 128-129) and because the motion had been ruled on by Judge Henderson's April 13, 2018 order denying summary judgment. (App. pp. 129-131).

On June 23, 2021 the Court of Appeals unanimously 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. 152-156). The Court of Appeals found Judge Henderson's order denying summary judgment constituted a "general ruling" of a purely legal question and determined that Judge Hall did not have the authority to overrule Judge Henderson's previous rejection of Doe's timeliness argument. (App. p. 155). As the resolution of this issue was dispositive of the appeal, the court declined to address Rice's other appellate issues concerning the withdrawal of a motion and equitable tolling. (App. p. 156).

Doe's Petition for Certiorari followed.

STANDARD OF REVIEW

"A writ of certiorari is not a matter of right, but of sound judicial discretion and will be granted only where there are special and important reasons." Rule 242 (B), SCACR.

ARGUMENT

The Court of Appeals correctly determined, in a unanimous decision, that in granting Doe's Motion to Dismiss, Judge Hall improperly overruled Judge Henderson's previous order concerning a purely legal issue.

I. THE COURT OF APPEALS CORRECTLY FOUND THAT THE TRIAL JUDGE'S ORDER FOR DISMISSAL IMPROPERLY OVERRULED A PRIOR TRIAL COURT ORDER ON A PURELY LEGAL ISSUE.

The Order by Judge Henderson denying Summary Judgment specifically states, "After reviewing *the written submissions* and hearing oral argument, this Court denies Defendant Doe's Motion." (App. p. 4) (emphasis added). Petitioner's argument that there was 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 is disproven by the documents in the Record itself. The written submission Judge Henderson reviewed was Petitioner Doe's Memorandum in Support as it was the only written submission submitted to the trial court. The first argument advanced in Doe's memorandum in support of its Motion for Summary Judgment, in Section 1.A., was that there was no affidavit filed prior to filing suit, raising the issue of the timeliness of Rice's section 38-77-170(2) affidavit i.e. the contemporaneous filing requirement.

(App. pp. 103-104). This timeliness issue was reviewed, considered and ruled upon in Judge Henderson's Order.

Citing *Spence v. Wingate,* 381 S.C. 487, 489, 674 S.E. 2d 169, 170 (2009), the Court of Appeals correctly determined, unanimously, that Judge Henderson's Order made a general ruling on the purely legal issue of the timeliness of the affidavit. The transcript from the summary judgment hearing is not part of the Record; however, Doe's memorandum and Judge Henderson's Order clearly indicate that the timeliness issue was decided. Doe did not request Judge Henderson to reconsider the Order nor was he asked to elaborate further on the ruling.

II. THE TRIAL COURT LACKED THE AUTHORITY TO HEAR AND DECIDE PETITIONER DOE'S MOTION TO DISMISS

Rice contends that based upon South Carolina law, Doe's Motion to Dismiss was not ripe for the trial court's consideration on the eve of trial, due to the motion being withdrawn over one and a half years prior. This contention was not ruled upon by the Court of Appeals as other issues were dispositive of the appeal.

Doe raised a general Motion to Dismiss in its Answer filed on November 21, 2016, alleging that Rice failed to comply with S.C. Code §38-77-170. (App. p. 29). The hearing on this motion was scheduled for January 5, 2017. (R. p. 97). The day before the scheduled motion hearing, counsel for Doe sent counsel for all parties an email indicating that the motion to dismiss was being removed. (App. p. 98). The morning of January 5, 2017, a paralegal from the office of Doe's trial counsel sent an email to the clerk of court indicating that the motion was removed from the motion roster. (App. p. 99). The clerk's office marked the official hearing roster that the motion, listed as #9 on the motion roster, was "resolved". (R. p. 97).

On June 20, 2018, during the SCRCP 16(a) Pre-Trial Conference, Doe requested that the Motion to Dismiss be heard. (App. p. 57, lines 16-18). Rice'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. (App. p. 45). 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." Doe contends that the Motion to Dismiss was never re-filed or re-noticed after being removed on January 4, 2017, approximately 1 ½ years prior to the hearing.

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 that was not pending during a SCRCP 16(a) Pre-Trial Conference. 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 and marked "resolved" on January 5, 2017, it was not pending before the trial court on June 20, 2018 and was not ripe for adjudication.

Rule 12(b)(6) SCRCP states, "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state facts sufficient to constitute a cause of action, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment, and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all materials made pertinent to such a motion by Rule 56." The arguments made during Doe's Motion to Dismiss on June 20, 2018 considered matters outside of

the pleadings, namely the affidavit(s) submitted by Rice, which provided the central argument of Doe's motion. (App. pp. 53-91). 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. During the June 20, 2018, hearing on Doe's Motion to Dismiss, counsel for Rice raised the issue that the argument being advanced by Respondent had already been heard and decided at the summary judgment stage by Judge Henderson. (App. p. 57, l. 22 - p. 58, l. 3; p. 66, l. 23-p. 67, l. 21).

Once the purely legal issue concerning the timeliness of Rice's section 38-77-170(2) affidavit had been decided by Judge Henderson, it was improper to have it reheard by Judge Hall pursuant to *Graham v. Town of Loris*, 272 S.C. 442 248 S.E.2d 594 (S.C. 1978). Judge Hall was asked to decide whether the filing of an affidavit was a condition precedent under S.C. Code §38-77-170(2). The condition precedent argument was raised, considered and ruled upon by Judge Henderson in denying Doe's Motion for Summary Judgment over 3 months prior. (App. pp. 103-104). This issue was clearly resolved as determined by the Court of Appeals, and thus was not subject to being changed, altered or reversed by another Circuit Court Judge.

In discussing the interplay of different circuit court judges being asked to adjudicate the same issue without new facts or evidence being presented, the Graham court cited *Steele v. C., C. & A. Railroad Co.*, 14 S.C. 324 (1880):

> The Court of Common Pleas is a unity, although its jurisdiction is administered by a number of judges who are, in some sense, the exponents of the court. When one of these judges makes a decision upon the merits of a matter within his jurisdiction, that is not merely the personal opinion of the judge, but a judgment of the Court of Common Pleas, which exhausts the power of the court upon that subject and must stand until reversed or set aside in the manner prescribed by law. There is no appeal from one Circuit Judge to another. All are of equal dignity and have the same right to pronounce the judgments of the court. One Circuit Judge upon the same state of facts, has no power to change, alter or reverse a decision of a brother judge of the same Circuit.

III. THE TRIAL COURT ERRED IN FINDING THE PLAINTIFF FAILED TO SATISFY THE AFFIDAVIT REQUIREMENTS OF S.C. CODE §38-77-170(2) IN GRANTING DOE'S MOTION TO DISMISS

A S.C. CODE §38-77-170(2) FILING REQUIRMENTS

Assuming *arguendo* that this Court finds that Doe's Order to Dismiss was properly before the trial court, had not been withdrawn, did not convert into a summary judgment motion, did not conflict with Judge Henderson's Order and was correctly decided by Judge Hall, Rice asserts that a plain reading of S.C. Code § 38-77-170(2) does not impose a requirement of filing an affidavit prior to an Answer being filed.

South Carolina authority for "John Doe" actions in order to sue and recover uninsured motorist benefits is contained within S.C. Code of Laws. §38-77-170.

> **§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 subitem (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.

From the plain reading of S.C. Code §38-77-170, there is no requirement that the affidavit *be filed* with the Court. (emphasis added) The trial court ultimately granted Respondent's Motion to Dismiss on the ground that the filing of an affidavit was a condition precedent for filing suit under S.C. Code §38-77-170(2). (App. p. 89, l 19 - p. 91, l. 25). In so holding, the trial court stated, "I find that the—that the motion to dismiss is granted because of the failure to file an affidavit until after an answer was filed in this case, and so that's the basis for the Court's ruling." (App. p. 89, ll 10-14). However, a plain reading of the language of the statute at issue contains no requirement that the Affidavit is required to be filed, nor that it is required to be filed prior to Respondent's filing its Answer. It simply states that the witness must sign an affidavit attesting to the truth of the facts of the accident contained in the affidavit.

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, emphasis added). Upon request via email on November 7, 2016, counsel for Doe requested the affidavit be provided. Email receipts confirm that counsel for Respondent was provided with Rice's Affidavit on November 18, 2016 via email. (App. p. 42). Rice's first affidavit, signed on November 18, 2016 was filed with the clerk's office on November 22, 2016.

The *Collins* case is factually distinguishable from the instant case. In *Collins*, there was no affidavit filed by any 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).

This Court in *Gilliland* allowed recovery to Ms. Gilliland. The reasoning was based upon a seeming disagreement between *Wausau Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992) and *Collins v. Doe*, 352 S.C. 462, 574 S.E.2d 739 (2002). *Howser* seemed to liberally interpret §38-77-170(2) while *Collins* more strictly interpreted the statute with regard to the requirement of a witness affidavit versus court testimony from a witness.

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.")

B. EQUITABLE TOLLING

Assuming *arguendo* that this Court finds that Rice failed to meet the affidavit requirements of S.C. Code §38-77-170(2), Rice contends the remedy of equitable tolling should be applied to prevent an unjust and unintended result based on the unique facts present in the instant case. In *Hooper v. Ebenezer Sr. Services*, 687 S.E.2d 29, 386 S.C. 108 (S.C., 2009), the South Carolina Supreme Court adopted the remedy of equitable tolling. "Equitable tolling is a

nonstatutory tolling theory which suspends a limitations period." *Ocana v. Am. Furniture Co.*, 135 N.M. 539, 91 P.3d 58, 66 (2004), cited by *Hooper at 33*. The remedy of equitable tolling is to be used "[i]n order to serve the ends of justice where technical forfeitures would unjustifiably prevent a trial on the merits, the doctrine of equitable tolling may be applied to toll the running of the statute of limitations." 54 C.J.S. Limitations of Actions § 115 (2005). The *Hooper* court held, "The equitable power of a court is not bound by cast-iron rules but exists to do fairness and is flexible and adaptable to particular exigencies so that relief will be granted when, in view of all the circumstances, to deny it would permit one party to suffer a gross wrong at the hands of the other." *Hausman v. Hausman*, 199 S.W.3d 38, 42 (Tex.App.2006). Equitable tolling may be applied where it is justified under all the circumstances. We agree, however, that equitable tolling is a doctrine that should be used sparingly and only when the interests of justice compel its use. *Hooper at 33*.

If the trial court determined that an affidavit being filed was a condition precedent to filing a John Doe, no-contact action, the end result could have been cured in a timely fashion by Rice dismissing his case without prejudice and simply re-filing it at any point from when Respondent's initial Motion to Dismiss was raised on November 22, 2016 until the statute of limitations expired on April 17, 2018, approximately one and a half years later.

Trial counsel for Doe was afforded the opportunity to depose Rice and the driver of the vehicle in which Rice was a passenger, Mr. Dye, as well as engage in written discovery. (App. p. 45). Rice signed a second affidavit on September 26, 2017, which was filed February 5, 2018 (App. pp. 38-40). The legislature's concern of fraud prevention involving single-vehicle accidents was satisfied. Neither Doe nor his insurer have been prejudiced due to a lack of notice or an opportunity to further investigate this claim, as litigation spanned over two years, involved

multiple depositions, and two filed affidavits. In sum, the resulting prejudice to Rice 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.

Doe's Motion to Dismiss was initially scheduled to be heard in January 5, 2017. Doe's trial counsel removed the hearing from the calendar and it was marked as "resolved" by court personnel. (R. p. 97). The motion was resurrected on June 20, 2018, the day the case was set for trial. The consequence of the delay in timing of the hearing granting Respondent's Motion to Dismiss, whether intentional or unintentional by Doe's former counsel, rendered Rice's claim expired due to the running of the statute of limitations. This result seems patently unfair given that, in the light most favorable to Rice, he filed an Affidavit which met all requirements of S.C. Code §38-77-170(2) on February 5, 2018, at the latest, well before the statute of limitations on his claim expired on April 17, 2018.

If this Court is inclined to revisit the trial court's ruling that Rice was required to file his affidavit prior to the filing of Doe's Answer, as a condition precedent, Rice submits that the doctrine of equitable tolling should be applied to prevent an injustice based on a delayed ruling which Rice had no control over. Both affidavits were executed by Rice, unquestionably in advance of the expiration of the statute of limitations. All legislative concerns of fraud prevention have been satisfied by the opportunity to depose the parties and engage in written discovery. There was no prejudice to Doe. Respondent Rice respectfully requests that the Court consider the remedy of equitable tolling of the statute of limitations due to these exceptional circumstances, if further appellate consideration is warranted.

CONCLUSION

The Court of Appeals, in its unanimous decision, correctly determined that Judge Henderson reviewed, considered and ruled on the purely legal issue of the timeliness of Rice's section 38-77-170(2) affidavit in the Order Denying Summary Judgement. As such, the Court of Appeals correctly determined that Judge Hall was without authority to rule on the same issue in the subsequent motion to dismiss the action. Furthermore, Doe's motion to dismiss was not ripe for adjudication since it had been withdrawn on January 5, 2017 prior to the June 20, 2018 hearing. It was never re-filed nor re-noticed during that 17 month period. Assuming *arguendo* that the motion was properly heard on the eve of trial, since matters were considered outside of the pleadings, Doe's Motion to Dismiss converted to a Rule 56 Motion for Summary Judgment, which had previously been reviewed, considered and rejected by Judge Henderson.

If this Court finds that Petitioner Doe's Motion to Dismiss was properly before the trial court, the plain language of S.C. Code of Laws §38-77-170 does not require the filing of an affidavit. It requires that an Affidavit must be completed and signed pursuant to the terms of the statute. A plain reading of the statute shows no requirement that the affidavit be filed and by extension, makes no requirement that the affidavit be filed prior to the filing of a Complaint or an Answer.

The trial court's ruling, if allowed to stand, allows a procedural loophole to create an absurd result outside of the legislature's intent if strictly applied to the facts in this case. When this lawsuit was filed, properly served and required affidavits were provided prior to the expiration of the statute of limitations, surely the net result of this action being dismissed is a result so absurd that it runs counter to the legislative intent of this, or any, statute. If the trial court's dismissal is allowed to stand, equitable tolling should be applied so this controversy may

proceed with the issues to be fairly determined by a jury. Therefore, the Petition should be denied and this matter remanded to the trial court for adjudication by a jury.

RESPECTFULLY SUBMITTED,

HARRIS AND GRAVES, P.A.

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

Columbia, South Carolina

September 17, 2021