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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Appellate Case No.: 2022-000082

Case No. 2019-CP-26-005892

RONALD L. MIMS

Appellant

vs.

DIANE W. RAY

Respondent.

FINAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

- I. THE LOWER COURT ERRED IN DETERMINING THE EVIDENCE GENERATED ONLY A SINGLE INFERENCE—THAT PLAINTIFF’S NEGLIGENCE AMOUNTED TO MORE THAN FIFTY PERCENT OF THE TOTAL FAULT

STATEMENT OF THE CASE

Ronald L. Mims filed the Summons and Complaint in this action on September 18, 2019. Defendant Diane W. Ray was served with the Summons and Complaint on September 28, 2019. Ronald Mims brought this action for negligence seeking damages for injuries sustained in a June 20, 2019 motor vehicle versus pedestrian collision. Diane W. Ray served her Answer on October 23, 2019.

Diane W. Ray filed her Motion for Summary Judgment on July 15, 2020 and Ronald L. Mims served his Memorandum in Opposition to Defendant’s Motion for Summary Judgment on October 20, 2020. Ronald L. Mims filed Recent Legal Authority in Support of Plaintiff’s Memorandum in Opposition to Defendant’s Motion for Summary Judgment on October 30, 2020 in light of this Court’s October 28, 2020 opinion in *Abdelgheny v. Moody*, 432 S.C. 346, 852 S.E.2d 225 (Ct. App. 2020). The parties have polarized arguments as to whether Diane W. Ray was negligent in the subject motor vehicle versus pedestrian collision and whether Ronald L. Mims’ own negligence amounted to more than fifty percent of the total fault.

On January 20, 2021, the Honorable Benjamin H. Culbertson heard the parties’ arguments on Diane W. Ray’s Motion for Summary Judgment via WebEx.

The trial court’s Order was filed January 20, 2021. The trial court ruled in favor of Diane W. Ray. Ronald L. Mims received written notice of the entry of the Order on January 20, 2021. Ronald L. Mims filed his Notice of Motion and Motion to Alter or Amend Judgment Pursuant to

Rule 59, *SCRCP*, and Motion to Reconsider Pursuant to Rule 52, *SCRCP* on January 29, 2021. Diane W. Ray filed her Memorandum in Response to Plaintiff's Motion to Alter or Amend Judgment Pursuant to Rule 59, *SCRCP*, and Motion to Reconsider Pursuant to Rule 52, *SCRCP* on February 16, 2021.

Ronald L. Mims' Motion to Reconsider was denied without oral arguments on January 5, 2022. Thereafter, Ronald L. Mims filed and served his Notice of Appeal on January 19, 2022.

FACTS

Ronald L. Mims was a pedestrian crossing South Dogwood Drive near the intersection of Atlantic Avenue in Murrell's Inlet, South Carolina on June 20, 2019 when he was struck by a vehicle driven by Diane W. Ray (Depo. of Ray 19:23-20:2, Depo. of Mims 26:12-15, 25:11-14, R.p. 208, line 23-p.209, line 2; p.252, lines 12-15; p. 251, lines 11-14). The parties dispute whether it was cloudy (Depo. of Ray 20:14-15, R.p. 209, lines 14-15) or sunny (Depo. of Mims 25:18-20, R.p. 251, lines 18-20). The parties agree Ray apologized after the crash (Depo. of Ray 23:8-14, Depo. of Mims 36:16-21, R.p. 212, lines 8-14; p. 262, lines 16-21).

Ray was unable to see Mims prior to the impact because of a delivery truck parked along Dogwood Drive (Depo. of Ray 25:13-18, R.p. 214, lines 13-18). Ray was familiar with the roadway and owns a second home on Dogwood Drive (Depo. of Ray 9:17-22, R.p. 198, lines 17-22). Ray's passage around the delivery truck was very narrow (Depo. of Ray 24:1-21, R.p. 213, lines 1-21) but she nonetheless passed the delivery truck parked partially in the road and partially off the road (Depo. of Ray 20:22-22:3, R.p. 209, line 22-p.211, line 3).

Mims was set to cross Dogwood Drive to go to the beach (Depo. of Mims 26:16-22, R.p. 250, lines 16-22). Prior to crossing the street, Mims did not see any traffic (Depo. of Mims

28:15-23, R.p. 254, lines 15-23) and paused for five seconds to look both ways (Depo. of Mims 29:24-30-3, R.p. 255, line 24-p.256, line 3).

Ray and Mims agree there are no signs directing pedestrians to any pedestrian crossing (Depo. of Ray 33:11-13, R.p. 222, lines 11-13) and that there is no painted crosswalk on Dogwood Drive (Depo. of Mims 30:13-18, R.p. 256, lines 13-18).

As a result of Ray striking Mims with her vehicle, Mims lost consciousness and suffered injuries to his back and right upper extremity requiring surgery (Depo. of Mims 31:1-2, 31:14-18, 34:2-19, 39:18-20, R.p. 257, lines 1-2, lines 14-18; p. 260, lines 2-19; p. 18-19).

STANDARD OF REVIEW

Rule 56(c) SCRPC provides that a trial court may grant a motion for summary judgment “if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Rule 56(c) SCRPC. “In determining whether any triable issues of facts exists, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in that light most favorable to the nonmoving party.” *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 329-30, 673 S.E.2d 801, 802 (2009). “At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact.” *S.C. Prop. & Cas. Guar. Ass’n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). “[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*, 381 S.C at 330, 673 S.E.2d at 803.

“Since it is a drastic remedy, summary judgment ‘should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues.’” *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 337 (S.C. 1990).

“Because reasonableness depends upon the evidence and the rational inferences that may be drawn from them in their context, granting summary judgment in a negligence case is infrequent, for the court’s duty at this state is to presume the credibility of the evidence.” *Abdelgheny v. Moody*, 432 S.C. 346, 852 S.E.2d 225 (Ct. App. 2020). When inferences conflict as to a material fact in a comparative negligence case, choosing between them—that is, choosing the facts that bear upon the percent of negligence attributable to the plaintiff and to the defendant—is up to the jury, whose duty is to decide what the facts are, not what they are presumed to be. *Berberich v. Jack*, 392 S.C. 278, 286, 709 S.E.2d 607, 611 (2011). If a reasonable juror looking at the evidence in the light most favorable to the non-movant could draw more than one inference about a material fact from it, summary judgment must be denied. *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002). It is only in the “rare” instance—when the evidence generates only a single inference—that summary judgment is proper in a comparative negligence action. *Bloom v. Ravoir*, 339 S.C.417, 424-25, 529 S.E.2d 710 , 714 (2000).

LEGAL ARGUMENT

I. THE LOWER COURT ERRED IN DETERMINING THE EVIDENCE GENERATED ONLY A SINGLE INFERENCE—THAT PLAINTIFF’S NEGLIGENCE AMOUNTED TO MORE THAN FIFTY PERCENT (50.00%) OF THE TOTAL FAULT

The lower court erred in determining the evidence presented by Plaintiff and Defendant in arguing Defendant’s Motion for Summary Judgment led only to a single inference—that Plaintiff’s negligence amounted to more than fifty percent (50.00%) of the total fault. When presented with a choice of conflicting inferences, a jury must determine the respective degree of each party’s negligence. Appellant requests the South Carolina Court of Appeals reverse the lower Court’s decision granting Respondent Ray’s Motion for Summary Judgment as more than a single inference could be generated from the evidence presented and, as such, the allocation of comparative negligence is the job of the jury.

a. Negligence

To establish a cause of action for negligence, a plaintiff must show three elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty; and (3) damages proximately resulting from the breach of duty. *South Carolina State Ports Auth. v. Booz-Allen & Hamilton, Inc.*, 289 S.C. 373, 346 S.E.2d 324 (1886).

For the first element, and at a minimum, Respondent Ray owed Appellant Mims a duty of care to keep a proper lookout. See S.C. Code Ann. § 56-5-3230 (2018) “[E]very driver of a vehicle shall exercise due care to avoid colliding with any pedestrian . . . “. In her deposition, Respondent Ray indicated that she understood this duty:

- Q: All right. And, Ms. Ray, would you agree with me that a driver has a duty to maintain a proper lookout?
A: Yes.
Q: And would agree with me that the driver has a duty to yield the right-of-way?
A: Yes.

Q: And would you agree with me that a driver has a duty to yield the right-of-way to pedestrians?
A: Yes.

(Depo. of Ray 31:11-22, R.p. 220, lines 11-22)

Second, the duty owed to Mims by Ray was breached when Ray failed to see Mims. By her own testimony, Ray never saw Mims until her vehicle made contact with him:

Q: Did you see Mr. Mims at all prior to impact?
A: No.

(Depo. of Ray 24:22-24, R.p. 213, lines 22-24)

Q: When was the first time that you saw Mr. Mims?
A: When he hit the side of the car

(Depo. of Ray 22:11-13, R.p. 211, lines 11-13)

Similar to this Court's eloquent statement in *Abdelgheny v. Moody*, Mims' unfortunate choice to not use the [nonexistent] crosswalk did not excuse Ray from her urgent duty to not only look, but to see. *Abdelgheny v. Moody*, 432 S.C. 346, 350, 852 S.E.2d 225, 228 (Ct. App. 2020) citing *Thomasko v. Poole*, 349 S.C. 7, 11-12, 561 S.E.2d 597, 599 (2002) ("whether driver kept a proper lookout is a jury question if the evidence yields multiple inferences.")

As a proximate result of Ray's breach, Mims suffered serious bodily injury requiring surgery. Mims' was questioned about some of his injuries in his deposition:

Q: Do you know if you lost consciousness [after the crash]?
A: Yes, ma'am.

(Depo. of Mims 31:1-2, R.p. 257, lines 1-2)

Q: All right. When you say you noticed your arm, I just want to be clear about what that means. Is that your right arm or your left arm?
A: My right arm was completely broke.

(Depo. of Mims 31:14-18 R.p. 257, lines 14-18)

Q: Okay. So, circling back to where we're talking about the accident, Mr. Mims, could you tell me what areas of your body you started feeling pain in immediately after the impact?

A: My left leg, it triggered my sciatic nerve, and my lower back.

Q: And I apologize, I might ask you some repeat questions, but ---

A: That's okay.

Q: --- I believe you said you did lose consciousness, is that right?

A: Yes, I did.

Q: Do you have any idea how long?

A: Honestly, I'm not too sure. It wasn't, you know, terribly long, maybe thirty seconds to a minute, maybe, somewhere around there.

(Depo. of Mims 34:2-19, R.p. 260, lines 2-19)

As evidenced above, Mims developed sufficient facts to satisfy the three elements of a negligence cause of action.

b. Comparative Negligence

In 1991, the South Carolina Supreme Court adopted, but did not define, the doctrine of comparative negligence. See *Nelson v. Concrete Supply Co.* 303 S.C. 243, 399 S.E.2d 783 (1991). Under this doctrine, a plaintiff “. . . in a negligence action may recover damages if his or her negligence is not greater than that of the defendant. The amount of the plaintiff's recovery shall be reduced in proportion to the amount of his or her [own] negligence.” *Id.*, 303 S.C. at 245, 399 S.E.2d at 784.

The Court adopted a modified version of the traditional comparative negligence standard known as a the “less than or equal to” approach, by which the plaintiff in a negligence action could recover damages if his or her negligence in causing a tortious incident is fifty percent (50%) or less. Stated another way, the plaintiff's cause of action will be successful so long as their negligence does not exceed fifty percent (50%), or the combined total negligence of the

other parties. *Singleton v. Sherer*, 377 S.C. 185, 205, 659 S.E.2d 196, 206 (Ct. App. 2008). “The determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn.” *Hurd v. Williamsburg County*, 363 S.C. 421, 429, 611 (S.E.2d 488, 492 (2005). “Summary judgment is generally not appropriate in a comparative negligence case.” *Bloom v. Ravora*, 339 S.C. 417, 422, 529 S.E.2d 710 (2000).

c. ***Bloom v. Ravora***

Ray’s motion for summary judgment argument centered around the fact specific case of *Bloom v. Ravora*, 339 S.C. 417, 529 S.E.2d 710 (2000). *see also* Def. MSJ, R.pp. 17-153. Ray contended the facts in *Bloom* are analogous to those in this case, and consequently that Mims’ recovery should be barred by the doctrine of comparative negligence. Mims responded that summary judgment was improper as *Bloom* was decided on a specific, narrow set of facts. (“[I]n the rare case where a verdict is not reasonably possible under the facts presented, summary judgment is proper.”) *Bloom*, 339 S.C. at 425. Further, Mims argued to the lower Court “. . . comparative negligence is a question reserved for a jury.” (MSJ Hearing Transcript 9:18-19, R.p. 293, lines 18-19)

In *Bloom*, both Bloom and Ravora were visiting Charleston, South Carolina. *Id.* at 421. Bloom was running between two parked cars in an attempt to cross Meeting Street between Market and Cumberland Streets. *Id.* at 419- 421. At both ends of this block, there were crosswalks, traffic lights, and walk/don’t walk signals. *Id.* at 420. A witness testified that Bloom hesitated for a “split-second” and then ran across the street. *Id.* at 421. At the time, it was dark and there was a misty rain. *Id.* at 420. Bloom was wearing a navy-colored overcoat. *Id.* Ravora testified that his car’s lights and windshield wipers were on at the time of the wreck. *Id.* Witnesses testified that there were cars parked in front of where Bloom was crossing the street,

and therefore, Bloom must have entered the street from between parked cars or in front of a parked car. *Id.* at 421.

Here, Mims crossed Dogwood Drive near a parked truck, but that is where the similarities between the two matters ends. Unlike in *Bloom*, there were no crosswalks, traffic lights, or walk/don't walk signals in the immediate proximity of where Mims was crossing Dogwood Drive. In fact, Dogwood Drive, an approximately 1.1 mile road that runs parallel to the South Carolina coast in Garden City from Cyprus Road to Moonfish Lane, does not have a single crosswalk, traffic light, or walk/don't walk signal. (Memo. In Opp. to MSJ, Exhibits 1-6, R.pp. 159-170). Plaintiff testified that he does not recall there ever being a painted crosswalk on Dogwood Drive throughout the duration of his life. (Depo. of Mims 30:13-18, R.p. 256, lines 13-18). Further, Google Maps satellite images demonstrate there has not been a painted crosswalk, traffic light, or walk/don't walk sign at or near the subject location since at least 2008. (Memo. In Opp. to MSJ, Exhibits 1-6, R.pp. 159-170).

Unlike *Bloom*, Ray was not a visitor to the area. Instead she was intimately familiar with the roadway and owns a second home on Dogwood Drive where she frequently stays. (Depo. of Ray 9:17-22, R.p. 198, lines 17-22). Ray testified that she was unable to see because of a delivery truck parked along Dogwood Drive. (Depo. of Ray 25:13-18, R.p. 214, lines13-18). In the same breath, Respondent Ray testified that she drives on Dogwood Drive everyday (Depo. of Ray 24:25-25:1, R.p. 213, line 25-p. 214, line 1) and is aware that pedestrians and delivery trucks are often in the vicinity (Depo of Ray 25:2-26:4, R.p. 214, line 2-p.215, line 4). Ray stated she remained in her lane as she passed a semi-truck that was parked partially in the road and partially off the road. (Depo. of Ray 20:22-22:3, R.p. 209, line 22-p. 211, line 3). Ray admits it was "very narrow through there" and that she was "just kind of rolling along." (Depo. of Ray 23:2-24:21, R.p. 212, line 2-p.213, line 21).

In further contrast to *Bloom*, Mims testified that he waited five seconds and looked both ways before crossing the street. (Depo. of Mims 29:24-30:3, R.p. 255, line 24-p. 256, line 3). *Bloom*, however, hesitated only for a “split-second” and then “ran” across Meeting Street. *Bloom* 339 S.C. at 421. Ray goes on to mention that there are no signs directing pedestrians to a pedestrian crossing, presumably because there are no pedestrian crossings to which pedestrians should be directed (Depo. of Ray 33:11-13, R.p. 222, lines 11-14). It is illogical to think that Garden City beach patrons are prohibited from crossing Dogwood Drive to go to the beach because of the lack of painted pedestrian crossings. If this were the case, every visitor or resident who parks or lives west of Dogwood Drive must violate the law to enjoy the beach. Interestingly, Ray admits that when she walks to the beach from her home on Dogwood Drive, she does not go to the corner of Dogwood Drive and Atlantic Avenue like she argues is the duty of Mims, and instead crosses Dogwood Drive absent a pedestrian crossing (Depo. of Ray 35:18-36:21, R.p. 224, line 18-p.225, line 21). Ray looks to this Court to excuse and endorse her negligence in failing to keep a proper lookout for pedestrians that she knew or should have known would be present.

Mims emphasized the factual differences between *Bloom* and this case to the lower Court while arguing that summary judgment is improper due to the existence of genuine issues of material fact (Memo In Opp. to MSJ, R.pp. 154-187) and maintain that a jury is the proper trier of fact when apportioning fault among the parties when a comparative negligence defense is raised. (MSJ Hearing Transcript 9:18-19, R.p. 293, lines 18-19).

d. ***Abdelgheny v. Moody***

After Mims’ Memorandum in Opposition to Ray’s Motion for Summary Judgment was submitted to the lower court on October 20, 2020, this Court issued its opinion in *Abdelgheny v. Moody* on October 28, 2020. A copy of *Abdelgheny v. Moody* was provided to the lower court by

Mims in support of his position on October 30, 2020 well in advance of the January 20, 2021 oral arguments regarding Ray's motion for summary judgment.

Just as Ray argued in this case, Moody too saw little difference between his facts and those supporting summary judgment in *Bloom v. Raviora*. This Court, however, saw many differences, and concluded that it, “. . . underst[ood] how the trial court could have concluded Chelsea's negligence exceeded Moody's and amounted to more than fifty percent of the comparative fault. But arriving at the conclusion required choosing between the multiple inferences emerging from the evidence. Rule 56, SCRCP, reserves that choice to the jury.” *Abdelgheny v. Moody*, 432 S.C. 346, 351, 852 S.E.2d 225, 228 (Ct. App. 2020).

In *Moody*, this Court compared the duties owed by Chelsea Abdelgheny and Gerald Moody to each keep a proper lookout. This Court agreed that Chelsea was negligent by crossing the highway outside a crosswalk but did not agree that the only inference a reasonable juror could make is Chelsea's own negligence accounted for more than fifty percent of the fault. *Id.* at 227-228.

Here, a reasonable juror could interpret Ray's testimony that she never saw Mims until she made contact with him as incompatible with a careful lookout. Another reasonable juror may think that a careful and prudent driver would have swung out further from the parked delivery truck to give her a better view of any pedestrians crossing Dogwood Drive adjacent to the truck as opposed to driving through a narrow pathway. This is especially true since Ray testified she was aware trucks and pedestrians were often present in the vicinity of the crash site. See Depo. of Ray 24:25-25:12, R.p. 213, line 25-p. 214, line 12. A third reasonable juror may question how a driver who claims to have been “just kind of rolling along” could have struck Mims with enough force to cause his serious injuries.

Any number of reasonable jurors could conceive more than the single inference from the evidence relied upon by the lower court in granting Ray's motion for summary judgment. The lower court was forced to choose between multiple inferences emerging from the evidence in reaching its conclusion, a task which should be reserved exclusively for a jury, and as such, Ray's motion for summary judgment should have been denied.

CONCLUSION

The trial court erred in granting Defendant's Motion for Summary Judgment. The lower court's determination that Mims' negligence exceeded Ray's and amounted to more than fifty percent of the comparative fault required choosing between multiple inferences from the presented evidence. The decision to choose between multiple inferences is one that must be left to a jury and thus, the trial court's granting of Defendant's Motion for Summary Judgment was improper.

For the foregoing reasons set forth above, Appellant asks this Court to reverse the trial court's decision to grant Defendant's Motion for Summary Judgment.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

Appellant's counsel certifies that the Final Brief of Appellant complies with Rule 211, SCACR.

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