IN THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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SC 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

v.

Diane W. Ray ..... Respondent

FINAL BRIEF OF RESPONDENT

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I. Did the Trial Court Properly Apply the Rules of Comparative Negligence in Finding that the Facts Supporting a Single Inference and that Summary Judgement under Rule 56, SCRCP, was Proper?

STATEMENT OF THE CASE

This appeal arises from a negligence action brought by Appellant Ronald L. Mims ("Mims") against Respondent Diane W. Ray ("Ray"). Mims' Complaint was filed on or about September 18, 2019, and Ray's Answer was filed on October 23, 2019. Ray's Answer included an affirmative defense of comparative negligence.

Ray's motion for summary judgment was heard before the Honorable Benjamin H. Culbertson on January 20, 2021, via web-ex. The trial court issued an Order, dated January 20, 2021, granting Ray's motion for summary judgment. (R.p. 5, Summary Judgement Order). The decision was a Form 4 Order and cited the statutory and caselaw relied upon by Ray in her motion for summary judgment. Thereafter, Mims filed a motion to reconsider and/or alter and/or amend the Order, pursuant to Rules 52 and 59, SCRCP. Ray opposed the motion. The Court denied Mims' motion on January 5, 2022, without oral argument, by a Form 4 Order dated January 5, 2022. (R.p. 2, Reconsideration Order).

Mims filed his Notice of Appeal, on January 20, 2022.

STATEMENT OF FACTS

This is a negligence action arising out of an accident involving an automobile and a pedestrian that occurred on June 20, 2019, on South Dogwood Drive in Garden City. Ray testified in her deposition that she was driving east on Dogwood when she saw a delivery truck parked ahead of her on the right side of the road and partially in her lane. As Ray

approached the truck, she stopped to look for traffic and proceeded with caution. As the front of Ray's vehicle began to pass the front of the truck, Mims walked into the passenger side of her vehicle after hearing an engine or car. Ray testified she was familiar with the area where the accident occurred and that there was no cross-walk in the immediate area where the accident occurred.

Similarly, in his deposition, Mims testified that he did not cross the street using a crosswalk at the time of the accident. His testimony is as follows:

> Q. Is there a crosswalk or anything like that at the area where you cross the street?
>
> A. No, ma'am, they're all eroded.
>
> Q. They were eroded?
>
> A. Yes, ma'am.
>
> Q. Could you see lines in the road for a crosswalk that had been there before?
>
> A. No, ma'am.
>
> Q. What makes you say they're eroded?
>
> A: Well, the one – that's what I mean. The one at Atlantic, it used to be yellow years and years ago. I've lived here my whole life, and it hasn't been painted in, I don't think ever.
>
> Q. At Atlantic where the intersection is?
>
> A. Yes, ma'am.

(R.p. 256, lines 4-20). Mims testified he paused and saw no traffic before crossing the street. (R.p. 254, lines 15-23).

Mims also testified as follows:

Q: Were you crossing near an intersection?

A: I was crossing to another street, not off of the main street, Atlantic, the secondary street.

Q: Do you know if there's any traffic signals or stop signs or anything like that at the spot where you were crossing or nearby?

A: Nearby.

Q: About how far away?

A: Maybe fifty to eight feet.

Q: Is that a traffic signal or a stop sign?

A: No, it's the direct turn off of Atlantic.

(R.p. 253, line 24 – p. 254, line 11).

The investigating police officer, Trooper Brendan Delaney, testified that after speaking with both parties and observing the scene of the accident, he determined that Mims contributed to the accident and Ray did not. Regarding the issue of whether Mims attempted to use a crosswalk when crossing the street at the time of the accident, Trooper Delaney testified as follows:

Q. And are you familiar with that area where this crash had taken place?

A. Yes, sir.

Q. And when you arrived on the scene of this crash, had you observed any crosswalks?

A: The only crosswalk is when you turn right off, and I can't

remember the, the main road that feeds into that area, but off Dogwood Drive there's a crosswalk on that corner.

Q. On the corner of Dogwood Drive and Atlantic Avenue?

A. I think it's Atlantic Avenue, yes, sir, 'cause I think there's a row of restaurants and stuff right there.

Q. And is that a painted pedestrian walkway? When you say the pedestrian crosswalk, what are you referring to?

A. The crosswalk.

Q. Well, what is a crosswalk?

A. Painted crosswalk.

Q. Was there a painted crosswalk at the corner of Dogwood Drive and Atlantic Avenue

on the date of this crash?

A. To my knowledge, yes.

(R.p. 100, line 25 – p.101, line 24). Regarding who he determined at fault, Trooper Delaney testified as follows:

Q. And I think you said a moment ago you marked Mr. Mims as contributing to that crash; is that correct?

A. Yes, sir.

Q. What evidence did you use to reach that conclusion?

A. With where the driver of the BMW stated she hit the pedestrian was outside the crosswalk and where Fire –

Q. So ---

A. Sorry, where Fire and EMS said they – where Fire and EMS treated him, also, we put all that together. Well, I put it all together.

(R.p. 103, lines 9-21).

Q. So just to be clear, the reason you marked Mr. Mims as contributing to this crash is because he was outside the painted crosswalk there on South Dogwood Drive; is that correct?

A. Yes, sir. Yes, sir.

(R.p. 105, lines 3-8).

Trooper Delaney similarly testified that:

Q: And when you arrived on the scene of this crash, had you observed any crosswalks?

A: The only crosswalk is when you turn right off, and I can't remember the, the main road that feeds into that area, but off Dogwood Drive there's a crosswalk on that corner.

Q: On the corner of Dogwood Drive and Atlantic Avenue?

A: I think it's Atlantic Avenue, yes, sir, 'cause I think there's a row of 13 restaurants and stuff right there.

Q: And is that a painted pedestrian walkway? When you say the pedestrian crosswalk, what are you referring to?

A: The crosswalk.

Q: Well, what is a crosswalk?

A: Painted crosswalk.

Q: Was there a painted crosswalk at the corner of Dogwood Drive

and Atlantic Avenue on the date of this crash?

A: To my knowledge, yes.

(R.p. 101, lines 3-24).

Ray testified that she did not receive a ticket from this crash. (R.p. 142, lines 5-7). Ray further testified that there were no crosswalks in the road where the impact occurred but that "there is a corner that you're supposed to cross at." (R.p. 149, lines 1-6).

The only testimony as to how quickly Ray was driving was by Ray – who stated she was driving maybe 1 or 2 miles an hour. (R.p. 140, lines 17-21).

Based on the undisputed testimony of Ray, the investigating officer, Trooper Delaney, and Mims, the accident occurred outside of a legal pedestrian crossing. Ray filed a motion for summary judgment based on the comparative negligence of Mims in failing to cross the street within a crosswalk. The Court granted this motion.

ARGUMENT

STANDARD OF REVIEW OF SUMMARY JUDGMENT

"Summary judgment is warranted if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRCP. *Bloom v. Ravoira*, 339 S.C. 417, 421, 529 S.E.2d 710, 712 (2000). "In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party." *Koester v. Carolina Rental Ctr., Inc.,* 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994) *citing Hamilton v. Miller,* 301 S.C. 45, 47, 389 S.E.2d 652, 653 (1990). "Even when there is no dispute as to the evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied." *Id.*

However, a "court cannot ignore facts unfavorable to [the non-moving party] and [the court] must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." *Bloom v. Ravoira*, 339 S.C. 417, 423, 529 S.E.2d 710, 713 (2000) *citing Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct.App.1996). "If the evidence as a whole is susceptible to only one reasonable inference, no jury issue is created, and a directed verdict motion is properly granted)." *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) *quoting Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct.App.1996) (internal citations omitted).

I. COMPARATIVE NEGLIGENCE IS A BAR TO APPELLANT'S RECOVERY

To establish a cause of action in negligence, a plaintiff must prove the following elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *See, Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 82 (1998). Assuming, *arguendo*, that Ray owed a duty to Mims, Mims' recovery is barred under the doctrine of comparative negligence. *See, Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000). *See, also, Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct.App.1996) (holding that plaintiff's claim was barred under comparative negligence doctrine because plaintiff's own negligence was, as a matter of law, greater than any negligence attributable to defendant and the more determinative factor in causing the accident.)

In this case, Mims argues that Ray had a duty to yield the right of way to pedestrians pursuant to S.C. Code Ann § 56-5-5230 (2018). ("...[E]very driver of a vehicle shall exercise due care to avoid colliding with any pedestrian or any person propelling a human-

powered vehicle…). Mims uses this statute and his injuries caused by the impact to show a duty was owed by Ray. As an initial matter, any injuries are irrelevant to this appeal as the appeal's basis is comparative negligence – not injuries. While citing the statute requiring a driver to yield, Mims fails to mention another salient statute - "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." S.C. Code Ann. § 56-5-3150 (2018).

In this case, Mims testified he heard the engine or car prior to impact. He was the one that had the ability to avoid the impact.

> Q: …Tell me what you remember about the actual impact.
>
> A: The actual impact, I just heard the engine, looked over, saw a blue hood…
>
> …
>
> Q: And just to backtrack, did you say you heard the engine or you heard a car?
>
> A: Yes, ma'am, it was real quick.

(R.p. 256, line 21 – p. 257, line 5). Thus, Mims had the opportunity to avoid the impact as he heard the car or engine. Conversely, Ray stated she did not see Mims until "[w]hen he hit the side of the car." (R.p. 138, lines 11-13). Her testimony as to her speed was uncontradicted. Ray testified that she was driving "... less than a mile, two miles an hour, if you want to put a number to it, just kind of rolling along, as they say." (R.p. 140, lines 17-21). She specifically noted that she had not passed the first mark on her speedometer, which was 10 miles an hour. (R.p. 149, line 17). She also stated that she stopped when she

drove around the truck to make sure that there was no oncoming traffic and that she had enough room to get through. (R.p. 137, lines 2-21). The testimony of Ray and Trooper Delaney is that she did exercise due care pursuant to S.C. Code Ann. § 56-5-5230 (2018). Ray was driving slowly. Trooper Delany did not give her a ticket for failing to yield the right of way or any moving violation. Ray could not yield to a pedestrian that she could not observe.

However, Mims could have avoided the accident as he heard the car approaching. Regardless of whether Ray breached her duty to yield to pedestrians, Mims breached his duty to yield the right of way to traffic. *Cf.* S.C. Code Ann. § 56-5-5230 (2018), S.C. Code Ann. § 56-5-3150 (2018). Notably, Mims ignores the plain language reading of the statute regarding Ray's duty – while operating a motor vehicle Ray "...shall exercise due care to avoid colliding with any pedestrian." There is no testimony that she did not utilize due care to avoid the collision. Moreover, the statute does not require avoiding the collision. The undisputed facts are that she did exercise due care and, thus, fulfill her statutory obligation whereas Mims did not as he failed to yield the right of way outside a crosswalk. The facts in this case support a conclusion that summary judgment is appropriate on comparative negligence. The only reasonable inference is that Mims is liable for more than fifty percent of this accident.

"In *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244, 399 S.E.2d 783, 784 (1991), the South Carolina Supreme Court adopted a modified version of comparative negligence known as the "less than or qual to" approach. Under this version, for all causes of action ... a plaintiff in a negligence action may recover damages if his or her negligence is not greater than that of defendant." *Singleton v. Sherer*, 377 S.C. 185, 205 659 S.E.2d 196, 206

(Ct.App.2008) (internal citations and quotations omitted). Courts have granted summary judgment to defendants based on comparative negligence where the sole reasonable inference which may be drawn from the evidence is that plaintiff's negligence exceeded fifty percent. If only a single inference can be drawn, there is no jury issue *See, Hopson v. Clary*, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct.App.1996). In this case, despite comparative negligence generally being a jury question, there is no jury question as to whether Mims' negligence exceeded fifty percent. *See, inter alia., Hopson v. Clary*, 321 S.C. 312, 468 S.E.2d 305 (Ct.App.1996) (affirming trial court's grant of directed verdict on the issue of comparative negligence where plaintiff was driving down the street, pulled over, and attempted to make a U-turn when she was struck by the defendant who was traveling behind her); *Singleton v. Sherer*, 377 S.C. 185, 659 S.E.2d 196 (Ct.App.2008) (affirming summary judgment where a racoon bit the plaintiff based on plaintiff's comparative negligence); *Estate of Haley v. Brown*, 370 S.C. 240, 243 634 S.E.2d 62, 63 (Ct.App.2006) (directed verdict proper where the "only reasonable inference that can be drawn from the evidence is that [plaintiff's] negligence in running into the side of [defendant's] truck outweighed any possible negligence by [defendant] and was the more determinative factor in causing the collision.")

The *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000) case is directly on point. In that case, the South Carolina Supreme Court upheld the circuit court's decision to grant the defendant's motion for summary judgment based on the plaintiff's comparative negligence. In that case, in an attempt to cross a street, the plaintiff, a pedestrian entered the street between two parked vehicles and ran into the side of the defendant driver's vehicle. *Id.* The plaintiff pedestrian did not enter the street at a crosswalk or any other

pedestrian crossing, so the driver had no warning of the impact. *Id.* Additionally, the evidence showed that the driver was driving no more than 25 miles per hour and was not driving recklessly at the time of the impact. *Id.* The Supreme Court affirmed the Circuit Court's decision to grant the defendant driver's motion for summary judgment and held that the only reasonable inference was that the plaintiff pedestrian's own negligence was more than fifty percent, thus precluding his recovery in a negligence action against the motorist. *Id.* Specifically, the Supreme Court held the following:

> Here, the undisputed facts establish that [the pedestrian] attempted to cross the street but did not do so in a safe, reasonable manner. Any factual issues that might exist as to [the motorist's] fault in this accident cannot alter the inescapable conclusion that, as a matter of law, [the pedestrian's] fault exceeded fifty percent. Where evidence of the plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the defendant is simply not enough for a case to go to the jury. *Id.* 339 S.C. at 424, 529 S.E.2d at 714.

The instant case is analogous to *Bloom*. Mims similarly attempted to cross the street in an unsafe manner and any factual issues that may exist regarding Ray's fault do not alter the conclusion that as a matter of law. Mim's negligence was greater than fifty percent. In this case, Mims breached his statutory duty and contributed negligently to the impact as "[e]very pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." S.C. Code Ann. § 56-5-3150 (2018). It is undisputed that he was not within a marked crosswalk or an unmarked crosswalk at an intersection. It is undisputed that he did not walk to an intersection to cross the street in an unmarked crosswalk. It is undisputed that he heard an engine or car before the impact.

Mims attempts to set up dueling authority on whether his comparative negligence is more than fifty percent as a matter of law by citing to the recent Court of Appeals' decision in *Abdelgheny v. Moody*, 432 S.C. 346, 852 S.E.2d 225, 228 (Ct.App.2020). In *Abdelgheny*, a pedestrian was struck by a car while crossing a four lane road while not in a crosswalk. The Court of Appeals determined that the facts of *Abdelgheny* were sufficiently different from *Bloom* to preclude the grant of summary judgment, and specifically that a reasonable juror could conclude that the driver in *Abdelgheny* could have avoided the accident whereas the drive in *Bloom* could not have. *Id.*, 432 S.C. at 351, 852 S.E.2d at 228. In *Blum*, the pedestrian ran into a narrow urban street between two parked cars so that the driver had no opportunity to observe and avoid the pedestrian. Whereas in *Abdelgheny*, the pedestrian was crossing a broad upland expanse of a four lane highway and had already managed to cross the first two lanes and into the median. Under these circumstances, the Court of Appeals reasoned that a juror could find that had the driver maintained a sufficient lookout, that the accident may have been avoided.

The instant case is almost identical to *Bloom* and wholly unlike *Abdelgheny*. Here, Ray was driving on a two-lane neighborhood road, not a broad four-lane rural highway. Just like in Bloom, there was a vehicle parked on the side of the road, and the accident occurred when the pedestrian (in this case Mims) walked out into the roadway in front of the parked vehicle just as the traveling vehicle (in this case Ray) was passing the parked vehicle. Just as in *Blume*, and just as unlike in *Abdelgheny*, the driver, Ray, had no opportunity to see and avoid the pedestrian, Mims.

Further, the investigating officer that investigated the collision did not find Ray at fault or issue her any moving violation. Instead, the investigating officer found Mims at fault.

Mims decided to cross the street in a place where he knew the view was obstructed by the truck. He could not be bothered (i) to walk fifteen feet away so that he had an unobstructed view of the street, (ii) to even poke his head out to make sure he was clear to cross once he was level with the truck's driver's side, or (iii) to walk to the corner and cross in an unmarked crosswalk. Instead, he chose to walk outside a crosswalk and "paused." Pausing does not equate to yielding. He heard an engine or car and then continued to walk into it. He had the duty and opportunity to yield to that Ray's vehicle.

While the testimony as to where there was a crossing or a cross-light or crosswalk was not clear, Mims asks this Court to disregard the testimony in its entirety and instead review the Google maps images that were attached to Mims Memorandum in Opposition for Summary Judgment. No one testified as to the authenticity of the images or as to whether they represented a true and accurate depiction of the location of any intersection or crosswalk. Accordingly, Ray asks this Court to ignore the Google maps image and review the salient portions quoted regarding the crosswalks. Similarly, Mims asks that this Court disregard the length of Dogwood Drive and its depiction as stated in the Appellant's brief as it does not cite to any testimony. It is a lawyer describing purported facts that were not elicited during discovery despite every witness being asked about crosswalks and the layout. Respectfully, Ray asks that the Court disregard that portion of Appellant's brief as well.

CONCLUSION

For the foregoing reasons, Respondent Diane W. Ray requests the Court affirm the lower court's decision.

[SIGNATURE ON NEXT PAGE].

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