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SC Court of Appeals

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

The Honorable Jean Hoefer Toal, Circuit Court Judge

Appellate Case No. 2023-000060
Trial Court Case No. 2021-CP-40-03672

Bill R. Sharpe and Angela Sharpe, ...Respondents.

v.

Rocky Rutherford, Legacy Equipment, Inc., and G.A. West and Company, Inc., ... Appellants,

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INITIAL BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

(I) Whether the Circuit Court erred in granting the Plaintiffs summary judgment as to the issue of liability in this auto accident case where the other driver testified that the Plaintiff was traveling at an excessive rate of speed and failed to keep a proper lookout?

STATEMENT OF THE CASE

This action arises out of a May 2, 2019 auto accident involving vehicles operated by Plaintiff Bill Sharpe ("Sharpe") and Rocky Rutherford ("Rutherford"). Sharpe alleges that Rutherford caused the accident. Rutherford alleges that Sharpe caused the accident. Based on Defendant Rocky Rutherford's deposition testimony, there is at least a scintilla of evidence that Mr. Sharpe was excessively speeding and that his speeding was a causative factor of the accident. There is also at least a scintilla of evidence that Mr. Sharpe failed to keep a proper lookout and such failure was a causative factor for the accident. Despite the foregoing, the Circuit Court granted summary judgment in favor of the Sharpes.

STATEMENT OF THE FACTS

On May 2, 2019, Bill Sharpe was operating a vehicle heading North on Bluff Road when he collided with a vehicle operated by Rocky Rutherford. (Compl. ¶ 4). The accident occurred at the intersection of Bluff Road and South Beltline Boulevard in Columbia, South Carolina. *See* (Dep. of Rocky Rutherford 9:21-10:21). Sharpe testified that he was coming from I-77 South before the accident and got off the I-77 ramp onto Bluff Road. (Dep. of Billy Sharpe 67:8-17). The section of the roadway from the interstate ramp to the intersection at issue is straight. Sharpe testified that it was a dry and beautiful day. (*Id.* at 67:18-21).

At the time of the accident, Rutherford was in the left turn lane on Bluff Road and turning left into the Petro Truck Stop. (*Id.*). Defendant Rutherford testified that the road was clear when he began his left turn and while he was turning "out of nowhere Mr. Sharpe came." (Dep. of

Rocky Rutherford 10:13-21). Defendant Rutherford also testified that Mr. Sharpe did not slow down before hitting him. (*Id.*). He testified that Sharpe caused the accident by "[t]raveling way too fast" and that Sharpe's speed "had to have been pretty extensive." (*Id.* at 11:10-14; 12:5-7). When Defendant Rutherford began his turn Sharpe was not visible on the straight roadway, but Sharpe slammed into the right front passenger side of Rutherford's vehicle before Rutherford had even crossed two of the four lanes required to complete the turn. *See* (Dep. of Rocky Rutherford 11:8-9).

On July 23, 2021, the Sharpes filed suit against Rutherford and his alleged employers. (Compl.). On September 3, 2021, the Defendants filed an Answer wherein they alleged Billy Sharpe negligently caused the accident by failing to keep a proper lookout and in failing to act as a reasonable and prudent person would have acted under the same or similar circumstances. (Answer ¶ 7). On January 28, 2022, the Sharpes filed a Motion seeking summary judgment on the issue of liability alone. (Sharpes' Mot. for Summ. J.). On November 2, 2022, the Defendants filed a Memorandum in Opposition to such Motion and Defendant Rutherford's deposition transcript. (Defs.' Mem. in Opp.); (Dep. of Rocky Rutherford). On December 9, 2022, the Circuit Court filed a form 4 Order granting Plaintiffs' Motion for Summary Judgment as to the issue of liability alone. (December 9, 2022 Order).

On December 19, 2022, the Defendants filed a Motion to Reconsider and Memorandum of Law in support of such Motion. (Defs.' Mot. to Reconsider). On January 10, 2023, the Circuit Court filed a three-sentence Order denying the Defendants' Motion to Reconsider. (January 10, 2023). This appeal followed.

STANDARD OF REVIEW

"In reviewing the grant of a summary judgment motion, this Court applies the same standard which governs the trial court under Rule 56(c), SCRCP: summary judgment is proper when 'there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law.'" *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001) (quoting *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991)). "In determining whether any triable issues of fact exist, the evidence and all reasonable inferences therefrom must be viewed in the light most favorable to the non-moving party." *Id.* "On appeal from an order granting summary judgment, the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.*, 349 S.C. 356, 361, 563 S.E.2d 331, 333 (2002); *see also Nauful v. Milligan*, 258 S.C. 139, 187 S.E.2d 511 (1972) (holding summary judgment granted on liability alone and leaving only amount of damages at issue was immediately appealable).

"[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 v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009); *Turner v. Milliman*, 392 S.C. 116, 122, 708 S.E.2d 766, 769 (2011) (same); *Zurich Am. Ins. Co. v. Tolbert*, 387 S.C. 280, 283, 692 S.E.2d 523, 524 (2010) ("Summary judgment should be denied where the non-moving party submits a mere scintilla of evidence."). "'When determining if any triable issues of fact exist, the evidence and all reasonable inferences must be viewed in the light most favorable to the non-moving party.'" *Turner*, 392 S.C. at 122, 708 S.E.2d at 769 (quoting *Fleming v. Rose*, 350 S.C. 488, 493–94, 567 S.E.2d 857, 860 (2002)).

ARGUMENT

At the time of the collision, Rutherford was making a left turn on a blinking yellow traffic light across Bluff Road onto South Beltline Boulevard when Billy Sharpe traveled through the same intersection and collided with the passenger side of Rutherford's tractor trailer. On November 2, 2022, the Defendants filed Defendant Rutherford's deposition transcript with the Court. In his deposition, Defendant Rutherford testified that the road was clear when he began his left turn and while he was turning "out of nowhere Mr. Sharpe came." (Dep. of Rocky Rutherford 10:13-21). Defendant Rutherford also testified that Mr. Sharpe did not slow down before hitting him. (*Id.*). He testified that Sharpe caused the accident by "[t]raveling way too fast" and that Sharpe's speed "had to have been pretty extensive." (*Id.* at 11:10-14; 12:5-7).

Viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party, as the Court is required to do, Sharpe was excessively speeding at the time of the accident. He was speeding enough to not even be visible on the straight roadway when Defendant Rutherford began his turn and to then slam into the right front passenger side of Rutherford's vehicle before Rutherford had even crossed two of the four lanes required to complete the turn. *See* (Dep. of Rocky Rutherford 11:8-9).

Based on Mr. Rutherford's testimony that the roadway was clear when he began his turn, there is also a reasonable inference that Mr. Sharpe had the entire length of the visible Bluff roadway from the I-77 ramp to see Mr. Rutherford turning but failed to keep a proper lookout. Defendant Rutherford pled Mr. Sharpe's failure to keep a proper lookout as a defense in his Answer. (Def.s' Answer ¶ 7). Even a party who "had the right of way…owe[s] a duty of due care to maintain a proper lookout under all of the circumstances." *Blanding v. Hammell*, 267 S.C. 352, 357, 228 S.E.2d 271, 273 (1976).

In a similar case, *Clark v. Cantrell*, "[a]s Anderson turned left across a four-lane road into a gas station's service area, Cantrell, who was traveling in her car from the opposite direction, hit the rear passenger side of" Anderson's vehicle. 332 S.C. 433, 439, 504 S.E.2d 605, 608 (Ct. App. 1998), *aff'd as modified on other grounds*, 339 S.C. 369, 529 S.E.2d 528 (2000). Despite Cantrell having the right of way, the jury found Cantrell eighty-four percent (84%) at fault for the accident because she was excessively speeding. *Id.* at 438–39, 504 S.E.2d at 608. Cantrell challenged the denial of her directed verdict and JNOV motions. She argued that "she was entitled to a directed verdict or JNOV because her speed was not the proximate cause of the accident." *Id.* at 443, 504 S.E.2d at 611. The court disagreed and stated that only in "rare cases" involving "entry of a vehicle from a servient roadway onto the main highway in such an abrupt fashion that an accident could not have been avoided, notwithstanding the excessive speed of the oncoming vehicle," is the question of whether speed contributed to the accident not for the jury. *Id.* at 444, 504 S.E.2d at 611. "***[I]n most automobile accident cases, speed creates imponderable issues of time and distance which must be resolved by the jury.***" *Id.* (citations omitted) (italics emphasis in orig.).

This is not one of those "rare cases." Rutherford was not entering "from a servient roadway onto the main highway." *See id.* He was already in the turn lane on Bluff Road before the accident, a clear indication to drivers paying attention that he intended to turn across the intersection. (Dep. of Rocky Rutherford 10:5-17). Consequently, this is a case where "*speed created imponderable issues of time and distance which must be resolved by the jury.*" *See Clark*, 332 S.C. at 444, 504 S.E.2d at 611 (emphasis in orig.). As such, this case should not have been decided on summary judgment.

Moreover, according to the South Carolina Supreme Court, the doctrine of "last clear chance has been subsumed by adoption of comparative negligence such that it remains a factor for the jury's consideration in comparing the parties' fault...." *Spahn v. Town of Port Royal*, 330 S.C. 168, 173, 499 S.E.2d 205, 208 (1998). It is properly stated as a jury instruction as follows:

> In determining the relative percentages of negligence for the plaintiff and the defendant, you should consider, as a factor relevant to the [plaintiff]'s share of negligence, whether the [defendant] was in peril and unable to extricate himself from the peril. If the [defendant] was in peril, you should also consider whether the [plaintiff] was aware of that peril and if he was, whether the [plaintiff] could have then avoided the injury to the [defendant] if the [plaintiff] had used due care at that point.

Id. at 174, 499 S.E.2d at 208. Here, Defendant Rutherford testified that he began his left turn when the road was clear. He testified that Sharpe came "out of nowhere," was traveling way too fast, and did not slow down before hitting him. Thus, the jury should have been able to compare the parties' fault under the last clear chance factor. There was at least a scintilla of evidence that Plaintiff Sharpe could have avoided the accident had he used due care.

The *Horton v. Greyhound Corp.*, 241 S.C. 430, 128 S.E.2d 776 (1962) line of cases Plaintiffs relied upon in their Memorandum apply only in narrow circumstances that are not at issue here. *See* (Pl.'s Mot. for Summ. J. Mem., pp. 4-6). As the Court of Appeals in *Davis v. Tripp* explained:

> The *Horton* court found excessive speed was the only evidence of the bus driver's negligence, and concluded such evidence,
>
> > although sufficient to support an inference of concurrent negligence by the defendant, is insufficient to support a reasonable inference that without such negligence the collision would not have occurred. Our conclusion does not and need not rest on a certainty that, if the bus had been operated at a reasonable speed, the collision would have happened anyway. It does rest on the absence of evidence sufficient to raise a reasonable inference that it would not have occurred but for the negligence of the bus driver, which amounts to a failure of proof of an essential element of plaintiff's cause of action.

> *Id.* at 441, 128 S.E.2d at 782. The cases that have relied on *Horton* in order to find a party's negligence was not a concurring cause of the collision have similarly found speed to be the only evidence of such party's negligence. *Odom v. Steigerwald*, 260 S.C. 422, 196 S.E.2d 635 (1973); *Kennedy v. Carter*, 249 S.C. 168, 153 S.E.2d 312 (1967); *Guyton v. Guyton*, 244 S.C. 357, 137 S.E.2d 273 (1964); *Alston v. Blue Ridge Transfer Co.*, 308 S.C. 292, 417 S.E.2d 631 (Ct.App.1992); *see also Gunnels v. Roach*, 243 S.C. 248, 133 S.E.2d 757 (1963) (the collision could not have been avoided even if the defendant had seen the plaintiff at the instant he became visible).
>
> **These principles, however, do not apply when there is evidence of additional negligence or that speed was a causative factor. In such cases, the court cannot, as a matter of law, find no liability.** *See Tubbs by Duren v. Bowie*, 308 S.C. 155, 417 S.E.2d 550 (1992) (where there was evidence that the speeding defendant failed to take appropriate evasive action, liability was an issue for the jury); *Wilson v. Marshall*, 260 S.C. 271, 195 S.E.2d 610 (1973) (although decedent was clearly negligent in failing to yield the right of way, plaintiff's failure to keep a proper lookout and driving at a reduced speed inferred plaintiff's negligence was a contributing proximate cause of the collision); *Roumillat v. Keller*, 252 S.C. 512, 167 S.E.2d 425 (1969) (the nature of the impact could lead the jury to conclude that, if not for defendant's excessive speed, his auto could have been controlled as to avoid the collision); *Clark v. Cantrell*, 332 S.C. 433, 504 S.E.2d 605 (Ct.App.1998) (evidence of defendant's excessive speed and recklessness supported the jury's finding that her speed contributed to the accident); see also *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972) (where there was additional evidence of negligence, dog running out in front of car could not be held as a matter of law to be the sole proximate cause of the collision).

338 S.C. 226, 235–36, 525 S.E.2d 528, 532–33 (Ct. App. 1999) (emphasis added). Based on Defendant Rutherford's testimony, there are reasonable inferences that Sharpe's speed was a causative factor and that Sharpe was also negligent in failing to maintain a proper lookout. Consequently, the *Horton* principle is inapplicable. This case is much more similar to *Cantrell* where the court submitted the liability issues to the jury and held it could not rule on them as a matter of law.

CONCLUSION

For the above-stated reasons, Appellants respectfully request that the Court reverse the Circuit Court's grant of summary judgment in favor of Respondents as to liability. There was at least a scintilla of evidence that Mr. Sharpe was excessively speeding at the time of the accident and that his speed was a causative factor for the accident. Additionally, there was at least a scintilla of evidence that Mr. Sharpe failed to keep a proper lookout and that this was also a causative factor for the accident. Therefore, summary judgment in favor of the Respondents on the issue of liability was not proper.

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