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SC Court of Appeals

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.

INITIAL BRIEF OF RESPONDENTS

Submitting counsel:

GARY W. POPWELL, JR.
Attorneys Lee, Eadon, Isgett,
Popwell & Owens, P.A.
P.O. Box 1505
Columbia, South Carolina 29202
(803) 799-9811
gary@leiplaw.com
Attorney for Respondents

Other Counsel of Record:

EVERETT A. KENDALL, ESQUIRE
PHILLIP FLORENCE, JR., ESQUIRE
MURPHY & GRANTLAND, P.A.
Post Office Box 6648
Columbia, South Carolina 29260
(803) 782-4100
rkendall@murphygrantland.com
pflorence@murphygrantland.com
Attorneys for Appellants

MARK B. GODDARD, ESQUIRE
TURNER, PADGET, GRAHAM & LANEY
Post Office Box 1473
1901 Main Street - 17th Floor
Columbia, South Carolina 29202
(803) 227-4372
mgoddard@turnerpadget.com
Attorney for Liberty Mutual Insurance Company, purported UIM carrier

THOMAS JONATHAN CLARK, ESQUIRE
JOHN ELLIOTT ROGERS, II, ESQUIRE
THE WARD LAW FIRM
Post Office Box 5663
Spartanburg, South Carolina 29304
(864) 591-2342
jclark@wardfirm.com
jrogers@wardfirm.com
Attorneys for Frankenmuth Mutual Insurance Company, purported UIM carrier

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Statement of the Case 2

Statement of Facts 3

Standard of Review 5

Argument

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR THE RESPONDENTS GIVEN THE ABSENCE OF EVIDENCE SUFFICIENT TO RAISE A REASONABLE INFERENCE THAT THIS ACCIDENT WOULD NOT HAVE OCCURRED BUT FOR THE NEGLIGENCE OF SHARPE PURSUANT TO *HORTON V. GREYHOUND CORP.* AND THE CASES FLOWING THEREFROM. 6

Conclusion 13

TABLE OF AUTHORITIES

CASES

Alston v. Blue Ridge Transfer Company, 308 S.C. 292, 417 S.E.2d 631 (1992) 8, 10

Baughman v. American Tel. & Tel. Co., 306 S.C. 101, 115, 410 S.E.2d 537 (1991) 5

Blanding v. Hammell, 267 S.C. 352, 228 S.E.2d 271 (1976) 7, 8, 9, 10

Clark v. Cantrell, 332 S.C. 433, 504 S.E2d 605 (Ct. App. 1998); 339 S.C. 369, 529 S.E.2d 528 (2000 affirmed as modified) 7, 8

Davis v. Tripp, 338 S.C. 226, 525 S.E.2d 528 (Ct. App. 1999) 8, 9

Dyer v. Moss, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1995) 5

Hanahan v. Simpson, 326 S.C. 140, 45 S.E.2d 903 (1997) 6

Hoard v. Roper Hospital, Inc., 387 S.C. 539, S.E.2d 1 (2010) 5

Horton v. Greyhound, 241 S.C. 430, 128 S.E.2d 776 (1962) 6, 7, 10, 13

Johnson v. Metropolitan Life Insurance Company, 206 S.C. 415, 419, 34 S.E.2d 757 (1945) 6

Kennedy v. Carter, 249 S.C. 168, 153 S.E.2d 312 (1967) 7, 10

Klippel v. Mid Carolina Oil, Inc., 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990) 5

Miller v. FerrellGas, L.P., Inc., 392 S.C. 295, 709 S.E.2d 616 (2011) 7

Nelson v. Piggly Wiggly Center, Inc., 390 S.C. 382, 701 S.E.2d 776 (C.T. App. 2010) 5

Odom v. Steigerwald, 260 S.C. 422, 196 S.E.2d 635 (1973) 7, 10

Osborne v. Adams, 346 S.C. 4, 550 S.E.2d 319 (2001) 5

Roumillat v. Keller, 252 S.C. 512, 167 S.E.2d 425 (1969) 8, 9

Spahn v. Town of Port Royal, 330 S.C. 168, 499 S.E.2d 205 (1998) 12, 13

Tubbs v. Bowie, 308 S.C. 155, 417 S.E.2d 550 (1992) 8, 9

STATUTES

S.C. Code Ann. §56-5-2320, (1976 as amended) 6

SOUTH CAROLINA RULES OF CIVIL PROCEDURE

Rule 50 5

Rule 56 5

STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE DECISION OF THE CIRCUIT COURT TO GRANT SUMMARY JUDGMENT FOR THE RESPONDENTS ON THE ISSUE OF LIABILITY WAS PROPER GIVEN THE EVIDENCE PRESENTED AND LONG STANDING CASE LAW IN SOUTH CAROLINA?

STATEMENT OF THE CASE

This case concerns an accident between a pickup truck driven by Respondent Bill R. Sharpe and an 18 wheeler hauling crane parts driven by Appellant Rocky Rutherford on behalf of Appellants Legacy Equipment, Inc. and G.A. West and Company, Inc. The accident happened on May 2, 2019 at the intersection of Bluff Road and South Beltline Boulevard in Richland County, South Carolina. Suit was filed on July 23, 2021. (Summons and Complaint, R. pp. ______). After exchanging discovery and depositions, the Plaintiffs moved for summary judgment on the issue of liability alone on June 28, 2022. (Motion for Summary Judgment filed June 28, 2022, R. p. ______). The Plaintiffs filed a Memorandum in Support of their Motion for Summary Judgment on the issue of liability which included photographs and depositions. (Plaintiffs' Memorandum in Support of an Order Granting Summary Judgment, R. pp. ______ - ______). The Defendants also filed a Memorandum Opposing Plaintiffs' Motion for Summary Judgment. (Defendants' Memorandum in Opposition to Plaintiffs' Motion for Summary Judgment, R. pp. ______ - ______).

The Motion was argued on November 29, 2022 and the Court granted the Plaintiffs' Motion for Summary Judgment on the issue of liability alone. (Transcript of Motion Hearing, R. pp. ______ - ______; Order Granting Summary Judgment As To The Issue of Liability Alone, R. p. ______). The Defendants filed a Motion to Reconsider and Memorandum of Law on December 19, 2022. (R. pp. ______ - ______). The Plaintiffs filed a Reply to Defendants' Motion to Reconsider and Memorandum of Law on December 21, 2022. (R. pp. ______ - ______). The Defendants' Motion to

Reconsider was denied by Order filed January 10, 2023. (Order Denying Defendants' Motion to Reconsider, R. p. ______). This appeal followed.

STATEMENT OF THE FACTS

On May 2, 2019, Appellant Rocky Rutherford (Rutherford) was driving for Legacy Equipment, Inc. and G.A. West and Company, Inc. His was one of a fleet of tractor trailers Legacy Equipment had sent to Columbia to pick up crane parts and bring them back to Alabama where the company is based and where Rutherford resides. (See Depo. of Rutherford, pp. 8-9; and p. 16, line 23 – p. 17, line 6). After loading his trailer with crane parts in the Maxim Crane Yard on Bluff Road, Rutherford was headed back to the Petro Truck Stop. He was on Bluff Road in the left turn only lane of Bluff Road and South Beltline Boulevard, and intended to turn his tractor trailer left at the intersection onto South Beltline Boulevard so he could get back into the Petro Truck Stop. (Depo. of Rutherford, pp. 9-10). He pulled up into the left turn only lane on a flashing yellow arrow and testified in his deposition that "When traffic cleared I started to make my turn, and out of nowhere Mr. Sharpe came. By the time I seen him there was nowhere I could go. He never – I'm assuming never slowed down. He hit me and that's how it happened." (Depo. of Rutherford, p. 10, line 5 – line 21). Mr. Sharpe struck the front tire and front bumper on the passenger side of the tractor Mr. Rutherford was driving. (Depo. of Rutherford, p. 11, lines 6-9). Rutherford did not have any estimate as to Mr. Sharpe's speed at the time of the accident. "I did not have a radar and no way of determining except to say that it had to have been pretty extensive. He shook me pretty hard". (Depo. of Rutherford, p. 11, lines 10-14).

Rutherford admitted Mr. Shape had the right of way at the time the accident took place. (Depo. of Rutherford, p. 12, lines 1-4). The only thing he could think of anything Mr. Sharpe did to cause the accident was "traveling way too fast", but he did not know how fast he was going. (Depo. of Rutherford, p. 12, lines 5-10). Rutherford had never been through that intersection of Bluff Road and South Beltline Boulevard before this accident. (Depo. of Rutherford, p. 15, line 21 – p. 16, line 3).

Respondent Bill R. Sharpe (Sharpe) testified in his deposition that he was proceeding straight down Bluff Road in one of the lanes to go straight as he approached the intersection. He saw the 18 wheeler in the left turn lane of oncoming Bluff Road traffic. Just as he started to enter the intersection, all of a sudden the tractor trailer driven by Rutherford turned left in front of him. (Depo. of Sharpe, p. 67, line 22 – p. 68, line 14). Sharpe testified he was going 35-40 miles per hour as he approached the intersection and the speed limit on that stretch of Bluff Road is 40 miles per hour. (Depo. of Sharpe, p. 77, lines 5-10). Sharpe testified again that he was traveling 35-40 miles per hour as he approached the intersection. (Depo. of Sharpe, p. 85, lines 6-7). He testified that he knew he was going to hit the tractor trailer driven by Rutherford and there was nothing he could do about it and did not have time to hit the brakes. (Depo. of Sharpe, p. 85, line 10 – p. 86, line 2).

Plaintiffs' Exhibits A-D in their Memorandum show the intersection of Bluff Road southbound and South Beltline Boulevard and the view from the left turn only lane where Rutherford was located when he made his left turn in front of Sharpe. (Plaintiffs' Memorandum in Support of Summary Judgment, Exhibits A-D, R. pp. ______ - ______).

These photographs show the traffic signal facing Mr. Rutherford at the time of the accident which has a red arrow at the top, a solid yellow arrow in the middle of the traffic signal and a flashing yellow arrow at the bottom of the signal, along with a sign which states, "Left Turn Yield On Flashing" and then a yellow arrow symbol.

STANDARD OF REVIEW

Summary judgment is appropriate when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), S.C.R.C.P.; *Osborne v. Adams*, 346 S.C. 4, 550 S.E.2d 319 (2001). In considering whether summary judgment is appropriate, the court must construe all ambiguities, conclusions and reasonable inferences arising from the evidence against the moving party. *Osborne*, *supra*. The standard for granting summary judgment under Rule 56 of the S.C.R.C.P. and directed verdict under Rule 50 of the Rules is the same. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 115, 410 S.E.2d 537 (1991).

For purposes of summary judgment, an issue is 'material' if the facts alleged are such as to constitute a legal defense or are of such a nature as to affect the result of the action. *Nelson v. Piggly Wiggly Center, Inc.*, 390 S.C. 382, 701 S.E.2d 776 (Ct. App. 2010). A party cannot create a genuine issue of fact through mere speculation. *Hoard v. Roper Hospital, Inc.*, 387 S.C. 539, 694 S.E.2d 1 (2010). The nonmoving party may not rest on the allegations of their pleading without more to overcome a motion, but must demonstrate by other evidence that a *genuine* issue of material fact exists. *Klippel v. Mid Carolina Oil, Inc.*, 303 S.C. 127, 399 S.E.2d 163 (Ct. App. 1990) (emphasis added); *Dyer v. Moss*, 284 S.C. 208, 325 S.E.2d 69 (Ct. App. 1995). The rule requiring submission of

issues to a jury whenever there is material evidence tending to establish an issue in the mind of a reasonable juror does not require submission of speculative, theoretical and hypothetical views to a jury. *Hanahan v. Simpson*, 326 S.C. 140, 45 S.E.2d 903 (1997). The "scintilla of evidence" on which a case should be sent to a jury must be real, material and pertinent and relevant evidence, not speculative and theoretical deductions. *Johnson v. Metropolitan Life Insurance Company*, 206 S.C. 415, 419, 34 S.E.2d 757 (1945).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY GRANTED SUMMARY JUDGMENT FOR THE RESPONDENTS GIVEN THE ABSENCE OF EVIDENCE SUFFICIENT TO RAISE A REASONABLE INFERENCE THAT THIS ACCIDENT WOULD NOT HAVE OCCURRED BUT FOR THE NEGLIGENCE OF SHARPE PURSUANT TO *HORTON V. GREYHOUND CORP.* AND THE CASES FLOWING THEREFROM.

This is not a complicated case. An out of state truck driver who was unfamiliar with the area turned his 18 wheeler loaded with crane parts left on a flashing yellow arrow in a left turn only lane directly in front of Respondent Sharpe. It is uncontested that Sharpe had the right of way at the time of the accident. Rutherford had a mandatory duty to yield the right of way when making his left hand turn to any vehicle approaching from the opposite direction which was within the intersection or so close thereto as to constitute an immediate hazard. Section 56-5-2320, S.C. Code Ann. (1976 as amended). Rutherford did not do so.

The Appellants were required to present evidence sufficient to raise a reasonable inference that this accident would not have occurred but for the negligence of Sharpe pursuant to *Horton v. Greyhound*, 241 S.C. 430, 128 S.E.2d 776 (1962). "Our conclusion

does not and need not rest on a certainty that, if the bus had been operating 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." *Horton, supra* at 441. This proposition of law has been reiterated and reaffirmed again and again for the past sixty years. See *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); *Blanding v. Hammell*, 267 S.C. 352, 228 S.E.2d 271 (1976). It was reiterated again by our Supreme Court in *Miller v. FerrellGas, L.P., Inc.*, 392 S.C. 295, 709 S.E.2d 616 (2011).

The evidence relied upon by the Appellants is actually no evidence at all. It is Rutherford's testimony that although he does not have an estimate as to Plaintiff Sharpe's speed (presumably because he appeared "out of nowhere") his speed "had to have been pretty extensive. He shook me pretty hard". The only thing Rutherford said that Sharpe could have done to cause the accident was "traveling way too fast" when he has no estimate as to the speed Sharpe was going. These are mere conclusory statements. Thus, the negligence alleged on the part of Sharpe seems to be the fact that there was an accident. This is simply insufficient given the case law in South Carolina.

The Appellants cite a series of cases to support their contention that the evidence they presented to the Circuit Court Judge was sufficient to overcome a motion for summary judgment and the clear mandates of the *Horton, supra* line of cases.

The Appellants cite *Clark v. Cantrell*, 332 S.C. 433, 504 S.E2d 605 (Ct. App.

1998); 339 S.C. 369, 529 S.E.2d 528 (2000 affirmed as modified); *Tubbs v. Bowie*, 308 S.C. 155, 417 S.E.2d 550 (1992); *Davis v. Tripp*, 338 S.C. 226, 525 S.E.2d 528 (Ct. App. 1999); and *Roumillat v. Keller*, 252 S.C. 512, 167 S.E.2d 425 (1969). In all of those cases, there was actual evidence which raised reasonable inferences of excessive speed, failure to keep a proper lookout, and failure to take available evasive action as proximately causing the accident even though the vehicle at issue had the right-of-way. All of the cases are very fact specific.

In some of the cases cited by Appellants, the Court determined that the vehicle which had the right-of-way could not be reasonably found to have proximately caused the accident even though it was exceeding the speed limit and not keeping a proper lookout or failing to reduce speed on an icy road. See *Blanding v. Hammell, supra*; and *Alston v. Blue Ridge Transfer Company*, 308 S.C. 292, 417 S.E.2d 631 (1992).

In *Clark v. Cantrell, supra,* there was evidence from an independent witness who testified Cantrell (driving the vehicle with the right-of-way) passed her at a speed of 75-80 miles per hour in a 35 mile per hour speed limit zone right before the accident. Another independent eyewitness estimated Cantrell's speed at 75-100 miles per hour right before the accident. The trooper who investigated the accident and performed an accident reconstruction estimated Cantrell's speed at 67-71 miles per hour when she first applied her brakes. Cantrell's own accident reconstruction report estimated her speed at 57 miles per hour at the time of the accident. Thus her speed was anywhere from 22 miles per hour to 65 miles per hour over the speed limit at the time of the accident. Given that evidence, of course the issue of Cantrell's negligence was submitted to the

jury. That is not the case here.

In *Tubbs, supra*, a passenger sued the driver of the vehicle she was in when it struck a dump truck which entered the highway in front of the defendant some 350 feet away. There was evidence that the driver was traveling at a high and excessive speed and failed to take appropriate evasive action upon seeing the Glasscock truck entering the highway at a distance of some 350 feet. *Tubbs, supra* at 157. Clearly that is not the case here. There is absolutely no evidence of Respondent Sharpe's distance from the intersection when Rutherford started turning except Sharpe's testimony that Rutherford turned in front of him just as he was entering the intersection.

In *Davis, supra*, the defendant taxi's speedometer was broken but the defendant admitted to going at least 60 miles per hour, which was 5 miles over the speed limit and had passed several vehicles just before the accident, so his speed could have reasonably been inferred to be higher. The defendant driver saw a vehicle sitting in the median of the dominant highway as he approached and turned and looked at the passenger in the taxi he was driving and said "Yeah that's what he needs to do is just pull out. I need a new car." When he looked back at the road, the other car had in fact pulled out and a tremendous collision ensued. The defendant also admitted he could have pulled to the left into the median and missed the car. *Davis, supra* at 236, 237.

In *Roumillat, supra*, the defendant was driving 65 miles per hour in a 45 mile per hour zone in congested traffic and after being struck by another vehicle, traveled 105 yards and crossed a median to strike the plaintiff head on.

In *Blanding, supra*, our Supreme Court ruled that even though there was evidence

the defendant was traveling above the posted speed limit, as a matter of law it was not a contributing factor to the accident when the plaintiff stopped at the dominant highway and then proceeded across the four lane highway from a private drive. The court noted that even though the defendant was speeding, it was not so excessive as to proximately cause the accident. The court ruled that directive verdict for the defendant was appropriate pursuant to *Odom*, *supra*; *Horton*, *supra*; and *Kennedy*, *supra*. Additionally, the court in *Blanding* ruled that even though the driver on the dominant highway had looked into his mirror to change lanes just before the accident and more than a split second in time elapsed between the time he looked into his mirror and observed the defendant in the road, it was not enough time to give rise to an inference of improper lookout. *Blanding* at 358. "[a]n automobile may not be controlled by brakes or steering so as to avoid a hazard which becomes apparent for only a split second before the point of impact is reached." *Blanding* at 358.

In *Alston*, *supra*, this court found that even though a truck driver did not reduce speed on an icy road, his speed was not a proximate cause of an accident with an oncoming vehicle which skidded on the ice into his lanes. The mere fact the speed of the truck placed it in its lane opposite Alston at the time of the accident, a point where it had the legal right to be, was without legal significance. *Alston*, *supra* at 296; citing *Odom* and *Horton*, *supra*.

There is a complete failure of evidence on the part of the Appellants to raise a reasonable inference that the Respondent Sharpe was driving over the speed limit at all, much less at a speed such that an accident with an 18 wheeler turning left in front of him

could have been avoided had he been driving at a lower speed. There is absolutely no evidence as to Sharpe's position on Bluff Road when Rutherford started his turn except for the testimony of Sharpe. All Rutherford said was that he started his turn "when traffic cleared". That does not raise a reasonable inference that Sharpe was not approaching the intersection at the time Rutherford started to turn. It simply means that Rutherford did not see him.

There is no evidence that Sharpe looked at a passenger and commented that Rutherford should just go ahead and turn in front of him because he needed a new truck. There is no evidence that Respondent Sharpe was exceeding the 40 mile per hour speed limit by anywhere from 22 miles per hour to 65 miles per hour (62 miles per hour to 105 miles per hour) and that this is what caused the accident. In fact there is no evidence as to Sharpe's speed whatsoever except his own testimony that he was driving between 35 miles per hour and the speed limit of 40 miles per hour.

The Appellants seem to rest their allegations concerning Sharpe's speed and alleged failure to keep a proper lookout on Rutherford's statement that he waited for traffic to clear before starting his turn. Thus, Appellants would have this Court find that it would be a reasonable inference that Respondent Sharpe was so far back away from the intersection at the time Rutherford started his turn that he could not be seen by Rutherford or any other driver keeping a proper lookout and that Sharpe covered this massive distance almost instantaneously, coming out of "nowhere". This is hardly a reasonable inference given the laws of physics. The distance one can see down Bluff Road from the left turn only lane of southbound Bluff Road is several hundred yards as

evidenced by the photographs entered into evidence by the Respondents. (See Plaintiffs' Memorandum Exhibits A-D). Respondent Sharpe's speed from such a distance in order for him to strike Rutherford from "out of nowhere" as soon as he started to make his turn would have had to be miraculous. This is not a reasonable inference and this is not a genuine issue of material fact. The only reasonable inference given the evidence is that Rutherford failed to see what was plainly visible. Sharpe was closely approaching the intersection when Rutherford made his turn, just as Sharpe testified in his deposition.

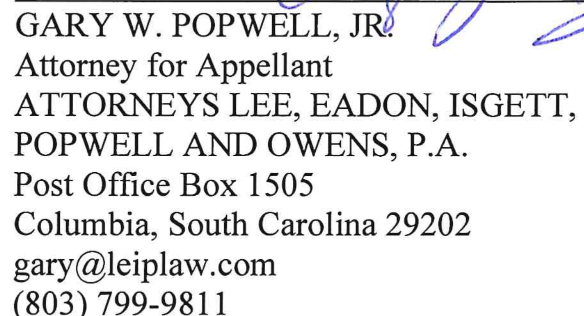
Finally, the Appellants state that the last clear chance doctrine mandates submission of this case to a jury. Suffice to say that absent evidence raising at least a reasonable inference of negligence on the part of Sharpe which acted as a proximate cause of this accident, last clear chance would not apply even if it were available to a defendant. The doctrine of last clear chance is a doctrine available to plaintiffs when they have placed themselves in a position of peril and are powerless to extricate themselves from it and a defendant who could have taken evasive action or reduced speed in order to avoid the accident fails to do so despite adequate opportunity to do so. The Appellants have cited no case in South Carolina where the doctrine has been used by a defendant against a plaintiff. Although it has been subsumed by comparative negligence pursuant to *Spahn v. Town of Port Royal*, 330 S.C. 168, 499 S.E.2d 205 (1998), it can't be used against a plaintiff, much less a plaintiff against whom there are no plausible allegations of negligence other than conclusory statements and no specific evidence whatsoever of the plaintiff's negligence. *Spahn* involved a johnboat which fell off the plaintiff's truck. Plaintiff and his brother were attempting to get the johnboat out of the road when it was

struck by a police car. Its facts have no similarity whatsoever with this case. The Appellants' quote of the jury instruction approved in *Spahn*, *supra* substitutes "plaintiff" for "defendant" and vice versa. *Spahn* at 174. This is not what *Spahn* says. It refers to principles of last clear chance asserted by a plaintiff against a defendant.

CONCLUSION

There was ample evidence presented at the summary judgment hearing in his case from which the Circuit Court Judge properly granted summary judgment in favor of the Plaintiffs on the issue of liability alone. There was no evidence presented which raised reasonable inferences and created genuine issues of material fact concerning any alleged negligence on the part of Respondent Sharpe which proximately caused this accident. The Appellants urge this Court to basically overturn over sixty years of the *Horton* line of cases on the basis of conclusory statements with no evidentiary basis. Respondents respectfully argue that "out of nowhere" and "too fast" are insufficient to create a *genuine* issue of material fact by raising a *reasonable* inference. The Order of the lower court granting the Plaintiffs summary judgment on the issue of liability should be affirmed.

Respectfully submitted,



By: ______________________________
GARY W. POPWELL, JR.
Attorney for Appellant
ATTORNEYS LEE, EADON, ISGETT, POPWELL AND OWENS, P.A.
Post Office Box 1505
Columbia, South Carolina 29202
gary@leiplaw.com
(803) 799-9811

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THE STATE OF SOUTH CAROLINA
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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.

PROOF OF SERVICE

I certify that I have served the ***Respondents' Initial Brief and Designation of Matter to be Included in the Record on Appeal*** on Appellants by emailing to their attorneys of record as follows: Everett A. Kendall, Esquire (*rkendall@murphygrantland.com*) and Phillip Florence, Jr., Esquire (*pflorence@murphygrantland.com*) - Post Office Box 6648 – Columbia, SC 29260; Mark B. Goddard, Esquire (*mgoddard@turnerpadget.com*) - Post Office Box 1473 – Columbia, SC 29202; Thomas Jonathan Clark, Esquire (*jclark@wardfirm.com*) and John Elliott Rogers, II, Esquire (*jrogers@wardfirm.com*) – Post Office Box 5663 – Spartanburg, SC 29304.

March 29, 2023.

GARY W. POPWELL, JR.
Attorneys Lee, Eadon, Isgett,
Popwell & Owens
Attorney for Respondents
Post Office Box 1505
Columbia, South Carolina 29202
(803) 799-9811
gary@leiplaw.com

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Attorneys

LEE, EADON, ISGETT, POPWELL AND OWENS, P.A.

LUTHER M. LEE (1923-1996)
SHEROD H. EADON, JR., OF COUNSEL
CHRISTOPHER G. ISGETT
GARY W. POPWELL, JR.
BRETT A. OWENS
ZACHARY D. LINOWSKI

1314 LINCOLN STREET
POST OFFICE BOX 1505
COLUMBIA, SOUTH CAROLINA 29202
TELEPHONE (803) 799-9811
FAX (803) 807-9820
TOLL FREE (800) 882-0742
www.leiplaw.com

March 30, 2023

VIA EMAIL: CTAPPFILINGS@SCCOURTS.ORG
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
Post Office Box 11629
1220 Senate Street
Columbia, South Carolina 29211

Re: Bill R. Sharpe and Angela Sharpe -vs- Rocky Rutherford, Legacy Equipment, Inc., and G.A. West and Company, Inc.
Appellate Case No.: 2023-000060

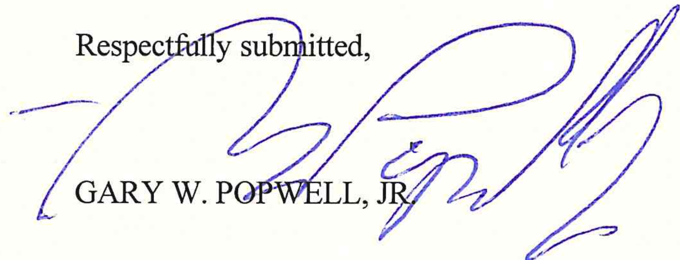
Dear Ms. Kitchings:

Please find enclosed for filing the Initial Brief of Respondents and Designation of Matter to Be Included in the Record on Appeal, along with the Proof of Service, in the above-referenced matter.

Please return clocked copies via email.

By copy of this letter and as evidenced by the attached Proof of Service, I am serving a copy of the Initial Brief of Appellant and Designation of Matter to Be Included in the Record on Appeal on counsel for the Appellants.

Respectfully submitted,



GARY W. POPWELL, JR.

GWPJr/gsr
Enclosures

cc: Everett A. Kendall, Esquire (*rkendall@murphygrantland.com*)
Phillip Florence, Jr., Esquire (*pflorence@murphygrantland.com*)
Mark B. Goddard, Esquire (*mgoddard@turnerpadget.com*)
Thomas Jonathan Clark, Esquire (*jclark@wardfirm.com*)
John Elliott Rogers, II, Esquire (*jrogers@wardfirm.com*)