THE STATE OF SOUTH CAROLINA
In The Supreme Court

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S.C. SUPREME COURT

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Unpublished Opinion No. 2023-UP-179
Submitted March 1, 2023 – Filed May 11, 2023
Appellate Case No. 2022-000082

RONALD L. MIMS,

Petitioner,

vs.

DIANE W. RAY

Respondent.

PETITION FOR WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on July 5, 2023.

QUESTION PRESENTED

1. IS THE COURT OF APPEALS' DETERMINATION TO UPHOLD THE LOWER COURT'S DECISION THAT ONLY A SINGLE INFERENCE COULD BE DRAWN FROM THE EVIDENCE— THAT PETITIONER'S NEGLIGENCE EXCEEDED ANY POTENTIAL NEGLIGENCE OF RESPONDENT, IN CONFLICT WITH THIS COURT'S PRECEDENT?

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 L. 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 Judgement on July 15, 2020 and Ronald L. Mims served his Memorandum in Opposing 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 Opposing to Defendant's Motion for Summary Judgement on October 30, 2020 in light of the Court of Appeals' 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 Judgement 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 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. Ronald L. Mims requested an extension of time to serve and file his initial brief and designation of matter to be included in the Record on Appeal until April 3, 2022. The Court of Appeals granted Mims' request.

Mims filed his Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal on April 1, 2022. Diane W. Ray served and filed her Initial Brief of Respondent on June 23, 2022. Appellant's Final Brief and Record on Appeal was filed with the South Carolina Court of Appeals on August 11, 2022. Respondent's Final Brief and Record on Appeal was filed with the South Carolina Court of Appeals on August 12, 2022.

The South Carolina Court of Appeals affirmed the lower court's decision on May 11, 2023. Ronald L. Mims filed a Petition for Rehearing on May 26, 2023. Thereafter, on July 5, 2023, the parties were made aware of the South Carolina Court of Appeals' decision denying Appellant's Petition for Rehearing.

On August 4, 2023, Ronald L. Mims sought a 20-day extension to file the subject Writ of Certiorari. This Court generously granted Ronald L. Mims' request for an extension until August 24, 2023.

ARGUMENT

The South Carolina Court of Appeals mistakenly agreed with the lower court's determination that the evidence supported only a single inference—that Petitioner's negligence exceeded any potential negligence of Respondent, despite this Court's precedent. Petitioner requests the South Carolina Supreme Court reverse the South Carolina Court of Appeals' decision affirming the lower court as more than a single inference as to percentage of fault could be generated from the evidence presented and, as such, allow the jury to allocate the percentages of comparative negligence, if any.

In ruling on Diane W. Ray's Motion for Summary Judgement, the lower court was asked to determine whether any material fact exists, and whether the evidence and all inferences to be drawn from the evidence, produced only a single conclusion—whether Ronald L. Mims' fault exceeded that of Diane W. Ray's. This Court's prior decisions have made clear: when the evidence supports more than a single inference, summary judgement is improper, and the issue must be determined by a jury. "The issues of negligence should go to the jury: (1) When the facts which, if true, would constitute evidence of negligence, are controverted. (2) When such facts are not disputed, but there may be a fair difference of opinion as to whether the inference of negligence should be drawn. (3) When the facts are in dispute and the inferences to be drawn therefrom, are doubtful." *Wood v. Victor Mfg. Co*, 45 S.E.81, 66 S.C. 482 (S.C. 1903). "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). When presented with a choice of

conflicting inferences, a jury must determine the respective degree of each party's negligence. It is improper for a trial court, during a motion for summary judgement, to serve as the trier of fact. Here, the evidence supported more than a single inference and the lower court should have denied Diane W. Ray's motion for summary judgement so that a jury, the determiner of fact, could apportion fault among the parties.

Diane W. Ray filed a motion for summary judgment on July 15, 2020. Rule 56(c) SCRCP 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 judgment as a matter of law." Rule 56(c) SCRCP. "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 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). "In determining whether summary judgement is appropriate, a court must not try issues of fact, but must discern whether genuine issues of fact exist to be tried. *Spencer v. Miller*, 259 S.C. 453, 192 S.E.2d 863 (1972). "If triable issues exist, those issues must go to the jury." *Id*. "Summary judgment is proper where plain, palpable, and indisputable facts exist on which reasonable minds cannot differ." *Williams v. Chesterfield Lumbar Co.*, 267 S.C. 607, 230 S.E.2d 447 (1976).

The facts constituting negligence among the parties are in dispute and thus the issue of negligence must go to the jury. *See Wood v. Victor Mfg. Co*, 45 S.E.81, 66 S.C. 482 (S.C. 1903). The parties in this matter have polarized arguments as to whether Diane W. Ray, the motorist, was negligent in the subject June 20, 2019 crash with pedestrian Ronald L. Mims and whether Ronald

L. Mims' own negligence exceeded that of Diane W. Ray's barring Ronald L. Mims from recovery.

At a minimum, Diane W. Ray owed Ronald L. 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 . . . "). Diane W. Ray understood this duty. *See* APPENDIX 221; lines 11-22. Diane W. Ray breached the duty owed to Ronald L. Mims when she failed to timely see him. By her own account, she never saw Ronald L. Mims until her vehicle made contact with him. *See* APPENDIX 214, lines 22-24; APPENDIX 212, lines 11-13. Ronald L. Mims' unfortunate choice to not use the [nonexistent] crosswalk did not excuse Diane W. Ray from her urgent duty to not only look, but to see.

The lower court improperly found, and appellate court mistakenly agreed, the evidence supported only a single inference—that Ronald L. Mims' own negligence exceeded any potential negligence of Diane W. Ray and therefore barred Ronald L. Mims from recovery. A jury will be tasked with evaluating witness credibility, and asked to consider the witnesses interests, biases, prejudices, and demeanor. By evaluating the testimony of Diane W. Ray a juror may interpret her testimony that she never saw Ronald L. Mims until she made contact with him as incompatible with a careful lookout. A second reasonable juror may think that a careful and prudent driver would have taken a wider turn away from the parked delivery truck to get a better view of any pedestrians Diane W. Ray would have expected to be present *See* APPENDIX 215, lines 13-18; APPENDIX 214, line 25 – APPENDIX 215, line 1; APPENDIX 215, line 2 – APPENDIX 216, line 4. These are only a few examples of reasonable inferences that could be reached by a jury given the evidence presented during the subject motion for summary judgment. Because the lower court was forced

to select a single inference among many, it was improper of the lower court to grant Diane W. Ray's motion for summary judgement.

CONCLUSION

For the foregoing reasons, Ronald L. Mims asks this Court to issue a writ of *certiorari*, reverse the Court of Appeals, and order the Court of Appeals to overturn the lower court's decision in granting Diane W. Ray's motion for summary judgment.

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