THE STATE OF SOUTH CAROLINA

In the Court of Appeals

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY

Michael G. Nettles, Circuit Court Judge

Case No. 2013-CP-21-2395

Appeal Tracking No. 2014-001626

Anthony Fischetti, as Executor of the Estate of Concetta Fischetti.....Respondent,

v.

SeaTruck, Inc., KC Freight, LLC, and Carlos L. Ceballos.....Appellants.

INITIAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

South Carolina Cases

Federal and Out-of-State Cases

Learned Treatises

ISSUES ON APPEAL

I. **Should this court affirm summary judgment as to the Appellants' affirmative defense of "assumption of risk" where no such affirmative defense exists under South Carolina law?**

II. **Should this court affirm summary judgment as to the Appellants' affirmative defense of "unavoidable accident" where no such affirmative defense exists under South Carolina law and no facts exist to support the assertion of "unavoidable accident"?**

III. **Should this court affirm summary judgment as to the Appellants' affirmative defense of "spoliation of evidence" where no such affirmative defense exists under South Carolina law and no facts exist to support the assertion of spoliation?**

STATEMENT OF THE CASE

This action arises from an automobile collision between an automobile and a tractor trailer that occurred on Interstate 95 in Florence County, South Carolina on October 9, 2012. Concetta Fishetti, a passenger in the automobile, was killed in the collision. Her son, Respondent Anthony Fischetti, filed the complaint in this matter on September 12, 2013, alleging that his mother's death was caused by the negligent acts of the various defendants. (Complaint)

The defendants answered the Respondent's complaint with general denials and ten separate affirmative defenses. (Defendants' Answers) On May 15, 2014, Respondent moved for summary judgment as to eight of these defenses. (Motion for Summary Judgment) The trial court heard the motion for summary judgment on June 16, 2014 and granted summary judgment as to five of the eight affirmative defenses via written order filed on July 16, 2014. (Order) Appellants timely filed notice of appeal of the written order on July 23, 2014. (Notice of Appeal)

STATEMENT OF THE FACTS

Respondent Anthony Fischetti is the son of Concetta Fischetti, who was killed in an automobile/tractor trailer collision on Interstate 95 that occurred on October 12, 2012. Respondent filed the complaint in this matter on September 12, 2013, alleging that his mother's death resulted from the Appellants' negligent acts. (Complaint) Generally, Respondent alleged that a tractor trailer driven by Appellant Ceballos forced Concetta Fischetti's vehicle off of the road, causing it to lose control before veering back into the highway and impacting the tractor trailor. (Complaint) The Appellants answered the complaint on November 4, 2013, generally denying the Respondent's allegations and separately asserting ten individual affirmative defenses. (KC Freight/Ceballos Answer; SeaTruck Answer)

After the Appellants' answered the complaint, the parties initiated comprehensive discovery. Appellants KC Freight/Ceballos served their first requests for production and interrogatories upon the Respondent on November 13, 2013. (Defendants' 11/13/13 Requests for Production) The Appellants SeaTruck served their first interrogatories and request for production upon the respondent the next day. (Defendants' 11/14/13 Interrogatories) The Respondent answered both the interrogatories and the requests for production on December 17, 2013. (Plaintiff's 12/17/13 Answers to Discovery) Between December 17, 2013 and January 31, 2104, Appellants then served eight subpoenas *duces tecum* on third parties. (Defendants' December 2013 and January 2014 subpoenas)

Defendants noticed the depositions of Anthony Fishcetti and two other fact witnesses for March 31, 2014. (March 31, 2014 Deposition Notices) Respondent likewise noticed the depositions of Carlos Ceballos (the driver of the tractor trailer) and one other fact witness for April 2, 2014. (April 2, 2014 Deposition Notices) Respondent provided

to Appellants his first supplemental answers to interrogatories and responses to requests for production on May 5, 2014. (May 5, 2014 Supplemental Answers and Responses)

On May 15, 2014, Respondent filed a motion for summary judgment seeking judgment as a matter of law as to eight of the Appellants' ten affirmative defenses. (Motion for Summary Judgment; Memorandum in Support of Motion for Summary Judgment)

Respondent served upon the Defendant his second supplemental discovery responses on May 20, 2014. (Second Supplemental Discovery Responses) Respondent's third supplemental answers to interrogatories were provided to the Appellants on May 27, 2014. (Third Supplemental Answers to Interrogatories) Respondent's third supplemental responses to requests for production and a fourth supplemental answer to interrogatories were provided to the Appellants on June 3, 2014. (Third Supplemental Responses to Requests for Production; Fourth Supplemental Answers to Interrogatories)

Circuit Judge Michael Nettles heard the Plaintiff's motion for summary judgment on June 16, 2014. (Transcript Cover Page) As of that date, zero discovery requests or deposition notices served by the Appellants were pending. In the middle of the hearing, Appellants submitted for the court's consideration a nine page memorandum in opposition to the motion, accompanied by 49 pages of exhibits. (Transcript at 4; Defendants' Memorandum in Opposition with Exhibits) The trial court denied the motion as to the affirmative defenses of comparative negligence (Transcript at 7), sudden emergency (Transcript at 10), and waiver and estoppel (Transcript at 17).The court granted the motion as to assumption of risk (Transcript at 12), unavoidable accident

(Transcript at 14-15), improper venue (Transcript at 16), statute of limitations (Transcript at 17), and spoliation of evidence (Transcript at 18-19).

This appeal followed.[1]

ARGUMENT

The trial court correctly ruled that the Respondent was entitled to summary judgment on the Appellants' affirmative defenses of assumption of risk, unavoidable accident, and spoliation of evidence. The legal and factual sufficiency of an affirmative defense is appropriately addressed via a motion for summary judgment. "[A]n affirmative defense usually must be pled in an answer and either resolved in later motions such as summary judgment or directed verdict or at trial." Spence v. Spence, 368 S.C. 106, __, 628 S.E.2d 869, 878 (2006). See also Crosby v. Prysmian Commc'ns Cables, 397 S.C. 101, 723 S.E.2d 813 (Ct. App. 2012)(affirming summary judgment as to Defendant's affirmative defense). "[T]he purpose of summary judgment [is] to expedite disposition of cases not requiring the services of a fact finder." Bankers Trust of South Carolina v. Benson, 267 S.C. 152, 155, 226 S.E.2d 703, 704 (1976). "An appellate court reviews a grant of summary judgment under the same standard applied by the trial court pursuant to Rule 56, SCRCP." Hedgepath v. American Tel. & Tel. Co., 348 S.C. 340, 354, 559 S.E.2d 327, __ (Ct. App. 2001).

Here, the three affirmative defenses at issue fail as a matter of law because none are recognized as "affirmative defenses" in South Carolina. The latter two affirmative defenses—"unavoidable accident" and "spoliation of evidence"—also fail because no

[1] The Appellants have not appealed the trial court's rulings on the affirmative defenses of improper venue and statute of limitations. The unappealed portions of the trial court's order thus have become the law of the case. See Judy v. Martin, 381 S.C. 455, 674 S.E.2d 151 (2009).

factual evidence exists supporting such arguments. As a result, the trial court's rulings on each of these affirmative defenses should be affirmed.

I. "Assumption of Risk" is not an affirmative defense under South Carolina law

This court should affirm the trial court's grant of summary judgment as to "assumption of risk" (as an affirmative defense) because the trial court correctly ruled that "assumption of risk" has been subsumed within the defense of comparative negligence. Our Supreme Court observes that "[t]his Court effectively abolished the affirmative defense of assumption of the risk in Davenport v. Cotton Hope Plantation, holding that the doctrine had been largely subsumed by the law of comparative negligence." Cole v. Raut, 378 S.C. 398, __, 663 S.E.2d 30, 33 (2008), citing Davenport 333 S.C. 71, 78, 508 S.E.2d 565, 574 (1998). The trial court, in effect, granted summary judgment on the same basis.

> ...I'm going to have to grant his motion in that regard. I think the law is very clear that comparative negligence does address the issue of assumption of risk. You can make the same arguments to the jury in saying they are negligent in this regard for whatever reason, but the concept of assumption of risk no longer exists...

(Transcript at 12)

The Appellants misapprehend the present state of the law on assumption of risk, arguing that summary judgment must be denied on their affirmative defense "so that a jury charge regarding [assumption of the risk] can be given to the jury."[2] (Appellant's

[2] The ability to argue "assumption of risk" to the jury as a component of comparative negligence is not what the Appellants pleaded. Rather, the Appellants averred that "assumption of risk" was "a complete bar to this action." (Appellants' Answers) That

Brief at 13) However, as noted above, the trial court denied Respondent's motion for summary judgment as to comparative negligence. (Transcript at 7) In fact, the trial court went further to note that—despite its ruling as to the specific affirmative defense of assumption of risk, "[y]ou can make the same arguments to the jury in saying they are negligent in this regard for whatever reason." (Transcript at 12) Thus, the prejudice the Appellant's perceive within the trial court's ruling—a procedural prohibition from arguing comparative negligence via some assumption of risk—has not manifested.[3]

II. "Unavoidable Accident" is not an affirmative defense under South Carolina law and no facts exist to support such a defense even if it did exist

This court should affirm the trial court's grant of summary judgment as to "unavoidable accident" because, first, it is not an affirmative defense as a matter of law. Appellants concede this point in their brief, noting that the argument is "an integral part of a defendant's general defenses rather than as an affirmative defense upon which a defendant has the burden of proof." (Appellant's Brief at 13) See also Tucker v. Reynolds, 268 S.C. 330, 336, 233 S.E.2d 402, 404-405 (1977)("[T]he assertion of unavoidable accident is not an affirmative defense.") As with assumption of risk, the Appellants remain free to request such a jury charge (should the facts warrant), but unavoidable accident—as an affirmative defense—must be dismissed as a matter of law.

Secondly, even if Appellants appropriately pleaded unavoidable accident as an affirmative defense, there is no genuine issue of material fact supporting this defense.

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misstatement of law gave rise to the Respondent's motion and, eventually, the trial court's order.

[3] Of course, Appellants will still be required to produce evidence of comparative negligence at trial in order to receive their sought-after jury charge. But the trial court's ruling does not prevent them from doing so, provided that such evidence exists.

The Supreme Court holds that the defense of unavoidable accident "is inappropriate where the evidence shows clearly that the accident was caused or contributed to by the negligence of one or more of the parties." White v. Fowler, 276 S.C. 370, 372, 278 S.E.2d 777, 778 (1981). Before the trial court, the Appellants insisted that the deposition testimony of Anthony Fischetti gave rise to the "scintilla of evidence" necessary to preserve the defense of "unavoidable accident" from summary adjudication. "[T]hat testimony, alone, from the Plaintiff's own personal representative, the Decedent's own PR, indicates the accident occurred from a bump in the road. It shot them back onto the interstate and into the Defendant's vehicle. I think that, alone, creates a scintilla." (Transcript at 14) Fischetti's actual testimony, however, reveals that the Respondent's car did not encounter a "bump" in the road, but rather in the grassy median after the Appellants' tractor trailer forced it out of the roadway.

> Q. All right. How much of the trailer moved into your lane?
>
> A. Oh, my God. It had to be about three feet. Between two and three feet into our lane.
>
> ...
>
> Q. All right. So he moves into your lane, and your wife -- now, is she seeing this, or are you telling her, move over?
>
> A. No. My wife saw it at this point.
>
> Q. All right. Did she move -- she turns the steering wheel to the left, right?
>
> ...
>
> A. Yes.
>
> Q. Okay. And then you-all immediately leave the roadway, correct?

A. Yes.

...

Q. And then what happened?

A. We hit -- something happened. The truck jumped up. It hit like an impression in the grass, a

bump or a hole.

Q. I'm sorry. You said the truck.

A. Our truck. Our vehicle.

Q. Okay.

A. The vehicle that we were in, we -- hit like -- I don't know if it was an impression or a bump, okay, but the truck jumped up. The vehicle jumped up and brought us back onto the blacktop, and that's when we collided with the tractor-trailer, the middle of the back.

(Anthony Fischetti Transcript p. 67, l. 19 – p. 69, l. 8) As shown, the sequence of events leading to the "bump"—relied upon by Appellants to justify their appeal to unavoidable accident—did not occur in the absence of negligence. The "bump" occurred only when the tires of the decedent's automobile exited the roadway onto the grassy median—an act which could take place only via the negligence of the Appellants or the negligence of the decedent's driver. Thus the Appellants' defense of unavoidable accident must be dismissed as a matter of law.

III. "Spoliation of Evidence" is not an affirmative defense under South Carolina law, no facts support such a defense even if it did exist, and the spoiliation jury charge remains available to the Appellants

This court should affirm the trial court's summary adjudication of the Appellants' affirmative defense of spoliation of evidence because no such affirmative defense exists under South Carolina law. The Appellants admitted as much before the trial court.

> The Court: Spoliation, would you agree that that is not really a defense, but really a remedy? For instance, if you can prove that he destroyed documents, then I can charge them, you can assume those documents would be damaging to their position. What do you think about that?
>
> Mr. Cavanaugh: I mean, we pleaded, as a defense, but I agree with the Court, yeah, it is a jury charge if there is evidence in the record that shows—
>
> The Court: you can't say, you can't get sued and say they destroyed documents and therefore I sought not be sued.
>
> Mr. Cavanaugh: I would agree with the Court, Your Honor. I would just, you know, we've pled it as a defense. I agree that the Court can instruct the jury if there is evidence—
>
> The Court: That's rather premature.

(Transcript at 18) Our case law affirms that spoliation of evidence is neither a claim nor an affirmative defense to an allegation, but rather a permissible jury charge that "when evidence is lost or destroyed by a party an inference may be drawn by the jury that the evidence which was lost or destroyed by that party would have been adverse to that party." Kershaw County Bd. of Educ. v. U.S. Gypsum Co., 302 S.C. 390, 395, 396 S.E.2d 369, 372 (1990).[4] Thus the trial court correctly granted summary judgment as to spoliation of evidence "pled as a defense" while noting that "the Defendants may seek a spoliation jury instruction at the trial of this case if applicable and proper." (Order)

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[4] In Cole Vision Corp.. v. Hobbs, 394 S.C. 144, 714 S.E.2d 537 (2011), the Supreme Court stated that "our conclusion that [a party] is unable to bring an independent claim [for spoliation] does not preclude him from asserting spoliation as a defense." Id. At 153, 714 S.E.2d at 542. In support of this statement, the court citied the New Jersey case of Hirsch v. General Motors Corp., which itself recognized three legal doctrines applicable to spoliation: "the spoliation tort, the spoliation inference and civil discovery sanctions." 628 A.2d 1108, 1125, 266 N.J.Super. 222, 256 (N.J. Super. L. 1993). Having rejected the notion of a spoliation tort, the Hobbs court thus merely restated the existing adverse inference defense previously set forth in Kershaw County Bd. Of Educ. v. U.S. Gypsum Co., supra, or suggested a possible remedy through discovery sanctions. Hobbs did not, however, give rise to a new, previously unrecognized, affirmative defense.

Appellants argue that Anthony Fischetti's lack of knowledge of the present whereabouts of the vehicle in which his mother was killed gives rise to an affirmative defense of spoliation of evidence. As shown above, however, this argument was not raised before the trial court during argument.[5] Appellants' memorandum offered to the trial court also failed to assert any evidence of spoliation, insisting rather that "[d]ismissal of the affirmative defense of spoliation at this stage in the litigation would be particularly prejudicial to the Defendants as discovery is still on-going...." (Defendants' Memorandum in Opposition at 8) At the time of the June 16, 2014 hearing, however, litigation had been on-going for over nine months. Written discovery, depositions, and document subpoenas had been exchanged. Appellants had made no attempt to inspect the Respondent's vehicle and asserted no intent to do so at the hearing.

> If a material issue of fact can be created by a denial based on ignorance of the facts and neglecting to pursue discovery, the office of summary judgment would be mummified. Parties would be subjected to the burden of a trial merely because formal and pretended averments can not be separated from genuine factual controversies. Yet, the purpose of summary judgment was to expedite disposition of cases not requiring the services of a fact finder.
>
> ...
>
> 'The tools and devices of discovery are more than options and opportunities. Rule 56 ... expressly exacts them by negative compulsion on pain of judicial denouement--saying in effect, 'Meet these affidavit facts or judicially die.' Diligence in opposing a motion for summary judgment is required, for such a motion with supporting logistics and gear does not lose its thrust by an opponent's complacence.'

Bankers Trust of South Carolina at 155, 226 S.E.2d at 704-705, citing Southern Rambler Sales, Inc. v. American Motors Corp., 375 F.2d 932, 937 (5th Cir. 1967); King v.

[5] "Appellant did not object on this specific ground below and therefore this argument is procedurally barred." State v. Tucker, 462 S.E.2d 263, 265, 319 S.C. 425, 428 (1995).

National Industries, Inc., 512 F.2d 29 (6th Cir. 1975); Wright & Miller, Federal Practice and Procedure, § 2740, p. 726 (1973).

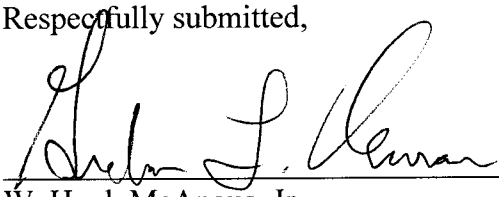
Furthermore, Anthony Fischetti's lack of knowledge of the whereabouts of the vehicle could not possibly raise a defense of spoliation of evidence because the Appellants have already located and inspected the vehicle. In fact, Appellants produced, in the course of discovery, ninety-two (92) post-accident images of the vehicle taken by their investigators or representatives. (Vehicle Photographs) Beyond this inspection, Appellants have made no other requests to "examine the vehicle." Thus any notion of spoliation of evidence is, in the words of Justice Ness, "a formal and pretended averment." Bankers Trust of South Carolina, supra.

Because Appellants' affirmative defense of spoliation of evidence is not recognized as a defense under South Carolina law, and because Appellants have failed to set forth any facts that would support such a defense if it existed, the trial court's order granting summary judgment on this point should be affirmed.

CONCLUSION

Based upon the foregoing, the trial court's order should be affirmed in its entirety.

Respectfully submitted,



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October 20, 2014
Columbia South Carolina

THE STATE OF SOUTH CAROLINA
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APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
Michael G. Nettles, Circuit Court Judge

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Appeal Tracking No. 2014-001626

Anthony Fischetti, as Executor of the Estate of Concetta Fischetti.....Respondent,

v.

SeaTruck, Inc., KC Freight, LLC, and Carlos L. Ceballos.....Appellants.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Respondent and Respondent's Designation of Matters on SeaTruck, Inc., KC Freight, LLC and Carlos L. Ceballos, by depositing a copy of them in the United States Mail, postage prepaid, on October 20, 2014, addressed to their attorney of record and all counsel of record, listed as follows:

Mark Barrow, Esq.
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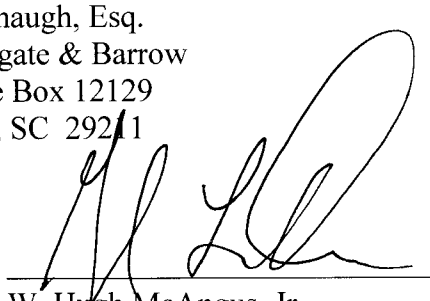

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October 20, 2014

VIA HAND DELIVERY
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RE: Anthony Fischetti, et al. v. SeaTruck, Inc., KC Freight, LLC and Carlos L. Ceballos
Appellate Case No.: 2014-001626/Civil Action No.: 2013-CP-21-2395

Dear Ms. Kitchings:

With regard to the above-referenced matter, enclosed for filing are the original and six copies of Initial Brief of Respondent, Respondent's Designation of Matters and Proof of Service. Please return filed stamped copies of the Initial Brief of Respondent, Respondent's Designation of Matters and Proof of Service.

Thank you for your assistance in this matter and should you have any questions or concerns, please do not hesitate to contact me directly.

Yours Truly,

Bonnie L. Sluce
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/bls
Enclosures
cc. All Attorneys of Record