THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
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.

REPLY BRIEF OF APPELLANT

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STANDARD OF REVIEW

A trial court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review; such an order must include those facts which the trial court finds relevant, determinative of the issues, and undisputed, and the trial court should provide clear notice to all parties and the reviewing court as to the rationale applied in granting summary judgment. SCRCP 56(c). Bowen v. Lee Process Systems Co., 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000).

[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). "A scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable juror." Taylor v. Atlantic Coast Line Railway Co., 78 S.C. 552, 556, 59 S.E. 641, 643 (1907). A scintilla is defined as "a spark or trace" of evidence. Black's Law Dictionary (9th ed.2009).

On review from a grant of summary judgment, the Court applies the same standard applied by the circuit court pursuant to Rule 56(c), SCRCP. Knight v. Austin, 396 S.C. 518, 521–22, 722 S.E.2d 802, 804 (2012). Accordingly, summary judgment is appropriate when the pleadings, depositions, affidavits, and discovery prove there is no genuine issue of material fact and the movant must prevail as a matter of law. Id. In reviewing the evidence, all inferences must be viewed in the light most favorable to the non-moving party. Id. In determining whether a genuine question of fact exists, on a motion for summary judgment, the court must view the evidence and all inferences which can be reasonably drawn from the evidence in the light most favorable to the nonmoving

party. Faile v. South Carolina Dept. of Juvenile Justice, 350 S.C. 315, 566 S.E.2d 536 (2002), rehearing denied.

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 708 S.E.2d 745 (2011). Moreover, because summary judgment is a drastic remedy, it should be cautiously invoked to ensure a litigant is not improperly deprived of a trial on disputed factual issues. Madison ex rel. Bryant v. Babcock Ctr., Inc., 371 S.C. 123, 134, 638 S.E.2d 650, 655 (2006).

As it is clear that a scintilla of evidence exists as to each defense, summary judgment was improper, and Appellants should be able to argue each to a jury. Because this case is not even a year old, summary judgment as to these defenses was improper and premature

ARGUMENT

Respondent's attempt to characterize these defenses as non-affirmative clouds the issue. The trial court granted summary judgment as to five defenses in its July 16, 2014 Order:

> 3. Plaintiff's Motion for Summary Judgment regarding Defendants' Fifth Defense, Assumption of Risk, is granted.
>
> 4. Plaintiff's Motion for Summary Judgment regarding Defendants' Sixth Defense, Unavoidable Accident, is granted.
>
> 5. Plaintiff's Motion for Summary Judgment regarding Defendants' Eighth Defense, Improper Venue, is granted.
>
> 7. Plaintiff's Motion for Summary Judgment regarding Defendants' Tenth Defense, Statute of Limitations, is granted.

8. Plaintiff's Motion for Summary Judgment regarding Defendants' Eleventh Defense, Spoliation, is granted, but the Defendants may seek a spoliation jury instruction at the trial of this case if applicable and proper.

Appellants respectfully contend that regardless of the status of these defenses as affirmative or not, summary judgment was improper because a scintilla of evidence exists and should have precluded summary judgment. Appellants should be allowed to seek jury instructions for these defenses at trial, and that right was not granted for assumption of the risk or unavoidable accident. Because discovery is still ongoing, it was premature for the trial court to make a finding of fact that precludes two of Appellants' defenses in their entirety.

I. As to the defense of unavoidable accident, the record is clear that a scintilla of evidence exists and precludes summary judgment.

Unavoidable accident remains a viable defense under South Carolina jurisprudence. Respondent disingenuously neglects to cite the complete law from Tucker v. Reynolds: "[T]he assertion of unavoidable accident is not an affirmative defense *requiring special proof on the part of the defendant*... Therefore, it was proper for the defendant to allege unavoidable accident in the First Defense of the Answer." 268 S.C. 330, 336, 33 S.E.2d 402, 404-405 (emphasis added). Appellants should be allowed to argue at trial that the accident was unavoidable. If summary judgment is affirmed, Respondent will argue at trial that the issue cannot even be raised. Appellants maintain that there is more than a scintilla of evidence that precludes summary judgment of this defense in this case. Our Supreme Court has held that "in 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, supra., 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In a similar case, conflicting statements by driver, car owner, and owner's employee created a jury question as to driver's permission to use his employer's car and as to liability coverage under the owner's commercial automobile policy. South Carolina Property and Cas. Guar. Ass'n v. Yensen, 345 S.C. 512, 548 S.E.2d 880, (Ct. App. 2001) certiorari denied. Because Respondent and Appellants offer conflicting statements as to the facts immediately preceding the accident, summary judgment was improper and should be reversed.

Appellant Ceballos strongly maintains that he remained in his lane and was unaware of anything out of the ordinary until he felt contact on his left. Summ. J. Hr'g Tr. 3-4, June 16, 2014; R.__. Respondent contends that Ceballos drifted left and forced Concetta Fischetti's vehicle off the road. Anthony Fischetti Dep. 37:18 – 38:9, March 31, 2014; R.__. Because Anthony Fischetti testified that his wife attempted to avoid the accident but was unable to do so, the accident was unavoidable. As such, there is a genuine issue of material fact that exceeds a scintilla of evidence.

The trial court granted Respondent's motion for summary judgment as to unavoidable accident, "because even if there's a bump in the road, there is...at least a factual question as to whether or not they should have seen the bump or how they should have reacted." Hr'g Tr. 15; R. __. Appellant correctly points out that the bump was in the grassy median. As such, the trial court erred in its fact finding. If Jennifer Fischetti was unable to see the bump in the grass, there is at least a scintilla of evidence that raises a genuine issue of material fact. As it stands, Appellant Ceballos testified that he maintained a safe mode of travel in his lane. Respondent alleges that Ceballos entered

their lane of travel. By definition, that is a genuine issue of material fact. If Jennifer Fischetti could not have seen the bump in the grass, there is a chance that the accident was unavoidable. It was after hitting the bump that she lost control of the vehicle, leading inextricably to the collision. The testimony of Appellant Ceballos creates a genuine issue of material fact—namely, that there was a chance that he was not negligent. Therefore, the existing testimony has opposing parties disputing the events leading up to the accident. Accordingly, summary judgment for the defense of unavoidable accident was improper and should be reversed.

II. Summary judgment for Appellants' assumption of the risk defense was improper because the trial court granted Appellants the right to argue the defense to a jury.

Appellants contend that it was premature to grant summary judgment as to this defense. While assumption of the risk may have been subsumed into comparative negligence, summary judgment was too extreme a measure. Appellants should be able to argue this defense at trial and present a corresponding jury charge. The trial court reserved this right to Appellants during the hearing of June 16, 2014: "[y]ou can make the same arguments to the jury in saying that they are negligent in this regard for whatever reason." Hr'g Tr. 12; R.__. Insofar as the trial court granted summary judgment to this defense, Appellants contend that the defense should not have been struck entirely—a jury instruction at trial should be allowed.

III. Summary judgment for Appellants' spoliation of evidence defense was improper because the trial court granted Appellants the right to argue the defense to a jury.

Similar to assumption of the risk, the trial court expressly granted Appellants the right to request a jury charge for this defense:

> But it doesn't alleviate [the defense] from the action, because if, indeed, [Respondent] destroyed documents. So, to the extent it is a defense, I'm granting your motion. But it doesn't alleviate it from the action, because if, indeed, you destroyed documents, he's going to be able to tender evidence to that effect and I will tell the jury how to handle destroyed documents, which essentially says, that if they destroy documents, then they must have been real, real, real bad documents for your position and that you can assume the very worst, is essentially what it says.

Hr'g Tr. 19

Accordingly, and similar to Appellants' discussion of assumption of the risk, summary judgment was improper insofar as it may preclude Appellants from arguing this point to a jury.

CONCLUSION

Appellants assert that the facts and law surrounding this case lead to the ineluctable conclusion that summary judgment was improper and should be reversed. While some of Appellants' defenses may not be characterized as affirmative, as a whole they represent potentially meritorious defenses.

Respectfully submitted,

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October 30, 2014

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Appellants on Anthony Fischetti as Executor of the Estate of Concetta Fischetti, individually and on behalf of all other similarly situated Plaintiffs, by depositing a copy of it in the United States Mail, postage prepaid, on October 30, 2014, addressed to his attorney of record and all counsel of record, listed as follows:

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October 30, 2014

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VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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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
Our File: 2870-8959

Dear Ms. Kitchings:

Enclosed for filing are the original and one copy of SeaTruck, Inc., KC Freight LLC and Carlos L. Ceballos' Reply Brief of Appellants along with the Proof of Service. Please return a filed stamped copy of the Reply Brief of Appellants and Proof of Service with the courier.

By copy hereof, all counsel of record are being served with the above.

Thank you for your assistance, and should you have any questions, please do no hesitate to contact me.

Best Regards,

SWEENY, WINGATE & BARROW, P.A.

J. Eric Cavanaugh

JEC/elw
Enclosures

cc: W. Hugh McAngus, Jr., Esquire
Office of Court Administration