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.

INITIAL BRIEF OF APPELLANTS

Mark. S. Barrow
J. Eric Cavanaugh
William R. Calhoun
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, South Carolina 29201
(803)256-2233
Attorneys for Appellants

RECEIVED
DEC 1 9 2014
SC Court of Appeals

Table of Contents

TABLE OF AUTHORITIES....ii

STATEMENT OF ISSUES ON APPEAL....1

STATEMENT OF THE CASE....1

FACTS....3

ARGUMENTS....9

I. The Standard of Review....9

II. Summary Judgment as to the Assumption of the Risk Defense Should Be Reversed....11

III. Summary Judgment as to the Unavoidable Accident Defense Should Be Reversed....13

IV. Summary Judgment as to the Spoliation Defense Should Be Reversed....15

CONCLUSION....16

CERTIFICATE OF COUNSEL....18

Table of Authorities

Cases

Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 410 S.E.2d 537 (1991)................10

Berberich v. Jack, 392 S.C. 278, 709 S.E.2d 607 (2011)..11, 12

Cooke v. Palmetto Health Alliance, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005)............3

Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998)..12

Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003)..9, 10

Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 708 S.E.2d 745 (2011)..10, 11

Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966)..14

Howard v. South Carolina Dep't of Highways, 343 S.C. 149, 538 S.E.2d 291 (Ct. App. 2000)..12

Knight v. Austin, 396 S.C. 518, 722 S.E.2d 802 (2012)...9, 10

Lanham v. Blue Cross & Blue Shield of S.C., Inc.,..10

O'Leary-Payne v. R.R. Hilton Head, II, 371 S.C. 340, 638 S.E.2d 96 (Ct. App. 2006).......12

Page v. Camp Mfg. Co., 180 N.C. 330, 104 S.E. 667 (1920)..14

Spencer v. Miller, 359 S.C. 453, 192 S.E.2d 863 (1972)..10

Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, Op. No 27434 (S.C. Sup.Ct. filed Aug. 20, 2014, Shearouse Adv. Sh. No. 33 at 19)...10

Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 563 S.E.2d 109 (Ct. App. 2002)..10

Tucker v. Reynolds, 268 S.C.330, 233 S.E.2d 402 (1977)..14

Statute

S.C. Code Ann. §14-3-330(2)..3, 11

Other Authorities

Honorable Ralph King Anderson Jury Charges..13, 14

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT AS TO APPELLANT'S AFFIRMATIVE DEFENSE OF ASSUMPTION OF THE RISK?

2. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT AS TO APPELLANT'S AFFIRMATIVE DEFENSE OF UNAVOIDABLE ACCIDENT?

3. DID THE TRIAL COURT ERR IN GRANTING SUMMARY JUDGMENT AS TO APPELLANT'S AFFIRMATIVE DEFENSE OF SPOLIATION OF EVIDENCE?

STATEMENT OF THE CASE

This action for wrongful death and survival arises out of an October 9, 2012 motor vehicle accident that occurred on Interstate 95 in Florence County, South Carolina. At the time of the accident, the Plaintiff, Anthony Fischetti, was riding in the passenger seat of a minivan driven by his wife, Jennifer Fischetti ("Jennifer"), which was traveling north on Interstate 95. The Plaintiff's mother, Concetta Fischetti; her boyfriend, Angelo Fischetti; and the Plaintiff's son, Salvatore Fischetti, were also passengers in the van. Defendant Carlos Ceballos was also driving north on Interstate 95 in his tractor trailer at the time of the accident.

It is uncontested that the minivan operated by Jennifer Fischetti struck the trailer portion of a commercial vehicle operated by Mr. Ceballos. However, the cause of this accident is disputed. Jennifer maintains that the accident was precipitated by Mr. Ceballos' vehicle intruding into her lane of travel, causing her to steer into the median. In exiting the median, she over-corrected and lost control of the van, which struck the trailer. The van ricocheted off the trailer into the median, colliding with the guardrail. Defendant Ceballos has testified that he never entered the Plaintiff's lane of travel but rather constantly maintained his lane of travel. Mr. Ceballos testified that he, suddenly

and without warning, felt the impact from the Fischetti's minivan and reacted to the ongoing emergency situation by immediately braking and pulling to the side.

An investigation by a South Carolina Highway Patrol MAIT unit found that the Fischetti's minivan, for unknown reasons, entered the median and over-corrected, thereafter entering Mr. Ceballos' lane of travel and striking his vehicle before crossing back across their lane and into the guardrail. When the Fischetti's minivan struck the guardrail, the right rear door opened and ejected the decedent, who was unrestrained in the back seat. It is unknown whether the door failed or whether the unrestrained decedent mistakenly grabbed the door handle during the accident; however, in her recorded statement, Jennifer Fischetti indicated that she believed that the decedent's hand was on the handle and that she must have opened the door and fallen out. Similar testimony appears in the deposition of Anthony Fischetti. After hitting the guardrail, the Fischetti's minivan spun back into the interstate, before ultimately coming to rest.

Anthony Fischetti, as executor of his mother's estate, filed the complaint in this action on September 12, 2013. Defendant SeaTruck answered the complaint on or about November 14, 2013, and the other two Defendants answered on or about November 18. All three Defendants included several affirmative defenses with their general denials. On or about June 11, 2014, the Plaintiff served his motion for summary judgment and supporting memorandum, as to eight of Defendants' affirmative defenses. A hearing was conducted before the Honorable Michael G. Nettles on June 16, 2014. Each party submitted a memorandum of law. By Order entered July 16, 2014, the Court granted Plaintiff's motion for summary judgment as to five of the Defendants' affirmative defenses. Order Granting Mot. Partial Sum. J., June 16, 2014; R. p. 2-p. 5.

Because the Court's Order struck defenses from their Answers, the Defendants have appealed the grant of summary judgment in favor of Plaintiff as to three of the defenses, as provided for in S. C. Code Ann. §14-3-330(2)(c) and Cooke v. Palmetto Health Alliance, 367 S.C. 167, 624 S.E.2d 439 (Ct. App. 2005) *reh'g denied.* The Notice of Appeal was filed and served on July 23, 2014.

FACTS

The following facts were, among others, presented to the court at the hearing on June 16, 2014.

> This is a wrongful death commercial motor vehicle case. The motion before the Court today is the Plaintiff's motion as it relates to several affirmative defenses the Defendant's filed.
>
> Just by way of brief background, Your Honor, this is a wreck that happened on I-95, northbound, here in Florence County. The Fischetti's, in a vehicle driven by Anthony Fischetti's wife, Jennifer, with Anthony's mom, Connie, in the back seat as a passenger. They were traveling north from Florida on their way back to New York. The Defendant, Ceballos, operating a tractor/trailer that he owned and had leased to the Defendant, Seatruck, was traveling from Florida up to New Jersey and the wreck happened here on I-95.
>
> The Plaintiff's allegations are, basically, that the Defendant/truck driver improperly merged into their lane forcing Jennifer Fischetti off the side of the road, she got two tires in the grass, lost control of her vehicle and came back and struck SeaTruck's vehicle, causing a wreck.

Transcript of Hearing 2, (Intro. by Respondent's counsel); R. p. 159, lines 6-23.

> Mr. Ceballos, the driver, testified, in fact, that he maintained his right lane of travel, not that he didn't do anything, that he maintained his right lane of travel. Ms. Jennifer Fischetti, who was driving the minivan, ran off the road for no reason, overcorrected, swerved back into the road, shot into Mr. Ceballos's lane of travel at which time she collided with his tracker/trailer, spun around, and the decedent, who was sitting in the rear right passenger seat, in the middle right passenger seat, and was not wearing her seatbelt actually opened the door to the minivan and fell out of the car, Your Honor.

Id. at 4 (Appellant's counsel); R. p. 161, lines 9-20.

> Plaintiff's own personal representative and the driver of the Plaintiff's car, the Decedent's car, both testified that when they struck the guardrail, the Decedent apparently reached up and grabbed the handle of the car and opened the door and fell out of the vehicle. There is no allegation that she flew through the windshield, through the front windshield to the outside, none of that Your Honor. We believe that that is a scintilla such that granting Plaintiff's motion for summary judgment is not prudent at this time.

Id. at 5, (Appellant's counsel); R. p. 162, lines 1-10. Respondent's counsel agreed that his clients had "speculated" that the decedent opened the door. Id.; R. p. 163, line 11-p. 164, line 1.

As to the assumption of risk defense, the trial court stated that there is "no such thing as the concept of assumption to risk as we speak today." Id. at 12; R. p. 169, lines 13-17.

Regarding the unavoidable accident defense, Appellant's counsel presented the following to the court,

> Your Honor, I would just call the Court's attention to, the facts are the accident didn't occur until Mrs. Fischetti re-entered the interstate after exiting the interstate. Of course, she could have easily gotten her car back on the road, but her own husband testified on page 69 of his deposition that, the vehicle that we were in hit like, I don't know if it was in impression or a bump, okay, but the truck jumped up, the vehicle jumped up and brought us, brought us, back onto the blacktop and that's when we collided with the tractor-trailer, in the middle of the back. Your Honor, again, I think that's a scintilla. Mr. McAngus continues to mention an act of God, but his own law says, which I think is accurate regarding an unavoidable accident, it is the having an event free from human agency. Your Honor, that 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.

Id. at 13-14; R. p. 170, line 14-p. 171, line 7.

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." Id. at 15; R. p. 172, lines 1-4.

As to the spoliation defense, the court held that:

> I don't think spoliation is a defense. I think it's a remedy to be sought if they can prove that you 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. Something in that general area.

Id. at 19:10-21; R. p. 176, lines 10-21.

Appellant's counsel argued that summary judgment was premature because discovery was not completed, implying that further investigation into the facts was certainly appropriate prior to the grant of summary judgment. Id. at 5-6, 17; R. p. 162, line 11-p. 163, line 1; p. 174, lines 2-8. The trial court recognized that discovery was not complete stating – regarding the sudden emergency defense, for which summary judgment was denied – that "it will probably be best, after all discovery has been conducted," to raise that issue. Id. at 10; R. p. 167, lines 11-12.

Plaintiff Anthony Fischetti, who was a passenger in the front seat of the car, testified in deposition to the following pertinent facts:

> Q. Tell me how the accident happened, Mr. Fischetti.
> A. We were both going down I-95. We were all the way – we were in the left lane. We were – my wife was driving. She was – had the cruise control set at 65. The truck was on the right-hand side of us, in the middle lane.[1] He was next to us for about – I don't know – eight to 12 minutes. We started going around the bend. And the back of the – he was riding on the line and we were a little bit over. The truck was very big. And the second we went into a turn, going around the turn, the back of the cab started coming into our lane. And we moved over to avoid it the best we could. It sort of put us onto the grass. I mean, the back of the cab really

[1] Photographs taken by the Highway Patrol reflect that I-95 has two lanes in this section.

came out far. And we bounced up and came back up, and he was still in our lane. And that's when we collided with the back of the cab, the trailer part.

Anthony Fischetti Dep. 37:18 – 38:9, March 31, 2014; R. p. 214, line 18-p. 215, line 9. (footnote added)

Q. So when I asked you when you first noticed him, how much time elapsed from when you first noticed him and the accident?
A. Well, we noticed him ten minutes. We were next to him. But it was a nice, straight path. So there was no problems. It wasn't until – the way the road was shaped was like a half an S. It wasn't until we went around that bend that he got very close to us and he started moving into our lane.

Id. at 49:4-12; R. p. 226, lines 4-12.

And you would have been traveling beside him for approximately ten minutes when you noticed he started getting close, in your words; is that right?
A. When we were on the straight path, it was fine.
Q. Yes, sir.
A. It wasn't until we started going around the bend that the trailer came into our lane. He was riding on the line, okay, the whole time. But there was plenty of room on the straight path. It wasn't until the trailer went around the bend that it went into our lane fully.

Id. at 50:1-12; R. p. 227, lines 1-12.

Q. But you said he was riding the line.
A. He was – his front tire – I could see the front of the cab. He was right on – his tire was right on the line.
Q. It was right on the line.
A. Yeah.
Q. For the entire period that you were riding beside him.
A. Yeah.

Id. at 54:14-23; R. p. 231, lines 14-23.

Q. And she just proceeded to maintain her speed in the left lane, and he maintained his speed in the middle lane, correct?
A. That's correct.

Id. at 56:11-14; R. p. 233, lines 11-14.

Q. So the curve or the bend was from your left and it bent to your right.
A. That's correct.
Q. Is that right?

A. I believe so.

Q. Sure. Okay. And so when – when you first noticed him start to come in your lane, I guess you saw his front left tire move over into your lane?

A. The cab, the front – the cab never came into our lane.

Id. at 57:3-12; R. p. 234, lines 3-12.

Q. So it's three feet between your vehicle and the trailer, and then you start to-

A. Going into the turn.

Q. You see the trailer start moving over.

A. That's correct.

Q. How far were you in the turn when you first start to see the trailer moving over?

A. We just entered the turn when the trailer went from having three feet of distance to less than a foot.

Id. at 63:7-15; R. p. 240, lines 7-15.

Q. When you saw him go from three feet width to one foot, he was in your lane; is that right?

A. That's correct.

Q. So how much was he in your lane? A foot? Two feet? Three feet?

A. No. At that point, it was only a couple inches over the line.

Q. And you could tell that.

A. Of course I could tell that.

Q. Did your wife blow the horn?

A. No. We moved over.

Q. Now, at the time you see his trailer in your lane a couple of inches, the cab is in its lane, correct? It didn't move over. I think you've already testified to that.

A. No. He was right on the line. He probably rode that line from beginning to end with the front of the trailer. Not the trailer. The cab.

Id. 64:4-21; R. p. 241, lines 4-21.

Q. Did she move – she turns the steering wheel to the left, right?

A. Uh-huh.

Q. It's a yes or no.

A. Yes.

Q. Okay. And then you-all immediately leave the roadway, correct?

A. Yes.

Q. Did she hit the brakes?

A. No. She took the foot off the gas.

Q. All right. She took the foot off the gas. And did you decelerate?

A. A little bit.

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.

Id. at 68:8 – 69:8; R. p. 245, line 8-p. 246, line 8.

Q. Right. And when you leave the roadway, there's a grass median?
A. There was grass there, yes.

x x x

Q. And how would you describe that area? Is it level or is it –
A. It looked level.
Q. Okay. And she travels about 12 to 15 feet, and then you hit a bump?
A. We hit – something happened where the vehicle jumped up. I don't know what happened. I don't know what he hit. Something on that grass couldn't have been level. It made us bump up, yes.

Id. at 70:18-20; 71:3-11; R. p. 247, lines 18-20; p. 248, lines 3-11.

Q. What are you saying to her? Can you remember the words you used?
A. Yeah. Get away from this guy.
Q. Okay. What else?
A. Get away from this guy. I wanted her to accelerate and pass him, okay? That's what I wanted her to do.
Q. After the impact.
A. No. This is before the impact happened.
Q. All right.
A. I wanted her to get away from him, accelerate and go in front of him.

Id. at 83:7-18; R. p. 260, lines 7-18.

Q. Sure. Okay. And let me ask you this: Would you agree with me that your wife lost control of her vehicle and overreacted?

MR. McANGUS: Object to the form.

THE WITNESS: No.

Q. You don't.
A. I believe there was a point where we lost control of the vehicle.
Q. When was that?
A. I told you, the vehicle bounced on something or hit something and it jumped up onto the road, okay?
Q. All right.

A. And, at that point, there was no controlling the vehicle.

Id. at 119:21-120:10; R. p. 296, line 21-p. 297, line 10.

> A couple of people have called and asked me where the vehicle is. I have no idea where the vehicle is. We left it in South Carolina.

Id. at 132:3-5; R. p. 309, lines 3-5.

As pointed out in the statement of the case, the Motor Accident Investigation Team ("MAIT") of the South Carolina Highway Patrol investigated this accident, including taking photographs of the accident site and the vehicles. MAIT Report DA-163-12 dated October 18, 2012; R. p. 396.

Of interest to the resolution of the issues before this Court are the following:

- The estimated speed of the Fischetti automobile as 70 mph. Id; R. p. 399.
- That the Fischetti automobile ran into the median and the driver overcorrected. Id.; R. p. 399.
- Further investigation of the photographs in the MAIT report would reveal that there was a rumble strip at the edge of the lane in which the Fischetti car was traveling; the ground to the left of the paved area was uneven; and the Fischetti car had its left wheels in the grass for several feet.

ARGUMENTS

I. THE STANDARD OF REVIEW

Our Supreme Court has recently reiterated the standard of review by an appellate court considering the appeal of a grant of summary judgment, as follows:

> "The purpose of summary judgment is to expedite disposition of cases which do not require the services of a fact finder." Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 438 (2003). 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.

Stevens and Wilkinson of South Carolina, Inc. v. City of Columbia, Op. No. 27434 (S.C. Sup. Ct. filed Aug. 20, 2014, Shearouse Adv. Sh. No. 33 at 19, 23), 2014 WL 4087936 (S.C.)

Regarding a grant of summary judgment, our law – stated in many cases – imposes two duties on a court prior to granting such final judgment. Those two duties are contained in the following:

> Because summary judgment is drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery". Dawkins v. Fields, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. Lanham v. Blue Cross & Blue Shield of S.C., Inc., 439 S.C. 356, 362, 361, 563 S.E.2d 331, 333 (2002).

Evening Post Pub. Co. v. Berkeley County School Dist., 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011). *See also, inter alia,* Baughman v. American Tel. and Tel. Co., 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991) (to same effect, also stating "summary judgment's should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues"); Thomas Sand Co. v. Colonial Pipeline Co., 349 S.C. 402, 407-08, 563 S.E.2d 109, 112 (Ct. App. 2002) (to same effect, also stating, "It is the duty of the court, on a motion for summary judgment, not to try issues of fact, but only determine whether there are genuine issues of fact to be tried….") (quoting Spencer v. Miller, 359 S.C. 453, 456, 192 S.E.2d 863, 864 (1972)).

This case does not generally meet a basic requirement for summary judgment: it does not dispose of a case and does not dispense with the requirement that a fact-finder hear it. Regardless of whether these defenses are available to the Defendant or not, a trial – and the presence of a jury – will still be required. Nothing substantial is gained in terms of judicial economy.

On the other hand, a "substantial right"[2] of Defendant is abrogated by the denial of its ability to develop and present a potentially viable defense. If "further inquiry into the facts of the case," Evening Post, *supra.*, 392 S.C. at 82, 708 S.E.2d at 748, is allowed – as SeaTruck desires – there is a good likelihood that the affirmative defenses, the denial of which is appealed herein, will be sufficient to go to the jury. As addressed and argued below, there is sufficient evidence presently existing to justify the "further inquiry" that should be allowed. The trial court violated the principle articulated in Evening Post, *supra.*, to the effect that "summary judgment *must not be granted*" until the opposing party has had a "full and fair opportunity to *complete* discovery." (emphasis added).

II. SUMMARY JUDGMENT AS TO THE ASSUMPTION OF RISK DEFENSE SHOULD BE REVERSED.

Our Supreme Court has recently held that "all forms of negligence amounting to negligence in any form…may be compared to and offset by conduct that falls short of conduct intended to cause injury." Berberich v. Jack, 392 S.C. 278, 295, 709 S.E.2d 607, 616 (2011). The Court held that trial courts "should instruct the jury on the definitions of these forms of negligence whenever requested by a party." Id. Specifically regarding assumption of the risk the Court held:

[2] S.C. CODE ANN. § 14-3-330(2) implicitly defines as a "substantial right" the right of a defendant to present a defense.

> Assumption of the risk as a complete bar to recovery was effectively abolished by this Court in Davenport v. Cotton Hope Plantation Horizontal Prop. Regime, 333 S.C. 71, 508 S.E.2d 565 (1998), in which we held assumption of the risk had been largely subsumed by the adoption of comparative negligence. "Although assumption of the risk is no longer recognized as a complete defense in a negligence action, it remains a facet of comparative negligence which may be charged to the jury." Howard v. South Carolina Dep't of Highways, 343 S.C. 149, 156 n. 4, 538 S.E.2d 291, 294 n. 4 (Ct. App. 2000).

Id., 392 S.C. at 293, n.4, 709 S.E.2d at 615, n.2.

There is sufficient evidence in the record to justify defining "assumption of the risk" and presenting it to the jury as to the driver of Plaintiff's vehicle, Jennifer Fischetti, and the woman who was ejected from Plaintiff's van, Concetta Fischetti.

Jennifer Fischetti made a "deliberate and voluntary choice to assume a known risk, " O'Leary-Payne v. R.R. Hilton Head, II, 371 S.C. 340, 350, 638 S.E.2d 96, 101 (Ct. App. 2006) by voluntarily swerving off the paved surface of the interstate highway while she was going 70 miles per hour. Recorded statement of J. Fischetti, pp. 2, 4; R. p. 148; p. 150. She did not apply the brakes to slow the automobile, A. Fischetti Dep., 68:16-17; R. p. 245, lines 16-17, but coasted as she left the road. A. Fischetti Dep. 68:18-20; R. p. 245, lines 18-20. She crossed over a rumble bar, intended as a warning to drivers, but inferably ignored it. A. Fischetti Dep. 101:10-25; R. p. 278, lines 10-25. She could not have known about the uneven nature of the off-road terrain into which she was driving, or its wetness, or obstacles beneath the grass.

Anthony Fischetti's testimony made plain that it was something in the grass that the vehicle hit that made his wife lose control of the vehicle. A Fischetti Dep. 68:8-69; R. p. 245, line 8-p. 246. He testified that the vehicle hit "an impression of a bump" and the van "jumped up and brought us back onto the blacktop and that's when we collided with

the tractor-trailer…" and that after that, "there was no controlling the vehicle." A. Fischetti Dep. 69:5-8; 120:9-10; R. p. 246, lines 5-8; p. 297, lines 9-10.

These facts lead to far more of a scintilla of evidence that she assumed a risk that is commonly known to be dangerous. The presence of rumble bars on the highway are testimony that it is common knowledge that driving off a paved highway at highway speed is dangerous.

There is also a scintilla of evidence that Concetta Fischetti assumed the risk of being ejected – not only by not engaging her seat belt, which is not admissible – but also by putting her hands on the door handle of the sliding door of the van. Jennifer Fischetti testified that she believed that her mother-in-law "pulled herself up to hold on [the door handle], she grabbed it and it just slid open because they weren't child proof…" Jennifer Fischetti Dep. 53:10-18, March 31, 2014; R. p. 373, lines 10-18. The failure to have the door locked and grabbing the door handle would be voluntary acts or omissions that create known dangers.

There is, therefore, sufficient evidence in the record to allow the defense of assumption of the risk to continue so that a jury charge regarding it can be given to the jury.

III. SUMMARY JUDGMENT AS TO THE UNAVOIDABLE ACCIDENT SHOULD BE REVERSED.

In South Carolina, an unavoidable accident has been defined as an inevitable accident. It is an accident which "could have not been prevented by the exercise of due care by both parties under the circumstances. An unavoidable accident is present when an event occurs which was not proximately caused by the negligence of any party to the event". *Honorable Ralph King Anderson Jury Charges*, §20-10 Negligence-Unavoidable

Accident Defense and cases cited therein. As between parties in this case, Anthony Fischetti concedes that there was nothing he or his wife could have done to avoid the accident. Furthermore, Defendant Carlos Ceballos is prepared to testify that he was unaware of the accident until Plaintiffs' vehicle made contact with his tractor trailer.

Our Supreme Court has addressed the defense of unavoidable accident as an integral part of a defendant's general defenses rather than as an affirmative defense upon which a defendant has the burden of proof. It has held as follows:

> First, the assertion of unavoidable accident is not an affirmative defense requiring special proof on the part of the defendant. Here, we rely on our decision in Grier v. Cornelius, 247 S.C. 521, 534, 148 S.E.2d 338, 344 (1966), which quoted with approval the following statement from Page v. Camp Mfg. Co., 180 N.C. 330, 104 S.E. 667 (1920):
>
> The burden to prove his case is always on the plaintiff, whether the defendant introduces evidence or not. Where we have said, 'It is the duty of the defendant to go forward with his proof,' it was only meant in the sense that, if he expects to win, it is his duty to do so, or take the risk of an adverse verdict, and not that any burden of proof rested upon him. He pleads no affirmative defense but the general issue, and this puts the burden throughout the case on the plaintiff, who must recover, if at all, by establishing his case by the greater weight of the evidence.
>
> See also 65 A.L.R.2d, Unavoidable Accident Instruction § 44. Therefore, it was proper for the defendant to allege unavoidable accident in the First Defense of the Answer. By the same token it was improper for the trial judge to instruct the jury that the defendant had the burden of proof on the question of unavoidable accident.

Tucker v. Reynolds, 268 S.C. 330, 336, 233 S.E.2d 402, 404-405 (1977).

Given this binding law, summary judgment as to this defense would be inappropriate. Defendant is entitled to elicit testimony to this effect so that unavoidable accident can be argued in front of a jury.

The testimony of Defendant's driver will be that he stayed in his own lane throughout, and he was unaware of any problem with the Fischetti's car until he felt an

impact on the left side of his trailer. Hearing Transcript pp. 3-4; R. p. 160- p. 161. Therefore, the accident was unavoidable from Mr. Ceballos' perspective. It was also unavoidable according to the Plaintiff's own testimony. Anthony Fischetti testified that his wife attempted to avoid Defendants' truck as best she could, resulting in Plaintiffs' vehicle entering the grassy median. A. Fischetti Dep. 67:16-18; R. p. 244, lines 16-18. He also testified that he was unsure of what Plaintiff's vehicle encountered in the grass. Id. at 71:8-11.; R. p. 248, lines 8-11. It was not immediately clear, therefore, that the vehicle would have hit the bump that allegedly caused the vehicle to "bump up." Id.; R. p. 248. Because Plaintiff conceded that his wife attempted to avoid the accident but was unable to do so, the accident was unavoidable.

Furthermore, Anthony Fischetti conceded that his wife lost control of vehicle. Id. at 119:21–120:10; R. p. 296, line 21-p. 297, line 10. As such, it is abundantly clear that there is a genuine issue of material fact that precludes a grant of summary judgment. Defendants should be able to present evidence as part of their general defense and argue this issue. Summary judgment should be reversed.

IV. SUMMARY JUDGMENT AS TO THE SPOLIATION DEFENSE SHOULD BE REVERSED.

The Plaintiff disposed of the Mazda automobile prior to the Defendants' experts having an opportunity to examine it. As quoted above, Anthony Fischetti testified that he had "no idea where the vehicle is. We left it in South Carolina." A. Fischetti Dep. 132:4-5; R. p. 309, lines 4-5.

By not retaining the vehicle – or being able to make provisions to preserve it and thereafter to inform Defendants of its location – the Plaintiffs have prejudiced the defense of this matter. Among other things, Defendants may have been able to determine that

there was, or was not, something mechanically wrong with the sliding door through which the Decedent was ejected. Defendants could also better determine whether there was any substance to Mr. Fischetti's testimony that the Plaintiff's van and the Defendants' truck were "side by side," when the vehicles collided after the van pulled back onto the highway. A. Fischetti Dep. 73:1-5; R. p. 250, lines 1-5. The presence or absence of paint scrapes or dents on the side of the van could likely dispel that notion, which contradicts the analysis made by the MAIT.

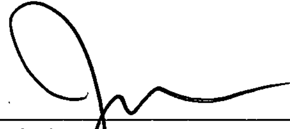
Having Defendants' expert examine the van after the accident would, therefore, provide the defense with direct evidence, and/or impeachment evidence. The defense should be allowed to refer in testimony and argument to Plaintiff's deprivation of the opportunity to examine the van in detail. A jury charge will be meaningless unless the Defendants are able to mention in testimony and argument what they likely lost by not being able to examine the van.

CONCLUSION

This Court should reverse the summary judgments as to the assumption of risk, unavoidable accident, and spoliation defenses. The proper standard for granting such judgment was not met by the trial court. There is more than a scintilla of evidence to support these three defenses and the Defendants should be entitled to present them to a jury.

(Signature page to follow)

Respectfully submitted,



Mark S. Barrow
J. Eric Cavanaugh
William R. Calhoun, Jr.
Sweeny, Wingate & Barrow, P.A.
Post Office Box 12129
Columbia SC 29211
(803) 256-2233
ATTORNEYS FOR APPELLANTS

Columbia, South Carolina

December 18, 2014

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.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Initial Brief complies with Rule 211(b), SCACR.

Mark S. Barrow
J. Eric Cavanaugh
William R. Calhoun
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, South Carolina 29201
(803) 256-2233
Attorney for Appellants

December 18, 2014

RECEIVED
DEC 19 2014
SC Court of Appeals

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,

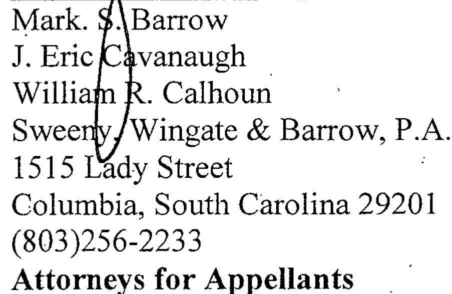
v.

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

PROOF OF SERVICE

Pursuant to Rule 211(a), SCRAP, I certify that I have served the Appellant's Final Briefs on Anthony Fischetti as Executor of the Estate of Concetta Fischetti by depositing a copy of them in the United States Mail, postage prepaid, on December 19, 2014, addressed to his attorneys of record, listed as follows:

W. Hugh McAngus, Jr., Esquire
Graham L. Newman, Esquire
Chappell, Smith & Arden, P.A.
Post Office Box 12330
Columbia, SC 29211
Attorneys for Respondent



Mark. S. Barrow
J. Eric Cavanaugh
William R. Calhoun
Sweeny, Wingate & Barrow, P.A.
1515 Lady Street
Columbia, South Carolina 29201
(803)256-2233
Attorneys for Appellants