THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM SPARTANBURG COUNTY
Court of Common Pleas

J. Derham Cole, Circuit Court Judge

Appellate Case No. 2015-000359
Case No. 2011-CP-42-3951

Dickie Shults ..... Appellant,

Angela G. Miller ..... Respondent.

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

1. Can Appellant show the trial court abused its discretion by finding good cause to set aside an entry of default where (1) the trial court applied the proper law and (2) evidence exists to support the trial court's decision?

2. Can Appellant maintain an action against Miller where the uncontested evidence demonstrates that Miller was struck by a motorist who failed to yield the right-of-way to Miller and pushed Miller into Appellant?

STATEMENT OF THE CASE

On July 22, 2009, Miller, her husband, and their three children were traveling on Highway 292 when a vehicle driven by Philip Seay disregarded a stop sign and pulled directly in front of Miller's vehicle. (R. pp. 28-34) Seay struck the front passenger's side of the Millers' vehicle and pushed it into a vehicle driven by Plaintiff. (R. pp. 28-34) Miller and her husband testified that Miller (1) was traveling below the speed limit, (2) had the right-of-way, (3) could not avoid Seay once he disregarded the stop sign and pulled into the path of Miller, and (4) did not cause or contribute to the accident. (R. pp. 28-31)

Appellant was traveling in the opposite direction as Miller on Highway 292. (R. p. 248 lines 16-23 & pp. 32-34) Appellant, who did not see the collision between Miller and Seay, confirmed that when Seay attempted to pull onto Highway 292, Seay would have to yield the right-of-way to Miller. (R. p. 247 lines 5-10 & p. 255 lines 3-9) Appellant also admitted that Miller was struck by Seay before Appellant was involved in the accident. (R. p. 256 lines 7-8) Appellant confirmed that Trooper Chris Mace spoke with all involved in accident. (R. p. 252 lines 9-24) Appellant made no complaint of injury to Trooper Mace. (R. p. 255 lines 22-23)

Trooper Mace investigated the accident and interviewed all the parties involved in the accident. All involved agreed that Miller was lawfully operating her vehicle on Highway 292 within the speed limit. (R. pp. 32-34) At all times, Miller would have had the right-of-way and Seay would have had to yield the right-of-way to her. (R. pp. 32-34) Trooper Mace did not find any evidence that Miller caused or contributed to the accident and found the sole cause of the accident was Seay. (R. p. 32-34)

Appellant filed a separate lawsuit against Seay for this accident (CA # 2011CP4203081).

(R. pp. 288-295) Seay resolved all of Appellant's claims against him. (R. p. 83 lines 5-12) Furthermore, Seay paid all property damage and bodily injury claims of Miller and her family. (R. p. 28-31)

Appellant filed this action against Miller and an entry of default was entered. Miller attempted to defend herself but there was some confusion due to a recent change in her insurance and because Seay's insurer paid all of Miller's claims. (R. pp. 35-45) Miller, however, was able to serve an Answer within days of when it was due. (R. pp. 35-45) The trial court found there was good cause to set aside the entry of default and permit Miller to defend this action. (R. pp. 3-5)

Following discovery, Miller filed a Motion for Summary Judgment. (R. pp. 48-55) The trial court found that Miller was entitled to judgment as a matter of law on the issue of liability for the accident. (R. pp. 6-9) Plaintiff's motions to reconsider were denied. (R. p. 10)

ARGUMENTS

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN FINDING GOOD CAUSE FOR RELIEF FROM THE ENTRY OF DEFAULT WHERE IT APPLIED THE PROPER LAW AND EVIDENCE SUPPORTS ITS DECISION.

"The decision whether to set aside an entry of default or a default judgment lies solely within the sound discretion of the trial judge. ***The trial court's decision will not be disturbed on appeal absent a clear showing of an abuse of that discretion.*** An abuse of discretion occurs when the judge issuing the order was controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." Sundown Operating Co. v. Intedge Indus., Inc., 383 S.C. 601, 606-07, 681 S.E.2d 885, 888 (2009) (emphasis added).

For Appellant to prevail on this abuse of discretion standard, Appellant, therefore must show either (1) the trial did not apply the proper law or (2) there is no evidentiary support of the trial court's ruling. Id. Appellant cannot prove either. Appellant merely seeks to have this Court substitute its judgment for the trial court, which is not a proper standard of review. Ricks v. Weinrauch, 293 S.C. 372, 374, 360 S.E.2d 535, 536 (Ct. App.1987).

A. The trial court applied the proper "good cause" standard for relief from the entry of default.

In the Order Granting Relief, the trial court properly noted that relief from an entry of default is governed by Rule 55(c), SCRCP. (R. pp. 3-5) Furthermore, the trial court applied the exact same law that Appellant argues applies to this case when it said the following in the Order Granting Relief:

> This standard requires a party seeking relief from an entry of default under Rule 55(c) to provide an explanation for the default and give reasons why vacation of the default entry would serve the interests of justice. Once a party has put forth a satisfactory explanation for the default, the trial court must also consider: (1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted. Sundown Operating Co. v.

Intedege Indus. Inc., 383 S.C. 601, 607-08, 681 S.E.2d 885, 888 (2009). (R. p. 4)

The trial court also properly noted and Appellant does not challenge the following:

> The "good cause" standard for relief under Rule 55(c) "is liberally construed to promote justice and dispose of cases on the merits." Dixon v. Besco Eng'g Inc., 320 S.C. 174, 178, 463 S.E.2d 636, 638 (Ct. App. 1995). "Relief granted at this point is within the equitable power of the court and excuses the previous failure to act promptly." James F. Flannagan, South Carolina Civil Procedure 440 (2d ed. 1996). (R. p. 4)

Accordingly, there is no legal basis for attacking the trial court's discretion in granting relief.

B. Evidence supports the trial court's decision to grant relief.

In the Order Granting Relief, the trial court exercised its discretion to find "good cause" existed to grant relief based on Sundown when it held:

> I believe that Defendant has adequately satisfied the standard for relief set forth in Sundown. Defendant explained there was some confusion with Seay's insurance accepting liability for the accident and a change of her own insurance companies. Nevertheless, Defendant appeared and answered and moved for relief very shortly after her Answer was due. Defendant has also shown a meritorious defense to the accident. Despite Plaintiff's argument that he would be prejudiced by a jury trial, I do not find this constitutes the type of prejudice expressed in Sundown. Accordingly, I find that this case should be disposed of on the merits. (R. p. 4)

The trial court's discretionary decision must stand as long as there is some evidence to support it. Sundown at 606-07, 681 S.E.2d at 888. "The trial court need not make specific findings of fact for each factor if there is sufficient evidentiary support on the record" to support the decision. Id.

On appeal, Appellant does not challenge the trial court's findings that (1) the timing for relief, (2) the existence of a meritorious defense, or (3) the lack of prejudice justify relief based on the "good cause" standard. Instead, Appellant erroneously argues the trial court did not address whether Defendant explained the default situation. Appellant is wrong.

As stated above, the trial court's Order Granting Relief specifically states, "I believe that

Defendant has adequately satisfied the standard for relief set forth in Sundown. *Defendant explained there was some confusion with Seay's insurance accepting liability for the accident and a change of her own insurance companies.*" (R. p. 4 emphasis added) In the Order Denying Plaintiff's Motion to Reconsider the Grant of Relief, the trial court held,

> Defendant continues to satisfy the factors to establish good cause as set forth in Sundown Operating Co. v. Intedege Indus. Inc., 383 S.C. 601, 607-08, 681 S.E.2d 885, 888 (2009). As stated in the previous order, *Defendant explained that following the service of the complaint there was some confusion early on because Seay's insurance company had accepted liability for her claims and because she had changed insurance companies.* Nevertheless, Defendant was able to answer very shortly after it was due, establish a meritorious defense, and show no prejudice to Plaintiff. (R. p. 8 emphasis added)

Keeping in mind the abuse of discretion standard applies to this case, all that is necessary to affirm the trial court's decision is some evidence that confusion explained the default situation. Supporting the trial court's discretionary decision on confusion are the affidavits of Miller and her husband asserting that Miller was not at fault for the accident and that Seay's insurance paid all their claims (R. pp. 28-31 & pp. 62-68), Trooper Mace's affidavit about his investigation and accident report indicating that Miller was not charged with the accident and the sole cause of the accident was Seay (R. pp. 32-34), the fact there was a prior lawsuit filed by Appellant against Seay, who is the real at-fault party (R. pp. 287-295), and the change in Miller's insurance (R. p. 66 lines 14-25 & pp. 176-177). Because some evidence exists on this issue, there exists no further basis for examining the trial court's discretionary decision.

Appellant's arguments based on White Oak Manor, Inc. v. Lexington Ins. Co., 407 S.C. 1, 753 S.E.2d 537 (2014), and Regions Bank v. Owens, 402 S.C. 642, 741 S.E.2d 51 (Ct. App. 2013), demonstrate Appellant's fundamental misunderstanding of the standard of review for abuse of discretion cases. Both cases involve appellate review under an abuse of discretion of the trial court's

decision **not** finding "good cause" for relief. Just like this Court should do in this case, the White Oak Manor and Regions Bank courts merely found there was evidence supporting the trial court's decisions; thus, there was no basis for reversing the trial courts when applying the abuse of discretion standard. White Oak Manor, 407 S.C. at 12, 753 S.E.2d at 543 (holding "we find no error in the court's holding that losing the complaint was not 'good cause'"); Regions Bank, 402 S.C. at 648, 741 S.E.2d at 54 ("We find evidence in the record supports the master's finding [defendant] did not show good cause for failing to answer the complaint"). Therefore, White Oak Manor and Regions Bank actually support this Court affirming the trial court's decision in this case.

Appellant's final argument about the interests of justice is disingenuous at best. The Sundown Court adopted the three factors based on Wham v. Shearson Lehman Bros., Inc., 298 S.C. 462, 381 S.E.2d 499 (Ct. App. 1989), for a trial court to use when determining whether vacation of the default entry would serve the interests of justice. Those three factors–(1) the timing of the motion for relief; (2) whether the defendant has a meritorious defense; and (3) the degree of prejudice to the plaintiff if relief is granted–were not only cited but analyzed by the trial court in the Orders. (R. pp. 3-5 & pp. 6-9) Although not challenged by Appellant, ample evidence supports the trial court's discretionary decision that interests of justice is served by granting relief based on the Wham factors. See also James F. Flannagan, South Carolina Civil Procedure 440 (2d ed. 1996) ("In most instances, the opposing party suffers little or no prejudice because there is no detrimental reliance on the entry of default."). (R pp. 28-34 & pp. 35-45 & pp. 62-68 & pp. 83-85)

The bottom line is this Court should affirm the trial court's decision to grant relief because the trial court did not abuse its discretion.

II. APPELLANT CANNOT MAINTAIN AN ACTION AGAINST MILLER WHERE THE UNCONTESTED EVIDENCE IS THAT MILLER WAS STRUCK BY A MOTORIST WHO FAILED TO YIELD THE RIGHT-OF-WAY TO MILLER AND PUSHED MILLER INTO PLAINTIFF.

The trial court properly found that evidence presented did not create any inference that Miller caused the subject accident. The following facts are not contested:

1. On July 22, 2009, Miller, her husband, and their three children were traveling on Highway 292. (R. pp. 28-31)

2. Miller was traveling below the speed limit. (R. pp. 28-34)

3. Seay, another motorist, approached Highway 292 from Miller's right. (R. pp. 28-34)

4. To enter Highway 292, Seay would have to stop at a stop sign and yield the right-of-way to Miller. (R. pp. 32-34 & pp. 255 lines 6-9)

5. Seay did not yield the right-of-way to Miller, pulled directly in front of her, and struck the front passenger's side of Miller's vehicle. (R. pp. 28-34 & p. 254 lines 7-8)

6. After failing to yield the right-of-way and colliding with Miller, Seay pushed Miller into Appellant's vehicle. (R. pp. 28-34)

7. Trooper Mace investigated the accident and spoke with all involved and found no evidence or testimony that Miller did anything to cause the accident. (R. pp. 32-34)

A. Appellant's proper lookout theory fails because it is speculative and does not address the uncontested evidence that Seay was the sole proximate cause of the accident by failing to yield the right-of-way.

Appellant does not and cannot challenge any of the facts listed above. Instead, Appellant attempts to create some speculative argument that Miller did not keep a proper lookout. This argument is improper because it is based on pure speculation and does not change the fact that Seay

was the sole cause of the accident.

When confronted with this overwhelming evidence that Miller did not cause the accident, Appellant cannot simply rest on the allegations of the pleadings but has to "come forward with specific facts showing there is a genuine issue for trial." Singleton v. Sherer, 377 S.C. 185, 198, 659 S.E.2d 196, 203 (Ct. App. 2008). Appellant, however, cannot rely on speculative, theoretical, or hypothetical evidence. Jackson v. Bermuda Sands, Inc., 383 S.C. 11, 17, 677 S.E.2d 612, 616 (Ct. App. 2009). "Our courts have recognized that when only one reasonable inference can be deduced from the evidence, the question becomes one of law for the court. A corollary of this rule is that ***verdicts may not be permitted to rest upon surmise, conjecture, or speculation. Finally, assertions as to liability must be more than mere bald allegations made by the non-moving party in order to create a genuine issue of material fact.***" Id. (emphasis added).

When discussing Seay failing to yield the right-of-way and pulling out directly in front of her, Miller said, "I did not have an opportunity to avoid Seay, and our vehicles collided." (R. p. 30) Miller said just before the accident she was looking straight ahead with both hands on the steering wheel. (R. p. 128 lines 7-10) Seay pulled so quickly in front of her from a side road that she did not see him until he was colliding with her vehicle. (R. p. 142 lines 10-25) "The sole contributing cause to the accident was the actions of Philip Seay." (R. p. 32)

Frank Miller, who was a passenger in Miller's vehicle, supports Miller's version of the accident. He testified that when Seay failed to yield the right-of-way and pulled directly into the path of the Miller vehicle, "My wife did not have an opportunity to take any evasive maneuvers to avoid the Seay vehicle." (R. p. 28) Furthermore, Frank Miller said, "The sole cause of the accident was the actions of Philip Seay." (R. p. 28)

Trooper Mace investigated the accident and spoke with all involved. No one claimed and no evidence supported any finding that Miller caused the accident. (R. pp. 32-34)

Contrary to the rule that evidence must rise above surmise, conjecture, and speculation, the only thing that Appellant argues to this Court is a proper lookout theory based solely on speculative, theoretical, and hypothetical guesswork. While ignoring the uncontradicted evidence that Miller was lawfully driving her vehicle and looking straight ahead when Seay failed to yield the right-of-way and darted out directly in front of Miller, Appellant argues he can support a verdict against Miller because she did not see Seay until he unlawfully barreled into her lane and hit her. This is the exact type of "bald allegations" that the speculative guesswork that the Jackson v. Bermuda Sands, Inc. decision found did not justify submission to a jury. Id.

Where Plaintiff's theoretical proper lookout argument falls completely flat is on the issue of proximate cause, a required element for any claim against Miller. Moore v. Weinberg, 373 S.C. 209, 220–21, 644 S.E.2d 740, 746 (Ct. App. 2007). Even if Appellant is right and some credible evidence exists that Miller failed to maintain a proper lookout, there is no evidence indicating anything related to a proper lookout caused the accident.[1] The only evidence in the record is that when Seay failed to yield the right-of-way, he pulled out directly in front of Miller and there was nothing she could do to avoid him. Without any evidence beyond mere speculation on causation, Appellant cannot prevail. Clark v. Cantrell, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (judgment as a matter of law is proper when any alleged negligence "could not have contributed to the cause of the accident").

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[1] Miller would be entitled to assume that Seay would obey the law and yield the right-of-way. Beverly v. Sarvis, 246 S.C. 470, 476, 144 S.E.2d 220, 223 (1965).

B. There is no evidence Miller violated any statute.

Appellant's arguments that Miller violated any statute is without any evidentiary support and seems like a desperate attempt to confuse this Court. Appellant is well aware of all the uncontested evidence cited above that Seay failed to yield the right-of-way, struck Miller's vehicle and pushed it into Appellant. (R. pp. 28-34) As illustrated above, there is no evidence that Miller did anything to cause the accident or that she would have entered Appellant's lane "but for" the actions of Seay.

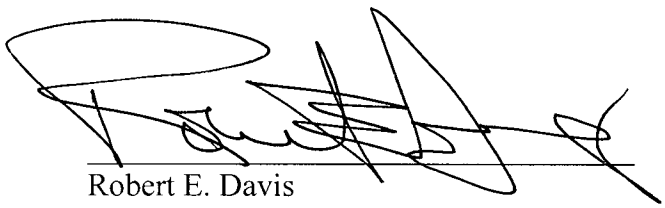
Given the facts presented, it stretches the boundaries of good faith for Appellant to argue that Miller violated statutes concerning driving on the right side of the road, right-of-way, left hand turn, or speed. For the statutes dealing with crossing the center line and right-of-way, the only evidence is that Miller was pushed by Seay across the center line into oncoming traffic. By definition, Miller was not a driver, defined as one "in actual physical control of a vehicle" by S.C. Code Ann. § 56-5-400, when she was pushed by Seay. Miller, therefore, could not violate those statutes. As for the statutes dealing with speed and left turn, there is not one shred of evidence that Miller was speeding or making a left turn when the accident occurred.

Like the argument on proper lookout, Appellant cannot point to actual evidence so he makes up wild theory based on speculation. This Court, therefore, should reject any argument based on a statutory violation as being wholly unsupported by actual evidence.

The record before this Court indicates that Seay was the sole cause of the subject accident. Appellant has already collected a lot of money in the suit filed against Seay. There is no basis for this lawsuit against Miller to continue.

CONCLUSION

The time has come for this case to finally end. In fact, it should have never been filed. Appellant cannot present any basis for overturning the discretionary decision to grant Miller relief. The record indicates the sole cause of the accident was Seay and not Miller. This Court, therefore, should affirm the decisions of the trial court.



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September 10, 2015.

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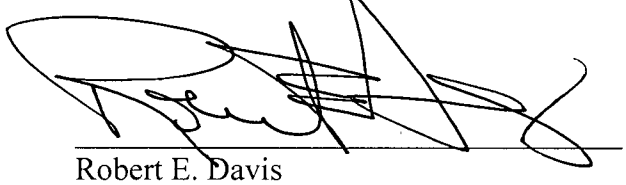
CERTIFICATE OF COUNSEL

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



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September 18, 2015.

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J. Derham Cole, Circuit Court Judge

Appellate Case No. 2015-000359
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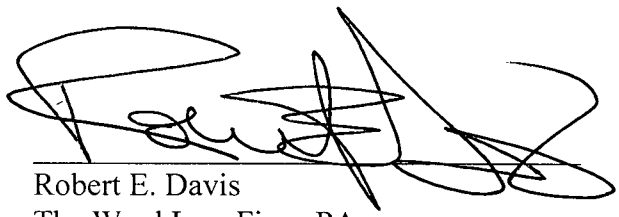
Angela G. Miller ..... Respondent.

PROOF OF SERVICE

I certify that I have served Respondent's Final Brief by US Mail, on September 11, 2015, addressed to Appellant's attorney of record, Samuel D. Harms, Harms Law Firm, PA, 33 Market Point Drive, Greenville, SC 29607.

September 11, 2015.



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