THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHESTERFIELD COUNTY
Court of Common Pleas

Roger E. Henderson, Circuit Court Judge

Appellate Case No. 2016-001865

Caroll Freeman and Brooke Freeman .....Appellants,

v.

South Carolina Department of Transportation,
and County of Chesterfield, South Carolina .....Respondents,

REPLY BRIEF OF APPELLANTS

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Without restating the issues or making redundant arguments which have been thoroughly set forth in their opening brief, the Appellants offer the following points of clarification and rebuttal to the arguments raised by Respondent.

ARGUMENT

I. NOT OWNING THE STOP SIGN DOES NOT ELIMINATE A DUTY.

Respondent relies upon *Crolley v. Hutchins*, 300 S.C. 355, 256, 387 S.E.2d 716, 717 (Ct. App. 1989) to establish that the Appellants must show: 1) a duty of care owed by the Respondent to the Appellant; 2) a breach of that duty by a negligent act or omission; and 3) damage proximately resulting from the breach for the cause of action of negligence. Respondent misinterprets the definition of duty in the context of negligence.

Professor William Prosser, a preeminent expert of tort law summarizes that "[n]o better general statement can be made that the courts will find a duty where, in general, reasonable persons would recognize it and agree that it exists." William L. Prosser & Robert E. Keeton, Prosser and Keeton on Torts § 53 at 359 (1984). South Carolina Supreme Court further explained that in some circumstances, "the question of whether a duty arises depends on the existence of particular facts. Where the existence or non-existence of a duty depends on facts, it is the duty of the court to instruct the jury as to the defendant's duty, or absence of duty, if either conclusion as to the facts is reached." *Carson v. Adgar*, 326 S.C. 212, 486 S.E.2d 3, 5 (1997). What constitutes negligence is a question of law for the court; but whether negligence in fact

exists in a particular case is a question of fact for the jury. *See Lundy v. Southern Bell Tel. & Tel. Co.*, 90 S.C. 25, 72 S.E. 558 (1911). Even where there is no duty to act, the defendant who acts voluntarily assumes a duty to use due care. *See Nettles v. Your Ice Co.,* 191 S.C. 429, 4 S.E.2d 797, 799 (1939). Where there are factual issues regarding whether the Defendant is a volunteer, the existence of a duty becomes a mixed question of law and fact to be resolved by the fact finder. *Carson* 486 S.E.2d at 5.

Once a duty of care is determined to exist, a person is required to consider the foreseeable risk of her actions or failures to act. If the injury is not foreseeable, she is not liable for the injury. *See, Araujo v. Southern Bell Tel. & Tel. Co.* 291 S.C. 54, 57-58, 351 S.E.2d 908 (Ct. App. 1986). Black's Law Dictionary defines foreseeability as "[t]he ability to see or know in advance; *e.g.* the reasonable anticipation that harm or injury is a likely result from certain acts or ***omissions***." (*emphasis added*) *Black's Law Dictionary* 649 (6th ed. 1991).

Respondent goes on to rely on *Hart v. Doe*, 261 S.C. 116, 122, 198 S.E.2d 526, 529 (1973), which states, "negligence is the failure to use due care," i.e., "that degree of care which a person of ordinary prudence and reason would exercise under the same circumstances." Certainly, once there was reason enough for an ordinarily prudent and reasonable person [as here with Melissa Eason Roscoe] to recognize the danger of this missing sign and notify whom she believed to be responsible for ensuring the safety of the Chesterfield County area, (R. 69) then in turn Chesterfield County, knowing the dangers that a missing stop sign poses, would recognize that neglecting to make a simple phone call notifying SCDOT of the downed sign is derelict use

of the due care Respondent quotes. This creates question of fact as to whether a duty to the County to report the damaged sign to SCDOT was imposed by Ms. Roscoe's phone call to the County Administration.

Additionally, Chesterfield County Public Works Director Tim Eubanks's Affidavit creates, a duty in that by his own sworn admission, Mr. Eubanks having particular knowledge due to his job at the county, would know about all downed signs in within Chesterfield County. (R. 35-36) This Affidavit again creates question of fact as to whether a duty of care is imposed to Chesterfield County sufficient enough to survive the "mere scintilla" standard of Summary Judgment.

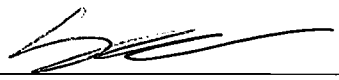
Finally, the affidavits of Roscoe (R. 69) and Eubanks (R. 35-36) show the involvement and knowledge of the county as it relates to the downed stop sign. These facts, taken in a light most favorable to the Appellant as the nonmoving party, creates a duty. Mr. Eubanks's actions (by doing nothing) created a dangerous situation.

CONCLUSION

Based upon the foregoing arguments and citations of authority, the Appellant respectfully request that this Court reverse the ruling of the trial court and grant Appellant a new trial on the merits.

Respectfully Submitted,

COCKRELL LAW FIRM, PC

By: 

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