THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

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SC Court of Appeals

CASE NO. 2015-CP-10-5379
Appellate Tracking Number 2017-002317

William Sean Irvin, Jr., as Personal Representative of the Estate of Jonathan Edward Irvin, Deceased, ...Appellant,

v.

City of Folly Beach, South Carolina Department of Highways and Public Transportation, Daniel Wilcutt, and Mitchell Dewitt Rabon, Jr., of whom

Mitchell Dewitt Rabon, Jr., is ..... Respondent.

REPLY BRIEF OF APPELLANT

April 23, 2018

Brooklyn O'Shea, #102505
Ian O'Shea, #100712
O'Shea Law Firm
1120 Folly Road
Charleston, S. C. 29412
(843) 805-4943
E-mail: ioshea@theoshealawfirm.com
E-mail: brook@theoshealawfirm.com

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

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STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Koester v. Carolina Rental Ctr.,* 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

The nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. *Hancock v. Mid-South Management Co., Inc.*, 301 S.C. 326, 673 S.E.2d 801 (2009) (reversed grant of summary judgment for injuries sustained in a parking lot because evidence of disrepair of parking lot raised a genuine issue of material fact as to whether injury was foreseeable.)

Ordinarily, a comparison of the plaintiff's [alleged] negligence with that of the defendant is a question of fact for the jury to decide. In a comparative negligence case, the trial court should only determine judgment as a matter of law if the sole reasonable inference, which may be drawn from the evidence, is that the plaintiff's negligence exceeded fifty percent. Therefore, summary judgment is generally not appropriate in a comparative negligence case. *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000).

Because summary judgment is a 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. *Evening Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011).

REPLY ARGUMENT I

Appellant's testimony of distance is not expert testimony and demonstrates negligence per se.

Respondent premises his entire argument on a single assertion: "As a matter of law, Appellant's affidavit could not be used to defeat Rabon's summary judgment motion because Appellant could never be considered an expert witness about accident reconstruction." (Respondent's Initial Brief at page 3) Respondent never addresses the overarching legal error committed by the trial court in hearing a summary judgment before discovery was complete (discussed fully in Appellant's Initial Brief at pages 13-14). Respondent's assertion about the Irvin affidavit is not supported by the facts or the law. Appellant did not offer Irvin as an accident reconstructionist. Rather, Appellant used Irvin's affidavit to summarize the MAIT Team's on-site measurements. Also, as discussed fully in Appellant's Initial Brief, once the Defendants took Appellant's accident reconstruction expert's deposition on January 22, 2018, he not only corroborated Irvin's measurements, but also, using state of the art laser measuring, placed the Rabon car almost exactly where Irvin did who was using an ordinary measuring tape. (Irvin said 10-15 feet; the expert said 16.4 feet). The expert's measurement is not in the record because the trial court took up the summary judgment motion before discovery was complete, and the Court's amended scheduling Order (R.O.A. page ___) imposed a July 1, 2018, closing date for discovery. Respondent makes several remarks about the length of time the case had been pending, but he ignores the undisputed fact that the parties' consent scheduling Order established the discovery deadlines, which do not expire until July 1, 2018. (R.O.A. page ___[Amended Scheduling Order

Oct. 5, 2017]. Respondent also omits that Rabon's deposition was rescheduled twice at Respondent's request and that Appellant's expert was out of the country and unavailable for his deposition until he returned at the end of 2017. Thus, there are no disputed facts—at the summary judgment stage—that the MAIT Team's on-site measurements are admissible, and testimony about distance does not require an expert opinion any more than measuring the length of a room or a driveway requires expert testimony:

Rule 701 OPINION TESTIMONY BY LAY WITNESS

If the witness is not testifying as an expert, the witness's testimony in the form of an opinion or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training. In *Small v. Pioneer Machinery*, 329 S.C. 448, 494 S.E.2d 835 (Ct. App. 1997), this Court affirmed the trial court's decision to admit a machine (log skidder) operator's opinion on how the skidder's throttle control malfunctioned:

IV. OPINION TESTIMONY

Pioneer and Timberjack claim the trial court abused its discretion in admitting lay and expert opinion testimony on debris being the cause of the sticking throttle and the sticking throttle being the cause of the falling tree. We find no error. [329 S.C. 468]

A. Opinion of Lay Witnesses

Rule 701, SCRE, which deals with opinion testimony by lay witnesses, provides:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the

determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

See also *State v. Williams*, 321 S.C. 455, 469 S.E.2d 49 (1996) (opinion or inference of lay witness is admissible if it is (a) rationally based on perception of witness; (b) helpful to determination of fact in issue; and (c) does not require special knowledge). Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury. *Id.*

Pioneer and Timberjack argue (1) there was no factual foundation for Harris' testimony and (2) Harris did not possess the requisite qualifications to give an opinion regarding whether debris caused the throttle to stick. Harris testified the throttle started sticking on the log skidder approximately two weeks after he began operating it. He cleaned debris out of the skidder every morning and sometimes during the day. The debris included limbs and leaves which would fall down on the hood of the skidder and collect in and around the transmission. Over objection, Harris stated the accumulated debris caused the throttle to stick.

The court held Harris could testify as the operator of the skidder. Harris deduced the tree was pushed over because the throttle stuck. On cross examination, he admitted cleaning debris from the throttle linkage area sometimes did not help the sticking throttle problem. He never stopped the skidder when he had a specific problem with the throttle in order to examine the throttle linkage area.

Harris' opinions were based upon his observations and perceptions as the operator of the log skidder. As the operator, he had special knowledge and experience in the daily operation of the machine, as well as the environment in which it was used. The basis of his opinion that the debris was the [329 S.C. 469] cause of the sticking throttle, and the sticking throttle the cause of the falling tree was subject to attack upon cross examination. We find no abuse of discretion by the trial court in the admission of the lay opinion testimony of Harris.

Following the Court of Appeals' analysis in *Small*, the Supreme Court relaxed the rule even further in another product liability case, *5-Star v. Ford Motor Company*, 408 S.C. 362, 759 S.E.2d 139 (2014). There, Ford Motor alleged that plaintiff's expert lacked sufficient qualifications to give an opinion on the cause of a vehicle fire. In deciding that case, the Supreme Court held that a "manufacturer cannot turn a blind eye to the obvious," and that expert testimony is not required to state obvious conclusions. (Ford designed a switch to handle 2 amperes of electricity and installed

it in continuously energized 15 ampere circuit.) Certainly, pulling a measuring tape between two points is not the type of measurement that requires an expert witness. As demonstrated in appellant's initial brief, because the trial court gave no explanation on the record or in its Order, neither the parties nor this Court have any idea as to whether an alleged deficiency in Irvin's testimony formed the basis of the Order under review. The only clue contained in this record as to the trial court's reasoning is the trial judge's statement on the record that she did not think the definition of cross-walk was relevant.

If an alleged deficiency in the Irvin affidavit was the deciding factor below, Appellant's affidavit merely summarizes the MAIT Team's on-site measurements to point out to the Court the distance of the Rabon vehicle from the intersection. Irvin measured the distance as 10-15 feet using the points marked by MAIT's measurements on the scene. When Appellant's expert returned from Germany, he did the same thing using state-of-the art laser measuring and calculated the distance as 16.4 feet. Assuming *arguendo* that reading a measuring tape is an "opinion," reading it requires nothing more than a lay person's understanding of distance, something anyone understands without special training. Reading a measuring tape does not require "scientific, technical, or other specialized knowledge" as required by Rule 702, Testimony by Experts. Rather, it requires only, "(a) rationally based . . . perception of witness; (b) helpful to determination of fact in issue; and (c) . . . not requir[ing] special knowledge." Rule 702, *SCRE*. Respondent's suggestion that the witness requires special training to measure the distance between two known points is spurious and not supported by case law.

Moreover, as discussed fully in Appellant's Initial Brief, the trial court ended this case on summary judgment, so the question is not whether the trial court does or does not believe

Appellant's measurements; rather, the analysis—if this issue were the basis for the trial court's decision—turns on whether Appellant is required to be a scientist to read a measuring tape. However, "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, 82, 708 S.E.2d 745, 748 (2011). Neither the Rules of Evidence nor the well-developed case law support Respondent's legal theory, and thus the trial court erred when it concluded that there is no genuine issue of material fact that Rabon parked his vehicle in violation of South Carolina law.

Respondent attempts to avoid the application of traditional principles of summary judgment by citing the "confidentiality" of wreck reports (§ 56-5-1340) and *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002). (Respondent's Initial Brief at pages 3-4). § 56-5-1340 is nothing more than the statutory equivalent of the hearsay rule. Every trial lawyer knows that she cannot enter a wreck report into evidence, but that does not mean that an officer testifying about an investigation cannot use it in her testimony. See § 56-5-1290, Evidentiary use of reports: "None of the reports required by Sections 56-5-1260 to 56-5-1280 may be evidence of the negligence or due care of either party at the trial of any action at law to recover damages. However, law enforcement officers may refer to these reports when testifying in order to refresh their recollection of events." In seeking to hold on to the decision below, Respondent conflates two concepts: one, that reports are not admissible to prove negligence, and two, that officers can use the reports to recall details of an accident investigation, **such as measurements**. It is astonishing to contemplate the assertion that the gathering of evidence on a crash scene is rendered inadmissible because it is reduced to writing!

Respondent's reliance on *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) does

not support Respondent's legal position. *Hall v. Fedor* is one of those rare lawsuits that Hollywood would reject as too implausible. In *Hall,* the Lexington County Sheriff's Department arrested the plaintiff for suspected drug activity and seized $40,000.00 in cash from his home. The defendant hired Fedor to handle his criminal case, and Fedor not only succeeded in having the criminal charges dropped, but also forced the Sheriff's Department to return the seized cash. For this, the defendant sued him!

The defendant's theory of the case was that Fedor mislead him about his chances of success in a civil action against the Lexington County Sheriff's Department. Fedor originally declined to bring a civil action against the Sheriff's Department, but after Hall found a lawyer who would bring it, Fedor later signed on with Hall's new lawyer as co-counsel. The two secured a settlement of $30,000.00, which Hall accepted to settle his civil rights claim against Lexington County. He then sued Hall for, as this Court summarized the facts: "Hall filed a legal malpractice claim against Fedor based upon Fedor's alleged misconduct and negligence in his actions regarding the settlement agreement and Fedor's comment about Hall's guilt to third parties." The trial court granted summary judgment for Fedor, and the Court of Appeals affirmed. The sole evidence presented by Hall that he should survive summary judgment was his unsupported opinion that the $30,000.00 settlement he accepted was too low. As this Court summarized the evidence:

> Hall states in his deposition Anders told him that as much as $250,000 was "on the table" to settle the case and that Fedor was aware of the higher amount. This statement is clearly hearsay and does not fall under any of the hearsay exceptions enumerated in the Rules of Evidence. Therefore, it would be inadmissible evidence at trial and is inadmissible to refute a motion for summary judgment.
>
> Hall additionally alleges Fedor lied when he told Hall the Insurance Reserve Fund was either not liable or would refuse to cover Harrison. During his deposition, Professor Adams testified that in order for a statement to constitute malpractice, it must result in damage to the client. Even if Hall were correct in his assertion that Fedor lied to him about the Insurance Reserve Fund's obligation

or willingness to pay, he was not damaged because there is no evidence showing that he would have recovered more than $30,000 in a settlement with the insurer.

Once these two statements are eliminated from consideration, there is no evidence in the record to show that Hall "most probably" would have received in excess of $30,000 but for Fedor's alleged malpractice.

In contrariety, the evidentiary record demonstrates with remarkable clarity that the $30,000 amount was a good settlement, even to the point of reaching a windfall for Hall.

Hall at page 176.

This is a remarkable case, on many levels, but one thing is clear: it does not support Respondent's assertion that a layperson cannot read a measuring tape. The evidence of legal malpractice in *Hall* was nothing more than the plaintiff's unsupported and self-serving opinion that his civil rights lawsuit was worth more than the amount he voluntarily agreed to accept. Clearly, Hall's lay opinion about the value of his case is not admissible to support any theory of legal malpractice. The inadmissibility of Hall's unsupported legal speculation is materially different from Appellant's affidavit here, which only measures the distance between two known points. Respondent's argument refutes itself because it is like saying a person cannot testify to the width of his driveway without calling an expert.

Respondent then argues that Appellant's affidavit is inadmissible because "Plaintiff's attempt at opinions regarding the 'intersection' violated the mandates set forth in *Watston v. Ford Motor Co.*, 389 S.C. 434, 699 S.E.2d 169 (2010) or Rule 702, SCRE, which clearly excluded any opinions from unqualified individuals who lacked the requisite knowledge, skill, or experience to make the purported opinion reliable." (Respondent's Initial Brief at page 4). In *Watson*, the Supreme Court reversed an 18-million-dollar jury verdict because it found the expert opinions of electronic radio interference did not meet the threshold of scientific reliability to be admitted as

evidence. Once again, Respondent conflates the concept of scientific expertise with matters of ordinary perception. Deep philosophical or scientific analysis is not required to measure the distance between two known points. In trials, witnesses are always permitted to opine about matters of common knowledge derived from their experience, including distance. The measurements made by officers on the scene are admissible whether through the officers or through other witnesses relying on their measurements. In pulling a measuring tape, Appellant was not forming an opinion about anything. All he did was read the number on the tape. It does not require an engineer to know that 15 is less than 20.

Finally, Respondent attacks Appellant's opinion on the ground that Appellant's measurement is a "legal opinion." It is irrelevant whether Appellant thinks Rabon is or is not "illegally parked" because the General Assembly sets motor vehicle standards, and courts apply them. Just as a witness cannot opine about whether a motorist should or should not obey a red light, a witness can testify that the light was red when he saw the car pass through. Neither lay witnesses nor expert witnesses provide opinions on the law. *Hall v. Fedor*, 349 S.C. 169, 561 S.E.2d 654 (Ct. App. 2002) Rather, the Court charges the law as it is written to the jury and instructs the jury to find the facts, and here, the facts are that the Rabon vehicle was parked too close to the intersection—not because of Appellant's measurements, which are mere facts, but because he was less than 20 feet from the crosswalk and/or less than 30 feet from the intersection, which violates statutes governing the operation of motor vehicles. Respondent ignores the standard of review on summary judgment, which requires that this Court view the evidence, and the reasonable inferences deducible from them, in the light most favorable to Appellant. Here, Respondent makes Appellant's argument for him: "The testimony and the photographs of the scene

clearly showed that Rabon parked his vehicle **some distance** beyond the intersection involved with this accident and did not block any stop sign on East Second Street or any 'approaching' stop sign for Irvin's lane of travel." (Respondent's Initial Brief at page 5, emphasis added). This is correct, but misleading, and obfuscates the question before the Court. The parties agree that "Rabon parked his vehicle **some distance** beyond the intersection," but there is a significant dispute about **how far**, and Respondent offers nothing on this fact other than to demand that this Court disregard Irvin's affidavit as well as ignore the fact that discovery was incomplete. The distance is a question of fact, and Respondent offers nothing on this crucial fact. Respondent has one theory, and it is a red herring.

To avoid the trap that the only evidence in the record is the MAIT Team's measurements offered by Appellant, Respondent fabricates an exemption into the parking statute that is not there. Respondent argues that the parking statute does not apply to vehicles on the favored roadway, but this exception is not found in the statute or caselaw and is woven of whole cloth. (The origin of "whole cloth" as a synonym for false, according to William Safire, had its origin as a by-product of the work of tailors who could "fabricate" whole cloth from remnants.) There is no favored roadway exemption in the statute, and the rules of statutory construction prohibit the spontaneous generation of such. Moreover, it defies logic to believe that a statute designed to keep intersections free of parked cars would apply to only one-half of intersections. Motorists, whether on a favored roadway or a secondary street, have just as much need for a clear intersection in one direction as the other. Respondent asserts, without any factual support: ". . . both Wilcutt and Irvin had unobstructed views." (Respondent's Brief at page 6). This assertion lacks support in the record, especially where, as here, the lower court took up the motion for

summary judgment before discovery was completed.

The overriding legal error is that the Court, not the witness, charges the jury on the definition of an intersection, which the General Assembly defines in S.C. Code Ann. § 56-5-500. As the transcript of the hearing before the trial court reveals, the trial judge was confused about the application of the statute, concluding incorrectly that the statute only applies to pedestrians. On this erroneous conclusion alone, the case must be reversed because the record shows the trial judge applied an incorrect definition of intersection to the facts before her, which led to an incorrect conclusion Respondent seeks to exploit here: ". . . because no **painted** crosswalk exists at the accident site." (Respondent's Initial Brief at page 5). This assertion is building on the trial court's error that because there is no **painted** crosswalk, the crosswalk does not exist. First, the General Assembly imputes a cross walk at every intersection, whether it is painted or not. See S.C. Code Ann. § 56-5-500. The lack of a painted sidewalk confused the trial court, when the point of the statutory definition is that it serves as a starting point to determine the crosswalk. The record of the hearing before the trial court demonstrates that the trial court did not appreciate this fundamental starting point, and in an effort to direct the inquiry to where it should be, counsel attempted to demonstrate that the depiction of the crosswalk was nothing more than a visual aid in helping the court see how close the Rabon vehicle was to the intersection. The South Carolina Code defines and regulates parking at an intersection as follows:

> . . . no person shall . . . (2) Stand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge passengers:
>
> (c) Within twenty feet of a crosswalk at an intersection.
>
> (d) Within thirty feet upon the approach to any flashing signal, stop sign, yield sign or traffic-control signal located at the side of a roadway.
> S.C. Code Ann. § 56-5-2530.

An intersection is:

> . . . the area embraced within the prolongation or connection of the lateral curb lines, or, if none, then the lateral boundary lines of the roadways of the two highways which join one another at, or approximately at, right angles or the area within which vehicles traveling upon different highways joining an any other angle may come in contact.
> S.C. Code Ann. § 56-5-490.

A crosswalk is

> (1) That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or in the absence of curbs from the edge of the traversable roadway; or
> (2) Any portion of a roadway at an intersection or elsewhere distinctly indicated for pedestrian crossing by lines or other markings on the surface.
> S.C. Code Ann. § 56-5-500.

Thus, whether the Court takes its measurements from "the lateral boundary lines of the roadways of the two highways which join one another at, or approximately at, right angles" or from "That part of a roadway at an intersection included within the connections of the lateral lines of the sidewalks on opposite sides of the highway measured from the curbs or in the absence of curbs from the edge of the traversable roadway," the starting point for the measurement is the same. The **only** difference between the two is that a motorist is required to park 30 feet from an intersection and 20 feet from a crosswalk. The statutes carve out the same exclusion area regardless of which starting point is employed. The trial court did not grasp this, and this is the error that requires reversal.

As a last-ditch effort to save his legal position, Respondent constructs a life raft from *Senn v. J. S. Weeks & Co.*, 255 S.C. 585, 180 S.E.2d 336 (1971) and *Gerrity v. Muthana*, 28 A.D.3d 1063 (N.Y. 1st Dep't. 20016). In *Senn,* the Supreme Court reversed a jury verdict for retrial because the trial judge excluded probative evidence. Regarding the "illegally parked truck," the Supreme Court said:

A detailed review of the testimony of the various witnesses would serve no useful purpose. We find evidence from which the reasonable inferences may be drawn that defendant's pickup truck was illegally parked near the intersection of President and Congress Streets, at an angle, in a "no parking" zone, and partially blocking traffic, so as to obscure the stop sign from the view of Mrs. Powell who was unfamiliar with the intersection; and that such deprived her of the benefit of the stop sign warning, thereby causing her to proceed into the intersection without stopping and collide with plaintiff's automobile. Under these facts and inferences, the trial judge properly held that the evidence presented a jury issue as to the actionable negligence and recklessness of defendant.

Senn at page 590.

Not only did the jury return a verdict for the plaintiff in *Senn*, but also the Supreme Court ordered a retrial because the plaintiff's photographs of the scene were excluded at trial! Here, of course, the standard of review on the grant of a summary judgment requires the Court to accept Appellant's evidence and the reasonable inferences deducible therefrom.

Likewise in *Gerrity*, the appellate court entered a one-paragraph "Memorandum" opinion affirming the grant of summary judgment on the ground that the appellant failed to raise the issue: "Defendant met its burden on the motion by establishing as a matter of law that the sole proximate cause of the accident was Muthana's failure to stop at the red light, and plaintiffs failed to raise an issue of fact." *Gerrity v. Muthana*, 28 A.D.3d 1063 (N.Y. 1st Dep't. 20016) Thus, this holding is not controlling because, unlike *Gerrity*, here, Appellant raised a clear issue by demonstrating Rabon parked his vehicle in violation of a state statute (and municipal ordinance). Even though the one-paragraph Memorandum opinion in *Gerrity* failed to address the legal issue, the two-judge dissent made clear that New York law, just as our Supreme Court said in *Senn*, allows for claims against negligently parked vehicles:

"It has been held in a variety of factual circumstances that owners of improperly parked cars may be held liable to plaintiffs injured by negligent drivers of other vehicles, depending on the determinations by the trier of fact of the issues of foreseeability and proximate cause unique to the particular case" (*O'Connor v. Pecoraro*, 141 A.D.2d 443, 445 [1988], citing, *inter alia*, *Ferrer*, 55

N.Y.2d 285 [1982]). Where, as here, the connection between the parking violations and the happening of the accident is logical and immediate enough to present an issue of fact, the issue is one for the trier of fact and is not properly resolved on a motion for summary judgment (*see id.*; *cf. Dormena v. Wallace,* 282 A.D.2d 425, 427 [2001]). We therefore would reverse the order, deny the motions of defendant and the City and the cross motion of the County and reinstate the amended complaint and cross claims against them and remit the matter to Supreme Court to determine plaintiffs' cross motion.

Gerrity at 1064.

While it might be interesting in the luxury of an academic setting to compare New York law to South Carolina law on the issue of negligently parked vehicles and proximate cause, South Carolina law has a well-developed body of law on both. Respondent helpfully identifies *Senn* as controlling authority for the question of fact arising from unlawfully parked vehicles, and Appellant discussed the law of proximate cause thoroughly in his Initial Brief at pages 10-11, which discussion does not require repetition. What does require reply is that Respondent omits a discussion that his own pleading alleges, comparative negligence as a defense, and this alone creates a jury question. R.O.A. page ___[answer] The record demonstrates that Appellant provided competent and compelling evidence that Rabon's vehicle violated parking a state parking statute, and this violation is evidence of negligence:

The Court of Appeals held that a violation of Reg 7-31 created a duty that Opening Break breached by knowingly allowing the minor to drink alcohol on hits premises. The Court of Appeals held that a violation of Reg. 7-31 constitutes negligence per se for purpose of an action in negligence. *Norton v. Opening Break, Inc.*, 313 S.C. 508, 443 S.E.2d 406 (Ct. App. 1994)

We agree with the Court of Appeals' opinion. See *Tant v. Dan River, Inc.*, 289 S.C. 325, 345 S.E.2d 495 (1986) (regulations have the force of law; violation of a regulation may constitute negligence per se); *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991) (setting forth two-prong test for determining when a duty created by statute or regulation will support an action for negligence.)

Norton v. Opening Break of Aiken, Inc., 319 S.C. 469, 462 S.E.2d 861 (1995)

Thus, it is for the jury to decide if the parked vehicle contributed to death of the decedent,

and the trial court erred in granting summary judgment.

CONCLUSION

As set forth in Appellant's Initial Brief, the lower court erred in granting summary judgment because Appellant provided more than a scintilla of evidence that Rabon violated a statute (and municipal ordinance) and parked too close to the intersection, thus creating an unsafe condition. Appellant provided indisputable evidence of the violation, and this evidence supports Appellant's allegation of negligence *per se*. Respondent never addresses Appellant's arguments that he was deprived of a meaningful opportunity to complete discovery or that Appellant is denied meaningful judicial review because neither the transcript nor the Orders under review offer an explanation as to the basis for entry of summary judgment. Likewise, Respondent does not address that his own pleading in which he alleges comparative negligence creates a genuine issue of material fact. Respondent offers nothing to support his position that he parked his vehicle a safe distance from the intersection as required by South Carolina law. The Respondent supports the trial court's imposition of summary judgment under these facts by only one assertion: that a lay witness cannot testify as to distance, which is not a correct statement of South Carolina law. As Appellant established the elements of duty and breach, which the law presumes by after Appellant demonstrated a violation of a statute, Appellant created more than a genuine issue of material fact. Whether an injury occurring from that condition is or is not foreseeable is a question of fact for the jury to determine. In addition, the record shows that Appellant rescheduled Respondent's deposition at his request and had attempted to complete his deposition prior to Respondent's Motion for Summary Judgment. Rabon had not even responded to Interrogatories, and the lower court should not consider a motion for summary judgment until the parties have a "full and fair

opportunity" to conduct discovery. Since Respondent raised the issue of comparative negligence as his defense, this defense itself became a question of fact reserved for a jury. Therefore, for any or all of these reasons, this Court should reverse the entry of summary judgment and remand the case to Charleston County to be resolved by a jury trial.

Respectfully submitted,

Brooklyn O'Shea, #102505
Ian O'Shea, #102712
O'Shea Law Firm
1120 Folly Road
Charleston, S. C. 29412
(843) 805-4943
E-mail: brook@theoshealawfirm.com
E-mail: ioshea@theoshealawfirm.com
Attorneys for Appellant

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Respondent
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that this Final Reply Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules*.

April 23, 2018

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Respondent
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

BELK, COBB, INFINGER AND GOLDSTEIN, P.A.

ATTORNEYS AT LAW
2344 COSGROVE AVENUE
CHARLESTON, SC 29405

Harry C. Belk (1919-2003)
Dale T. Cobb, Jr.

Peggy M. Infinger
pinfinger@cobblaw.net

Thomas R. Goldstein
tgoldstein@cobblaw.net

Mailing Address:
P.O. Box 71121
Charleston, SC
zip 29415-1121
Ph: (843) 554-4291
Fax: (843) 554-5566

April 23, 2018

Hon. Jenny Abbott Kitchings
Clerk of Court,
ATTN.: ELIZABETH CARTER
South Carolina Court of Appeals
1220 Senate Street
Columbia, S. C. 29201

RECEIVED
APR 25 2018
SC Court of Appeals

Re: William Sean Irvin vs. City of Folly Beach (Rabon), *et. al.*
Case Number: 2015-CP-10-05379
Appellate Tracking No.: 2017-002317

Dear Ms. Carter,

I enclose an original and an extra copy of the appellant's initial reply brief and designation of contents of record on appeal. I also enclose a proof of service. Would you be so kind as to file the original and return a filed copy in the envelope provided? By copy of this letter, I am providing a copy to all counsel of record. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,
BELK, COBB, INFINGER & GOLDSTEIN, P.A.

Thomas R. Goldstein

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P. O. Box 71121
Charleston, S. C. 29415-1121

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South Carolina Court of Appeals
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Columbia, S. C. 29201