THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

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Circuit Case No.: 2015-CP-10-5379
Appellate Case No.: 2017-002317

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

v.

City of Folly Beach, SC Department of Highways and Public Transportation, Daniel Wilcutt and Mitchell Dewitt Rabon, Jr., Defendants, of whom Mitchell Dewitt Rabon, Jr., is ..... Respondent.

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# FINAL BRIEF OF RESPONDENT

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June 7, 2018

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## STATEMENT OF ISSUES ON APPEAL

I. **THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT RABON BECAUSE PLAINTIFF DID NOT PRODUCE ANY ADMISSIBLE EVIDENCE OF ANY ACTIONABLE NEGLIGENCE AGAINST RESPONDENT RABON.**

## STATEMENT OF THE CASE

The vehicular accident that gave rise to this lawsuit occurred on October 5, 2013 on East Cooper Avenue on Folly Beach, South Carolina. Appellant asserted that, as the motorcycle driven by Jonathan Edward Irvin on East Cooper Avenue, approached the intersection of East Second Street, a vehicle driven by Defendant Daniel Wilcutt made a left turn from East Second Street onto East Cooper Avenue and failed to yield the right-of-way to Irvin. The contact between the Wilcutt vehicle and the Irvin motorcycle, according to Appellant, knocked the Irvin motorcycle out of control, across the intersection of East Cooper Avenue and East Second Street, off the paved roadway, and into the rear lift gate of the parked vehicle owned by Respondent Rabon. Defendant Wilcutt denied the allegations of any contact with the Irvin motorcycle, and, in his Answer, stated the accident resulted only from Irvin's excessive speed. Defendant Wilcutt's Answer, R. p. 44. Appellant admitted in his deposition that the Rabon vehicle was parked "off the road" and not on the paved surface. Deposition of William Sean Irvin, Jr., R. p. 89, lines 22-25. Rabon parked his vehicle past the intersection of East Cooper Avenue and East Second Street, as Irvin drove. Id., R. 90, lines 17-19.

The only role the Rabon vehicle played in this unfortunate accident was being the stopping point where the Irvin motorcycle collided after the Wilcutt vehicle allegedly knocked the Irvin motorcycle out of control, through the intersection, and off the road. Appellant did not claim that Rabon's parked vehicle had any role with the inability of either Wilcutt or Irvin to see each other, which could not have been the circumstance because (a) the Rabon vehicle was parked beyond the intersection of East Cooper Avenue and East Second Street and (b) Appellant asserted Wilcutt was making a left turn onto East Cooper Avenue at the time of the incident.

Paragraph 10 of the Complaint alleged the vegetation covered the stop sign governing Wilcutt's travel, which is why Appellant sued the governmental entities (City of Folly Beach and South Carolina Department of Highways and Public Transportation).

## STATEMENT OF FACTS

Appellant filed a pro se Complaint on October 16, 2015 that made various claims against all of the listed defendants. Counsel later filed an amended complaint for Appellant. With regards to Rabon, Appellant alleged in Paragraph 9 of the first Complaint that Rabon "parked illegally in the right-of-way on the right shoulder." The Amended Complaint filed on February 2, 2016 made only general allegations of negligence against Rabon in Paragraph 15, but did not offer any specific example. Rabon filed his answer on February 18, 2017, and the parties deposed Appellant on February 17, 2017.

Rabon filed the summary judgment motion on March 8, 2017 and Judge Harrington heard arguments on May 16, 2017 (some 19 months after Appellant first filed the lawsuit and 9 weeks after Rabon filed the motion). Judge Harrington granted the motion and later denied Appellant's motion for reconsideration. This appeal followed.

## ARGUMENT

### I. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT TO RESPONDENT RABON BECAUSE PLAINTIFF FAILED TO PRODUCE ANY ADMISSIBLE TESTIMONY TO ESTABLISH ANY ACTIONABLE NEGLIGENCE AGAINST RABON.

When Appellant (the brother of Jonathan Edward Irvin) was deposed on February 17, 2017, he admitted that Rabon was parked off the roadway. Deposition of Plaintiff, R. p. 89, lines 22-25. Plaintiff also indicated that he was not aware of any specifics regarding the allegation that Rabon was "parked illegally." Id., R. 91, lines 12-17. Yet, the Affidavit of Appellant (submitted at the May 16, 2017 summary judgment motion hearing) was the only material Appellant attempted to use at the summary judgment hearing to defeat Rabon's motion, and Appellant's affidavit

attempted to offer his opinions about the parked Rabon vehicle. See Appellant's Affidavit dated May 15, 2017 with attachments, R. 49.

As a primary matter, the May 16, 2017 summary judgment hearing took place when the case was 19 months old, 9 weeks after Rabon filed the motion, and when the wreck was 3½ years earlier. Appellant did not produce any affidavit or statement from any claimed accident reconstruction expert at any point before May 15, 2017, and is prohibited from now trying to do so in this appeal. Wilder Corp. v. Wilkie, 330 S.C. 71, 497 S.E.2d 731 (1998) (holding that a party may not argue on appeal a matter not first raised to the trial court). Appellant did not claim at the May 16, 2017 that he had an expert witness who had not yet completed any opinions or that he needed time for such. See Transcript of Record dated May 16, 2017, R. p. 70. And, any opinions by any expert on behalf of Appellant came after Judge Harrington granted summary judgment and such opinions were never presented to Judge Harrington or to Rabon for response.

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. Rule 56(e) of The South Carolina Rules of Civil Procedure requires any affidavit shall set forth facts that would be admissible into evidence and shall show affirmatively that the affiant is competent to testify about those matters. In this case, Appellant's affidavit submitted at the summary judgment hearing attempted to create an issue of fact against Rabon by having Appellant offer certain opinions based on Appellant superimposing a generic drawing of an intersection on top of the police report for this accident and Appellant's interpretations of what calculations the investigating officer made. Clearly, Appellant could not qualify as an accident reconstruction expert because he was not an accident reconstruction expert or an engineer and had no such qualifications, and the accident report was inadmissible pursuant to S.C. Code Ann. § 56-5-1340. Appellant admitted in his deposition that he had no expertise in this topic or the South Carolina laws regarding parking of vehicles. Deposition of William Sean Irvin, Jr., R., p. 91, lines 18-22.

In Hall v. Fedor, 349 S.C 169, 561 S.E.2d 654 (Ct. App. 2002), the South Carolina Court of Appeals wrote that materials used to support or refute a summary judgment motion must be those which would be admissible at trial. In that case, the court supported the trial court's decision not to rely on an affidavit to defeat a summary judgment motion because the affidavit relied on inadmissible evidence.

In the current case, Plaintiff attempted to do the same thing. Any drawing or opinion by Appellant, who could never be qualified as an accident reconstruction expert at trial, would not be admissible at any trial. Thus, according to the Hall decision, the trial court properly granted Rabon summary judgment because Appellant's affidavit relied on evidence that would be inadmissible at any trial, which cannot be used to refute a summary judgment motion. Further, Plaintiff's attempt at opinions regarding the "intersection" violated the mandates set forth in Watson 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.

Further, Appellant did not produce any admissible evidence that Rabon was "illegally parked." Clearly, S.C. Code Ann. § 56-5-2530(A)(2)(d) allowed Rabon to parked his vehicle where he parked it. That section reads, in relevant part," Except when necessary to avoid conflict with other traffic, or in compliance with law or the directions of a police officer or official traffic-control device, no person shall (2) Stand or park a vehicle, whether occupied or not, except momentarily to pick up or discharge passengers ... (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...." Thus, that code section says a vehicle can be parked unless it is "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." (emphasis added). 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. No stop sign existed on East Cooper Avenue at the East Second Street intersection, and no other traffic-control signals existed at the intersection.

Furthermore, as discussed in the hearing transcript dated May 16, 2017, Appellant's argument that Rabon somehow violated S.C. Code Ann. § 56-5-2530(A)(2)(c), which prohibited parking "within twenty feet of a crosswalk at an intersection" also failed as a matter of law. As the transcript detailed, Appellant attempted to use his personal affidavit based off measurements he performed near the time of the summary judgment hearing (years after the accident) to compare to the police officer's measurements and a generic overlay of a crosswalk because no painted crosswalk exists at the accident site. Such testimony was clearly inadmissible because of hearsay and Appellant's lack of qualification to give any expert opinion on the subject. Appellant's affidavit also failed to explain how Rabon's parked car contributed in any way to the event when Rabon's parked car was at a distance away from the drivers as they approached the intersection and the parked car did not obstruct any view.

As an additional basis for summary judgment to Rabon, Rabon's actions or inactions in parking his vehicle off the paved roadway could not, as a matter of law, constitute the proximate cause of any injury or damage to Irvin. "Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." McKnight v. S.C. Dep't of Corrections, 684 S.E.2d 566 (S.C. Ct. App. 2009).

As the Complaint and Amended Complaint alleged, Irvin hit the rear end of Rabon's parked vehicle after Defendant Wilcutt allegedly struck Irvin's motorcycle Irvin and caused Irvin to lose control of his motorcycle across the intersection and off the roadway. The photograph attached to Appellant's May 15, 2017 Affidavit showed the point of impact at the center rear lift gate of Rabon's vehicle from the Irvin motorcycle. The evidence also showed that Rabon was parked behind other vehicles off the roadway in front of the residential houses that line East Cooper

Avenue. Thus, Rabon's vehicle was simply the stopping point for Irvin and not the proximate cause of any injury or damage. Very simply, if Irvin had not hit the rear of the Rabon vehicle, Irvin would have struck another vehicle or house along the road. In addition, the "crosswalk" statute argued by Appellant to the trial court was intended to keep motorists free of any obstructions to their view, and both Wilcutt and Irvin had unobstructed views. See generally Senn v. J.S. Weeks & Co., 255 S.C. 585, 180 S.E.2d 336 (1971) (discussing issue is whether motorist has an unobstructed view of the roadway or any traffic signs, such as a stop sign).

The evidence showed both Wilcutt and Irvin had unobstructed views of the intersection. Appellant did not assert that Rabon's parked vehicle somehow obstructed Wilcutt's view of any stop sign or East Cooper Avenue. Clearly, no causative connection existed between Rabon's parked vehicle and the alleged accident between Wilcutt and Irvin. Accordingly, the trial court properly granted Rabon summary judgment because any violation of the cited statute (which was denied) would not have been the proximate cause of Appellant's claims.

In Gerrity v. Muthana, 28 A.D.3d 1063 (N.Y. 1st Dep't 2006), that court held that a parked bus struck by Plaintiff's bus after Defendant ran a red light and collided with Plaintiff's bus was not a proximate cause of any claim. The court ruled that the location of the parked bus in a "No Standing" area "merely furnished the condition or occasion for the occurrence of the event' and was not one of its causes.'" Id. (citing Mendrykowski v. New York Telephone Co., 2 A.D.3d 1410 (NY 1st Dep't. 2003). See also Rauh v. Jensen, 507 P.2d 520 (Mont. 1973) (holding the lack of proximate cause under similar circumstances and no liability because no relationship existed between the purpose of the parking ordinance and the claimed injury); Pepsi-Cola Bottling Co. of Tulsa, Oklahoma v. Von Brady, 386 P.2d 993 (1963) (holding violation of "no parking" ordinance not a proximate cause of the injury).

## CONCLUSION

When deciding a summary judgment motion pursuant to Rule 56, SCRCP, a trial court must weigh the facts and inferences in a light most favorable to the non-

moving party. Summary judgment is appropriate when the pleadings, depositions, discovery, and affidavits show no genuine issue of material fact exists. Bravis v. Dunbar, 316 S.C. 263, 449 S.E.2d 495 (Ct. App. 1994). Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Moore v. Weinberg, 373 S.C. 209, 217, 644 S.E.2d 740, 744 (Ct. App. 2007). The nonmoving party must come forward with specific facts showing a genuine issue for trial. Id.

In this case, the trial court correctly ruled that Appellant did not produce sufficient evidence at the summary judgment hearing held 19 months after Appellant filed the lawsuit to show any actionable negligence by Rabon. Appellant was not qualified to offer expert opinions as an accident reconstructionist, which he attempted to do in his Affidavit by (a) juxtaposing the investigating officer's measurements onto an overlay of a generic intersection and (b) attempting to locate Rabon's parked vehicle by comparison of his measurements with the unmarked crosswalk at the intersection of East Cooper Avenue and East Second Street. The trial court properly did not consider those opinions because such would have violated Rule 56€, SCRCP.

Alternatively, the testimony and evidence showed that Rabon's parked vehicle, which Appellant conceded was parked off of the paved roadway, was not the proximate cause of the event but merely the stopping point for the Irvin motorcycle once it left the roadway. If the Irvin motorcycle had not collided with Rabon's parked car, the motorcycle would have hit another car or the houses along the street.. In any event, Rabon's parked vehicle did not obstruct any view of any approaching motorist to any stop sign or traffic control device, and Rabon's parked vehicle did not obstruct the vision of either Wilcutt or Irvin. Accordingly, the trial court properly granted Rabon summary judgment.

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and Public Transportation, Daniel Wilcutt and
Mitchell Dewitt Rabon, Jr., of whom

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

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**RULE 211(b) CERTIFICATION**

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The undersigned, an attorney in this matter for Respondent, certifies that this Final Appellant's Brief is identical to the Initial Respondent's Brief, except for inclusion of references to the Record and correction of typographical errors and/or misspellings, and it otherwise conforms to the requirements of Rule 211(b), SCACR.

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