THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

CASE NO. 2016-CP-26-798

South Carolina Farm Bureau Mutual Insurance Company ..... Respondent

vs.

Michael David Harrelson, Devora Harrelson, Kevin Duke
and Government Employees Insurance Company ..... Defendants

OF WHOM:
Michael David Harrelson and Devora Harrelson are..... Appellants
and
Government Employees Insurance Company is..... Respondent

PETITION FOR REHEARING

The Appellants, pursuant to Rule 221 of the South Carolina Appellate Court Rules, moves this Court for a rehearing of its decision filed June 27, 2018 and received by Appellant's attorney on June 29, 2018 based on the following points which the Court overlooked and/or misapprehended.

1. The Opinion of the Court of Appeals is not in compliance with South Carolina Appellate Court Rule 220(b) which provides in pertinent part: "In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case."

The Appellants believes that the opinion of this Court does not comply with SCACR 220(b) because this Court fails to state concisely its findings of fact in affirming the grant of summary judgment by the Circuit Court.

2. This court erred in failing to state the facts which give rise to this Court affirming the circuit court's order that there was no genuine issue of material fact.

3. This Court erred in failing to explain why Appellants had not produced a scintilla of evidence as required by SCRCP 56.

4. This Court erred in failing to articulate why *South Carolina Farm Bureau Mutual Insurance Company v. Mumford*, 299 S.C. 14, 17-18, 382 S.E.2d 11, 13 (Ct. App. 1989) was not applicable. In particular, this Court does not explain or address the following points:

a. The use by Duke of his vehicle to trap Harrelson and pin him to his car and injure him.

b. The use of Duke's vehicle to block Harrelson from leaving the scene in his vehicle.

5. The Court also erred in failing to consider *South Carolina Farm Bureau Mutual Insurance Co. v. Kennedy*, 398 S.C. 604, 730 S.E.2d 862 (2012) which holds that an individual "touching" a vehicle qualifies for uninsured and/or underinsured motorist coverage. In this case, the following factual points were not addressed by the Court:

a. This was a parking lot dispute that arose out of use of a parking space. (use of vehicle/causal link).

b. The assailant Duke used his vehicle to block Harrelson from leaving and by pinning him against his own car. (active accessory).

c. Duke used his car as a weapon to assault Harrelson. (active accessory).

(Coverage was found in similar circumstances in the case of *Home Insurance Co. v. Towe* 314 S.C. 105, 441 S.E.2d 825 (S.C. 1994) and this Court does not address that issue.

6. This Court erred in not determining or deciding what facts in this case applied regarding the three prong test for determining when an injury arises out of ownership, maintenance or use of an uninsured motor vehicle. This test was set out in *Wassau Underwriters Ins. Co. v. Howser*, 309 S.C. 269, 422 S.E.2d 106 (1992). While Appellants argued there were sufficient facts in the record to satisfy the *Howser* test, this Court did not address it in affirming the circuit court judge's order. In particular, Appellants offered evidence as follows:

a. A dispute arose over a parking space and the driving conduct of each of the parties. (no independent break of causal link) (use of vehicle).

b. Testimony of Harrelson was he couldn't back out because Duke blocked his vehicle from leaving. (active accessory use by Duke of his vehicle).

c. Duke then used his vehicle as a weapon to assault Harrelson by pinning Harrelson against the vehicle. (active accessory).

In sum, this Court fails to discuss these facts and fails to address that Appellants had more than a scintilla of evidence; and; thus; this should have been decided by a jury and not by the circuit court.

WHEREFORE, Appellants pray this Court rehear this matter and reverse the circuit court consistent with this Petition.

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July 6, 2018
Surfside Beach, South Carolina.

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IN THE COURT OF APPEALS

APPEAL FROM HORRY COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson, Circuit Court Judge

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vs.

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and Government Employees Insurance Company ..... Defendants

OF WHOM:
Michael David Harrelson and Devora Harrelson are..... Appellants
and
Government Employees Insurance Company is..... Respondent

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR REHEARING

On June 27, 2018, this Court issued its Opinion No. 2018-U-287. The Appellants in response to this Court's opinion offers the following additional argument concerning its Petition for Rehearing.

I. THIS COURT'S OPINION DOES NOT COMPLY WITH SCACR 220.

Appellants respectfully points out to the Court that the opinion provided by this Court does not comply with SCACR 220(b). It provides:

> In every decision rendered by an appellate court, every point distinctly stated in the case which is necessary to the decision of the appeal and fairly arising upon the

record of the court must be stated in writing and must, with the reason for the court's decision, be preserved in the record of the case.[1]

Petitioner respectfully points out to the Court that the opinion has none of the facts of this case and is presented more as a memorandum opinion than a full opinion on the merits. As this Court is aware, only The Supreme Court can file a memorandum opinion. See SCACR 220(b)(1) ("The Supreme Court may file a memorandum opinion....")

It is well settled in South Carolina that when an appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and reasons for its decisions. This Court fails to explain why the evidence presented in the light most favorable to the non-moving party requires summary judgment be granted to South Carolina Farm Bureau and Geico. Appellants respectfully argue to the Court that the best practice in most cases, in fact, the common practice, as well as that beneficial to the judicial process, is for this Court to articulate relevant reasons for affirming a grant of summary judgment. See *Carpenter v. Burr*, 381 S.C. 494, 673 S.E.2d 818, *rehearing denied, certiorari dismissed*, 394 S.C. 518, 716 S.E.2d 295 (2009) (If Appellate court chooses to find facts in accordance with its own view of the evidence, the court must state distinctly its findings of fact and reasons for its decisions.); *Simmons v. Berkley Electric Coop.*, 319 S.C. 479, 462 S.E.2d 291 (2016) (Appellate court must apply the same standard as circuit court when considering motion for summary judgment.)

Accordingly, Appellants request that the Court specifically apply the facts presented in this case to the law and provide the Appellants with specific factual reasoning as to why the grant of summary judgment was affirmed.

As has been stated previously, this case as to Geico concerned the application of South Carolina Financial Responsibility Act for intentional acts of the insured. In this case, Appellants presented facts which would indicate that Duke's use of his vehicle was an intentional act which

[1] Appellants believe the opinion does not specify the reasoning for the Court's opinion.

still covered under South Carolina Financial Responsibility Act and *Mumford*. This Court, however, fails to articulate reasons why this case is any different from *Mumford*. Appellants point out that Duke used his vehicle as an active weapon, that Duke and Harrelson were involved in a traffic dispute and that Duke positioned his vehicle behind Harrelson's in such a way that Harrelson could not escape and then used his own vehicle to attack Harrelson. Appellants have been provided no reason why the *Mumford* case does not apply based on the facts and the scintilla of evidence rule.

II. THIS COURT DOES NOT EXPLAIN WHY APPELLANTS HAVE NOT PRESENTED MORE THAN A SCINTILLA OF EVIDENCE WHICH REQUIRED THAT SUMMARY JUDGMENT BE DENIED.

The per curiam opinion presented by this Court does not discuss any of the facts of this case. It does not tell Appellants why there is no genuine issue of material fact and what facts it relied upon in making this conclusion. In fact, the evidence presented is that this injury arose out of the ownership of a motor vehicle, i.e., a dispute in a Wal-Mart parking lot over a parking space, and that there was a causal connection between Duke's vehicle and the injury, i.e., the pinning of Harrelson against Duke's vehicle and the blocking of Harrelson's vehicle, and further there was no active independent significance which broke the causal connection since the dispute clearly arose out of use of a motor vehicle. Finally, Duke used his vehicle both to block Harrelson's vehicle and to leave the scene.

This Court in listing the elements found in *State Farm Mutual Automobile Ins. Co. v. Bookert*, 337 S.C. 291, 293, 523 S.E.2d 181 (1999) and in *Peagler v. USAA Ins. Co.*, 368 S.C. 153, 159, 628 S.E.2d 475 (2006) makes no mention of which of the elements Appellants have not satisfied. Appellants respectfully suggest that they have presented evidence on each of the elements and that this Court must address each element based on the evidence presented. Appellants respectfully request that the Court review the depositions and the salient parts of those depositions

offered in Appellants' Brief. The Court simply affirms without citing the facts of this case. which Appellants believe is incorrect as a matter of law.

In sum, Appellants respectfully request the Court reverse its order affirming the grant of summary judgment and return this matter to the circuit court based on the scintilla of evidence rule.[2]

III. THIS COURT ERRED IN FAILING TO DISCUSS IN ITS OPINION THE TESTIMONY OF THE WITNESSES.

It is respectfully submitted that the Court of appeals erred in granting summary judgment without discussing the facts of the case. The Appellants raised specific factual issues which this Court must address.

As an example, Appellants provided in the Record on Appeal the testimony of Michael Harrelson. He testified that on December 21, 2012 he was in the parking lot at Walmart at the Myrtle Beach store waiting for another individual to pull out of a parking space so that he could pull in and all of a sudden he heard someone blowing a horn behind him and flashing his lights. (R. p. 216, lines 22-24). He further saw the same person back up and come flying back up towards him and get so close he could see his face in the rearview mirror. (R. p. 216, lines 24-25; R. p. 217, lines 1-14). Harrelson stated he had to walk around the back of the car to get by, that he couldn't have backed out of the space if he wanted to as Duke's car was so close to him. (R. p. 217, lines 12-15). Harrelson got out and walked to the back of his car to see what was going on. Duke got out of his car and struck Harrelson so hard he knocked his glasses off and fractured his eye socket. (R. p. 219, lines 20-25). Harrelson held up his hands trying to block the blows and Duke had pushed Harrelson right onto the trunk of Duke's BMW. (R. p. 220, lines 1-5). Duke used his car to pin Harrelson against it so he couldn't get away. (R. p. 220, lines 4-7). Duke pushed Harrelson all the way up

[2] Appellants also note they requested a jury trial in their pleadings and thus the Court should explain why they are not entitled to a jury trial.

against the car as he pushed Harrelson onto the car. (R. p. 220, lines 8-12). Harrelson also offered testimony that there was blood all over the back of Duke's car because of the way Harrelson was losing blood and the fact that he (Duke) had pushed him (Harrelson) onto the car. (R. p. 220, lines 18-21).

There was also testimony that Harrelson stated Duke had used his car as a weapon. The salient testimony is as follows:

Q: How was his vehicle a weapon?

A: Because of using it to pin me against. Just like if I come at you and held a baseball bat up to you. I mean it was a weapon. Because if I had—If he hadn't thrown me against the car, I could have got away from him and twisted around. But with him having me pinned to the car there was nowhere for me to go or to get away from him.

Q: Would you agree with me that the fight could have just as easily moved to the right or to the left and you could have ended up pinned up against a separate vehicle?

A: No, Sir. Because he made sure to put me on his car. That's where he forced me to. (R. p. 223, lines 18-23).

Q: So that's the only reason that you're saying it's a weapon is because it was there and he pinned you against it?

A: Because of his actions of using it and how he revved the engine and pulled up behind me. The whole—The whole thing.

(R. p. 224, line 25; R. p. 225, lines 1-5).

Q: How would revving the engine have anything to do with it being a weapon?

A: That's like pointing a gun at you. Him revving the engine to threaten you like he's going to run over you.

(R. p. 225, lines 6-9)

Harrelson further described how the car itself caused him injuries:

Q: You would agree that the injuries that you received and which you are complaining about were caused by Mr. Duke's fists?

A: His fists and his car.

Q: And what part of his car caused any injury to you directly?

A: From him pinning me against it where I could not move or get away.

Q: What part of the car caused what injury to you?

A: The car didn't cause the injury, but it helped -- It enabled him to do the injury....If he hadn't been able to force me to his car and use his car, I could have twisted and turned where he couldn't have beat me and caused the brain injury.

(R. p. 227, lines 9-16).

This Court, in its opinion, discusses none of these facts, but simply holds "As to GEICO's liability under the Act: *USAA Prop. & Cas. Inc. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008)." However, in *Clegg*, the court specifically discussed the facts of how the incident occurred. Further, *Clegg* has no factual application to this case since it involved the residency of a 19-year old son and a single vehicle accident involving the death of a passenger. Here, Appellants have been provided with no reasoning why Harrelson's claim is not covered under the policy and the applicable law. This case clearly involves driving and arguments about a parking space. However, the Court does not discuss it in its opinion. Appellants are left to wonder whether or not the facts of this case require coverage under the mandate for intentional acts of the insured pursuant to *S.C. Farm Bureau v. Mumford*, 299, S.C. 14, 382 S.E.2d 11, (Ct. App. 1989). Appellants request

the Court address the specific facts of this case and apply the Financial Responsibility Act. (S.C. Code § 38-77-140(a) (2005).

IV. THIS COURT HAS NOT APPLIED THE FACTS TO THE CASE OF *STATE FARM MUTUAL AUTOMOBILE INS. CO. v. BOOKERT*, 337 S.C. 291, 523 S.E.2d 181, 182 (1999).

Appellants respectfully point out to the Court that the specific facts which have been presented in this record have not been applied to the three elements in *Bookert*. Appellants request the Court specifically apply the facts of this case to those elements. The record reveals that Duke's vehicle was an active accessory to the incident, especially in light of his conduct in the car leading up to the assault. Further, the testimony of Harrelson establishes that Duke used his vehicle to trap Harrelson and then used his vehicle to assault him by pinning him against the vehicle. Thus, the vehicle was more than the mere situs of the injury. Finally, the injury that Harrelson suffered from the road rage incident over his driving in a crowded Walmart parking lot during the Christmas season was foreseeable with the normal use of the vehicle. Appellants request this Court specifically apply those facts to the summary judgment standard and if this Court does so, it will hold that summary judgment should not have been granted and that the case should be heard by a jury.

V. THE COURT DOES NOT ADDRESS THE SCINTILLA OF EVIDENCE RULE.

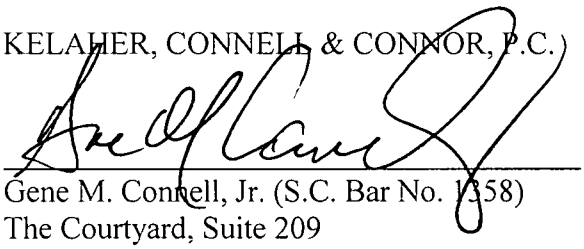
The Court, in its opinion, does not address the scintilla of evidence rule. It is well established in South Carolina that summary judgment is a drastic remedy to be applied cautiously. See *McKnight v. S.C. Dept. of Corrections*, S.C. App. 2009, 385 S.C. 380 (summary judgment is not appropriate where further inquiry into the facts is desirable to clarify the application of the law). Appellants respectfully request the Court review this matter and comb the record since it is an appellate court's duty to review all ambiguities, conclusions and inferences arising in or from the

evidence in a light most favorable to the non-moving party. See *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 661 S.E.2d 791 (S.C. 2008). A review of the record provided, particularly the testimony of the Harrelsons, shows more than a scintilla of evidence; and, thus, summary judgment should have been denied and the issue submitted to a jury. See *Pye v. Estate of Fox*, 369 S.C. 555, 633 S.E.2d 505 (2006) (Trial issues exist. Those issues must be for a jury and not the Court.)

VI. CONCLUSION

In summary, Appellants respectfully request the Court rehear this matter, provide a new opinion to Appellants applying the facts to the law and when doing so, discuss the application of the facts to *State Farm Mutual Automobile Ins. Co. v. Bookert*, 337 S.C. 291, 523 S.E.2d 181 (1999) and *S.C. Farm Bureau Mut. Ins. Co. v. Mumford*, 299 S.C. 14, 382 S.E.2d 11, (Ct. App. 1989). If this Court will apply these cases to the specific facts, this Court will come to the conclusion that there was more than a scintilla of evidence and that summary judgment should have been denied by the circuit court. See *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (S.C. 2000) (Summary judgment is a drastic remedy which should be cautiously invoked.) See also *Hancock v. Midsouth Management Co.*, 381 S.C. 326, 673 S.E.2d 801 (S.C. 2009); (We hold that in cases applying the preponderance of the evidence burden of proof, the nonmoving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment). Appellants point to the record in this case and the testimony of the witnesses to show that more than a scintilla of evidence has been presented and that summary judgment should not have been granted. Thus, Appellants respectfully request the Court withdraw its opinion and rehear this case.

KELAHER, CONNELL & CONNOR, P.C.



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July 6, 2018
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PROOF OF SERVICE

PERSONALLY appeared before me, Shelia Y. McCumbee, who being duly sworn, deposes and says that she is an employee of Kelaher, Connell & Connor, P.C., and that she has served a copy of Appellants' **Petition for Rehearing and Memorandum of Law in Support of Petition for Rehearing** on the Respondents on the 6th day of July, 2018, by depositing a copy of same in the United States Mail, postage prepaid, to:

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Ginger D. Goforth, Esquire
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Shelia Y. McCumbee

Shelia Y. McCumbee

SWORN AND SUBSCRIBED before me,
this 6th day of July, 2018.

Notary Public for South Carolina
My Commission Expires: 2/17/19

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July 6, 2018

VIA FEDERAL EXPRESS
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
1220 Senate Street
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Re: Appellate Case No. 2017-000745
South Carolina Farm Bureau Mutual Insurance Company v. Michael David Harrelson, Devora Harrelson, Kevin Duke and Government Employees Ins. Co.
C/A No. 2016-CP-26-798
Our File No. 2015-0183C

Dear Ms. Kitchings:

Enclosed please find an original and seven (7) copies of Appellants' **Petition for Rehearing, Memorandum of Law in Support of Petition for Rehearing** and **Proof of Service** of same in the above-captioned matter. I also enclose our check for $25.00 for the filing fee. Please return a filed copy to this office in the self-addressed, stamped envelope enclosed for your convenience.

By copy of this letter, we hereby serve a copy of the above-stated document on Respondents through counsel of record.

With best regards, I am

Sincerely yours,

Gene M. Connell, Jr.

GMC,Jr.:sm
Enclosures

cc w/enc.: J. Dwight Hudson, Esquire
John E. Rogers, II, Esquire
Ginger D. Goforth, Esquire