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| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF PICKENS | ) | |
| | ) | |
| Kevin M. Granatino, | ) | **ORDER GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT** |
| | ) | |
| Plaintiff, | ) | |
| | ) | |
| vs. | ) | |
| | ) | C.A. NO.: 2016-CP-39-01223 |
| Calvin Williams, Clemson University, South Carolina Department of Transportation and Thrift Development Corporation, | ) | |
| | ) | |
| Defendants. | ) | |



This matter is before the court on the Motions for Summary Judgment by the Defendants, Thrift Development Corporation ("Thrift"), South Carolina Department of Transportation ("DOT") and Clemson University ("Clemson"). The Defendants allege that the Plaintiff has failed to present any expert testimony that they deviated from any professional standard of care. Further, they allege that the Plaintiff was comparatively negligent and that such negligence exceeded 50%. Finally, Clemson argues that it owed no duty to the Plaintiff and/or that there is any evidence that it breached a duty of care to the Plaintiff.

Following a hearing on June 1, 2018, and a careful review of the various memoranda, pleadings, all other matters submitted and applicable case law, the Court hereby grants each of the Motions for Summary Judgment.

The Plaintiff, Kevin Granatino, was a student at Clemson University at the time of the accident on October 23, 2014. On that date, the Plaintiff was walking across the intersection of Highway 123/Tiger Boulevard and Highway 33/College Avenue when he was hit by a vehicle driven by the Defendant, Calvin Williams. The Plaintiff alleges that the Defendant, South Carolina

Department of Transportation ("DOT") contracted with Thrift to complete construction in and around the intersection of Highway 123 and College Avenue. The Plaintiff alleges that he suffered permanent injuries as a result of being struck by Mr. Williams' vehicle.

The Plaintiff alleges that Thrift provides construction services to the DOT. The Plaintiff further alleges that on the day of the accident, the intersection had a "defective, poorly maintained, and/or unsafe construction area." (Complaint at paragraph 24). Plaintiff further alleges that Thrift and DOT owed a duty to create and/or maintain the intersection in a reasonably safe condition and to create and/or maintain the intersection according to the standards applicable to such creation and maintenance. The Plaintiff further alleges that Thrift and DOT owed a duty to exercise reasonable care and inspections of the intersection along with a duty to warn. The Plaintiff argues negligence in the failing to correct and/or repair any dangerous conditions, negligence in creating and/or constructing the intersection, failing to maintain the intersection, failing to repair/correct hazardous conditions and failing to warn of those hazardous conditions. In Paragraph 35 of the Complaint, the Plaintiff lists seven particulars of negligence against Thrift and the DOT.

I. Plaintiff was comparatively negligent in excess of 50% and therefore barred from recovery.

The Defendants submit that the Plaintiff was negligent in crossing the intersection and that his negligence exceeded 50%, therefore barring his recovery. They maintain that even if they were in some way negligent, no reasonable jury could find that their negligence equaled, or was greater than, the Plaintiff's negligence.

Under South Carolina's Doctrine of Comparative Negligence, a Plaintiff may only recover damages if its own negligence is not greater than that of the Defendant. Nelson v. Concrete Supply Co., 303 S.C. 243, 399 S.E. 2d 783 (1991).

The Court acknowledges that ordinarily, comparison of the Plaintiff's negligence with that of the Defendant is a question of fact for the jury to decide. Bloom v. Ravoira, 339 S.C. 417, 429 S.E. 2d 710 (2000). The Ravoira court further stated as follows: "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 50%." Bloom, 529 S.E. 2d at 711.

In Bloom, the case involved a driver and a pedestrian. The pedestrian was crossing the street when he was struck by the Defendant's car. The trial court granted the Defendant's Motion for Summary Judgment, finding that even if the Defendant was "in some way negligent, no reasonable jury could find that [Defendant's] equaled, or was greater than, [Plaintiff's] negligence." Bloom, 529 S.E. 2d at 711.

In reaching this decision, the Bloom court stated that it must view the facts in the light most favorable to the non-moving party. However, it further said that a court cannot ignore facts "unfavorable to that party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts." Bloom, 527 S.E. 2d at 713. The court then cited the many facts which, even when viewed in the light most favorable to the Plaintiff, clearly showed that the Plaintiff was negligent.

In upholding the trial court's decision to grant summary judgment to the Defendant, the Bloom court stated as follows: "Here, the undisputed facts established that Bloom attempted to cross the street but did not do so in a safe, reasonable manner. Any factual issues which might exist as to Ravoira's fault in this accident cannot alter the inescapable conclusion that, as a matter of law, Bloom's fault exceeded 50%. Where evidence of the Plaintiff's greater negligence is

overwhelming, evidence of slight negligence on the part of the Defendant is simply not enough for a case to go to the jury." Bloom, 529 S.E. 2d at 713–714.

The Bloom court concluded that its decision is no departure from the rule that summary judgment is a "drastic remedy" which should be "cautiously invoked". Bloom, 529 S.E. 2d at 714.

> Nevertheless, in the rare case where a verdict is not reasonably possible under the facts presented, summary judgment is proper. Accordingly, we find that the trial court correctly granted summary judgment...

Bloom, 529 S.E. 2d at 714.

As in Bloom, the Plaintiff in this case was clearly negligent in excess of 50%, and accordingly, summary judgment is the proper remedy. Even if Defendants were negligent, no reasonable jury could find that their negligence equaled, or was greater than, the Plaintiff's negligence. The Plaintiff attempted to cross the street but did not do so in a safe, reasonable manner. Any factual issues which might exist as to Defendants' fault cannot alter the "inescapable conclusion" that, as a matter of law, Plaintiff's fault exceeded 50%.

While the Court understands that summary judgment in such circumstances is a "drastic remedy," it is nevertheless warranted. For other cases in which the court reached similar results, see Hopson v. Clary, 321 S.C. 312, 468 S.E. 2d 305 (Ct. App. 1996); Estate of Haley v. Brown, 370 S.C. 240, 634 S.E. 2d 62 (Ct. App. 2006).

The Plaintiff's own sworn testimony supports the conclusion that he was negligent, and that such negligence was more than 50%. The Plaintiff, 21 years old at the time, was racing into the busiest intersection[1] in Clemson on a Thursday night before a Clemson home game, after drinking alcohol to excess (.122 according to the medical records), carrying his friend piggy-back

[1] The Plaintiff identified the intersection shown in the photographs of Exhibit 6 to Officer Brooks' deposition.

style. He testified repeatedly in his deposition that the traffic light turned yellow after he got into the middle of the intersection. (Granatino @ 121; See also, Granatino @ 141-142) At that point, he had already crossed several lanes of travel. The clear implication is that the light was green when he and his friend hurried into the busy street and were hit by the Williams' vehicle. (Granatino @ 21; See also, Granatino @ 40-41). The Plaintiff's own description of his action leading up to the incident establish that he violated South Carolina law and evidence of negligence per se.

Earlier that evening, the Plaintiff and several of his friends met up with 5 or 6 girls, including Lindsay Jones. As they walked from a local apartment, they had to cross through the intersection of Highway 123 and College Avenue before they entered the intersection at the time of the accident. The Plaintiff recalls stopping and looking for traffic at that intersection earlier that evening. Further, the Plaintiff was familiar with the intersection as he had been through the intersection both on foot and by car on previous occasions. The Plaintiff recalls they were either going to go downtown or to one of the bars. At some point before arriving at the intersection, the Plaintiff began carrying Ms. Jones on his back. (Granatino @ 12-20)

The Plaintiff further recalled that when he stepped into the roadway, he was carrying Ms. Jones on his back and continued to do so until they got to the middle of the road. He stopped in the middle of the road because "there was cars going the other way, so we just wanted to make sure we were safe to cross." (Granatino @ 121; See also, Granatino @ 141-142) At that point, the light turned yellow and they continued to crossing the intersection at which time they were struck by the Williams' vehicle. (Granatino @ 23-25; Granatino @ 32-33)

The accident report (Exhibit 2 to Brooks' deposition) includes a diagram and narrative of what happened that night. Several MAIT officers in the Clemson City Police Department

investigated the accident. They concluded that Plaintiff and his friend were "unlawfully in the roadway" and "failed to yield to the traffic." As a result, Plaintiff was found to have contributed to the accident.

While the Plaintiff has submitted an affidavit directly contradicting his prior testimony, on several occasions during the deposition he admitted that the light turned yellow after they had gotten to the middle of the intersection. (Granatino @ 40-41; Granatino @ 21; Granatino @ 121; Granatino @ 141-142) To the extent the Plaintiff's affidavit offered in opposition to the Motion for Summary Judgment materially and directly conflicts with his prior sworn testimony, the Court does not consider the affidavit. Our courts have consistently held that the trial court may disregard a subsequent affidavit as a "sham," that is, does not create an issue of fact merely by contradicting that party's own prior testimony. In distinguishing between a sham affidavit and a correcting or clarifying affidavit, the court must take into account a number of considerations including when the affidavit is offered in relation to the Summary Judgment motion. In this case, the Plaintiff's affidavit was not offered until mere days before the motion hearing and he has not offered a credible explanation for the statements that contradict his prior sworn testimony. Accordingly, the court rejects the affidavit as a sham. Ins. Prods Mktg. v Conseco Life Ins. Co., 2012 U.S. Dist. LEXIS 113111 (2012); Cothran v. Brown, 357 S.C. 210, 592 S.E. 2d 629 (2004); Wells Fargo Bank, N.A. v. Prescott, 2017 S.C. App. Unpub. LEXIS 54 (2017)

The Court further notes Plaintiff had competent counsel at his deposition who had the opportunity to clarify his testimony at that time. Plaintiff also had the opportunity to read and sign his deposition.

While the Plaintiff admitted that he could have been intoxicated that night and simply did not remember, the medical records make it clear that he was in fact intoxicated. (Greenville

Memorial Hospital records 1100-GHS-83; 1100-GHS-394). Officer Brooks from MAIT testified that he has investigated numerous cases involving the issue of intoxication and impairment by alcohol. He has encountered drivers in the past who were impaired when they had a blood alcohol of .122 as the Plaintiff in this case. He confirmed that is above the legal limit as far as operating a vehicle on public highways. He further testified that if someone has alcohol in their system above the legal limit, then S.C. Code Ann §56-5-3270 would be applicable. That statute specifically provides that pedestrians who are under the influence of alcohol "which renders himself a hazard shall not walk on or be upon a roadway except a sidewalk" (Brooks @ 95-97). Officer Craig from MAIT also testified that it was unsafe for a pedestrian who was under the influence to walk into a roadway. (Craig @ 93-94) Officer Craig further testified that it was his experience with the Highway Patrol that individuals with .122 alcohol level are often impaired. Officer Craig agreed that the effects of such impairment could include their judgment. (Craig @ 94-95)

Officer Johnson with the Clemson City Police Department also testified that it has been his experience that when someone's alcohol level is at .08 or greater, that they will show signs of impairment. That impairment includes being unsteady on their feet, impairment in their thinking and judgment, and the inability to judge distance and speed. (Johnson @ 112-115)

While Ms. Jones could not recall whether the Plaintiff consumed alcohol that night, she admitted that she drank liquor and was intoxicated. She further testified that they had crossed through the Highway 123/College Avenue intersection at least two times that night before the accident and that the girls who were with her had also been drinking. (Jones @ 26-28; 33-35; 39; 46-47)

In summary, the Plaintiff violated at least five different statutes governing pedestrians in or around the highway and intersections:

§56-5-3110 – Pedestrians shall obey the instructions of any official traffic control device.

§56-5-3130 – No pedestrian shall suddenly leave a curb or other place of safety to walk or run into the path of a vehicle which is so close as to constitute an immediate hazard.

§56-5-3150 – Pedestrians shall yield the right of way upon the roadway.

§56-5-3160 – Any pedestrian upon a roadway shall yield a right of way to all vehicles upon the roadway.

§56-5-3270 – A pedestrian who is under the influence of alcohol to a degree which renders himself a hazard shall not walk or be upon a highway except a sidewalk.

Based upon the Plaintiff's own testimony and testimony of other witnesses, the Plaintiff was clearly comparatively negligent in excess of 50%, and accordingly, his claims are barred.

II. The conduct of Thrift, DOT and Clemson was not the proximate cause of this accident.

Even if one assumes that the light for traffic on Highway 123 was red at the time of this accident, as Plaintiff now claims in his Affidavit, then Defendant Calvin Williams ("Williams") disregarded the red light and his conduct alone was the sole cause of this accident. Based upon the Plaintiff's own testimony, he knew **when** he could lawfully enter the intersection and **where** he could lawfully cross at the intersection and, therefore, under the Plaintiff's own new theory, there could be no liability on the part of the remaining Defendants. Such knowledge on the part of the Plaintiff completely absolves Thrift, DOT and Clemson of any liability in this case. Accordingly, the Plaintiff's claims against these remaining Defendants are barred as a matter of law.

III. The Defendants are entitled to judgment as a matter of law because the Plaintiff has not presented any expert testimony that they deviated from a professional standard of care.

The Plaintiff has alleged that Thrift and DOT were negligent in many different respects concerning the construction at the intersection of Highway 123 and College Avenue. Those

allegations include construction services and management, as well as coordination of the work of various sub-contractors. The allegations also refer to concerns compliance with industry standards, including the Manual On Uniform Traffic Control Devices. Such matters are not within the area of common knowledge and experience of the layman, and therefore, expert testimony is necessary to establish both the standard of care and Thrift's deviation from that standard. City of York Co. v Turner-Murphy Co., 317 S.C. 194, 452 S.E. 2d 615 (1994).

In the City of York case, the Plaintiff alleged that the project engineer was negligent in failing to adequately observe, inspect, and supervise the construction and failing to ensure conformance with the plans and specifications. In reaching this conclusion, the City of York court found that expert testimony was necessary to establish the standard of care. In reaching that conclusion, the court found as follows:

> That capability requires professional knowledge of construction methods and procedures to determine whether any engineering company should have anticipated this problem based upon difficulties encountered during the construction process.

City of York, 452 S.E. 2d at 617.

Similarly, Thrift was the general contractor for this construction project and DOT was the "owner." An analysis of the performance of their duties requires something more than the common knowledge and experience of a layman. There must be testimony to establish that a reasonable and prudent construction management company would anticipate the particular problems, if any, regarding the placement of traffic control devices and management of the intersection generally. As the City of York court stated:

> In a professional negligence cause of action, the Plaintiff must prove the professional failed to conform to generally recognized and accepted practices in the profession. If the Plaintiff cannot meet this burden, then the professional cannot be found liable as a matter of law.

City of York, 452 S.E. 2d at 615.

An expert witness "must have acquired by reason of study or experience or both, such knowledge and skill in a business, profession, or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." City of York, 477 S.E. 2d at 472.

In this particular case, the parties entered into a Consent Scheduling Order which required the Plaintiff to identify an expert by January 1, 2018. The Plaintiff has failed to identify any such experts, and correspondingly, has no competent evidence or testimony to establish a breach of a duty on the part of Thrift or DOT. This failure to offer expert testimony under the circumstances of this case is fatal and the Court hereby grants their Motions for Summary Judgment. Further, based upon the Plaintiff's own factual evidence, no expert testimony was necessary.

IV. Clemson owed no duty to the Plaintiff, and accordingly, Plaintiff's claim against it is barred.

South Carolina law does not recognize a "general duty to control the conduct of another or to warn a third person or potential victim of danger.'" Doe ex rel. Doe, 393 S.C. at 246, 711 S.E.2d at 911 (quoting Faile v. S.C. Dep't of Juvenile Justice, 350 S.C. 315, 334, 566 S.E.2d 536, 546 (2002)). South Carolina Courts have recognized just "five exceptions to this rule: 1) where the defendant has a special relationship to the victim; 2) where the defendant has a special relationship to the injurer; 3) where the defendant voluntarily undertakes a duty; 4) where the defendant negligently or intentionally creates the risk; and 5) where a statute imposes a duty on the defendant." Id. Here, after over a year of extensive discovery, Plaintiff cannot set forth facts sufficient to establish any of the five exceptions. Nothing contained in any deposition transcript, interrogatory answer, document produced, or sham affidavit states any facts sufficient to establish

a duty on behalf of Clemson to Granatino. Accordingly, the Court grants summary judgment to Clemson as a matter of law.

South Carolina courts have not recognized the existence of a special relationship between universities or colleges and their students. See e.g. Hendricks v. Clemson Univ., 353 S.C. 449, 578 S.E.2d 711 (2003) (holding that Clemson University had no duty of care to prevent economic harm where university advisor failed to provide accurate recommendations for academic courses to maintain plaintiff's NCAA eligibility). In fact, the Court held that universities did not have a general duty or a fiduciary duty to students.

Here, Plaintiff did not even allege that a special relationship exists between Clemson and himself, nor has discovery established any facts that would support the existence of a special relationship with Clemson. Plaintiff merely alleges Clemson should have known that students of Clemson crossed the intersection in question in their regular travels to and from school and non-school locations. As such, Clemson, according to Plaintiff, should have created a safe route for people to get to and from campus and that the school was responsible for the safety of those students. Furthermore, Plaintiff asserts Clemson should have controlled the actions of other entities that controlled the intersection in question.

However, Plaintiff has provided no facts to support his allegations that Clemson had any duty to warn or protect Plaintiff from the alleged deficiencies in the Intersection. The Intersection is approximately six-tenths of a mile from Clemson's campus and is in the City of Clemson, not on the campus of Clemson, according to the responding officer for the City of Clemson Police Department. (Johnson @ 78) The Intersection is not on or immediately adjacent to Clemson's campus and all of the property surrounding the intersection is privately owned and used for commercial purposes. Additionally, while there are apartments and other residential properties on

or about College Avenue north of the Intersection, none of those apartments are Clemson housing or owned or controlled by Clemson. Finally, Clemson has no ownership, possession, or control over the Intersection and had no involvement with the construction project taking place at the time of the accident. The Clemson Police Department does not have jurisdiction at this intersection and responds only when requested by City of Clemson Police Department. (Johnson @ 78) Clemson Fire Department and EMS responded to the scene, but that was the result of a mutual aid agreement between the City of Clemson and Clemson and not because of any specific duty Clemson has for the Intersection or the people traveling through the Intersection. (Johnson @ 79 and 80)

Because Plaintiff has not established facts supporting the existence of a special relationship with Clemson and because no facts exist to support the existence of such a special relationship, this Court finds as a matter of law that Clemson did not have a duty to the Plaintiff under the special relationship to the victim exception.

Further, Plaintiff does not allege that a special relationship exists between Clemson and Williams, nor does he state any facts that would support the existence such a relationship. Further, there are no facts that indicate Clemson had any control over Williams, the at-fault driver in the Accident. Accordingly, even viewing the alleged facts in the light most favorable to the Plaintiff, Clemson did not have a duty to the Plaintiff under the special relationship to the injurer exception.

Plaintiff also did not allege that Clemson voluntarily undertook a duty to warn or protect him, nor does he state any facts that would support such a conclusion. Furthermore, discovery has not established the existence of any facts that would give rise to Clemson voluntarily undertaking a duty to warn or protect Plaintiff. Accordingly, even viewing the alleged facts in the light most favorable to the Plaintiff, Clemson did not have a duty to the Plaintiff under this exception.

Other than mere assertions that Clemson University negligently created, allowed, maintained, constructed, repaired, and/or corrected the Intersection, Plaintiff has offered absolutely no factual support or bases to support the allegation that Clemson University somehow created the risk with regard to the Intersection. Nothing contained in any deposition or discovery response suggest that Clemson created any risk to the Plaintiff.

The Intersection is approximately six-tenths of a mile from Clemson's campus and is not attached or adjacent to its campus. Furthermore, Clemson has no ownership, possession, or control over the intersection and had no involvement with the construction project taking place at the time of the accident. Accordingly, even viewing the alleged facts in the light most favorable to the Plaintiff, this Court finds as a matter of law that Clemson did not have a duty to the Plaintiff under this exception.

As for the statutory exception, Plaintiff merely alleges that Clemson failed to "obey the laws and regulations of the State of South Carolina, which were enacted for the safety and well-being of all persons traveling on public roadways." (Compl. ¶ 44.) Plaintiff does not allege any specific statute under which Clemson would owe him a duty regarding construction work on an intersection six-tenths of a mile from its campus over which it had no ownership, possession, or control.

In fact, the South Carolina Tort Claims Act specifically states that Clemson does not have a duty for defects with this intersection as it was not the governmental entity responsible for its maintenance. "[A] governmental entity is not liable for a loss resulting from: absence, condition, or malfunction of any sign, signal, warning device, illumination device, guardrail, or median barrier unless the absence, condition, or malfunction is not corrected by the governmental entity

responsible for its maintenance within a reasonable time after actual or constructive notice." S.C. Code Ann. § 15-78-60(15) (Supp. 2005).

Accordingly, even viewing the alleged facts in the light most favorable to the Plaintiff, this Court should find as a matter of law that Clemson did not have a duty to the Plaintiff under this exception.

The Plaintiff has failed to establish that there is any duty owed to him by Clemson. However, even if under some set of facts there is some argument that a duty might exist, he has failed to establish a breach of any duty.

The Plaintiff has also introduced no testimony or evidence into the case regarding any breach of a duty by Clemson. Only the Plaintiff himself has testified that Clemson has any liability for the Plaintiff's injuries, but nothing in his testimony states what Clemson supposedly did or failed to do that would constitute a breach of a duty. Furthermore, the Plaintiff has not identified any expert witness that would offer any opinion regarding whether Clemson breached a duty to the Plaintiff.

While Plaintiff argues that it is premature to rule on Clemson's Motion, the Court finds that the parties had ample opportunity for discovery prior to the hearing on these motions.

IT IS SO ORDERED.

_____
Perry H. Gravely
Presiding Judge, Thirteenth Judicial Circuit

_____, 2018

Pickens, South Carolina

Pickens Common Pleas

**Case Caption:** Kevin M Granatino VS Calvin Williams , defendant, et al

**Case Number:** 2016CP3901223

**Type:** Order/Summary Judgment

So Ordered

s/ Honorable Perry H. Gravely, #2755