| | | |
|---|---|---|
| STATE OF SOUTH CAROLINA | ) | |
| | ) | IN THE COURT OF COMMON PLEAS |
| COUNTY OF PICKENS | ) | |
| | ) | |
| Kevin M. Granatino, | ) | **ORDER DENYING PLAINTIFF'S MOTION TO ALTER OR AMEND** |
| | ) | |
| Plaintiff | ) | |
| | ) | C.A. NO.: 2016-CP-39-01223 |
| v. | ) | |
| | ) | |
| Calvin Williams, Clemson University, South Carolina Department of Transportation and Thrift Development Corporation, | ) | |
| | ) | |
| Defendants. | ) | |



This matter is before the Court on the Plaintiff's Motion to Alter or Amend the Court's granting of summary judgment in favor of Defendants, South Carolina Department of Transportation ("DOT") and Thrift Development Corporation ("Thrift")[1]. The Plaintiff offers several arguments in support of his motion for reconsideration: first, that the Court erred in determining as a matter of law that the Plaintiff was greater than 50% liable for the injuries he sustained; second, that there are genuine issues of material fact which preclude the granting of summary judgment; and third, that extenuating circumstances, including the withdrawal of the Plaintiff's original counsel, constitute sufficient cause for the Plaintiff to be excused from identifying expert witnesses within the deadlines established by the Consent Scheduling Order submitted by the parties and signed by the Court. For the reasons discussed herein, the Court finds these arguments without merit, and therefore denies the Plaintiff's motion.

[1] In the same Order, the Court also granted summary judgment to Clemson University. The Plaintiff has not sought reconsideration of that finding, and therefore is not addressed within this Order.

## BACKGROUND

Mr. Granatino was a 21-year old student at Clemson University who was struck by a vehicle being operated by Calvin Williams while attempting to cross Highway 123 on a Thursday night before a Clemson home football game while carrying a friend on his back. Mr. Granatino, who sustained significant injuries in the accident, was found to have a blood alcohol level of .122 while at the hospital following the incident.

Mr. Granatino commenced the within action on October 21, 2016, against not only Mr. Williams, the driver of the vehicle, but also Clemson University, the South Carolina Department of Transportation, and Thrift Development Corporation.

During the discovery phase of this matter, the parties entered into a consent scheduling order, which required the Plaintiff to identify expert witnesses on or before January 1, 2018. The Plaintiff did not identify any expert witnesses by the deadline, and has not sought amendment of the scheduling order. Several weeks later, the Plaintiff's then-attorneys sought to be relieved as counsel of record. That request was granted, and Plaintiff's current attorneys, which include his step-father who is an attorney licensed to practice law in Massachusetts and who is admitted *pro hac vice* for this matter, as well as local counsel, filed appearances thereafter.

Thrift and DOT filed motions for summary judgment in mid-January 2018, asserting that the Plaintiff was, as a matter of law, greater than 50% negligent in causing his own injuries; that the Plaintiff's theory of the case established that neither Thrift nor DOT performed acts or omissions that were a proximate cause of the Plaintiff's injuries; and that the Plaintiff failed to offer expert testimony to establish any breach of the standard of care owed by either Thrift or DOT. Following a review of the parties' submissions, a hearing on the motion, and consideration of

proposed orders submitted by the parties, the Court granted the Defendants' motions. The Plaintiff then filed this motion to alter or amend.

## STANDARD OF REVIEW

Under South Carolina law, a Rule 59(e) motion to alter or amend is only appropriate when a party "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue and when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004). Therefore, "a party cannot use a Rule 59(e) motion to advance an issue the party could have raised to the circuit court prior to judgment, but did not." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014); *Hickman v. Hickman,* 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990); *see Smith v. Fedor*, 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017) (finding that issues were not preserved for appeal when first raised in a motion for reconsideration under Rule 59(e)). Accordingly, a party cannot use Rule 59(e) to present evidence absent from the record to the court for consideration. *Mozingo ex rel. Estate of Stewart v. Ford Motor Co.,* No. 2009-UP-282, 2009 S.C. App. Unpub. LEXIS 285 (Ct. App. June 4, 2009) (citing *Brailsford v. Brailsford*, 380 S.C. 443, 448, 669 S.E.2d 342, 345 (Ct. App. 2008)).

Stated another way, the purpose of a motion to alter or amend is "to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Coward Hund Constr. Co., Inc. v. Ball Corp.*, 336 S.C. 1, 4, 518 S.E.2d 56, 58 (Ct. App. 1999); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778 (2004).

In *Mozingo*, the Court of Appeals of South Carolina held that evidence mentioned during a summary judgment hearing but not entered into the record could not later be entered through a 59(e) motion for reconsideration. *See Morzingo* at *2. In that case, the court granted summary

judgment in favor of Defendant in a wrongful death action. *Id.* at *1. Subsequently, Plaintiff filed a Rule 59(e) motion for reconsideration and attached documentation that was mentioned but not presented to the trial court prior to the hearing. *Id.* The court held that, although the documents were attached as an exhibit as "new evidence," a party may not use the Rule 59(e) motion as a vehicle to present the same to the court. *Id.* at *2. Therefore, Plaintiff's motion for reconsideration was denied and the ruling of the lower court was affirmed. *Id.*

**ANALYSIS**

As an initial matter, the Court notes that in order to prevail on this motion, the Plaintiff must establish that the Court misconstrued or misapplied law related to each of the stated grounds for granting the Defendants' motions for summary judgment. It is not sufficient merely to prevail on one of the grounds upon which the Court based its decision to grant summary judgment.

In claiming that there exists genuine issues of material facts, the Plaintiff contends that the Court mistakenly relied upon the testimony of the Plaintiff himself; that the Court improperly found the affidavit submitted by the Plaintiff to be a "sham" affidavit; that the Court misconstrued the evidence establishing the Plaintiff's level of intoxication around the time of the incident; that the Court failed to consider the contradictory testimony of various eyewitnesses; and that the Court failed to consider whether inadequate lighting and/or inoperable pedestrian traffic signals caused or contributed to the accident. These arguments are unavailing.

The Plaintiff's contention that his significant brain injury requires the Court to disregard his deposition testimony is without merit. First, the Plaintiff failed to make this argument at the summary judgment stage, and cannot make the argument for the first time in a Rule 59(e) motion. *See Smith v. Fedor*, 422 S.C. 118, 126, 809 S.E.2d 612, 616 (Ct. App. 2017) (finding that issues were not preserved for appeal when first raised in a motion for reconsideration under Rule 59(e)).

Moreover, the Plaintiff has not offered any evidence to support his contention that his testimony is unreliable. He has not offered an affidavit, report, or medical records from a qualified physician regarding his competency, or lack thereof, at the time his deposition was taken, and he has not submitted any other information upon which the Court may rely in support of this contention. Ironically, the Plaintiff's only evidence that his deposition testimony is not to be believed is by an affidavit dated May 28, 2018 ("Affidavit") submitted by the Plaintiff at the hearing on June 1, 2018. Moreover, if there was a concern about the Plaintiff's state of mind or ability to respond to deposition questions, his attorney at the time of his deposition had the opportunity to raise that issue on the record before, during or after the deposition, but did not do so. Furthermore, the Plaintiff had the opportunity to have a guardian appointed on his behalf to the extent he could not reliably provide information for his case. However, that was also not done. In effect, the Plaintiff is asking this Court to find that the Plaintiff's brain injury renders him an unreliable witness, but the only evidence submitted to the Court is the Plaintiff's own affidavit. This is clearly insufficient and wholly self-serving, and as a result, the Court rejects the Plaintiff's arguments.

In the affidavit presented to the Court by the Plaintiff's attorneys, the Plaintiff changed his deposition testimony concerning the color of the traffic light at the time he was hit in the cross walk from yellow to red. By presenting that Affidavit, the Plaintiff and his attorneys represented to this Court that the Plaintiff was competent, mentally and physically, to make the statements, under oath, that are made therein and that the Plaintiff was not impaired in any way by medication, alcohol, etc. at the time those statements were made. Accordingly, even if the Court were to assume that the affidavit was not a "sham" and found that the color of the light was indeed red at the time of crossing, the Plaintiff could still not prevail against these Defendants. As stated in this Court's Order of July 19, 2018, that would simply mean that the Defendant, Calvin Williams

("Williams") disregarded the red light and that his wrongful conduct alone was the sole cause of the accident. The Plaintiff still knew *when* he could lawfully enter the intersection (on a red light) and *where* he could lawfully cross at the intersection (at a crosswalk where he was crossing) thereby still completely absolving Thrift and DOT of any liability in this case.

Likewise, the Court also rejects the Plaintiff's argument that it improperly considered the Plaintiff's blood alcohol level in determining the Plaintiff was greater than 50% responsible for his injuries. Again, this was not raised at the summary judgment motion hearing, and therefore is improperly before the Court. However, the argument itself is not persuasive. The Plaintiff asserts that there must be some extrinsic evidence demonstrating the effect of alcohol consumption on the Plaintiff, such as unsteadiness on his feet, glassy eyes, or other indicia of impairment. The Plaintiff misapprehends the import of this evidence, which is not intended to establish a particular level of intoxication, but rather that he was intoxicated beyond the legal limit. Moreover, it is not merely the intoxication the court relies upon, but also that the Plaintiff was carrying someone on his back across a busy intersection, that he testified the light was yellow when he reached the median, and that he was in violation of at least five provisions of the South Carolina Code of Laws at the time of the incident. A violation of a statute is evidence of recklessness; therefore, there is more than ample support for the Court's finding that the Plaintiff was greater than 50% responsible for the incident and is therefore barred from recovery.

In asserting that eyewitness testimony creates a question as to whether the Plaintiff crossed on a red, green, or yellow light, the Plaintiff ignores his own affidavit testimony that the Defendant, Calvin Williams, ran the red light. If Mr. Williams, as the Plaintiff has asserted, ran the red light, then Thrift and DOT cannot be liable to the Plaintiff. However, assuming Mr. Williams did not run the red light, then the Plaintiff must have been crossing against the light, another indication

that the Plaintiff is greater than 50% liable for his injuries. Finally, the question of whether the pedestrian light was operable is irrelevant to any issue in this case. First, the Plaintiff's initial contention was that Defendant Williams ran the red light, which if true, would mean that the pedestrian signal would have been instructing Mr. Granatino to walk. If Mr. Williams did not run the red light, then Mr. Granatino would not have had permission to walk on the pedestrian signal. Thus, the purported lack of an operating pedestrian signal is of no consequence to the question of liability. Ultimately, based on the set of facts presented to this Court, there are only two potential individuals who could be responsible for Mr. Granatino's injuries: Mr. Williams and Mr. Granatino. There is no combination of facts present in this case that would reduce Mr. Granatino's responsibility to 50% or below, and there is no combination of facts that would create of material fact as to the liability of Thrift or DOT.

Finally, the Plaintiff argues that the Court erred in holding that the Plaintiff failed to present expert testimony on any deviation from the standards of care, arguing that the Court failed to take into account the sequence of events. The Plaintiff argues that there are extenuating circumstances which make it inequitable for the Court to grant summary judgment based upon the failure of the Plaintiff to obtain expert testimony. However, Plaintiff's original counsel consented to a Scheduling Order which required the disclosure of Plaintiff's experts on or before January 1, 2018. Counsel never asked for consent to extend the deadline and never moved the Court for such relief. Even after new counsel appeared for the Plaintiff, no expert witnesses have been identified or proposed. The fact remains that the Plaintiff and his counsel had every opportunity to comply with the Scheduling Order or otherwise identify some witness(es) to testify regarding purported breaches of the standards of acre owed by Thrift and DOT in the two years this matter has been pending, but have failed to do so. Indeed, both the Plaintiff's mother and step-father are practicing

attorneys in the State of Massachusetts whose presence is noted on multiple deposition transcripts. As a result, the Court finds this argument to be unpersuasive.

For the reasons discussed herein, the Plaintiff's Motion to Alter or Amend the Order of July 19, 2018 is denied.

***Perry H. Gravely***
***Presiding Judge***
***Electronic Signature on following Page***

Pickens, South Carolina
November 20, 2018

Pickens Common Pleas

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

**Case Number:** 2016CP3901223

**Type:** Order/Other

So Ordered

s/ Honorable Perry H. Gravely, #2755