THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM SUMTERCOUNTY
COURT OF COMMON PLEAS

The Honorable W. Jeffrey Young, Circuit Court

Case No. 2010-CP-43-1499

Melvin Muldrow.....Appellant,

v.

Herman Muldrow.....Respondent.

FINAL BRIEF OF RESPONDENT

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TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues on Appeal 1

Argument 1-4

1. IN RULING UPON THE MOTION FOR SUMMARY JUDGMENT, THE TRIAL COURT PROPERLY EXCLUDED FROM CONSIDERATION THE AFFIDAVIT OF THE APPELLANT/PLAINTIFF WHICH CONTRADICTED HIS DEPOSITION TESTIMONY

2. THE TRIAL COURT DID NOT ERR IN GRANTING THE RESPONDENT/DEFENDANT SUMMARY JUDGMENT

Conclusion 5

TABLE OF AUTHORITIES

SOUTH CAROLINA CASES

Bowen v Lee Process Sys. Co., 342 S.C. 232,536 S.E. 2d 86 (Ct. App. 2000) 4

Baughman v. American Tel., 306 S.C. 101, 410 S.E.2d 545 (1991) 4

Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629 633 (S.C. 2004) 2

Fletcher v. Medical University of South Carolina 390 S.C. 458, 463, 702 S.E.2d 372, (S.C.App.,2010) 4

Turner v. Milliman, 392 S.C. 116,122, 708 S.E.2d 766, 769 (S.C. 2011) 4

CASES FROM OTHER JURISDICTIONS

Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir.1984) 3

Byrne v Boadle (2 Hurl. & Colt. 722, 159 Eng. Rep. 299, 1863) 4

Margo v. Weiss, 213 F.3d 55, 63 (2nd Cir.2000) 2

Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703, 705 (3rd Cir.1988) 2

Pittman v. Atlantic Realty Co., 359 Md. 513, 754 A.2d 1030, 1042 (2000) 2

Rohrbough v. Wyeth Labs. Inc., 916 F.2d 970, 976 (4th Cir.1990) 2

Yahnke v. Carson 236 Wis.2d 257, 265, 613 N.W.2d 102, 106 (Wis.,2000) 3

STATEMENT OF ISSUES ON APPEAL

1. WAS THE TRIAL COURT CORRECT IN FINDING THE AFFIDAVIT OF THE APPELLANT/PLAINTIFF A SHAM AFFIDAVIT?

2. WAS THE TRIAL COURT CORRECT IN GRANTING THE RESPONDENT/DEFENDANT SUMAMRY JUDGMENT?

ARGUMENT

1. IN RULING UPON THE MOTION FOR SUMMARY JUDGMENT, THE TRIAL COURT PROPERLY EXCLUDED FROM CONSIDERATION THE AFFIDAVIT OF THE APPELLANT/PLAINTIFF WHICH CONTRADICTED HIS DEPOSITION TESTIMONY.

The discovery depositions of the Appellant and Respondent were taken in February, 2010. One purpose of the depositions was to discover the evidence of the cause of the alleged explosion. Both testified that they did not know what caused the explosion. (R. p. 26 line13, R. p. 38 lines 4-7, R. p. 38 line15) (R. p. 46 line13, thru R. p. 47 line 6, R. p. 48 lines15- 23) The Appellant also testified that he could not recall any statements made by Respondent as to the cause of the alleged explosion.(R. p. 38 lines 8-12) The Summary Judgment motion (R. pgs. 55-57) was filed and served by Respondent on August 10, 2011, R. p. 57). In opposition to the motion, the Appellant presented his affidavit dated September 30, 2011, stating that subsequent to the depositions, his brother, the Respondent, informed him that he discovered the cause of the explosion to be aerosol hairspray cans which he, Respondent, had placed in the burn barrel. (R. p. 74)

The lower court, finding that the affidavit contradicted the Appellant's deposition testimony, did not consider it in ruling upon the motion. The Appellant argues this was error because the affidavit was not contradictory.

Regarding the competing affidavit rule, the Supreme Court has stated: "We find persuasive the reasoning of federal case law. Federal courts, including the Fourth Circuit, have held a court may disregard a subsequent affidavit as a 'sham', that is, as not creating an issue of fact for purposes of summary judgment, by submitting the subsequent affidavit to contradict that party's own prior sworn statement." Cothran v. Brown, 357 S.C. 210, 218, 592 S.E.2d 629 633 (S.C. 2004). Referencing Margo v. Weiss, 213 F.3d 55, 63 (2nd Cir.2000); Rohrbough v. Wyeth Labs. Inc., 916 F.2d 970, 976 (4th Cir.1990) and Martin v. Merrell Dow Pharmaceuticals, Inc., 851 F.2d 703, 705 (3rd Cir.1988)

The Cothran court citing from Pittman v. Atlantic Realty Co., 359 Md. 513, 754 A.2d 1030, 1042 (2000) spelled out factors useful in distinguishing between a sham affidavit and a correcting or clarifying affidavit, to wit: (1) whether an explanation is offered for the statements that contradict prior sworn statements; (2) the importance to the litigation of the fact about which there is a contradiction; (3) whether the nonmovant had access to this fact prior to the previous sworn testimony; (4) the frequency and degree of variation between statements in the previous sworn testimony and statements made in the later affidavit concerning this fact; (5) whether the previous sworn testimony indicates the witness was confused at the time; (6) when, in relation to summary judgment, the second affidavit is submitted. In Cothran, the competing affidavit was allegedly in conflict with a prior affidavit and guilty plea as opposed to prior deposition testimony.

Appellant does not separately address these factors, instead argues that the affidavit does not contradict the deposition testimony. The fact that the Appellant felt the need to submit the affidavit suggests otherwise. Respondent did not submit an affidavit in support of the summary judgment motion, instead, relied solely upon the deposition testimony to support his position -no

evidence of the cause of the explosion and hence the absence of a genuine issue as to it having been caused by failure on the part of Respondent to exercise due care. Had the deposition testimony contained evidence which created a genuine issue of material fact, Appellant would not have thought it necessary to submit an opposing affidavit. Likewise, the affidavit would have been superfluous, and, consequently any error in excluding it from consideration would be harmless.

The ability to create trial issues by submitting affidavits in direct contradiction of deposition testimony reduces the effectiveness of summary judgment as a tool for separating the genuine factual disputes from the ones that are not, and undermines summary judgment's purpose of avoiding unnecessary trials. Yahnke v. Carson 236 Wis.2d 257, 265, 613 N.W.2d 102, 106 (Wis.,2000)

In Barwick v. Celotex Corp., 736 F.2d 946 (4th Cir.1984), the court stated in reference to a situation in which a plaintiff, when faced with a summary judgment motion, submitted an affidavit that contradicted his prior sworn deposition testimony: "If a party who has been examined at length on deposition could raise an issue of fact simply by submitting an affidavit contradicting his own prior testimony, this would greatly diminish the utility of summary judgment as a procedure for screening out sham issues of fact."

The Appellant's affidavit contradicts his own deposition testimony and its consideration was properly excluded.

2. THE TRIAL COURT DID NOT ERR IN GRANTING THE RESPONDENT/DEFENDANT SUMMARY JUDGMENT

Summary judgment is appropriate when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no

genuine issue of material fact, and that the moving party is entitled to judgment as a matter of law." Rule 56(c), SCRCP; Bowen v Lee Process Sys. Co., 342 S.C. 232,536 S.E. 2d 86 (Ct. App. 2000). "Summary judgment should be granted when plain, palpable and undisputed facts exist upon which reasonable minds cannot differ." Bowen, 536 S.E.2d at 87.

Once the moving party shows a lack of evidentiary support for the nonmoving party's claims, the nonmoving party cannot simply rest upon mere allegations or denials in the pleadings but must come forward with facts showing there is a genuine issue for trial in order to avoid summary judgment. Baughman v. American Tel., 306 S.C. 101, 410 S.E.2d 545 (1991). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. Turner v. Milliman, 392 S.C. 116,122, 708 S.E.2d 766, 769 (S.C. 2011).

The Complaint did not allege any specific negligent act of the Defendant. The deposition testimony of the parties disclosed no evidence from which a reasonable inference may be drawn that Appellant's injury was proximately caused by the negligence of the Respondent.

South Carolina does not recognize the doctrine of *res ipsa loquitur*. Fletcher v. Medical University of South Carolina 390 S.C. 458, 463, 702 S.E.2d 372, 374 (S.C.App.,2010) This doctrine was adopted as part of the English tort law in the case of Byrne v Boadle (2 Hurl. & Colt. 722, 159 Eng. Rep. 299, 1863) a case in which a barrel of flour fell from the upper story of a flour warehouse striking the Plaintiff. The court held that the fact that the incident occurred, in and of itself, was some evidence of negligence on the part of the owner of the warehouse. As stated, South Carolina has declined to adopt that doctrine.

The court was correct in concluding that the case could not survive based upon no evidence other than the occurrence of an explosion on Respondent's property.

CONCLUSION

For the foregoing reasons, the trial court was correct in granting summary judgment and this Court should not reverse the judgment.

Respectfully Submitted,

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November 2nd, 2012

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CERTIFICATE THAT RESPONDENT HERMAN MULDROW'S
FINAL BRIEF COMPLIES WITH RULE 211(b)

I certify that the Final Brief of Respondent Herman Muldrow complies with the requirements of South Carolina Rules of Appellate Procedure 211(b).

November 12, 2012

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PROOF OF SERVICE

I CERTIFY THAT I HAVE SERVED THE Final Brief on behalf of Respondent, Herman Muldrow on the Appellant by depositing a copy of it in the United States Mail, postage prepaid, on November 2nd, 2012, addressed to its attorney of record, Charles T. Brooks, III, Esquire, The Brooks Law Offices, LLC, Post Office Box 3512, Sumter, SC 29151.

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