THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2018-002166
Trial Court Case No. 2016-CP-39-01223

Kevin M. Granatino, ...
Appellant,

vs.

Calvin Williams, Clemson University, South Carolina Department of Transportation, and Thrift Development Corporation, ...
Defendants,

Of which South Carolina Department of Transportation and Thrift Development Corporation are . . . . . .
Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUES ON APPEAL

1. Did the circuit court commit reversible error in granting Respondents' motions for summary judgment against Appellant's negligence claim in its entirety on the basis that Appellant, as a matter of law, bore the preponderance of fault for causing his substantial, lifelong, debilitating injuries?

2. Did the circuit court also commit reversible error in granting Respondents' motions for summary judgment against Appellant's negligence claim in its entirety even though there were unrequited, genuine disputes as to material facts that were ultimately adjudicated by the court to Appellant's detriment?

3. Did the circuit court also commit reversible error in granting Respondents' motions for summary judgment against Appellant's negligence claim in its entirety on the basis that Appellant, at the dispositive motion stage, had failed to procure expert testimony in support of propositions for which expert testimony is not required?

STATEMENT OF THE CASE

This appeal arises from an improvident grant of summary judgment against the entirety of Appellant's personal injury claim. On October 23, 2014, Appellant was a pedestrian at a certain traffic intersection located within the City of Clemson. As Appellant was crossing the intersection, he was struck by a vehicle owned and operated by Calvin Williams. As a consequence of the impact, Appellant nearly died. Since then, Appellant has made substantial progress in his path toward healing, though he continues to suffer from debilitating mental, physical, and emotional wounds, and will do so for the rest of his life.

Appellant commenced the underlying personal injury claim on February 15, 2017. Initially, there were four Defendants, all sued under various negligence theories. The first Defendant was Calvin Williams. However, Defendant Williams reached a settlement agreement with Appellant prior to the procedural events giving rise to this appeal, and therefore, is not a Respondent to these proceedings.

The second, third, and fourth Defendants are, respectively, Clemson University ("**Clemson**"), the South Carolina Department of Transportation ("**SCDOT**"), and Thrift Development Corporation ("**Thrift**"). Consistent with the allegations of the Complaint, SCDOT and Thrift were named because Appellant was struck by a vehicle at an intersection which was under construction by SCDOT, that work had been subcontracted to Thrift, and SCDOT and/or Thrift had failed to install mechanisms that were likely to protect the safety of pedestrians. Clemson had been named a Defendant because, it was then believed, that the intersection in question was subject to Clemson's control.

At various times during the fall of 2017, Clemson, SCDOT, and Thrift each filed motions for summary judgment. The motions were consolidated, and were heard all at once before the Honorable Perry H. Gravely on June 1, 2018. By decision filed July 19, 2018, the circuit court granted the motions for summary judgment of Clemson, SCDOT, and Thrift in their entirety.

Appellant subsequently filed a timely motion under Rule 59, SCRCP, which sought to alter or amend the underlying judgment only as to SCDOT and Thrift; it did not address Clemson's dismissal. Consequently, Clemson is not a Respondent to these proceedings. In any event, a hearing on Appellant's Rule 59 motion was held on October 25, 2018. By decision dated November 20, 2018, the motion was denied. Appellant subsequently filed a timely notice of appeal as to the summary judgment decisions affecting SCDOT and Thrift.

Through this appeal, Appellant respectfully requests the Court of Appeals to reverse the circuit court's decision to grant summary judgment in favor of SCDOT and Thrift, and to remand the case to the circuit court to resume proceedings from the point at which they were improvidently terminated.

The primary issue for the Court's consideration is whether the circuit court applied the law appropriately in granting judgment as a matter of law in favor of SCDOT and Thrift. As explained in the pages that follow, and as evidenced in the decision granting summary judgment, the circuit court misapplied the calculus by which a claimant's contributory negligence may be wielded as a complete bar to his relief. Under the law, contributory negligence prohibits a claimant's recovery only if the claimant's negligence exceeds the proportion of negligence attributable to all contributing

tortfeasors. By contrast, the circuit court granted summary judgment by examining whether Appellant's negligence was greater than that of Clemson, SCDOT, and Thrift. This was error. The court was required to evaluate Appellant's negligence against all contributing causes of injuries, including the contribution of Defendant Calvin Williams.

The secondary issue for the Court's consideration is whether the factual record before the circuit court allowed summary judgment at the dispositive stage, at all.

The third and final issue for the Court is whether expert testimony was required as to each and every theory of relief advanced by Appellant, or if it was error for the circuit court to so hold.

For the foregoing reasons, and for any other reason that may be apparent to the Court based on the record below, Appellant would respectfully request that the circuit court's decision granting summary judgment in favor of SCDOT and Thrift be reversed, and that the case be remanded for further proceedings.

STATEMENT OF FACTS

At approximately 10pm on Thursday, October 23, 2014, Appellant took a step that literally changed the course and direction of his life forever. Appellant had awoken that morning as a senior at Clemson University. (Appellant Aff. ¶ 2.) He would finish the day fighting for his life.

The events of this case take place, in the most substantial part, around a particular intersection in the City of Clemson. It is the intersection of South Carolina Highway 123—also known as Tiger Boulevard—and College Avenue. Tiger Boulevard is among the main commercial arteries of Clemson; it is flanked by fast-food restaurants, retail stores, and apartment complexes, (Appellant Aff. ¶ 12)—all the standard accoutrements of a true college town. College Avenue, for its part, is also heavily trafficked. Heading south from Tiger Boulevard, College Avenue leads first to Downtown Clemson, then to the University's main campus. It is therefore not a stretch of truth or imagination to say that the intersection of Tiger Boulevard and College Avenue ("**the Intersection**") is busy every hour of every day.

In the weeks during and around fall 2014, the Intersection was undergoing construction. (Appellant Aff. at ¶ 12.) Because Tiger Boulevard is a state highway, design and construction efforts at the Intersection were conducted under the auspices of the South Carolina Department of Transportation ("**SCDOT**"). SCDOT, in turn, had subcontracted a substantial portion of the work to Thrift Development Corporation ("**Thrift**").

Appellant was no stranger to the Intersection. Appellant started Clemson during Fall 2011. (Appellant Aff. ¶ 2.) Many times over the following three years, Appellant

had frequented Starbucks, Walgreens, restaurants, churches, and other businesses, all located in the immediate vicinity of the Intersection. (Appellant Aff. ¶ 12.)

Earlier in the evening of October 23, 2014, Appellant had crossed the Intersection by foot, specifically, from the southern side of Tiger Boulevard—the Clemson University side—to the northern side. (Appellant Aff. ¶ 12.) He was going to visit some friends at their home. (Id.) Later that evening, just shy of 10pm, it was decided that the group of friends would walk Downtown. (Appellant Dep. at 11:13-19.) This would require them to cross over the Intersection at the exact place that Appellant had done so earlier; Appellant was essentially retracing his steps. (Appellant Aff. ¶ 12.)

What happened next is both tragic and unclear. (Appellant Dep. 20:22-25:22.) Appellant approached the northern side of the Intersection with his friends. He hoisted a friend of his—Lindsay Jones—onto his back, giving her a piggy-back ride. Appellant then looked both ways and entered into the Intersection. There is a dispute about what color the lights on Tiger Boulevard were when Appellant left the curb—green or yellow. Regardless, Appellant made it safely to the midway point of Tiger Boulevard before stopping again to check traffic. At this point, the light controlling traffic on Tiger Boulevard was either yellow or red. Appellant perceived that traffic was coming to a halt at the stop-bar, and so he took his fateful step into the Intersection.

It so happens that, at the exact same moment, Defendant Calvin Williams was in his SUV, heading eastbound on Tiger Boulevard, approaching the Intersection as Appellant crossed. It is not clear whether Williams had the right-of-way, or whether he accelerated to beat a yellow light, or whether he intended to run a red light. What is clear, however, is that Williams' vehicle violently struck Appellant, nearly killing him.

This is no exaggeration. Appellant was rendered unconscious at the scene of the accident, and was bleeding profusely. He was evacuated by air to Greenville Memorial Hospital where he was diagnosed with having sustained a traumatic brain injury, (Appellant Aff. ¶ 3), in addition to many broken bones and teeth, as well as significant internal bleeding, (Appellant Aff. ¶ 4). Appellant slipped into a comatose state, where he stayed for weeks. (Appellant Aff. ¶ 3.)

By the grace of God, as well as the miracles of modern medicine, Appellant survived. But he was not the same young man that he was before the accident. Appellant had to re-learn every aspect of essential daily living, including walking and talking. (Appellant Aff. ¶ 7.) Though there are some wounds that will never heal. Appellant still suffers from his traumatic brain injury. (Appellant Aff. ¶ 9.) He suffers from memory loss, confusion, nightmares, and poor sleep. (Id.) His brain processing and physical movements are slow. (Id.) For the rest of his life, Appellant will have an enhanced risk of suffering seizures, strokes, and blood clots. (Appellant Aff. ¶ 10.)

Perhaps the greatest mercy given to Appellant is that he has little-to-no recollection of having suffered his catastrophic injury. He recalls events from earlier that evening. Specifically, Appellant remembers that, when he crossed Tiger Boulevard at the Intersection earlier in the evening of October 23, there was no crosswalk, just chalk lines indicating where the crosswalk should be. (Appellant Aff. ¶ 12.) There were also no pedestrian crossing lights, signs, barriers, or road cones. (Id.) Lighting was also poor. (Id.)

The last recollection that Appellant has of the events of October 23 relate to the seconds just before his injury. Appellant remembers standing in the midpoint of Tiger

Boulevard, waiting to cross. (Appellant Aff. ¶ 14.) He believes the light was red when he started to cross the second half, (id.), but it could have been yellow, (Appellant Dep. 21:16-22:10). From that point on, Appellant knows nothing, and remembers nothing, about the events of October 23 until the time that he recovered from his coma, other than what he has been told. (Appellant Aff. ¶¶ 3, 4 & 9.)

ARGUMENT

I. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR BY DISMISSING THE ENTIRETY OF APPELLANT'S PERSONAL INJURY CLAIM UNDER THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE.

A. The Circuit Court's Decision

In the Order Granting Defendants' Motions for Summary Judgment, and in relevant part, the Court summarized the law regarding comparative negligence as allowing recovery only if claimant's negligence is "not greater than that of Defendant." (Or. 2.) The Court then considered the application of this principle under the decision of Bloom v. Ravoira, 339 S.C. 417, 429 S.E.2d 710 (2000), which involved a single plaintiff against a single defendant in the context of a personal injury action. (Or. 3.) The trial court in Bloom granted summary judgment in defendant's favor on the basis that the undisputed facts established, as a matter of law, plaintiff's contribution to his injury to have been the preponderant cause of his damages. Thus, plaintiff's ability to recover against defendant was prohibited by the doctrine of contributory negligence. The decision was affirmed on appeal.

In the instant case, the circuit court's decision applied Bloom directly to the circumstances of Appellant's case. "As in Bloom, [Appellant] 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, [Appellant's] negligence." (Or. 4.) To support this conclusion, the court then offered a statement of facts regarding the circumstances that ostensibly established Appellant's preponderant negligence. (Or. 4-8.)

Finally, the court held that, as a matter of law, neither SCDOT nor Thrift was a cause of Appellant's injuries. (Or. 8.) "Even if one assumes that the light for traffic on [Tiger Boulevard] was red at the time of this accident, as [Appellant] 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 [Appellant's] own testimony, he knew when he could lawfully enter the intersection and where he could lawfully cross at the intersection and, therefore, under [Appellant's] own new theory, there could be no liability on the part of the remaining Defendants. Such knowledge on the part of [Appellant] completely absolves Thrift, DOT, and Clemson of any liability in this case. Accordingly, [Appellant's] claims against these remaining Defendants are barred as a matter of law." (Id.)

B. The Error / Standard of Law

The foregoing excerpts of the court's Order Granting Summary Judgment demonstrate two legal errors. The first error is based on the court's conclusion that Appellant was preponderantly negligent, even though, in arriving at that conclusion, the court did not consider the proportion of negligence contributed by Defendant Calvin Williams. The second error arises from the court's assertion that the proportion of negligence contributed by Appellant and Defendant Calvin Williams totals 100%; that, as a matter of law, Respondents' proportion of negligence is 0%. Each of these errors is considered in turn.

1. Appellant's Preponderant Negligence

As stated above, the circuit court's first legal error arises from the court's conclusion that Appellant was preponderantly negligent in causing his injuries, despite

the fact that the court did not consider the contributions of all tortfeasors, specifically Defendant Williams. It is true, as the court held, that as between one plaintiff and one defendant, the plaintiff may recover damages in tort only if his own negligence is not greater than that of the defendant. The standard of law applicable is slightly different when it is alleged that one plaintiff's injuries were caused by multiple tortfeasors. In that circumstance, "the plaintiff's negligence shall be compared to the combined negligence of all defendants." Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991) (citation omitted).

As it is used in the foregoing sentence, the word "defendants" means more than just parties who are named as defendants and present in the case at the time of disposition. It means all parties who are contributing tortfeasors. See Roddey v. Wal-Mart Stores E., LP, 400 S.C. 59, 67, 732 S.E.2d 635, 639 (Ct. App. 2012) ("In many cases involving multiple tortfeasors, the negligence of a tortfeasor absent from the case could affect the relative fault of the plaintiff."). This would include parties who were initially named as defendants but have settled out prior to disposition, as well as parties who were never named as defendants.

And therein lies the problem with the circuit court's analysis. In one section of the opinion, the court concludes that the entirety of Appellant's injury was caused by Appellant's negligence plus the negligence of Defendant Calvin Williams. (Or. 8.) Stated in the form of an equation:

Appellant's Negligence + Defendant's Negligence = 100%

However, the court never apportioned percentages of fault to either party. Nor could it have properly done so. See, e.g., Bloom, 339 S.C. 417, 429 S.E.2d 710 (holding that the apportionment of relative fault is generally a question of fact for the jury to decide).

Then, in another section of its opinion, the court concludes that Appellant's contribution of negligence was greater than the relative contributions of Clemson, Thrift, and SCDOT. (Op. 4-8.) As an equation:

$$\text{Appellant's Negligence} > \begin{matrix}\text{Clemson's Negligence} \\ \text{Thrift's Negligence} \\ \text{SCDOT's Negligence}\end{matrix}$$

The error with this analysis is apparent. The circuit court never factored Defendant Calvin Williams' negligence into the combined negligence of all defendants, so that it could be weighed against Appellant's contribution. This is the analysis that the court was obliged to undertake, see Nelson, 303 S.C. at 245, 399 S.E.2d at 784; Roddey, 400 S.C. at 67, 732 S.E.2d at 639, and which it failed to do.

2. Respondents' Absence of Negligence

Respondents will almost certainly contend that the circuit court's failure to consider Defendant Williams' negligence as a portion of Defendants' combined negligence is harmless error. After all, the court quite clearly held that the negligence contributions of Clemson, Thrift, and SCDOT were 0%. (Or. 8.) But this, too, is error.

As the Court is well-aware, summary judgment is appropriate only if there is no genuine issue as to any material fact and, upon those undisputed facts, the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRCP.

With regard to the circuit court's order granting summary judgment, there is absolutely no clarity as to what facts the court was relying upon to conclude that, as a

matter of law, neither Respondent bore any responsibility for Appellant's injuries. The substantive portions of the court's decision regarding liability focus almost exclusively on the reasons why Appellant was negligent. (Or. 4-8.) By contrast, there is no discussion whatsoever as to why neither Respondent bears any liability, let alone an identification of undisputed facts that support the conclusion of their lack of responsibility.

Certainly, the circuit court was under no obligation to make findings of fact or conclusions of law in disposing of the motions for summary judgment. Rule 52(a), SCRCP. But the provisions of Rule 52 do not absolve the court of its obligation to ensure that a grant of summary judgment is predicated on anything less than undisputed facts.

In the instant case, the Complaint asserts that Thrift and SCDOT are liable for Appellant's injuries due to their failure to create a safe environment for pedestrians at the Intersection. (Compl. ¶ 35.) The undisputed facts—which were presented to the circuit court—were that "there were no pedestrian crossing lights," signs, or barriers at the Intersection, nor was there a crosswalk; just a rudimentary chalk line where a crosswalk should have been. (Appellant Aff. ¶ 12; see also Appellant Dep. 15:22-17:5.) This is consistent with the testimony of Lance Corporal Craig, who affirmed that there is no crosswalk at the Intersection, (Craig Dep. 36:15-19), and Corporal Brooks, who testified that, when he responded to the accident scene, the pedestrian signals were not operational because they had no power, (Brooks Dep. 22:6-15.) In light of these undisputed facts, which indisputably touch upon the reasonable probability that liability could be imputed to SCDOT and Thrift, it was improper for the circuit court to grant summary judgment in Respondents' favor.

C. Standard of Review

On appeal, the standard of review applicable to the grant of a motion for summary judgment motion is the same as the standard applied by the circuit court pursuant to Rule 56(c), SCRCP. See, e.g., Woodson v. DLI Props., LLC, 406 S.C. 517, 528, 753 S.E.2d 428, 434 (2014). Summary judgment is properly granted when, viewing the evidence and inferences to be drawn therefrom in a light most favorable to the nonmoving party, the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP; Woodson, 406 S.C. at 528, 753 S.E.2d at 434. In determining whether any triable issues of fact exist for summary judgment purposes, the evidence and all the inferences that can be reasonably drawn from the evidence must be viewed in the light most favorable to the nonmoving party, who is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment. Hancock v. Mid-S. Mgmt., 381 S.C. 326, 329-31, 673 S.E.2d 801, 802-03 (2009).

D. Recommended Disposition

The circuit court should have denied Respondents' motions for summary judgment on the basis that Appellant's comparative fault could not, as a matter of law, be adjudicated the preponderant cause of his injuries, thereby paving the way for the doctrine of contributory negligence to bar any further recovery in Plaintiff's favor. In light of the circuit court's error, the Court of Appeals is respectfully requested to reverse the decision of the circuit court, and remand the case for further proceedings.

II. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN BASING SUMMARY JUDGMENT ON MATERIAL FACTS THAT WERE IN DISPUTE.

A. The Court's Decision

As explained in the preceding section, the circuit court held that Appellant's conduct was the preponderant cause of his own injuries. This conclusion was ostensibly based solely on the following facts:

(1) Appellant "raced" into the busiest intersection in the City of Clemson, (Op. 4);

(2) Because of alcohol consumption, Appellant was impaired, (Op. 6-7);

(3) At the time of the accident, Appellant was carrying a friend "piggy-back style," (Op. 4-5); and,

(4) Appellant stepped into oncoming traffic while the light was yellow, (Op. 6), at which time he was struck by Defendant Williams' vehicle.

B. The Error / Standard of Law

It is axiomatic that summary judgment be predicated on material facts which are not in dispute. Rule 56(c), SCRCP. However, of the four facts laid out above, which were all used to bar Appellant's recovery under contributory negligence, three are absolutely in dispute, and were directly in dispute at the time of the hearing on the motions for summary judgment. The only fact not in dispute is that Appellant was carrying a friend on his back at the time of the accident, though neither Respondents nor

the court has ever undertaken any serious effort to connect that circumstance to Appellant's injury as a contributing cause.

At the outset of this discussion, it should be noted that the circuit court's decision granting Respondents' motions for summary judgment is nearly identical to Thrift's memorandum in support of its motion. Therefore, to examine what facts of record were available to the court so that it could reach its conclusions, this Court need look no further than Thrift's memorandum and the documents cited in connection therewith, if any.

As noted above, the circuit court found as a matter of fact that Appellant "raced" into the Intersection. (Op. 4.) The language used by the court mirrors—word for word—the language found in Thrift's memorandum. (Thrift Memo. Supp. Mot. Summ. Judg. 4.) For its part, Thrift's memorandum gives no citation to any admissible evidence to support this assertion. The deposition testimony submitted to the court for consideration of the motions for summary judgment—by Thrift, no less—states just the opposite. Appellant was asked whether he was walking, running, or trotting through the Intersection. His response: "I think like a brisk walk, walking as fast as I could while carrying somebody." (Appellant Dep. 25:14-17.) For the purposes of summary judgment, the "fact" that Appellant was racing into the Intersection was nothing more than a figment of Respondent's imagination.

The next figment conjured up by Respondents is that Appellant was intoxicated at the time of the accident, to the point of impairment. (Op. 6-7.) Here again, the language of the court's decision tracks the language of Thrift's memorandum. (Thrift Memo. Supp. Mot. Summ. Judg. at pp. 6-7.) Respondents' "evidence" that Appellant was

impaired at the time of the accident comes from two sources: (1) Appellant's blood-alcohol content as reflected in the records of Greenville Hospital following Appellant's admission; and (2) the testimony of a MAIT officer who reconstructed the scene of the accident, and who generally opined about his experience of blood-alcohol content causing impairment. Neither of these sources constitutes admissible evidence of Appellant's actual impairment at the time of his injury.

The best evidence that Respondents could possibly offer would be eye-witness testimony from someone who was present at the time of the accident, who could testify to their observations of Appellant's impairment. But Respondents have no such testimony. And no such testimony was ever presented to the court. From an evidentiary standpoint, Respondents' assertion that Appellant's intoxication contributed to the accident is pure fiction.

Third, and finally, the court held that Appellant stepped into the path of Defendant Williams' vehicle while the traffic light was yellow, and therefore, while Defendant Williams still had the right-of-way. (Op. 6.) On this point, at least, Thrift presented the court with deposition testimony from Appellant, though the portions cited do not address whether the traffic light was yellow or red at the time that Appellant was struck.

Other portions of Appellant's deposition testimony cited by Thrift—and provided to the court—undermine the "undisputed fact" that Appellant entered into oncoming traffic. On Page 5 of Thrift's Memorandum, Respondent cites to the following passage of Appellant's deposition testimony:

Q: Did the light turn yellow before you attempted—started to attempt to cross 123?

A: I think so.

Q: And then you attempt to cross 123, and this is where I'm unclear, okay. Did you stop again before the accident happened?

A: Yeah, because when we made it from the Sonic side to the middle, we stopped again.

Q: Okay.

A: And then the car closest to the middle stopped. The light turned yellow, so the car stopped. We were like, all right. It came to a complete stop. We started to cross again, didn't see the car in the next lane that hit me.

Q: Okay. So you see the light turn yellow. Why did you start across? What prompted you to start across with Lindsay on your back?

A: Well, the car in the closest lane came to a complete stop.

(Appellant Dep. 121:1-19.)

To be candid, there are certainly sections of Appellant's testimony where he seems clearer about the color of the light being yellow at the moment immediately prior to impact; there are also sections where he remains unsure. For example:

Q: Okay. So tell me what you remember as you got to the—as you approached that intersection.

A: I just remember we crossed, we made it to the middle like of the intersection, and then the lights turned yellow, the car closest to us stopped, and then we started to cross, and then I got hit.

Q: And let's back up to when you first stepped off the sidewalk to cross, okay. What do you remember doing? Did you stop?

A: We stopped, and then the car in the first lane came to a complete stop, so we started across.

Q: And the stopping of that vehicle, is that what signaled to you that it was appropriate to go into the intersection?

A: Yeah. And well, the light was yellow, turning red, the first car stopped, so we thought we were good to cross.

(Appellant Dep. 21:16-22:10.)

To be clear, there is nothing nefarious about Appellant's inability to recall the color of the traffic light at the time of his accident to any degree of precision. The fact of the matter is—and this is undisputed—Appellant suffered severe cognitive impairment as a consequence of this very accident which has permanently diminished his capacity for recollection. (Hr'g Tr. 31:12-14.) This is a critical point. The only witness whose testimony was presented to the court about the color of the light at the time of impact was Appellant. And Appellant is not sure whether the light was yellow or red.

Appellant attempted to clarify his testimony through an affidavit, (Appellant Aff. ¶¶ 14 & 16), which was presented to the court at the time of the hearing on the motions for summary judgment. However, the court disregarded portions of Appellant's affidavit as a "sham." (Op. 6.) This is particularly disappointing, as Appellant offered the

affidavit to explain the severity of his physical, emotional, and cognitive impairments arising from the accident, (Appellant Aff. ¶¶ 8-10), all of which informs the creditability of his testimony as to the color of the light at issue.

That is not an insubstantial point. The adjudication of the color of the light at the time of impact—whether Defendant Williams had the right-of-way, or whether he was attempting to run a traffic light—bears directly on whether and to what extent Appellant contributed to his own injuries. That, in turn, has a direct and substantial effect on whether Appellant is, or is not, barred from recovering under the doctrine of contributory negligence.

Ultimately, the material facts on which the court relied to grant summary judgment in Respondents' favor were very much in dispute. By resolving those facts against Appellant, the court improperly invaded upon the exclusive province of the jury.

C. Standard of Review

Appellant incorporates the standard of review set forth in Section I.C, supra.

D. Recommended Disposition

The circuit court should have denied Respondents' motions for summary judgment on the basis that genuine issues of material fact remained on the questions of proportional liability. In light of the circuit court's error, the Court of Appeals is respectfully requested to reverse the decision of the circuit court, and remand the case for further proceedings.

III. THE CIRCUIT COURT COMMITTED REVERSIBLE ERROR IN HOLDING THAT APPELLANT HAD FAILED TO PROCURE EXPERT TESTIMONY IN SUPPORT OF PROPOSITIONS FOR WHICH EXPERT TESTIMONY IS NOT REQUIRED.

A. The Circuit Court's Decision

The circuit court's order characterized the claims against Thrift and SCDOT as arising in connection with "construction services and management," including "compliance with industry standards." (Or. 9.) The court went on to conclude that expert testimony was necessary to support the entirety of Appellant's tort claims against Thrift and SCDOT. (Or. 9-10.) Finally, the court held that Appellant's lack of procuring expert testimony as to the negligence of Thrift and SCDOT required the direction of summary judgment in their favor. (Or. 10.)

B. The Error / Standard of Law

The allegations of the Complaint regarding the liability of Thrift and SCDOT are, admittedly, broadly drafted. (See Compl. ¶ 35.) However, at the hearing on the motions for summary judgment, the theories of their liability as presented were much narrower. (Hr'g Tr. 15:18-28:10.) Essentially, it was argued that Thrift and SCDOT were liable for undertaking construction at the Intersection without installing mechanisms to facilitate the safe passage of pedestrians. The mechanisms at issue were exceedingly basic, and pertained to whether lighting, signage, a crosswalk, and working pedestrian signals were present.

The circuit court ostensibly adopted the position of Respondents wholesale, which was that expert testimony is necessary, as a matter of law, to establish every aspect of pedestrian safety in a construction zone. In arriving at this conclusion, the court relied in substantial part on City of York v. Turner-Murphy Co., 317 S.C. 194, 452 S.E.2d 615 (Ct. App. 1994). Excerpts of City of York were cobbled together to create the impression that claims of negligence against a general construction contractor require expert

testimony for their survival. But that is not the case. It is not the holding of City of York, and more broadly, it is not the law in this State.

City of York was a professional negligence claim against a company who was engaged specifically to supervise the construction of a wastewater treatment plant for compliance with certain contract documents. It failed to do so. And at trial, a verdict was returned in plaintiff's favor. The company appealed, taking the position that the sufficiency of its professional supervisory services required expert testimony as to the pertinent industry standard by which to measure its alleged negligence. The Court of Appeals agreed. "Where professional negligence is alleged, expert testimony is usually necessary to establish both the standard of care and the professional's deviation from that standard, unless the subject matter is within the area of common knowledge and experience of the layman so that no special learning is needed to evaluate the professional's conduct." Id., 317 S.C. at 195, 452 S.E.2d at 617 (citation omitted).

Before going any further, it is important to note that the case presently before the Court is not a professional negligence claim. The professions subject to "professional negligence claims" are identified specifically within our body of law at South Carolina Code § 15-36-100(G). Twenty-two professions are enumerated. "General construction contractor" is not among them.

As the Court doubtless knows, to bring an action against any of the twenty-two professions identified under § 15-36-100(G), the complainant must provide expert testimony as to the standard of care—and its breach—contemporaneously with the filing of the complaint. In that regard, and only as to those professions, expert testimony is necessary as a matter of law for claims alleging negligence to survive. In every other

context, and as to every other occupation, the need for expert testimony depends on the particular facts of the case.

Despite the fact that City of York was a professional negligence case, it is nonetheless instructive as to when—even in an ordinary negligence case—expert testimony is needed for the survival of a claim at a dispositive stage, and perhaps more importantly, when expert testimony is not needed. As a general proposition, expert testimony is necessary only when the subject matter of the testimony cannot be understood by a person of ordinary intellect without the assistance of special knowledge, skill, education, training, or experience. See, e.g., City of York, 317 S.C. at 196, 452 S.E.2d at 617. By contrast, expert testimony is unnecessary when the subject matter is within the common knowledge and experience of an ordinary person. Id.

Consequently, not everything requires the testimony of an expert to survive a dispositive motion. In fact, as this very Court acknowledged in City of York, there are some types of cases that would seem to require expert testimony, but don't. One example given was where an architect designed a building without waterproofing, even though the building was constructed two feet below the high-water-mark of a prior flood. See Seiler v. Levitz Furniture Co. of the Eastern Region, Inc., 367 A.2d 999 (Del. 1976). Another example is from a case where an architectural firm was hired to compare shop drawings of a proposed structure with the as-designed specifications. Jaeger v. Henningson, Durham & Richardson, Inc., 714 F.2d 773 (8th Cir. 1983). The firm failed to notice a discrepancy in the gauge of steel required, which resulted in the structural failure of the entire building. Neither of these cases, cited with approval by this very Court, required expert testimony for their survival.

The theories of liability presented by Appellant's case are in substance no different than these examples. In Thrift's Memorandum in Support of its Motion for Summary Judgment, it describes the Intersection as "the busiest" in the City of Clemson. (Thrift Memo. Supp. Mot. Summ. Judg. 4.) Is expert testimony really necessary to establish the proposition that, at the busiest intersection in the college town of Clemson, some measures be deployed during construction to promote the safe passage of pedestrians?

This is actually a sharper analytical question than may appear at first blush. And it may be helpful to more carefully identify what Appellant's contention is and is not. It is Appellant's contention that the absence of lighting, signage, crosswalks, and functioning pedestrian lights—whose implementation were the responsibility of Thrift and SCDOT—were contributing causes to the injuries he sustained. It is not Appellant's contention that there were some safety measures which were inadequate under the circumstances. More simply stated, it is the difference between whether Respondents' safety measures were good enough, or whether there were any at all. The latter option is absolutely within the ambit of the ordinary person's knowledge and experience, and therefore, did not require expert testimony for its survival.

C. Standard of Review

Appellant incorporates the standard of review set forth in Section I.C, supra.

D. Recommended Disposition

The circuit court should have denied Respondents' motions for summary judgment on the basis that expert testimony was unnecessary for Appellant to establish at least one viable theory of recovery on its negligence claims. In light of the circuit court's

error, the Court of Appeals is respectfully requested to reverse the decision of the circuit court, and remand the case for further proceedings.

CONCLUDING STATEMENT

Although not raised as a discrete ground of appeal, there is a final matter worth discussing, and it would seem this concluding statement is the best place for doing so. As a general proposition, there is no such thing as a "normal" case. Each has its own particular challenges—be they factual, legal, procedural, or otherwise. This case is no different.

Perhaps the Court has gained a sense that, at the time of the hearing on the underlying motions for summary judgment, there was still a significant amount of work to be done in furtherance of Appellant's case. This was the consequence of some procedural difficulties. When the lawsuit was commenced, Appellant was represented by an attorney who is no longer involved in this case. That attorney entered into a consent scheduling order which required Appellant to disclose the identity of any testifying experts on or before January 1, 2018. However, by late 2017, the attorney/client relationship had become strained, and on January 12, 2018, Appellant's initial counsel filed a motion to withdraw. Barely a week later, Respondents' motions for summary judgment were filed.

Appellant subsequently engaged Mr. Lewis and Mr. Marlette as his attorneys. Because Mr. Marlette is licensed only in Massachusetts, it was necessary for him to obtain permission to practice pro hac vice within our State. In an email exchange with the Honorable Robin B. Stilwell, who at that time was the chief judge for administrative purposes for the Thirteenth Judicial Circuit, Mr. Marlette explained the procedural status and the challenges associated with representing Appellant without formal admission to practice. In response, by email dated March 25, 2018, Judge Stilwell said that any

scheduling order deadlines following the withdrawal of Appellant's prior counsel would be suspended pending Mr. Marlette's admission to practice. No one objected.

Mr. Marlette's pro hac vice application was approved by order dated May 5, 2018. The hearing on Respondents' motions for summary judgment occurred less than a month later—June 1, 2018. At that time, Mr. Marlette respectfully requested more time from the circuit court to conduct discovery. (Hr'g Tr. 18:4-19:23.) No such latitude was given. Regrettably, Defendants' counsel threw their weight into the dogpile, bemoaning the prejudice their clients would sustain if even a brief window of additional discovery were allowed. (See Hr'g Tr. 28:13-15, 29:7-9, 31:23-32:3.)

Defendants would not have sustained any prejudice—much less their legal counsel—had a brief window been allowed for Mr. Marlette to round out discovery. Especially when there was general agreement among counsel and court that all deadlines would be stayed pending Mr. Marlette's admission to practice. There seems something inequitable about shooting Mr. Marlette out of the saddle before he has even had a chance to sit down, particularly when the one who suffers is Kevin Granatino. To quote Mr. Marlette's closing plea to the circuit court:

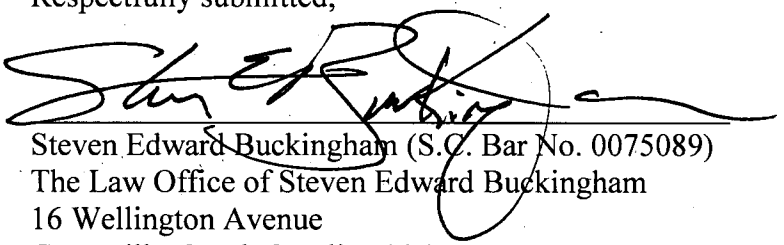
> All I know is he's a good kid who ended up with a very, very serious, permanent brain injury, and he lives with that every single day, and all he wants is his opportunity to tell his story. So please, please afford him that opportunity.

(Hr'g Tr. 28:6-10.)

For the foregoing reasons, and on any other basis that may appear to the Court upon a review of the record on appeal, Appellant respectfully requests an order which reverses the decision of the circuit court granting summary judgment to SCDOT and

Thrift, remands the case for further proceedings, and provides for such other and further relief as the Court deems just and proper.

Respectfully submitted,



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Attorneys for Appellant

June 13, 2019

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Appellate Case No. 2018-002166
Trial Court Case No. 2016-CP-39-01223

Kevin M. Granatino, ... Appellant,

vs.

Calvin Williams, Clemson University, South Carolina Department of Transportation, and Thrift Development Corporation, ... Defendants,

Of which South Carolina Department of Transportation and Thrift Development Corporation are ..... Respondents.

PROOF OF SERVICE

The undersigned counsel for Appellant hereby certifies, subject to penalty of perjury, that the following document(s) was/were served upon the following counsel of record by the following means as of the date identified below.

Document(s):
(1) Notice of Appearance of Steven Edward Buckingham, Esq.
(2) Appellant's Initial Opening Brief
(3) Appellant's Initial Designation of Matter to be Included in the Record on Appeal

Counsel Served: (1) For Respondent Thrift Development Corporation

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William T. Young, III, Esq.
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Greenville, South Carolina 29601

(2) Logan, Jolly & Smith
James W. Logan, Jr.
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Means of Delivery: FedEx to the Addresses Identified Above

Date: June 13, 2019

Respectfully,

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June 13, 2019

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Regarding: **Granatino v. Williams et al., Appellate Case No. 2018-002166**
Matter No.: 27032.01001

Dear Ms. Kitchings:

Please find the following documents enclosed:

(1) My notice of appearance on behalf of Appellant;
(2) Appellant's Initial Opening Brief;
(3) Appellant's Initial Designation of Matter to be Included in the Record on Appeal; and,
(4) Proof of Service of same on counsel of record.

I have enclosed the originals of these documents for filing. I do not need any copies returned. Thank you.

Respectfully,

Steven Edward Buckingham
Attorney for Appellant

ENCLOSURE(S)/ATTACHMENT(S)
☒ Yes
☐ No

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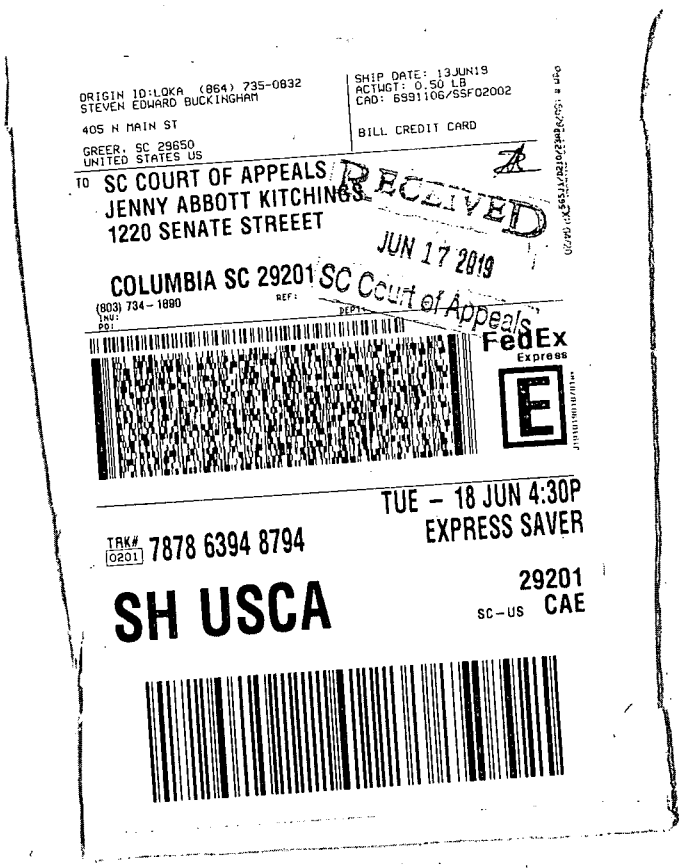

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