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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	Civil Action No. 2017-CP-26-7892
Gary Clark, Jr.,	)	
Plaintiff,	)	
vs.	)	**ORDER DENYING PLAINTIFF'S PARTIAL MOTION FOR SUMMARY JUDGMENT**
Richard Kenneth Richards,	)	
Defendant.	)	

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SC Court of Appeals

This matter is before the court on Plaintiff's Partial Motion for Summary Judgment made pursuant to Rule 56, South Carolina Rules of Civil Procedure. Plaintiff's Motion was brought on for hearing before this court on April 23, 2019, in Conway, South Carolina. Appearing for the Plaintiff was Stephen J. Wukela, Esquire, of Florence. Appearing for the Defendant was Edward R. Cole, Esquire, of Myrtle Beach. Matthew N. Tyler, Esquire and Edward A. Love, Esquire, both of Florence, appeared on behalf of their respective underinsured motorist carriers.

After full consideration of the written submissions by the parties in support of their respective positions and the oral arguments of counsel, this Court denies Plaintiff's Motion.

BACKGROUND

This case arises from a motor vehicle accident which occurred on June 7, 2015, in the intersection of Highway 17 Bypass and Grande Dunes Boulevard in Myrtle Beach. An ambulance owned and being operated by the Horry County Fire & Rescue Department ("HCFRD") was traveling south on Highway 17 en route to Grand Strand

Regional Medical Center on an emergency call, when it collided with a car being driven by Defendant Richard Kenneth Richards in an easterly direction on Grande Dunes Boulevard. Plaintiff Gary Clark, a firefighter/EMT employed by the HCFRD, was riding in the back of the ambulance tending to a cardiac patient en route to Grand Strand Regional Medical Center. The ambulance was being operated by another HCFRD firefighter/EMT, Scott Allen Burkhardt, Jr.

Clark was injured in the accident and filed this suit against Richards, alleging that Richards was negligent, grossly negligent and/or reckless in causing the accident in a number of particulars, including failing to yield the right-of-way to the ambulance. In his Answer Richards denied that he was at fault and pleaded as an affirmative defense that the accident was proximately caused by the HCFRD through the negligence, carelessness, recklessness and gross negligence of its ambulance driver, Burkhardt. Richards also asserted the additional defenses of unavoidable accident and sudden emergency.

After engaging in a substantial course of written discovery, as well as numerous depositions, including those of the parties, Burkhardt, several eyewitnesses and HCFRD management personnel, the Plaintiff filed this Motion for Partial Summary Judgment. In his Motion, the Plaintiff basically makes two contentions: (1) that the standard of care applicable to Burkhardt and his employer, HCFRD, is "gross negligence;" and (2) that the Defendant has failed to produce evidence creating a genuine issue of material fact from which a jury could reasonably

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conclude that any act or omission on the part of Burkhardt/HCFRD meets that standard.

STANDARD OF REVIEW

Summary judgment is appropriate only when the pleadings, depositions, interrogatory answers, admissions and affidavits show that there is no genuine issue of material fact. *Thomas v. Waters*, 315 S.C. 524, 445 S.E.2d 659 (Ct. App. 1994). In determining whether any triable issues of fact exist, the evidence and all inferences which can be reasonably drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Krester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994). Summary judgment is a drastic remedy which should be cautiously invoked so that a litigant is not improperly deprived of a trial on disputed factual issues. *Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991). As here, "in cases applied a preponderance of evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009).

ANALYSIS

(A) The Applicable Standard of Care

The Plaintiff first argues that the standard of care applicable to the HCFRD and to Burkhardt as a governmental subdivision and its employee, is that of "gross negligence." This Court disagrees.

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ELECTRONICALLY FILED - 2019 May 31 8:44 AM - HORRY - COMMON PLEAS - CASE#2017CP2607892

The Plaintiff asserts that the cases of *Jones v. Way*, 278 S.C. 295, 294 S.E.2d 432 (1982) and *Clark v. S.C. Dep't. of Pub. Safety*, 353 S.C 291, 578 S.E. 2d 16 (Ct. App. 2002), *aff'd* 362 S.C. 377, 608 S.E.2d 573 (2005) established "gross negligence" as the applicable standard in cases in which emergency vehicles are involved in accidents while on emergency calls.

In both *Jones* and *Clark*, the central issue was whether § 56-5-760, S.C. Code, Ann., which governs the operation of authorized emergency vehicles, specifies a "gross negligence" or "reckless conduct" standard of care for the operators of emergency vehicles on emergency calls. In *Jones*, decided in 1982, the South Carolina Supreme Court held that the statute absolved the driver of an authorized emergency vehicle from ordinary negligence, and imposed liability only when the conduct of the operator was reckless. *Jones*, at 295. However, at the time *Jones* was decided, § 56-5-760(D) provided explicitly that the driver could only be held responsible if he/she was guilty of "reckless conduct."

Bt the time *Clark* was decided by the Court of Appeals in 2002 and then affirmed by the Supreme Court in 2005, however, subsection (D) had been amended by the legislature to read as follows:

> "(D) The provisions of this section do not relieve the driver of an authorized emergency vehicle from the duty to drive *with due regard* for the safety of all persons." (Emphasis added)

This important change from the "reckless conduct" standard in the former version to one of "due regard" in the amended statute was duly noted by both the trial court and appellate courts in *Clark*. Those courts pointedly indicated that the amendment of the statute might well have caused the application of an "ordinary

negligence" standard in *Clark* had that issue been before the court there. However, the appropriate standard of care was not an issue submitted by the parties either in the trial court or on appeal, because the parties had stipulated that the applicable standard was "gross negligence." In this case, unlike the defendant in *Clark,* Defendant Richards does not agree with the Plaintiff's contention that "gross negligence" is the standard applicable to the HCFRD and, instead, asserts that the appropriate standard is "ordinary negligence." This issue is squarely before this court.

Plaintiff further argues in support of his position that the case of *City of Amarillo v. Martin*, 971 S.W.2d 426, 428, 41 Tex. Sup. Ct. J. 870-30 (Tex. 1998), cited by the South Carolina Court of Appeals in *Clark,* imposed a "reckless disregard" standard in construing an emergency vehicle statute similar to that at issue here. *Id.* at 300, n.7, 578 S.E.2d at 20, n.7. However, the Texas statute considered by the Texas court in *Amarillo* included the following provision, which is markedly different than the language in the amended South Carolina statute:

> "This chapter does not relieve the operator of an authorized emergency vehicle from:
>
> (1) The duty to operate the vehicle with appropriate regard for the safety of all persons; or
>
> . . .
>
> (2) The consequences of *reckless disregard for the safety of others.*" (Emphasis added)

In reaching its decision the Texas court opined that by the inclusion of the phrase "reckless disregard" that, while the Texas legislature intended for emergency

ELECTRONICALLY FILED - 2019 May 31 8:44 AM - HORRY - COMMON PLEAS - CASE#2017CP2607892

vehicles in emergency situations to be cognizant of public safety, the legislature nonetheless *"...only intended to impose liability for reckless conduct."*

The language of the Texas statute is quite different from that of the amended version of § 56-5-760(D) of the South Carolina Code, which specifically deleted any mention of the previous "reckless conduct" standard and replaced it with "due regard." As clearly implied by the South Carolina courts which considered the standard of care issue in *Clark,* the amended language in the South Carolina statute readily lends itself to an interpretation that the South Carolina legislature intended to make "ordinary care" standard of care applicable to the operators of emergency vehicles, such as the ambulance driver and the HCFRD in this case.

Adding further weight to this conclusion is the HCFRD Safety Policy cited by Defendant in his brief. Defendant's Memorandum in Opposition, page 7. That policy, in force at the time of this accident, provides in pertinent part that "when responding to a call in a Fire Rescue vehicle, the operator of said vehicle must drive "...with *due regard for others and must use caution* while . . . approaching intersections . . . or in heavy traffic areas." (Emphasis added)

§ 56-5-760(E) provides the HCFRD the authority to enact policies such as that described above furthering the purposes of the statute. The HCFRD, under the auspices of this statutorily granted authority, has applied and clearly adopted internally the statutory "due regard" standard to be obeyed by its own operators. The language of this internal HCFRD policy further mitigates against the application of

ELECTRONICALLY FILED - 2019 May 31 8:44 AM - HORRY - COMMON PLEAS - CASE#2017CP2607892

a "gross negligence" or "recklessness" standard to the operators of its emergency vehicles, and weighs substantially in favor of an "ordinary negligence" standard.

This Court, based on the applicable legal authorities and the extensive factual record before it, is of the opinion that the standard of care applicable to the HCFRD in this instance should be one of "ordinary care." The Plaintiff's Motion to impose a "gross negligence" or "reckless conduct" standard as to the conduct of the HCFRD and its driver, Burkhardt, is, therefore, denied for the reasons set forth above.

(B) Genuine Issues of fact Exist as to the Conduct of the HCFRD and its Driver, Scott Burkhardt

The Plaintiff, as the party seeking summary judgment in this case, has the responsibility of demonstrating the absence of a genuine issue of material fact for decision by a jury. *Richardson v. The State Record Co., Inc.*, 330 S.C. 562, 499 S.E.2d 822, 824-25 (Ct. App. 1998). This the Plaintiff has failed to do, and the Court is constrained to deny this second prong of the Plaintiff's Motion.

Here the Plaintiff contends that "[n]o reasonable jury could conclude that [the conduct of the ambulance driver] created fault..." on his part for this accident. Plaintiff's Reply brief, page 13. Essentially, the Plaintiff takes the position that the ambulance driver, by using the required emergency signals and slowing down as he entered the intersection, even against a red light, was thereby rendered immune from fault. In support of his position the Plaintiff filed with his Motion the depositions of numerous witnesses and cited to the Court the testimony from a number of those witnesses.

ELECTRONICALLY FILED - 2019 May 31 8:44 AM - HORRY - COMMON PLEAS - CASE#2017CP2607892

ELECTRONICALLY FILED - 2019 May 31 8:44 AM - HORRY - COMMON PLEAS - CASE#2017CP2607892

As set out in detail above in the discussion concerning the applicable standard of care, even if the ambulance driver approached and attempted to cross the intersection with his emergency signals working and also slowed down before entering the intersection, he was still required to use "due regard" for the safety of the other motorists on the highway in doing so under § 56-5-760(D). As the submissions of the parties clearly show, there are genuine issues of material fact which require decision by a jury on this crucial issue.

There is clearly a dispute among the eyewitnesses as to whether the ambulance had a green light, as contended by its driver, Burkhardt, or whether the Defendant, entering the intersection from Grande Dunes Boulevard, had a green light. Thus, the color of the light, as is usually the case, is a crucial issue as to liability here for a number of reasons. That fact is disputed and must be decided by jury.

The importance of the color of the light is highlighted, for example by the provision of the HCFRD safety policy cited by the Defendant in his brief, which requires a driver to " . . . stop at all intersections and . . . double check to ensure that all traffic is yielding before proceeding through." (Defendant's Brief, p. 6). The defense referenced the testimony of the ambulance driver and two superior officers with the HCFRD to the effect that, if the light for the ambulance was red at the time the driver approached and entered the intersection, his failure to stop before entering would have been a violation of the Department policy. There is also testimony from the ambulance driver that he understood the purpose of this provision to make sure that all traffic which might have a green light had, in fact, seen and/or heard the

ambulance and, therefore, had an opportunity to yield before entering the intersection. Far from creating the inference urged by the Plaintiff that no reasonable jury could find fault on the part of the HCFRD and its ambulance driver, these facts are genuine issues which must be submitted to a jury for decision. Additionally, whether the light was red or green for the Defendant quite obviously affects his liability for the accident.

Other issues affecting the ambulance's fault have been raised by the Defendant, including the configuration of the exit from Grand Dunes Boulevard into its intersection with Highway 17. The Defendant contends, for example, that there were a number of obstacles that prevented him from hearing or seeing the ambulance until he entered the intersection moments before his collision with the ambulance. Defendant's Memorandum, pp. 3-5. The ambulance driver acknowledged in his deposition testimony (Defendant's Memorandum, p. 4) that he was familiar with the configuration of the exit on Grand Dunes Boulevard into the intersection from prior, personal experience, including the obstacles which the Defendant describes in his Memorandum. Whether or not these as possibly prevented the Defendant from either seeing or hearing the ambulance until it was too late to avoid the collision is an additional example of a genuine issues of material fact as to which, once again, a jury must decide. In short, there are numerous genuine issues of material fact raised by the record in this case as presented to this Court, including, but not limited to the issues highlighted above.

ELECTRONICALLY FILED - 2019 May 31 8:44 AM - HORRY - COMMON PLEAS - CASE#2017CP2607892

The Defendant has affirmatively pleaded that the HCFRD was at fault for the accident in question and the Plaintiff's injuries and damages. Under the decision of the South Carolina Supreme Court in *Machin v. Carus Corporation*, 419 S.C. 527, 799 S.E.2d 468 (2017), the Defendant here is entitled to present evidence at trial that assigns fault to or for the Plaintiff's injuries to his employer, the HCFRD, and a jury may consider whether the employer's actions (or omissions) were the cause of Plaintiff's injuries. *Id.* at 543, 477. As the record here demonstrates a number of genuine issues of material fact for consideration of and decision by the jury on this score, the Court denies the Plaintiff's Motion for Partial Summary Judgment seeking to dismiss this affirmative defense.

SUMMARY

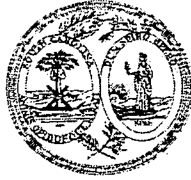
The Court finds that the Plaintiff has failed to establish as a matter of law that the standard of care applicable to the ambulance driver and his employer, the Horry County Fire & Rescue Department, was "gross negligence." To the contrary, as indicated above, the *Clark* decision cited above and subsection 56-5-760(D) of the South Carolina Code lead this court to conclude that, in fact, the standard of care applicable to Burkhardt and the HCFRD is, in fact, "ordinary negligence." Further, no matter which standard were found to be applicable, there are numerous genuine issues of material fact affecting both the liability of the Horry County Fire & Rescue Department and the Defendant. This Court is constrained to deny Plaintiff's motion in its entirety.

ELECTRONICALLY FILED - 2019 May 31 8:44 AM - HORRY - COMMON PLEAS - CASE#2017CP2607892

Benjamin H. Culbertson, Presiding Judge
Fifteenth Judicial Circuit

May ____, 2019

ELECTRONICALLY FILED - 2019 May 31 8:44 AM - HORRY - COMMON PLEAS - CASE#2017CP2607892



Horry Common Pleas

Case Caption: Gary Clark Jr VS Richard Kenneth Richards

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Presiding Circuit Court Judge

s/Benjamin H. Culbertson, Judge Code 2148

Electronically signed on 2019-05-30 11:43:17 page 12 of 12

ELECTRONICALLY FILED - 2019 May 31 8:44 AM - HORRY - COMMON PLEAS - CASE#2017CP2607892