THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

CASE NO. 2015-CP-10-5379
Appellate Tracking Number 2017-002317

William Sean Irvin, Jr., as Personal Representative of the Estate of Jonathan Edward Irvin, Deceased, ...Appellant,

v.

City of Folly Beach, South Carolina Department of Highways and Public Transportation, Daniel Wilcutt, and Mitchell Dewitt Rabon, Jr., ... Defendants of whom

Mitchell Dewitt Rabon, Jr., is ..... Respondent.

BRIEF OF APPELLANT

May 31, 2018

Brooklyn O'Shea, #102505
Ian O'Shea, #100712
O'Shea Law Firm
1120 Folly Road
Charleston, S. C. 29412
(843) 805-4943
E-mail: ioshea@theoshealawfirm.com
E-mail: brook@theoshealawfirm.com

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Kristi L. Harrington, Circuit Court Judge

CASE NO. 2015-CP-10-5379
Appellate Tracking Number 2017-002317

William Sean Irvin, Jr., as Personal Representative of the Estate of Jonathan Edward Irvin, Deceased, ...Appellant,

v.

City of Folly Beach, South Carolina Department of Highways and Public Transportation, Daniel Wilcutt, and Mitchell Dewitt Rabon, Jr., ... Defendants of whom

Mitchell Dewitt Rabon, Jr., is ..... Respondent.

BRIEF OF APPELLANT

May 31, 2018

Brooklyn O'Shea, #102505
Ian O'Shea, #100712
O'Shea Law Firm
1120 Folly Road
Charleston, S. C. 29412
(843) 805-4943
E-mail: ioshea@theoshealawfirm.com
E-mail: brook@theoshealawfirm.com

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES AND OTHER AUTHORITIES:

STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in granting summary judgment to Respondent, Michael Rabon, when Appellant demonstrated genuine issues of material fact?

II. Did the trial court err in granting summary judgment to Respondent, Michael Rabon, before the parties completed discovery?

III. Did the trial court deprive the parties of an opportunity for judicial review by failing to make findings of fact and conclusions of law?

IV. Did the trial court erred in granting summary judgment because comparative negligence is an issue and is a question of fact that must be decided by a jury?

STATEMENT OF CASE

On October 5, 2015, at approximately 6:00 PM, the decedent was driving his 2010 Kawasaki motorcycle along East Cooper Avenue on Folly Beach. East Cooper Avenue is a main traffic artery on Folly Beach, running approximately east and west, and the decedent was driving in an easterly direction, with the setting sun at his back. As he approached the intersection of East Cooper Avenue and Second Street, a Dodge Durango attempted to make a left turn from Second Street on to East Cooper Avenue heading west. The attempted left turn took the Durango across the decedent's path. The intersection of East Cooper and Second Street is controlled by a stop sign on Second Street, and vehicles making a left turn are required to yield to vehicles on East Cooper Avenue, which is the favored roadway.

Respondent, Rabon, parked his 2007 Honda Ridgeline pick-up truck on the right shoulder of East Cooper Avenue between 10 to 15 feet from the intersection of East Cooper and Second Street. Respondent parked his truck facing in the same direction as the decedent's path of travel, so that the decedent approached the rear of the vehicle. As the Dodge Durango attempted to make a left turn on to the favored roadway, East Cooper, he either failed to see the oncoming motorcycle, or misjudged its distance, and as the driver of the Dodge Durango made the left turn, the motorcycle struck the rear driver's side of the S.U.V. This impact caused the decedent to lose control of his motorcycle and begin to slide sideways through the intersection. The decedent slid through the intersection, striking Respondent Rabon's, truck, causing him significant injuries that ultimately took his life. A Good Samaritan ran to decedent's side and began administering C.P.R., which she continued to perform until E.M.S. arrived on the scene at approximately 6:00 PM. E.M.S. took over resuscitation efforts and transported decedent to the Medical University

Trauma Center, where physicians attempted to save his life. The emergency room physicians discontinued their efforts and pronounced the decedent's time of death as 6:28 PM on October 5, 2013.

On October 6, 2015, Appellant filed suit (R.O.A. page 13) against 4 parties as follows:

(1) Daniel Willcutt, alleging negligence in making an improper left turn, and

(2) The City of Folly Beach, alleging negligence in failing to provide a reasonably safe intersection by allowing vegetation to block the line of sight for cars entering the favored roadway, and

(3) The South Carolina Department of Highways and Public Transportation, alleging negligence in failing to provide a reasonably safe intersection by allowing vegetation to block the line of sight for cars entering the favored roadway, and

(4) Mitchell Dewitt Rabon, alleging negligence for parking too close to the intersection in violation of South Carolina state statute and municipal ordinance.

On February 18, 2016, Respondent filed an Answer, denying the material allegations of the Complaint and alleging two comparative negligence defenses. (R.O.A. page 30) On March 8, 2017, Respondent, Rabon, moved for summary judgment claiming there was no genuine issue of material fact. (R.O.A. page 38 [motion for summary judgment]) At the time Respondent filed his Motion for Summary Judgment, the parties had just begun to schedule and take depositions. Rabon had not yet responded standard interrogatories. Even though discovery was incomplete, Appellant filed a detailed affidavit demonstrating that Respondent illegally parked his vehicle because he parked it too close to the intersection in violation of South Carolina state and

municipal law, which require a minimum separation of 20 feet. Appellant notified the trial court that Respondent parked his truck in a manner that violated the state statute (and municipal ordinance) governing parking near an intersection, and that the violation of a statute is evidence of negligence. (R.O.A. page 50 [affidavit] and 79 [tr. Page 10]

On May 15, 2017, Rabon's Motion for Summary Judgment came before the Honorable Kristi L. Harrington, who took the matter under advisement and thereafter granted the motion by written Form 4 Order dated June 8, 2017. (R.O.A. page 3)

On June 28, 2017, Appellant filed a Motion for Reconsideration (R.O.A. page 56), pointing out to the Court that:

1) Appellant provided evidence that the Rabon vehicle violated the statute, and
2) The parties were just beginning discovery, and Appellant was entitled to conduct discovery prior to facing a motion for summary judgment.
3) The trial court failed to provide an explanation in writing or on the record as to what facts it relied on in deciding to grant summary judgment.

On October 11, 2017, the Court denied the Motion for Reconsideration by Form 4 Order (R.O.A. page 5), and on November 2, 2017, Appellant filed a Notice of Appeal with this Court. (R.O.A. pages 64 and 68)

STATEMENT OF FACTS

The material facts are set forth fully in the Statement of Case.

STANDARD OF REVIEW

Summary judgment is appropriate where there is no genuine issue of material fact and it is clear the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. 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 nonmoving party. *Koester v. Carolina Rental Ctr.*, 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994).

The nonmoving 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.*, 301 S.C. 326, 673 S.E.2d 801 (2009) (reversed grant of summary judgment for injuries sustained in a parking lot because evidence of disrepair of parking lot raised a genuine issue of material fact as to whether injury was foreseeable.)

Ordinarily, a comparison of the plaintiff's [alleged] negligence with that of the defendant is a question of fact for the jury to decide. 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 fifty percent. Therefore, summary judgment is generally not appropriate in a comparative negligence case. *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000).

Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." *Dawkins v. Fields*, 354 S.C. 58, 69, 580 S.E.2d 433, 439 (2003). Summary Judgment is not appropriate where further inquiry

into the facts of the case is desirable to clarify the application of the law. Evening *Post Pub. Co. v. Berkeley County School Dist.*, 392 S.C. 76, 82, 708 S.E.2d 745, 748 (2011).

ARGUMENT I

The trial court erred in granting summary judgment to Respondent, Mitchell Dewitt Rabon, when Appellant demonstrated genuine issues of material fact exist.

The Order under review grants summary judgment to Respondent on a Form 4 Order stating in total: "Defendant Rabon demonstrated that there is no genuine issue of material fact as to the claims against him." (R.O.A. page 3 [Order Under Review]) The lack of specificity leaves Appellant—and this Court—without an ability to understand how the trial court reached its conclusions. (This lack of specificity is analyzed under Rules 52 and 58 in Argument III). As discussed in the next section, the trial court gave no explanation on the record that can serve as a substitute for findings of fact and conclusions of law. See transcript of hearing in the Record on Appeal at pages 70 - 87.) What is not disputed is that:

(1) The General Assembly of South Carolina enacted a statute regulating the minimum distance from intersections to prevent parked vehicles from impeding intersections,
(2) The Town of Folly Beach enacted a parking ordinance to prevent parked vehicles from impeding intersections, and
(3) The Rabon vehicle violated both. (See affidavit of William Irvin at pages 49 - 55 of Record on Appeal.)

Because the Respondent moved prematurely for summary judgment ahead of discovery, the Appellant filed a detailed affidavit using the unchallenged measurements from the crash team and

applying them to the statute and ordinance.[1] According to the affidavit of William Irvin, the Rabon vehicle was "10-15" feet from the intersection and therefore in violation of both the state statute and the municipal ordinance governing parking near intersections. See affidavit at page 49 of R.O.A. At the hearing, Rabon's attorney objected to the affidavit because William Irvin, Jr. is not an "expert." First, incorporating the crash team's unchallenged measurements taken at the scene by the first responders does not require an expert opinion. Appellant could have just as easily handed up the crash team's reports and rested on those measurements, but Appellant's affidavit summarized and restated the measurements in a narrative form. Second, Respondent's stated objections reverse the summary judgment standard and challenge the weight of the evidence. By contrast, as the party moving for summary judgment, Respondent offered nothing to challenge the assertion that the vehicle was parked too close to the intersection and crosswalk. Applying the measurements to South Carolina law yields the indisputable conclusion that Respondent parked his vehicle too close to the intersection, which is a violation of a statute and amounts to negligence *per se*. *Norton v. Opening Break*, 319 S.C. 469, 462 S.E.2d 861 (1995 (regulations have force of law; violation of regulation may constitute negligence *per se*; *Green v. Sparks*, 232 S.C. 414, 102 S.E.2d 435 (1958) (violation of an applicable statute is negligence per se, and whether or not such breach contributed as a proximate cause to plaintiff's injury is ordinarily question for jury; causative violation of applicable statute constitutes action negligence and is evidence of recklessness, willfulness and wantonness; *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001) (negligence *per se* is negligence arising from defendant's violation of statute;

[1] While not part of the record because he had not been deposed at the time, once the defendants took the expert's deposition, the expert confirmed that the Rabon vehicle was too close to the intersection. The Court cannot consider this testimony of course, but it is relevant because it demonstrates the motion for summary judgment was premature.

Coleman v. Shaw, 281 S.C. 107, 314 S.E.2d 154 (Ct App. 1984) (violation of statute is negligence *per se*). While proximate cause may be in dispute, the location of the Rabon vehicle is not, and thus a presumption of negligence arises. Third, a lay witness is competent to read a measuring tape because doing so is rationally related to the witness' perception, is helpful to a clear understanding of the witness' testimony or a determination of a fact in issue, and does not require special knowledge, skill, experience or training. Rule 701, *South Carolina Rules of Evidence.*

South Carolina (and municipal) law controls where motorists can park. South Carolina law furnishes the legal definition of an intersection, of a crosswalk, and establishes the distance a motorist must keep from both. See § 56-5-500 (definition of crosswalk) and § 56-5-2530 (distance from a crosswalk for parked vehicles). In defending against Rabon's premature motion for summary judgment, not only did Appellant provide these precise and unquestioned measurements to the Court, but also provided specific citations to the trial court—see Record on Appeal pages 56 - 59 [Memorandum of law]—for the legal definition of "crosswalk" and the requirements that a motorist park a minimum of twenty feet from any "crosswalk." Appellant intended his reference to a "crosswalk" to aid the trial court in understanding where the intersection exists relative to Rabon's vehicle, but the transcript of the hearing suggests the trial court overlooked this principle. Because the trial court did not furnish written findings or provide an explanation on the record, neither the parties nor the reviewing court can determine the trial court's reasoning. As a result, we are left to grope in the dark as to how the trial court reached its decision. However, clearly the trial court disregarded Appellant's affidavit in its entirety. This is an error of law that requires reversal. Moreover, in reading the transcript of the hearing as a whole, while the trial court never articulated her reasons for granting summary judgment—or what facts she found pertinent—she seemed to be

under the impression that the statutes governing distance from an intersection are for the protection of pedestrians but not motorists. See Transcript at page 85 of the R.O.A. [tr. Page 16]: "THE COURT: But my understanding is the purpose of a crosswalk is to protect the pedestrians within a crosswalk, not for somebody lawfully on the road." If this is the trial court's reason for granting summary judgment, it is a palpable error of law. Chapter 5 of Title 56 is entitled the *Uniform Act Regulating Traffic on Highways.* These statutes regulate motor vehicle traffic, and to the extent the trial court relied on the application of laws governing pedestrians, the court erred.

In 2003, the Court of Appeals addressed this precise issue in *Schmidt v. Courteney*, 357 S. C. 310 592 S.E.2d 326 (Ct. App. 2003), cert. den. There this Court reversed the grant of summary judgment in a negligence case because the trial court abused its discretion in refusing to consider the affidavit filed by the plaintiff resisting the motion. Moreover, in deciding *Schmidt*, this Court pre-empted Respondent's argument that expert testimony was needed, holding that even if expert testimony were needed, such need showed only that further discovery is necessary in order to evaluate the case properly. As this Court said in *Schmidt*:

> We find it extremely troubling this case was resolved on a summary judgment basis, especially considering the injury to Schmidt and the *novel* issue involved in this case. No South Carolina cases discuss the issue of personal injury from the impact of errant golf shots.
>
> Many South Carolina cases point out summary judgment is a "drastic remedy" which should be cautiously invoked so no person will be improperly deprived of a trial of the disputed factual issues. *Cunningham v. Helping Hands, Inc.,* 352 S.C. 485, 575 S.E.2d 549 (2003); *Lanham v. Blue Cross & Blue Shield,* 349 S.C. 356, 563 S.E.2d 331 (2002); *Conner v. City of Forest Acres,* 348 S.C. 454, 560 S.E.2d 606 (2002); *Redwend* [592 S.E.2d 319] *Ltd. P'ship v. Edwards,* 354 S.C. 459, 581 S.E.2d 496 (Ct.App. 2003); *Baril v. Aiken Reg'l Med. Ctrs.,* 352 S.C. 271, 573 S.E.2d 830 (Ct.App.2002); *Trivelas v. South Carolina Dep't of Transp.,* 348 S.C. 125, 558 S.E.2d 271 (Ct.App.2001); *Murray v. Holnam, Inc.,* 344 S.C. 129, 542 S.E.2d 743 (Ct.App.2001); *McNair v. Rainsford,* 330 S.C. 332, 499 S.E.2d 488 (Ct.App. 1998). Because summary judgment is a drastic remedy, it must not be granted until the opposing party has had a "full and fair opportunity to complete discovery." *Dawkins v. Fields,* 354 S.C. 58, 69, 580 S.E.2d

433, 439 (2003); *Lanham,* 349 S.C. at 363, 563 S.E.2d at 334; *Doe v. Batson,* 345 S.C. 316, 322, 548 S.E.2d 854, 857 (2001); *Baird v. Charleston County,* 333 S.C. 519, 529, 511 S.E.2d 69, 74 (1999); *Baughman v. American Tel. & Tel. Co.,* 306 S.C. 101, 112, 410 S.E.2d 537, 543 (1991).

Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. *Lanham,* 349 S.C. at 362, 563 S.E.2d at 333; *Moriarty v. Garden Sanctuary Church of God,* 341 S.C. 320, 534 S.E.2d 672 (2000); *Mosteller v. County of Lexington,* 336 S.C. 360, 520 S.E.2d 620 (1999); *Redwend Ltd. P'ship,* 354 S.C. at 468, 581 S.E.2d at 501; *Baril,* 352 S.C. at 280, 573 S.E.2d at 835; *Trivelas,* 348 S.C. at 130, 558 S.E.2d at 273; *Hall v. Fedor,* 349 S.C. 169, 561 S.E.2d 654 (Ct.App.2002); *Hedgepath v. American Tel. & Tel. Co.,* 348 S.C. 340, 559 S.E.2d 327 (Ct.App.2001); *Bayle v. South Carolina Dep't of Transp.,* 344 S.C. 115, 542 S.E.2d 736 (Ct.App.2001); *Vermeer Carolina's, Inc. v. Wood/Chuck Chipper Corp.,* 336 S.C. 53, 518 S.E.2d 301 (Ct.App.1999); *Middleborough Horizontal Prop. Regime Council v. Montedison,* 320 S.C. 470, 465 S.E.2d 765 (Ct.App.1995). "Summary judgment is inappropriate when further development of the facts is desirable to clarify the application of the law." *Lee v. Kelley,* 298 S.C. 155, 158, 378 S.E.2d 616, 617 (Ct.App.1989). Even when there is no dispute as to evidentiary facts, but only as to the conclusions or inferences to be drawn from them, summary judgment should be denied. *Redwend Ltd. P'ship,* 354 S.C. at 468, 581 S.E.2d at 501; *Baril,* 352 S.C. at 280, 573 S.E.2d at 835; *Hall,* 349 S.C. at 173-74, 561 S.E.2d at 656; *Glasscock, Inc. v. United States Fid. & Guar. Co.,* 348 S.C. 76, 557 S.E.2d 689 (Ct.App.2001); *Stewart v. State Farm Mut. Auto. Ins. Co.,* 341 [592 S.E.2d 320] S.C. 143, 533 S.E.2d 597 (Ct.App.2000); *see also Laurens Emergency Med. Specialists v. M.S. Bailey & Sons Bankers,* 355 S.C. 104, 584 S.E.2d 375 (2003) (noting that summary judgment should not be granted even when there is no dispute as to evidentiary facts, if there is dispute as to conclusions to be drawn therefrom).

Therefore, the trial court erred in refusing to acknowledge that Appellant's affidavit demonstrates a genuine issue of material fact by presenting indisputable evidence that Respondent's vehicle violated the state and municipal regulations governing parking too close to intersections.

ARGUMENT II

The lower court erred in granting summary judgment before Appellant had an opportunity to conduct discovery.

Although the trial court had evidence there was a genuine issue of material fact, at the time summary judgment was granted in this case, discovery was at its early stages and was incomplete. Respondent had not been deposed and had not responded to standard interrogatories.

Appellant's accident reconstruction expert had not been deposed.

As the Supreme Court held in *Baughman v. American Tel. & Tel. Co*:

"Since it is a drastic remedy, summary judgment "should be cautiously invoked so that no person will be improperly deprived of a trial of the disputed factual issues." *Watson v. Southern Ry. Co.*, 420 F. Supp. 483, 486 (D.S.C. 1975); see also *Holloman v. McAllister*, 289 S.C. 183, 186, 345 S.E. (2d) 728, 729 (1986) ("an extreme remedy to be cautiously invoked"). This means, among other things, that summary judgment must not be granted until the opposing party has had a full and fair opportunity to complete discovery. 10A Wright & Miller, *Federal Practice and Procedure* § 2741, p. 543 (1983); 6 *Moore's Federal Practice* ¶ 56.02[6], p. 56-39 (2d) ed. 1990); see, *e.g.*, *First Chicago Int'l v. United Exchange Co.*, 836 F. (2d) 1375 (D.C. Cir.1988); *Gary Plastic Packaging Corp. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 756 F. (2d) 230 (2d Cir.1985); *Tyler v. City of Enterprise*, 521 So. (2d) 951 (Ala. 1988); *Gangadean v. Leumi Fin. Corp.*, 13 Ariz. App. 534, 478 P. (2d) 532 (1970); *Commercial Bank of Kendall v. Heiman*, 322 So. (2d) 564 (Fla. Dist. Ct. App. 1975); *Board of Education v. Van Buren & Firestone, Architects, Inc.*, 165 W. Va. 140, 267 S.E. (2d) 440 (1980); cf. Rule 56(f), S.C.R.C.P.[4] Under the circumstances, we agree with Plaintiffs that the grant of partial summary judgment on the personal injury claims was premature. *Baughman v. American Tel. & Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991).

Here, Appellant explained to the trial court at the hearing on summary judgment that he had twice scheduled Respondents' deposition, which was postponed twice. See Appellant's Motion for Reconsideration at page ___ of the R.O.A. Appellant explained to the Court that the Defendants' depositions were set for Friday, three days after the hearing:

> Your Honor . . . I'm taking Mr. Rabon's deposition on Friday, so I'm a little surprised that he moved for summary judgment before I've had an opportunity to conduct my deposition. But as you can see, the vehicle is clearly undisputedly parked in violation of the controlling parking ordinance. Both Folly Beach and the State of South Carolina [have] a parking ordinance.
> R.O.A. page 58 and 79 [tr. Page 10]

In light of the uncontested facts that Appellant had not had a "fair and full opportunity" to conduct discovery, the trial court erred in granting summary judgment.

Argument III.

The trial court deprived the parties of an opportunity for meaningful judicial review by failing to make findings of fact and conclusions of law.

The Rules of Civil Procedure, Rules 52 and 58, require that a trial court make findings of

fact and conclusions of law when ending a case. In *Bowen v. Lee Process Systems Co.*, 342 S.C. 232, 536 S.E.2d 86 (Ct. App. 2000), this Court held that a trial court's order on summary judgment must set out facts and accompanying legal analysis sufficient to permit meaningful appellate review. However, in 2014, the Supreme Court modified this rule in *Woodson v. DLI Properties, LLC*, 406 S.C. 517, 753 S.E.2d 428 (2014) by concluding that while it is not always "necessary" to set out findings of fact and conclusions of law, it is the "better practice":

> "We agree it is better practice—and in most cases common practice—as well as beneficial to the judicial process for a trial judge to articulate relevant findings and conclusions of law in an order granting summary judgment. However, Rule 52, SCRCP, provides that "[f]indings of facts and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56. . .." Thus, such findings and conclusions are not required for appellate review, and, for this reason, we overrule *Bowen* to the extent it is relied upon to vacate and remand orders granting summary judgment. Nevertheless, here, the circuit court's reasoning is clear from the order, as it plainly referenced the evidence the circuit court considered in making its decision. *See Porter,* 372 S.C. at 568, 643 S.E.2d at 100 (stating that "not all situations require a detailed order, and the circuit court's form order may be sufficient **if the appellate court can ascertain the basis for the circuit court's ruling from the record on appeal**"). (emphasis added).
>
> *Woodson v. DLI Properties* 406 S.C. 517, 526–27, 753 S.E.2d 428, 433 (2014).

Of course, when applying *Woodson's* holding here, this Court must take note of the fact that *Woodson* did not require written findings of fact and conclusions of law because the record contained a statement of the Court's reasoning and the facts were set forth in the complete record established through discovery and colloquy with the Court. That factor is absent here as the Record on Appeal demonstrates. The absence of any explanation means that neither the parties nor this Court can determine what the trial court relied upon in reaching its conclusions. Unlike *Woodson*, this case presented to the trial court only the pleadings, Rabon's Motion, and Appellant's affidavit. Moreover, counsel explained to the Court that Rabon's deposition was scheduled for three days later. As the Supreme Court said in *Woodson*: "In reviewing the circuit court's order **and the**

Record, we find the facts—which are uncontested—and the law support summary judgment in favor of Respondents." *Woodson* at 434.

Here, because there is no record to explain how the trial court reached its decision, no one knows how the trial court reasoned. In Wright and Miller's Treatise on *Federal Practice and Procedure,* the authors point out the self-evident and intuitive conclusion that a party is entitled to know the basis of a Court's decision in order to know whether to accept the decision or seek judicial review. "Findings may well be helpful to the appellate court in making clear the basis for the trial court's decision and in indicating what the court understood to be the undisputed facts on which the summary judgment was granted." Wright and Miller, *Federal Practice* § 2575. As the 11th Circuit pointed out in *Hulsey v. Pride Restaurants*, LLC, 367 F.3d 1238 (11th Cir. 2004), the "appeal is not made any easier by the district court's failure to provide findings of fact and conclusions of law."

Every litigant has the right to understand the Court's reasoning so that he or she can make an informed decision on whether to accept the decision or seek judicial review. The South Carolina Supreme Court hinted at this analysis in *Woodson* when it concluded that based on the record as a whole, it understood the basis of the trial court's decision. Here the record is silent as to what fact or facts the trial court found to be so absent to justify the "drastic remedy" of summary judgment. Because there is no explanation how the trial court reached the decision to end the case, the decision is controlled by an error of law.

Argument IV.

The trial court erred in granting summary judgment because comparative negligence is an issue and is a question of fact that must be decided by a jury.

As may be seen by paragraphs 5 and 6 of Respondent's Answer (R.O.A. page 31),

Respondent asserted the defense of comparative negligence. This raises a question of fact that can only be resolved by a jury:

Ordinarily a comparison of the plaintiff's negligence with that of the defendant is a question of fact for the jury to decide. 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 fifty percent. Therefore, summary judgment is generally not appropriate in a comparative negligence case. *Bloom v. Ravaira*, 339 S.C. 417, 529 S.E.2d 710 (2000).

Here, as demonstrated by the transcript of the hearing, the Respondent did not rely on a "sole reasonable inference" assertion. Rather, the Respondent argued that Will Irvin's affidavit was insufficient because he is not an "expert" while simultaneously hiding behind Respondent's contributions to the delay in completing discovery. The Respondent's motion for summary judgment identified no facts to prove beyond dispute that Rabon's parked vehicle conformed to the minimum requirements of the state statute. Instead, he relied entirely on the application of the state statutes that the parties agree control without tying them to the facts. Apparently, the trial court thought these statutes only apply to pedestrians. R.O.A. page 85 [tr. Page 16, line 7] As to the first assertion, there is no rule of procedure or case law that holds a party cannot testify as to measurements. There is no special training required to read a tape measure and lay witnesses routinely testify as to distance. See Rule 701, *South Carolina Rules of Evidence*: "If the witness is not testifying as an expert, the witnesses'' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue,

and (c) do not require special knowledge, skill, experience or training." As set forth in argument I above, the trial court erred as a matter of law in ignoring the plaintiff's affidavit and concluding that Respondent parked his vehicle legally when the indisputable evidence is that he did not. In addition, the record demonstrates that the trial court misapplied the statute governing intersections on the erroneous belief that the statute relates only to pedestrians. Either way, the decision is controlled by an error of law.

CONCLUSION

The lower court erred in granting summary judgment, regardless of what the unknown basis may have been. First, Appellant provided much more than a scintilla of evidence that Rabon violated a statute and parked too close to the intersection, thus creating an unsafe condition and supporting Appellant's allegation of negligence *per se*. As the appellant established the elements of duty and breach, which are presumed by appellant demonstrating a violation of a statute, the appellant created more than a genuine issue of material fact. Whether an injury occurring from that condition is or is not foreseeable is a question of fact for the jury to determine. In addition, the record shows that Appellant rescheduled Respondent's deposition at his request and had attempted to complete his deposition prior to Respondent's Motion for Summary Judgment. Rabon had not even responded to Interrogatories, and the lower court should not consider a motion for summary judgment until the parties have a "full and fair opportunity" to conduct discovery. Since Respondent raised the issue of comparative negligence as his defense, this defense itself became a question of fact reserved for a jury. Therefore, for any or all of these reasons, this Court should reverse the entry of summary judgment and remand the case to Charleston County to be resolved by

a jury trial.

Respectfully submitted,

Brooklyn O'Shea, #102505
Ian O'Shea, #102712
O'Shea Law Firm
1120 Folly Road
Charleston, S. C. 29412
(843) 805-4943
E-mail: brook@theoshealawfirm.com
E-mail: ioshea@theoshealawfirm.com
Attorneys for Appellant

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Respondent
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net
Attorneys for Appellant

CERTIFICATE OF COUNSEL

I certify that this Final Brief complies with Rule 211(b) of the *South Carolina Appellate Court Rules.*

May 31, 2018

Thomas R. Goldstein, #2186.
Belk, Cobb, Infinger & Goldstein, P.A.
Attorneys for Respondent
P. O. Box 711121
N. Charleston, South Carolina 29415-1121
(843) 554-4291; (843) 554-5566 (fax)
E-mail: tgoldstein@cobblaw.net