THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM PICKENS COUNTY
Court of Common Pleas

Perry H. Gravely, Circuit Court Judge

Case No.: 2016-CP-39-01346
Appellate Case No.: 2018-000102

Chelsea Abdelgheny f/k/a Chelsea Jackson, Appellant,

v.

Gerald L. Moody, Respondent.

RESPONDENT'S FINAL BRIEF

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STATEMENT OF ISSUES ON APPEAL

1. Did the lower court err in finding as a matter of law that Appellant's negligence exceeded fifty percent as a matter of law and, thus, was barred from recovery against Respondent?

STATEMENT OF THE CASE

The Summons and Complaint in this lawsuit was filed on November 29, 2016 in the Pickens County of Common Pleas against Respondent alleging negligence arising out of an automobile accident occurring on October 26, 2015 at around 8PM on Gentry Memorial Highway. The allegations of the Complaint are that Appellant was on foot crossing Gentry Memorial Highway and was struck by Respondent who was operating a motor vehicle. Generally, the Complaint alleges Respondent was negligent for: (a) failing to keep vehicle under proper control; (b) failure keep vehicle properly equipped; (c) failure to use degree of care; (d) failing to maintain a proper lookout; (e) driving too fast for conditions; (f) failing to control speed of vehicle; (g) failing to exercise proper precautions; and (h) failing to use due care. (R.p. 10-R.p. 13)

Appellant was walking from her employer Mission Fitness across Gentry Memorial Highway to CMG Signs. (R.p. 178, line 12-R.p. 179, line 4) Appellant admitted that she was walking diagonally across Gentry Memorial Highway, and that she stopped in the median prior to proceeding into Moody's lane of travel. Appellant admitted that she was not using a crosswalk when the accident occurred. (R.p. 181, line 2- R.p. 182, line 6). Appellant admitted that two intersections controlled by stoplights were in close proximity to the area that she crossed. She could not provide a reason explaining her decision not to cross at those intersections, and admitted that it would have been safer to cross using those intersections. (R.p. 185, line 11-R.p. 186, line 7 and R.p. 221). Appellant admitted that it was raining and dark at the time she crossed the street, and that she had a hoody covering her face due to the rain. (R.p. 183, lines 7-10).

Appellant testified that she was in Respondent's lane of travel at the point of impact. (R.p. 184, lines 13-18). Appellant testified that she did not see Respondent's vehicle at any point prior to the impact and that she did not know how fast Respondent was traveling at the point of impact or prior to the impact. (R.p. 183, lines 14-20). Furthermore, Appellant admitted that she was told she was on a cell phone at the time of the impact. (R.p. 189, lines 2-6 and R.p. 190, lines 13-20).

Respondent had been at his grandson's house near downtown Pickens and was on his way home when the accident occurred. (R.p. 243, line 1-R.p. 244, line 10). The weather at the time of the accident was medium to heavy rain. (R.p. 242, lines 13-21). Respondent testified that he was traveling at around 25-30 miles per hour at the time of the impact. (R.p. 245, lines 8-14). He testified that he was keeping a proper lookout and saw Appellant when she was approximately 10 feet in front of his vehicle, and he immediately pressed his brakes. She took two fast steps after he saw her and his vehicle struck her with the front passenger side. (R.p. 246, line 8-R.p. 247, line 8). Respondent testified that Appellant went over his fender and she ended up in the road next to his back bumper. (R.p. 247, lines 9-17). Respondent testified that the area where the accident occurred was not very well lit. (R.p. 258, lines 22-25). Respondent testified that his lights were in proper working order. (R.p. 268, line 7-R.p. 269, line 3). Respondent was not given a ticket by the investigating officer as a result of this accident. (R.p. 252, line 25-R.p. 253, line 1).

Respondent filed an Answer on January 18, 2018. Respondent denied he was negligent in this accident and pled an affirmative defense of comparative negligence as a complete bar to Appellant's recovery. (R.p. 14-R.p 16). Respondent filed a Motion for Summary Judgment pursuant to Rule 56, SCRCP, on July 17, 2017 after the deposition of both Appellant and Respondent. The Motion was based upon the following grounds: (1) There is no evidence of negligence on the part of the Respondent entitling Appellant to a verdict; and in the alternative,

(2) Appellant was comparatively negligent as a matter of law in excess of Respondent. (R.p. 17.)

This Motion was argued in front of Judge Perry H. Gravely in Pickens County on October 13, 2017. On October 30, 2017, Judge Gravely granted Respondent's Motion for Summary Judgment. Judge Gravely found that Appellant did not cross the road in a safe, reasonable manner and that Appellant was negligent *per se* in crossing the road under S.C. Code Sections 56-5-3150(a) and 56-5-3150(c). (R.p. 5). He further found that even if it could be argued that the evidence established that the Respondent was slightly negligent it is not, as a matter of law, greater than Appellant's negligence. (R.p. 5). On November 9, 2017, Appellant filed Motion to Alter or Amend Judgment pursuant to Rule 59, SCRCP, and Motion to Reconsider pursuant to Rule 52, SCRCP. (R.p. 85-R.p. 97.) Judge Gravely denied Respondent's Motion pursuant to an Order Denying Appellants' Motion to Alter or Amend Judgment, and Motion to Reconsider. (R.p. 8-R.p. 9) Appellant filed her Notice of Appeal from Judge Gravely's Order on January 18, 2018.

STANDARD OF REVIEW

"Summary judgment is appropriate when there is no genuine issue of material fact such that the moving party must prevail as a matter of law." Russell v .Wachovia Bank, N.A., 370 S.C. 5, 633 S.E.2d 722, 727 (2006). "In reviewing a grant of summary judgment, Supreme Court applies the same standard that governs the trial court; summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Rules Civ.Proc., Rule 56. Vaughan v. Town of Lyman, 370 S.C. 436, 635 S.E.2d 631 (2006).

"Once the party moving for summary judgment meets the initial burden of showing an absence of evidentiary support for the opponent's case, the opponent cannot simply rest on mere allegations or denials contained in the pleadings. Rather, the non-moving party must come forward

with specific facts showing there is a genuine issue for trial. SSI Med. Servs., Inc. v. Cox, 301 S.C. 493, 392 S.E.2d 789 (1990); Peterson v. West American Ins. Co., 336 S.C. 89, 518 S.E.2d 608, (Ct.App. 1999).

"Ordinarily, comparison of the Plaintiff's negligence with that of the Defendant is a question of fact for the jury to decide." Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (citing Creech v. South Carolina Wildlife and Marine Resources Dep't, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct.App. 1997)). In comparative negligence cases, "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 Appellant's negligence exceeded fifty percent." Id. (citing Creech, 328 S.C. at 33, 491 S.E.2d at 575. "Where evidence of the Plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the Defendant is simply not enough for a case to go to the jury." Id. at, 339 S.C. at 424, 529 S.E.2d at 714.

I. THE TRIAL COURT DID NOT ERR IN GRANTING SUMMARY JUDGMENT AS APPELLANT'S NEGLIGENCE EXCEEDED RESPONDENT'S NEGLIGENCE AS A MATTER OF LAW

To establish a cause of action in negligence, a Plaintiff must prove the following three elements: 1) a duty of care owed by Defendant to Plaintiff; 2) beach of that duty owed by a negligence act or omission; and 3) damage proximately resulting from the breach of duty. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). Furthermore, pursuant to South Carolina's comparative fault system, "the Plaintiff in a negligence action may recover damages only when his or her negligence is not greater than that of the Defendant." Estate of Haley v. Brown, 370 S.C. 240, 634 S.E.2d 62, 63 n.3 (Ct. App. 2006).

a. Appellant Admitted to Negligence by Crossing Gentry Memorial Highway at an Area Other Than a Crosswalk

In South Carolina, a driver and a pedestrian owe certain statutory duties. Regarding pedestrian duties, "a pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right-of-way to all vehicles upon the roadway." S.C. Code Ann. Section 56-5-3150(a). Additionally, "between adjacent intersections at which traffic-control signals are in operation pedestrians shall not cross at any place except in a marked crosswalk." S.C. Code Ann. Section 56-5-3150(c).

As stated by the statutes listed above, pedestrians may not cross roadways outside of crosswalks without yielding the right of way to all vehicles. The testimony provided by Appellant demonstrates that Appellant chose to attempt to cross a four-lane roadway (with median) outside of a crosswalk in breach of the statutory duty created by S.C. Code Ann. Section 56-5-3150. (R.p. 181, line 2-R.p. 182, line 6 and R.p. 185, line 11-R.p. 186, line 7 and R.p. 221). Appellant's failure to yield the right of way under these conditions constitutes *negligence per se* as a clear violation of the pedestrian statute and by any common sense analysis. See Jowers v. Dupriest, 249 S.C. 506, 154, S.E. 922 (1967). Negligence per se simply means the jury need not decide if the Respondent acted as would a reasonable man in the circumstances. The statute fixes the standard of conduct required. Trivelas v. South Carolina Dept. of Transp., 558 S.E.2d 271, 275, 348 S.C. 125, 134 (S.C.App.,2001).

Appellant's negligence is further compounded by the conditions existing at the time of the accident. Gentry Highway is a main thoroughfare through Pickens County, but it is not the type of road where drivers expect pedestrians. (R.p. 221.) Appellant crossed the roadway in dark and rainy conditions. (R.p. 183, lines 7-10). She covered her face with a hoody and was talking on a cell phone at the time of the accident while failing to yield the right of way to Moody. (R.p. 183, lines 2-10 and R.p. 190, lines 13-20).

b. Appellant Fails to Provide any Evidence (or legal authority) of Respondent's Negligence, or Evidence that Appellant's Negligence did not Exceed Respondent's Negligence

The uncontroverted testimony lacks any evidence of negligence on behalf of Respondent. Respondent was not speeding. (R.p. 245, lines 8-14). Respondent's headlights were turned on and were in proper working order. (R.p. 268, line 3-R.p. 269, line 2). Respondent testified he was keeping a proper lookout when Appellant suddenly and without warning entered his lane of travel 10 feet in front of him. (R.p. 246, lines 8-17 and R.p. 268, line 25-R.p. 269, line 2). Respondent testified that Appellant's face was covered by a hoody and she was talking on the phone holding the phone with her right hand so that she was not facing Respondent's direction of travel. (R.p. 271, lines 15-20). Respondent immediately reacted as any reasonable driver would react by applying his brakes, but was unable to avoid the contact with Appellant. (R.p. 246, line 8-R.p. 247, line 8).

Appellant asserts that Respondent violated a duty to keep a proper lookout to avoid colliding with a pedestrian under S.C. Code Ann. Section 56-5-3230 due to the fact that the testimony demonstrates that he did not see Appellant until she was approximately 10 feet away from him. However, there is no support for this contention. Appellant's testimony is that she was in the median when she paused to look for oncoming traffic, she proceeded into the oncoming lanes of traffic walking at a normal speed and was struck soon thereafter. (R.p. 188, lines 5-13.) Despite the language of the statute, Respondent could not have anticipated Appellant would have been crossing this roadway illegally while on her cell phone so as to give him virtually no time to react to avoid the collision. He applied his brakes as soon as he saw Appellant in his lane of travel. Even viewing the light most favorable to Appellant, the record is devoid of any evidence of negligence on behalf of Respondent.

There is no evidence he failed to exercise due care commiserate with the conditions of travel. The cases cited in Appellant's brief, Epps v. S.C. State Hwy. Dept., 209 S.c. 125, 133, 39 S.E.2d 198, 202 (S.C. 1946) and Jones v. Southern Railway Co., 238 S.C. 27, 118 S.E.2d 880 (1961) are cases involving foggy weather conditions. In Brown v. Atl. Coast Line R. Co., 238 S.C. 191, 194, 119 S.E.2d 729, 730 (1961), the facts involve an accident involving a driver who hit a flatcar that was standing on and blocking a railroad crossing on South Harvin Street in the City of Sumter. The factual distinctions between these cases cited by Appellant in support of the contention of Respondent's negligence and the factual scenario in the subject accident are palpable. Appellant has cited no legal authority to support the contention that Respondent was negligence because he did not see Appellant until he was approximately 10 feet away from her.

c. Appellant's Negligence Exceeds Respondent's Based Upon Appellant Not Crossing at Crosswalk Under Existing Conditions and Using Cellphone at Time of Accident

Even if the Court were to assume a scintilla of evidence exists, the evidence is overwhelming that Appellant was more than 50% at fault for the accident. The Court may "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 exceeds fifty percent. Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d at 713. Under the doctrine of comparative negligence, a Appellant may only recover damages if his own negligence is not greater than that of the Respondent. Id.

The evidence of Appellant's negligence is compelling. She failed to yield the right of way by crossing a roadway at a location other than a crosswalk. (R.p. 181, line 2-R.p. 182, line 6). She crossed at night in rainy conditions with a hoody covering her face. (R.p. 183, lines 7-10). She failed to keep a proper lookout for vehicles lawfully in the roadway. Appellant admitted she was

talking on her cell phone at the time of the collision. (R.p. 189, lines 2-6 and R.p. 190, lines 13-20). Appellant's main assertion of Respondent's negligence, that he should have seen her prior to when she was 10 feet in front of her, further substantiates her own negligence. She was in the median lane of travel when she ascertained whether she had time to cross the roadway and then proceeded to walk across the remainder of the roadway at a normal speed. (R.p. 188, lines 5-9). The evidence is clear that Respondent had control of his lane for a substantial period of time prior to the impact and had not switched lanes since departing from the intersection that was approximately one/quarter of a mile from the scene of the accident. (R.p. 246, line 8-R.p. 247, line 8).

This case is controlled by the seminal driver/pedestrian case in South Carolina. In Bloom v. Ravoira, a pedestrian attempted to cross Meeting Street in Charleston at night in an area other than the crosswalk and was struck by a motorist. 339 S.C. 417, 419, 529 S.E.2d 710, 711 (2000). At both ends of this block of Meeting Street, there are crosswalks, traffic lights, and walk/don't walk signals. Id. at 420, 529 S.E.2d 710, 711 (2000). The pedestrian stated he looked left and then right and then entered the street without looking to the left again, and entered the roadway without ever seeing the motorist. Id. The testimony of nearby witnesses was that the motorist was driving within the speed limit at approximately 25 miles per hour, using properly working headlights and no evidence that he was driving recklessly. Id. at 421, 529 S.E.2d 710, 712 (2000). Bloom entered the street without warning any of the motorists. Id. at 423, 529 S.E.2d 710, 713 (2000).

The South Carolina Supreme Court found: "The undisputed facts establish the pedestrian attempted to cross the street but did not do so in a safe, reasonable manner. Any factual issues which might exist as to the driver's fault in this accident cannot alter the inescapable conclusion

that, as a matter of law, the pedestrian's fault exceeded fifty percent. Where evidence of the Plaintiff's greater negligence is overwhelming, evidence of slight negligence on the part of the Defendant is simply not enough for a case to go to the jury." *Id.* at 423, 529 S.E. at 714.

The subject case is factually consistent to those facts in Bloom. In both cases, the pedestrian entered the roadway at an area other than a crosswalk despite having alternative options to enter the roadway at intersections or areas controlled by traffic lights which would have been safer options. In both cases, the weather conditions were rainy and the accident occurred at night. In both cases, the pedestrian failed to properly ascertain whether the conditions created a safe situation for crossing the road.

However, several undisputed facts of the subject accident amplify Appellant's negligent when compared to the Plaintiff in Bloom. The accident in the subject case occurred on Gentry Memorial Highway in Pickens County in an area where there is minimal pedestrian foot traffic. A reasonable motorist would not expect pedestrian crossing at this particular area of roadway. Furthermore, Appellant stopped in the median and was not continuously walking across several lanes of traffic. She was struck a very short period of time after proceeding from the intersection. (R.p. 187, line 23-R.p. 188, line 2). Appellant by her own admission was on her cell phone at the time of the accident. Respondent testified that she was using the phone with her right hand and was not looking at him as she was crossing the roadway.

Conclusion

Comparative negligence is most times a question for a jury to answer. However, in rare cases where a verdict is not reasonably possible under the facts presented, summary judgment in proper. Bloom v. Ravoira, 339 S.C. 417, 425, 529 S.E.2d 710, 714 (2000). This case is one of those cases where the evidence of Appellant's negligence is overwhelming to the point that a jury

verdict in Appellant's favor is not reasonably possible. Based upon the foregoing, the trial court's Order Granting Summary Judgment should be upheld.

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September 14, 2018

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CERTIFICATE OF COUNSEL

The undersigned hereby certify that the Respondent's Final Brief complies with Rule 211(b), SCACR.

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