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
Opinion Number 5789

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., of whom

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

PETITION FOR REHEARING

January 27, 2021

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As authorized by the *South Carolina Appellate Court Rules*, Rules 221 and 240, the Petitioner moves for Reconsideration of the Court's Opinion No. 5789, filed January 13, 2021. The Petitioner respectfully submits that while the Court of Appeals stated the correct standard of review for cases ended by summary judgment, it failed to apply it. In the Opinion under review, the Court affirms the grant of summary judgment on three principal grounds:

1) The Petitioner's affidavit is insufficient for lack of personal knowledge, and

2) The Petitioner failed to identify the correct the subsection of § 56-5-2530, and

3) The Petitioner failed to alert the trial court that discovery was not complete.

1) The sufficiency of Irvin's affidavit

As to the first, the Court grounds its opinion principally upon a conclusion that Petitioner's affidavit was not based on personal knowledge. The Court emphasizes this term in its opinion as follows: "Supporting and opposing affidavits shall be made on *personal knowledge*, . . ." (Opinion at page 5, emphasis in Opinion) (As the Court of Appeals notes on page 4, the trial court granted summary judgment on a Form 4 Order, so neither the parties nor the Court of Appeals have any idea which conclusions the trial court reached in ending the case.) Throughout the Opinion under review, the Court picks apart the Petitioner's affidavit—both on the facts and the law—which violates the standard for summary judgment in at least two ways. First, at summary judgement, the Court is not concerned with the weight of a witness' evidence, merely its existence:

"Summary judgment should not be granted even when there is no dispute as to evidentiary facts if there is disagreement concerning the conclusion to be drawn from those facts." *Lanham v. Blue Cross & Blue Shield of S.C., Inc.* , 349 S.C. 356, 362, 563 S.E.2d 331, 333 (2002). "On appeal from an order granting summary judgment, the appellate [427 S.C. 589]

court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the nonmoving party below." *Id.*

Further, "in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment." *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803; see also *Radcliffe v. S. Aviation Sch.* , 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946) ("A scintilla of evidence is any material evidence that, if true, would tend to establish the issue in the mind of a reasonable jury." (emphasis in original) (quoting *In re Crawford* , 205 S.C. 72, 30 S.E.2d 841, 849 (1944))); *Bethea v. Floyd* , 177 S.C. 521, 181 S.E. 721, 724 (1935) (defining "scintilla" as the smallest trace)." At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact." *S.C. Prop. & Cas. Guar. Ass'n v. Yensen* , 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001). Moreover, "[s]ummary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law." *Id.*.

Loflin v. BMP Dev., LP, 427 S.C. 580, 832 S.E.2d 294 (S.C. App. 2019)

See also *Hancock v. Mid-South Management Co., Inc.*, 301 S.C. 326, 673 S.E.2d 801 (2009), which reversed a 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: "Accordingly, we hold that in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence in order to withstand a motion for summary judgment."

Here, the Court of Appeals dissects Irvin's affidavit finding: (1) it is not based on "personal knowledge" and (2) it relied upon an incorrect subsection of §56-5-2530, S. C. Code, Ann. Neither of these is correct.

First, Irvin's measurements are obviously based on his personal knowledge because he made them, and he made them by incorporating the Coroner's contemporaneous photographs and measurements, and the Coroner's report for the position of the vehicles at the time of the collision. Witnesses routinely rely on (and often cross-examined on) such objective evidence,

including photographs, in testifying about their observations, and, as our Supreme Court said in the context of defective products, we cannot turn a blind eye to the obvious. *Five Star v. Ford Motor Company*, "A manufacturer may not avoid negligence liability by turning a blind-eye to the obvious." *5 Star, Inc. v. Ford Motor Co.*, 408 S.C. 362, 759 S.E.2d 139 (S.C. 2014) Here, the position of the vehicles is a given because the Corner was on the scene and captured the photographs and made the measurements cited in the Irvin affidavit, and the Court cannot turn a blind eye to the fact that the legality of the parked vehicle within the exclusion zones established by statute is at least debatable.

When Irvin made his calculations, he did so based on his personal knowledge, and it was elementary computation to derive the measurements in relation to a crosswalk. The best that can be said for the position of the Rabon vehicle is that its position is highly disputed, something that cannot be resolved at summary judgment. In essence, the Court of Appeals weighed Irvin's affidavit and found it not credible, which is not permitted at the summary judgment stage. "However, in evaluating a motion for summary judgment, we must not weigh the credibility of the witnesses and the testimony. *Anderson v. The Augusta Chronicle*, 355 S.C. 461, 475, 585 S.E.2d 506, 513 (Ct.App.2003). . ." *Harris Teeter, Inc. v. Moore & Van Allen, PLLC*, 701 S.E.2d 742, 390 S.C. 275 (S.C. 2010) The Court's discussion of this issue in *Anderson* is even more emphatic:

> Moreover, since "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict," the evidence presented by Anderson "is to be believed, and all justifiable inferences are to be drawn in his favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986); see *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 520, 111 S.Ct. 2419, 115 L.Ed.2d 447

(1991) ("[W]e must draw all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence.").

Anderson v. The Augusta Chronicle, 355 S.C. 461, 585 S.E.2d 506 (S.C. App. 2003); cert. granted, affirmed August 22, 2005, 619 S.E.2d 428 (2005)

The affiant's reliance on photographic evidence is both routine and common, and when combined with his own measurements, meets the definition of "personal knowledge." The Coroner's photos and measurements of the scene are the only evidence that exists, and it does not prevent Irvin or anyone else from testifying from them. Such testimony is from "personal knowledge" and sufficient to create a genuine issue of material fact under the *Celotex* standard, quoted below on page 8. Thus, the Court of Appeals' criticism of Irvin's reliance on such evidence is no criticism at all. Moreover, since he made measurements himself, a fact overlooked by the Court ("Irvin did not personally measure the intersection on the day of the accident **or following the deposition**. . ." Opinion at page 6),the Court grounded its decision on a fact it misapprehended. See Record on Appeal page 50: "At my deposition on February 17th, counsel asked me what the measurements were, and I told him I did not know. As a result I went out and measured, and now I have evidence of the actual distance." This is both personal knowledge and substantially more than a scintilla, and much more than "mere conjecture of where a crosswalk would be . . ." (Opinion at page 6) since the General Assembly has declared where a crosswalks are. By relying on the Coroner's photographs—the same evidence the Coroner will rely on at trial—and measurements made on the day of the collision, Irvin relied on objective evidence, and it is for a jury to determine if it finds the evidence more than a preponderance. Photographs and plats are routinely used as evidence in trials. For example, if Irvin filed an affidavit that averred "Rome is the capitol of Italy" because he read it in a book, the Court cannot disregard the evidence on the ground that is not based on "personal knowledge."

The same can be said of one's existence. When a lawyer asks a witness, "When were you born?" every witness answers based on a review of a birth certificate because none of us have "personal knowledge" of our birth if we adopt the narrow reading of "personal knowledge" articulated in the Opinion under review. The Corner's measurements are part of the public record, no different than a statement based on consulting a birth certificate or an almanac for the time of high tide on a certain day in the past. Even if the evidence put forward in the Irvin affidavit's facts were inadmissible at trial, it is still sufficient to create a genuine issue of material fact:

> We do not mean that the nonmoving party must produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Obviously, Rule 56 does not require the nonmoving party to depose her own witnesses. Rule 56(e) permits a proper summary judgment motion to be opposed by any of the kinds of evidentiary materials listed in Rule 56(c), except the mere pleadings themselves, and it is from this list that one would normally expect the nonmoving party to make the showing to which we have referred.
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> *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548 (1986)

In short, in Opinion Number 5789, the Court weighs the Irvin affidavit and finds it insufficient, but the weight to be afforded evidence is never a function of summary judgment. This is a palpable error of law that justifies rehearing.

2) The plaintiff's pleadings raise genuine issues of material fact as to the law to be applied to the parked vehicle.

In addition to failing to give weight to the Irvin affidavit, the Court's conclusion that Petitioner's allegation that the parked vehicle violated subsection (A)(2)(c) (twenty feet from a crosswalk) of 56-5-2530 instead of section (A)(2)(d) (thirty feet from a stop sign) does not qualify as raising a "new" allegation. The photographs, measurements, and affidavit place the Rabon vehicle in violation of both, and whatever Petitioner proves at trial can go to the jury for its consideration in determining the facts. The violation of one is not the exclusion of the other,

and a jury could easily conclude the Respondent violated both. The Petitioner's pleading alleges 8 particulars of negligence, including, but not limited to, "any other such manner that Plaintiff may become aware of through discovery and/or trial." R.O.A. page 26 In short, the Court of Appeals jettisons the well-developed standard of summary judgment to parse the evidence in this case to reach a conclusion based on its view of disputed evidence. In resisting summary judgment, a party is entitled to rely on evidence that might ultimately be not admissible at trial:

The Court of Appeals grounds its decision not on a determination whether a scintilla of evidence exists, but instead of acknowledging that the Irvin affidavit raises at least a scintilla, the Opinion under review turns on its analysis that proximate cause is missing: "even if further discovery revealed evidence that Rabon illegally parked his truck, the record indicates Irvin would still be unable to establish a causal relationship between statutory violation and Decedent's injuries and consequential death." Opinion at page 7. Proximate cause is always a jury question, and it is not something a court can decide at summary judgement.

On the issue of proximate cause, we observed in *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 147-48, 352 S.E.2d 488, 493 (Ct.App.1986):

> The question of proximate cause is ordinarily a question of fact for determination by the jury. *Player v. Thompson*, 259 S.C. 600, 193 S.E.2d 531 (1972). Only in rare or exceptional cases may the question of proximate cause be decided as a matter of law. *65A C.J.S.* Negligence § 264 at 917 (1966). The particular facts and circumstances of each case determine whether the question of proximate cause is for the court or for the jury. Id. at 917-18. If there may be a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury. *Johnson v. Finney*, 246 S.C. 366, 143 S.E.2d 722 (1965).
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> *Mims v. Florence County Ambulance Service Com'n*, 370 S.E.2d 96, 296 S.C. 4 (S.C. App. 1988)

Here, the Court of Appeals invades the province of the jury and reaches a conclusion on proximate cause that is not a basis for ending a case. Such a narrow application violates the

standard of review for summary judgment. In *S. C. Property & Cas. Guaranty v. Yensen*, 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001), the trial court granted a directed verdict on the issue of whether two people standing on the side of the road were injured "arising out of" the use of an insured vehicle. The Court of Appeals reversed the directed verdict because it found that the trial judge weighed the evidence, which is reserved for a jury:

> Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law. At the summary judgment stage of litigation, the court does not weigh conflicting evidence with respect to a disputed material fact. *ML-Lee Acquisition Fund, L.P. v. Deloitte & Touche*,320 S.C. 143, 463 S.E.2d 618 (Ct.App.1995), rev'd in part on other grounds, 327 S.C. 238, 489 S.E.2d 470 (1997)...
>
> *S. C. Property & Cas. Guaranty v. Yensen*, 345 S.C. 512, 548 S.E.2d 880 (Ct. App. 2001)

Here, there is a dispute that Respondent escapes the application of § 56-5-2530, S. C. Code. The Respondent argues that because the stop sign faces Second Street, it is inapplicable to the facts presented by this case. This is both a highly restrictive and highly disputed reading of the statute and assumes something that is very much in dispute. Moreover, the application of § 56-5-500 is undisputed, which undercuts the Court's conclusion that "Irvin's measurements are solely based upon mere conjecture of where an intersection based upon the dimensions of the general schematic and his understanding of subsection 56-5-500(1)." Opinion at page 6. Irvin's "understanding" of where the crosswalk is does not enter into the analysis. The law declares where the crosswalk is, and the coroner's photographs and measurements allow any person to calculate the distance. While the facts may be disputed, when viewed in the light most favorable to the Petitioner as the party resisting summary judgment, they are sufficient to create a genuine issue of fact.

3) The grant of summary judgment was not appropriate because discovery was not complete

The Court also overlooks Irvin's affidavit that discovery was not complete. The Court criticizes Petitioner for not filing a motion, but Irvin raised this issue in his affidavit: "Even though we have not conducted discovery (the defendants' deposition are scheduled for Friday, May 19th. . ." (R.O.A. page 50) Thus the trial court was aware that discovery was not complete, and it was not necessary for Petitioner to repeat his statement in a motion. 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).

Conclusion

This Court misapprehended the facts that the Irvin affidavit and the pleadings establish. Irvin's measurements are far beyond "mere conjecture," and in viewing the disputed facts, the Court of Appeals viewed the facts in a highly restrictive manner. Thus it erred not only in applying the wrong standard to the facts, but also in reaching a conclusion about proximate cause, which is a quintessential jury question. For these reasons, the Petitioner respectfully requests that this case be set for oral argument and that the Court rehear the case and amend its conclusions based upon the application of the scintilla and inference standards of South Carolina law.

Respectfully submitted,

January 27, 2021

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v.

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

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

PROOF OF SERVICE

I certify that I have served the Petitioner's Petition for Rehearing on Appeal on Respondent, Mitchell Dewitt Rabon, Jr., by depositing a copy of it in the United States Mail, postage prepaid, on January 27, 2021, addressed to his attorney of record, Mr. David S. Cobb, TURNER PADGET, L.L.P., P. O. Box 22129, Charleston, S. C. 29413-2129.

January 27, 2021

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FACSIMILE COVER SHEET

DATE: January 27, 2021

TO: Court of Appeals

FROM: Tommy Goldstein

COMMENTS: Please find attached a Petition for Rehearing that is due tomorrow. In order to comply with the time requirements of Rule 221, I am faxing a copy and putting the original (and 7 copies) in the mail. Please let me know if I am required to do anything further to make sure this filing is timely. I thank you in advance.

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January 27, 2021

Hon. Jenny Abbott Kitchings
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Re: William Sean Irvin vs. City of Folly Beach (Rabon), *et. al.*
Case Number: 2015-CP-10-05379
Appellate Tracking No.: 2017-002317
Opinion Number 5789
By fax and regular mail: 803 734 1839

Dear Ms. Kitchings,

I enclose an original and seven copies of the Petitioner's Petition for Rehearing along with a Proof of Service. Would you be so kind as to file the original and return an extra filed copy to me in the envelope provided? By copy of this letter, I am serving a copy on counsel for the respondent, David Cobb. I also enclose our firm's check in the amount of $50.00 for the filing fee. I thank you in advance for your attention to this request. With kind regards, I am

Very truly yours,
BELK, COBB, INFINGER & GOLDSTEIN, P.A.

TRG/ Thomas R. Goldstein

enclosure: Petition for Rehearing, Check Number 19415, return envelope

cc: Victoria Anderson, attorney for Folly Beach
David Cobb, attorney for Respondent
Roy Maybank, attorney for S. C. D. O. T.