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.

FINAL REPLY BRIEF OF APPELLANT

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I. THE DOCTRINE OF CONTRIBUTORY NEGLIGENCE WAS IMPROPERLY APPLIED BY THE LOWER COURT WHICH MERITS REVERSAL, DESPITE RESPONDENTS' ASSERTIONS TO THE CONTRARY.

A. Recap of Appellant's Argument

The initial argument raised in Appellant's Opening Brief is that the circuit court committed reversible error by dismissing the entirety of Appellant's claim under the doctrine of contributory negligence. (Appellant's Op. Br. 10-12.) On the one hand, the court failed to consider each potential tortfeasors' relative contributions to the cause of Appellant's injuries, as it was required to do. See, e.g., Nelson v. Concrete Supply Co., 303 S.C. 243, 245, 399 S.E.2d 783, 784 (1991); Roddey v. Wal-Mart Stores E., LP, 400 S.C. 59, 67, 732 S.E.2d 635, 639 (Ct. App. 2012). On the other hand, the court based its decision to grant summary judgment to Respondents on material facts which were—and are—very much in dispute, in derogation of Rule 56(c), SCRCP.

B. Respondents' First Counterargument: The doctrine of law of the case prohibits this Court from reviewing the determination that Appellant was the preponderant cause of his injuries.

At Pages 9 & 10 of their opening brief, Respondents contend that this Court cannot review the lower court's conclusion that Appellant was the preponderant cause of his injuries because "Appellant has not appealed that ruling as to Clemson." (Respondents' Op. Br. 10.) Respondents would be well-served to review the more recent decisions of this Court regarding the law of the case doctrine.

In Flexon v. PHC-Jasper, Inc., this Court engaged in an extended discussion regarding the law of the case doctrine and its jurisprudential underpinnings. 413 S.C. 561, 776 S.E.2d 397 (Ct. App. 2015). At Note 6 of that opinion, the Court quoted the following

statement from Wright & Miller with approval: "So long as the same case remains alive, there is power to alter or revoke earlier rulings." 413 S.C. at 572, 776 S.E.2d at 403. Respondents do not explain—nor offer any authority for—the proposition that an unappealed grant of summary judgment against one defendant prohibits judicial review as to the appealed grant of summary judgment as to any of its other co-defendants. Presumably, if such authority exists, whether in South Carolina or out, Respondents would have brought it to the Court's attention. The absence of such authority is telling.

But this is not where Flexon's lessons end. Of particular importance, Flexon explains what kinds of decisions are capable of forming the law of the case. It is not every decision that a lower court makes. Instead, "[t]he law of the case applies both to those issues explicitly decided to those issues that were necessarily decided." Flexon, 413 S.C. at 572, 776 S.E.2d at 403. Somewhat restated, "[t]he doctrine applies to all issues decided expressly or by necessary implication." Id. (quoting In re Grossinger's Assocs., 184 B.R. 429, 434 (Bankr. S.D.N.Y. 1995)). "However, the prior adjudication does not preclude consideration on a subsequent appeal of questions expressly left open or reserved by the court." Flexon, 413 S.C. at 572, 776 S.E.2d at 403 (internal quotation and citation omitted).

These statements of law lead to a question that Respondents have not tried to answer: In granting summary judgment against Appellant, and with regard to Clemson, what did the lower court explicitly and necessarily decide? We need not wonder. The court explicitly held that "Clemson owed no duty to [Appellant.]" (R. 20.) And in the absence of a duty to Appellant, Clemson could not be liable for Appellant's injuries as a matter of law. (R. 20-24.) Simply stated, Clemson's contribution to Appellant's injury is 0%.

Somewhat creatively, Respondents have taken the position that the lower court's determination of Clemson's non-liability means that, as a matter of law, Appellant must have been preponderantly negligent, and that this determination is beyond the scope of the Court's review. Appellant fails to understand this leap in logic, and on the back of the principles described above, believes that Respondents' contention is legally indefensible.

What is defensible—and what compels a reversal of the lower court's decision—is the law regarding contributory negligence. Just as Respondents' silence on the citation to authority regarding the law of the case was telling, it is just as telling that Respondents have mocked Appellant's formulation of the contributory negligence calculus without explaining how it's wrong. (Respondents' Op. Br. 10.) Appellant did not make the formula up out of thin air. Instead, relying on the Supreme Court's decision in Nelson and this Court's decision in Roddy, Appellant simply observed that the contributory negligence calculation requires the trial court to weigh the complainant's negligence contribution with that of all identified tortfeasors, whether they are named as party-defendants or otherwise. (Appellant's Op. Br. 11-12.)

As applied to this case:

Appellant's Negligence	>	Clemson's Negligence Thrift's Negligence SCDOT's Negligence Defendant Williams' Negligence

Clemson's negligence contribution is 0%. The lower court never attempted to determine what, if any, negligence contribution Williams made, or how that contribution stacked with the contributions of Thrift and SCDOT. Without making those determinations, and having facts to substantiate its conclusions, it is truly impossible for the court to decide, as a matter of law, that Appellant was the preponderant cause of his injuries.

But that is exactly what the lower court did. And that is exactly why the grant of summary judgment against Appellant must be reversed and remanded.

C. Respondents' Second Counterargument: Failure in issue preservation.

At Pages 10 & 11 of Respondents' Opening Brief, the argument is made that Appellant failed to preserve the lower court's misapplication of the contributory negligence regime for appellate review. Before addressing this argument, Appellant would like to draw attention to the argument that Respondents are not making. They are not making the argument that Appellant is wrong; that the contributory negligence formula laid out in Appellant's Opening Brief and in the foregoing section is an incorrect statement of law. They're just saying that the Court cannot reach the question of whether it was error for the lower court to misapply the correct standard. It is probably a rare respondent who has ever found any appellate issue properly preserved.

In any event, Appellant raised his concerns regarding a proper calculation of contributory negligence in writing on at least occasions:

1. In Appellant's Memorandum in Opposition to Respondents' Motions for Summary Judgment, at pages 3-5, (R. 157-59 & 177-77); and,
2. In Appellant's Rule 59(e) Motion, at pages 1-3, (R. 263-65), which was in direct response to the lower court's Order Granting Summary Judgment, at pages 2-8, (R. 12-18).

(See also Appellant's Not. of Appeal, R. 274 (appealing the Orders Granting Summary Judgment and denying Appellant's Rule 59(e) Motion).)

Accordingly, Respondents' issue-preservation argument is without merit.

D. Respondents' Third Counterargument: Respondents' absence of negligence as a matter of law.

The touchstone of evaluating whether any party is entitled to judgment as a matter of law is, and always must be, whether there is any genuine issue as to any material fact. Rule 56(c), SCRCP. In evaluating a motion for summary judgment, the lower court may rely only on evidence that would be admissible at trial. Rule 56(e); see also Hall v. Fedor, 349 S.C. 169, 175, 561 S.E.2d 654, 657 (Ct. App. 2002).

In his Opening Brief, Appellant took care to identify—according to the lower court's order granting summary judgment—what "facts" the court relied upon to establish Respondents' absence of negligence as a matter of law. (Appellant's Op. Br. 15.) This was done, in part, as a direct challenge to Respondents to explain how these "facts" were undisputed for purposes of the summary judgment motion. Respondents did not rise to the occasion. (Respondents' Br. 11-16.)

To be candid, it seems that the parties agree on very little, besides the fact that Appellant was seriously injured at the Intersection on October 23, 2014. Perhaps the closest the parties come to any factual agreement is that, at the time of the accident, Appellant was carrying a friend "piggy-back style." But even this is somewhat open for debate. Respondents want to characterize this as uncontrolled "horseplay," (Respondents' Br. 13);[1] Appellant testified that he was trying to be a gentleman to a young lady whose feet were hurting, (R. 205 at 21:4-10; R. 213 at 119:16-120:20.)

[1] Respondents have supported this proposition with three cites to deposition testimony, none of which are helpful. The "Craig" reference is to Lance Corporal Craig, a Highway Patrol Officer who was not at the Intersection at the time of the accident, and whose testimony about events at the time of the accident is based off witness interviews. (R. 230

From there, the factual disagreements become more pronounced, and Respondents' evidentiary support for their narrative becomes less credible. Respondents keep saying that Appellant was "running" through the Intersection. (Respondents' Br. 4 & 13.) They have offered not a single item of evidence to substantiate this assertion. Respondents were successful in having the lower court describe Appellant as "racing" into the Intersection. (R. 14.) There is likewise no evidentiary support for that assertion. And it is directly contradicted by Appellant's testimony. (R. 206 at 25:14-17.)

Respondents have argued that Appellant was intoxicated to the point of impairment at the time of the accident. (Respondents' Br. 13.) This was also in the lower court's order. (R. 16-17.) Yet the only "evidence" of this proposition is from Appellant's unauthenticated (read: inadmissible) medical records taken some time after the accident. There are no eyewitnesses who have testified that Appellant was intoxicated, let alone impaired, at the time of the accident.

Perhaps the most significant "fact" in dispute is whether the light for oncoming traffic was red or yellow at the time of the accident. To be clear, no one knows. Not even Respondents. (Respondents' Br. 12-13.) But this doesn't faze them. Respondents would have this Court believe that the color of the light is irrelevant. And that is preposterous.

Surely, Respondents must concede that—if the light were red at the time of the accident—this would reduce the proportion of negligence attributable to Appellant, which would in turn affect the contributory negligence calculation. In response, Respondents

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at 103:3-18.) The "Johnson" reference is to Officer Johnson of the Clemson City Police Department. She was not at the Intersection at the time of the accident, and her testimony is based off witness interviews. (R. 246 at 22:25-23:17.) This is textbook inadmissible hearsay. The "Granatino" reference is to Appellant. He never uses the phrase "horseplay."

may contend that—if the light were red—this means that Defendant Williams would be substantially liable for Appellant's injuries. *Maybe*. This leads to other questions of fact that no one has provided the answer to. Those questions, which only Defendant Williams can answer, include: (1) Did you see Appellant at the Intersection prior to the accident; (2) If not, did the absence of lighting at the Intersection impair your ability to see pedestrians; (3) Do you believe you would have been more cautious in approaching the Intersection if it had pedestrian lighting; (4) Would you have been more cautious in approaching the Intersection if it had been more clearly marked as a crosswalk. The pertinent questions are endless, and their answer would have a material, substantial impact on each and every potential tortfeasors' contribution of liability to Appellant's injuries. And the fact of the matter is no one has asked Defendant Williams these questions, and certainly, no court has ever been presented with Defendant Williams' answers.

How is it possible, then, that any court could determine as a matter of law what any potential tortfeasors' relative contribution to Appellant's injuries was? The answer is simple: no court can.

In sum, the material "facts" which Respondents have characterized as undisputed, and on which the lower court relied in granting summary judgment, are hotly contested. And consequently, the decisions of the lower court must be reversed.

II. THE LOWER COURT'S DETERMINATIONS REGARDING THE NECESSITY OF EXPERT TESTIMONY WAS NOT ONLY CONTRARY TO LAW, BUT ALSO INEQUITABLE, AND ALSO MERITS REVERSAL.

A. Recap of Appellant's Argument

Simply stated, Appellant's argument is that, while some theories of recovery under the causes of action brought against Respondents may require expert testimony, expert

testimony is not necessary to prevail on every theory asserted in connection with such actions. (Appellant's Op. Br. 20-24.) Consequently, it was reversible error for the lower court to direct judgment as a matter of law in favor of Respondents on the basis that, at the time of the summary judgment hearing, Appellant had not procured expert testimony.

B. Respondents' First Counterargument: Appellant stipulated that expert testimony was necessary.

At Pages 6-8 of their brief, Respondents have taken the position that Appellant—through his legal counsel—stipulated to the proposition that expert testimony was necessary to support all of Appellant's claims against Respondents. As a practical matter, it appears that Respondents have confused a "stipulation" with a "tactical retreat under withering judicial fire." There is not a trial lawyer alive who has not been in a similar position.

As a legal matter, Appellant's dialogue with the lower court does not establish a stipulation. This is somewhat amusing, since this Court has previously decided a case involving SCDOT and the legal definition of a "stipulation." To quote the Court:

> Our supreme court has defined a stipulation as an agreement, admission, or concession made in judicial proceedings by the parties thereto or their attorneys. Stipulations, of course, are binding upon those who make them. A stipulation is an agreement, an understanding. The court must construe it like a contract, i.e., interpret it in a manner consistent with the parties' intentions. See Porter v. South Carolina Pub. Serv. Comm'n, 333 S.C. 12, 29-30, 507 S.E.2d 328, 337 (1998) (internal citations and quotations omitted); see also State v. Anderson, 318 S.C. 395, 399-400, 458 S.E.2d 56, 58 (Ct. App. 1995) ("Generally, a stipulation is an agreement between the parties to which there must be mutual assent." (quoting State v. Parra, 122 Wash. 2d 590, 859 P.2d 1231, 1238 (1993))); Black's Law Dictionary 1415 (6th ed. 1990) (defining a stipulation as a "[v]oluntary agreement between opposing counsel concerning disposition of some relevant point so as to obviate need for proof or to narrow range of litigable issues").

South Carolina Dep't of Transp. v. Richardson, 335 S.C. 278, 283-84, 516 S.E.2d 3, 3

(App. 1999).

B. Respondents' Second Counterargument: Expert testimony was necessary to sustain any viable cause of action against Respondents.

At Pages 8 of their brief, Respondents have offered—what appears to be—a half-hearted effort to defend the lower court's conclusion that expert testimony was necessary to render any of Appellant's causes of action against Respondents viable. Not a single South Carolina case was cited in support of the argument.

Perhaps more importantly, Respondents made no effort whatsoever to rehabilitate City of York v. Turner-Murphy Co., 317 S.C. 194, 452 S.E.2d 615 (Ct. App. 1994)—which was relied upon so heavily in the lower court's order—as dispositive of Appellant's case. Likewise, Respondents made no effort to distinguish Seiler v. Levitz Furniture Co. of the Eastern Region, Inc., 367 A.2d 999 (Del. 1976) or Jaeger v. Henningson, Durham & Richardson, Inc., 714 F.2d 773 (8th Cir. 1983)—both of which were cited with approval by this very Court in City of York for the proposition that expert testimony may be unnecessary in cases that may otherwise appear to require such testimony—from the circumstances of Appellant's case. One has to wonder whether Respondents' silence on such a salient point is a concession of the field.

C. Respondents' Third Counterargument: The Court should disregard equitable considerations with regard to Appellant's request for additional time to designate an expert.

Although Respondents did not break this argument out as a separate section, Pages 8-9 of their brief advance a strange position: Respondents want this Court to ignore equitable considerations as they pertain to Appellant's request to the lower court for additional time to procure expert testimony. This issue was presented in Appellant's Opening Brief as part of the Concluding Statement. (Appellant's Op. Br. 25-26.) But now

that Respondents' have seen fit to promote the matter to the argument section, it seems only fitting and proper that Appellant should respond in kind.

Item 5 of Appellant's Rule 59(e) Motion establishes the relevant timeline for the equitable considerations that should have militated in favor of an extension for Appellant to engage in limited additional discovery, including the procurement of expert testimony. In relevant part:

i. During October 2017, the parties entered into a consent scheduling order which required the disclosure of expert witnesses by January 1, 2018, (R. 1-2).

ii. Appellant's former counsel—prior to the appearance of Mr. Lewis and Mr. Marlette—filed a motion to withdraw as attorney on January 12, 2018, (R. 127-28).

iii. Respondents filed motions for summary judgment on January 18 & 19, 2018, (R. 129-31).

iv. The lower court granted the motion of Appellant's former counsel to withdraw on January 25, 2018, (R. 4-6).

v. Mr. Marlette contacted the chief administrative judge of the lower court, as well as opposing counsel, on or about February 5, 2018, to advise everyone of his intent to appear on behalf of Appellant, (R. 141-42).

vi. On or about February 7, 2018, Mr. Marlette began the process to be admitted pro hac vice in South Carolina., (R.134-37).

vii. On or about February 8, 2018, Defendants' counsel responded via email to say that they had no objections to Mr. Marlette's appearance, (R. 146-47).

viii. On or about February 27, 2018, Mr. Lewis completed the sponsorship portion of Mr. Marlette's pro hac vice application, (R. 138).

ix. On or about March 1, 2018, Mr. Marlette filed his pro hac vice application with the South Carolina Supreme Court, (R. 149).

x. On March 1, 2018, counsel for Respondent Thrift sent an email to Mr. Marlette which states as follows: "We have a scheduling order, but this is to confirm with you and the court, that any deadlines under that order after [former counsel's] withdrawal are suspended pending your obtaining counsel," (R. 148).

xi. On March 5, 2018, Mr. Marlette responded to Thrift's counsel to confirm the understanding that all scheduling order deadlines were stayed, (R. 149).

xii. Mr. Marlette's application to appear pro hac vice was approved on May 5, 2018, (R. 7-10).

xiii. The lower court's hearing on Respondents' motions for summary judgment was held on June 1, 2018.

As this timeline hopefully demonstrates, at no point was Appellant's substitute counsel unreasonably dilatory in gaining admission to practice in the courts of this State. Moreover, this timeline demonstrates the understanding of the parties and the court that all deadlines under the scheduling order had been stayed as a consequence of the withdrawal of Appellant's former counsel.

Granted, the deadline for expert designations expired eleven days before Appellant's former counsel filed his motion to withdraw. But, as the Court may appreciate, a strain in the attorney/client relationship generally develops over time, and it does not take

a stretch of imagine to presume that Appellant's former counsel had been considering withdrawal for awhile prior to the time that he actually filed the motion.

Regardless, as a practical matter, to the extent that expert testimony is necessary to sustain Appellant's claims against Respondents, the hardship of being prohibited from having the effective assistance of counsel in procuring such testimony falls squarely on no one else but Appellant.

To be certain, Respondents have articulated no meaningful prejudice whatsoever—even now—that would arise from an extension of time for Appellant and his new counsel to prepare their case. For these reasons, if the Court is so inclined, Appellant would respectfully request a decision from this Court which holds that the lower court's refusal to extend the deadlines imposed by the consent scheduling order to accommodate new counsel, and to protect the interests of a young man who has suffered a significant personal injury, was an abuse of discretion which requires reversal.

CONCLUDING STATEMENT

For the foregoing reasons, and for those set out in the Opening Brief, Appellant respectfully requests a decision from this Court that reverses the lower court's grant of summary judgment in favor of Respondents, remands the case for further proceedings not inconsistent with such decision, and provides for such other and further relief as the Court deems just and proper.

Respectfully submitted,

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December 20, 2019

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CERTIFICATE OF COUNSEL

The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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