0THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

Appeal No. 2020-001679

Elizabeth McCrabb, ... Respondent,

v.

Christine Baxter, ...Appellant.

INITIAL REPLY BRIEF OF APPELLANT

MCANGUS GOUDELOCK AND COURIE

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Respondent Elizabeth McCrabb ("McCrabb") fails to fully respond to the points and arguments raised by Appellant Christine Baxter ("Baxter") and, moreover, fails to effectively counter Baxter's arguments that the Circuit Court's grant of summary judgment should be reversed.

I. The Circuit Court erred in granting summary judgment because Plaintiff failed to meet her burden.

McCrabb failed to meet her burden of proving she is entitled to summary judgment. First, McCrabb misleadingly states that all she sought in her Motion for Partial Summary Judgment was a determination that Baxter was liable for the accident, *i.e.*, that Baxter owed McCrabb a duty which she breached, leaving the issue of proximate cause to the factfinder. However, McCrabb's Motion for Partial Summary Judgment sought a determination that Baxter was liable such that "[t]he *only* issues to be decided by the jury, trier-of-fact, are the *amount of actual damages*, economic and non-economic, owed to Plaintiff and then whether punitive damages should be awarded and if so the amount." (Motion for Partial Summary Judgment) (emphases added). Likewise, her Memorandum in Support of her Motion for Partial Summary Judgment stated her position below clearly: "The *only* triable issues are the *amount of damages* to be awarded to Plaintiff and whether punitive damages should be awarded and the amount thereof." (Plaintiff's Memo in Support, p. 5) (emphases added). The Form 4 Order filed on July 6, 2020 states that "[t]he Plaintiff's Motion for Partial Summary Judgment is granted." (July 6 Form 4).

Furthermore, contrary to McCrabb's suggestion, the Circuit Court did find "'negligence' as a matter of law," ruling that "*as a matter of law*, Defendant is solely liable for the injuries proximately caused and which Plaintiff may prove at the trial of this case." (Order Granting Partial Summary Judgment on the Issue of Liability, filed July 13, 2020) ("July 13 Order") (emphasis added).

While there arguably may be some ambiguity in the July 13 Order as to whether summary judgment had been granted on the issue of proximate cause or whether that issue was reserved to the factfinder, Baxter's Motion for Reconsideration placed that issue squarely before the Circuit Court. Baxter argued that, "[a]s to the third element [of a negligence cause of action] and *linchpin of Defendant's support for reconsideration*, the Plaintiff must prove damages which proximately resulted from the breach of a duty," and that "Plaintiff has failed to meet the causation requirement as is necessary to prove negligence and thus succeed on her Motion for Partial Summary Judgment." Baxter requested that the Circuit Court "reverse its ruling as the determining of liability inevitably includes the finding that Plaintiff has indeed sustained damages as a result of this accident." (Defendant's Memorandum in Support of Motion for Reconsideration, filed Nov. 4, 2020, pp. 2-4). The Circuit Court denied Baxter's Motion for Reconsideration without any further explanation or clarification. (Form 4 Order, filed December 18, 2020).

Thus, despite McCrabb's suggestion that Baxter is merely "confused about the effect of the trial court's order," such that she should have sought reconsideration, the fact is Baxter did move for reconsideration on this very point which the Circuit Court denied without further explication. Baxter could not move for reconsideration a second

time without risking her ability to appeal. *Elam v. S.C. DOT*, 361 S.C. 9, 18-19, 602 S.E.2d 772, 777 (2004) ("a second Rule 59(e) motion which raises the same issues and arguments made in a previous Rule 59(e) motion does not toll the time to appeal").

McCrabb's argument that the Circuit Court did not rule on proximate cause is further belied by her statement that, "[t]he trial court's ruling is exactly in line with Rule 56(c) which says, 'A summary judgment … may be rendered on the issue of liability alone although there is a genuine issue as to *the amount of damages*.'" (Resp. Br. p. 9) (emphasis added). Again, McCrabb is trying to argue both sides of the fence. On one hand, she moved for partial summary judgment, arguing that all she had to prove was the *amount* of her actual damages and whether punitive damages were warranted. On the other hand, she now argues on appeal that she still needs to prove to the trier-of-fact that any of her alleged injuries were proximately caused by Baxter's alleged negligence. She cannot have it both ways.

Hoping to further muddy the waters before this Court, McCrabb repeatedly and mistakenly suggests that Baxter is arguing that she had to prove "proximate cause *and* damages" before she was entitled to summary judgment and/or that the Circuit Court "somehow bound the jury on issues of proximate cause *and* damages." Baxter's point, in case McCrabb misunderstood or merely misconstrued it, is that summary judgment is not proper here because, even assuming she proved duty and breach, she did not meet her burden of proving any injuries were proximately caused by that breach.

Cases relied on by McCrabb do not support a different result. In *Lampley v. Hulon*, 854 S.E.2d 489, 2021 S.C. App. LEXIS 14 (Ct. App. 2021), because the issue of proximate cause was not raised as an issue, this Court remanded "for a determination on

the amount of damages for bodily injury based on the jury's finding of equal liability." *Brockbank v. Best Capital Corp.*, 341 S.C. 372, 534 S.E.2d 688 (2000), is not even a negligence case but, instead, involved a statutory penalty awarded to a debtor where the secured party failed to give the required notice of a sale under Article 9 of the Uniform Commercial Code. *Trivelas v. S.C. DOT*, 348 S.C. 125, 558 S.E.2d 271 (Ct. App. 2001), in fact, supports Baxter's position on appeal. There, this Court reversed a grant of partial summary judgment in favor of plaintiffs based on the lower court's erroneous finding that DOT was negligent *per se*. After reversing the grant of summary judgment, this Court explained that, even where a plaintiff establishes that a statute has been breached, that alone "does not automatically lead to the recovery of damages. [*citation omitted*] The plaintiff must prove the violation proximately caused the injury complained of by the injured party." 348 S.C. at 134, 558 S.E.2d at 275. Negligence simply "is not actionable unless it is a proximate cause of the injury." *Id.* at 136, 558 S.E.2d at 275.[1]

Second, McCrabb argues on appeal that she and the Circuit Court were entitled to rely solely on Baxter's deposition testimony and ignore Baxter's verified responses to the Requests to Admit such that the contradiction between the two does not create an issue of material fact. McCrabb fundamentally misunderstands or misstates the legal significance of responses to requests for admission. As stated in Baxter's main Brief, Rule 36(b), provides that, "[a]ny matter admitted under this rule *is conclusively established* unless the court on motion permits withdrawal or amendment of the admission." Rule 36(b), SCRCP (emphasis added). Furthermore, "[a]n answer to a request under Rule 36 is

[1] *Ballou v. Sigma Nu Gen'l Frat.*, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986) does not add anything to McCrabb's argument but, instead, merely affirms that the issue of proximate cause is rarely an issue that can be decided in summary fashion.

unlike a statement of fact by a witness made in the course of oral evidence at a trial, or in oral pre-trial depositions, or even in written answers to interrogatories. *It is on the contrary a studied response, made under sanctions against easy denials, to a request to assert the truth or falsity of a relevant fact point out by the request for admission …*" *Airco Indus. Gases, Inc. Div. of BOC Group, Inc. v Teamsters Health & Welfare Pens Fund*, 850 F.2d 1028, 1036 (3rd Cir. 1988).

It is not unusual for an attorney to craft a party's response to a request for admission, just as an attorney typically writes the answer to a complaint. This is because facts admitted in response to a request for admission "are conclusively admitted for the purposes of" the litigation in which they are made. *Scott v. Greenville Hous. Auth.*, 353 S.C. 639, 647, 579 S.E.2d 151, 155 (Ct. App. 2003). In fact, where "the language of the request for admission specifically goes to an issue in the pleadings, the admission resulting from a party's failure to respond to the request may override the pleadings." *Id.* at 650, 579 S.E.2d at 157. *Pulte Home Corp. v. Woodland Nursery & Landscapes*, cited in *Scott*, explains that a response to a request to admit "is comparable to an admission in pleadings or stipulation of facts and as such is generally regarded as a judicial admission rather than evidentiary admission of a party. A judicial admission, unless allowed to be withdrawn by the court, is conclusive whereas an evidentiary admission is not conclusive *but is always subject to be contradicted* or explained." 230 Ga. App. 455, 496 S.E.2d 546, 548 (Ga. Ct. App. 1998) (emphasis added).

Baxter does not argue that she was "incompetent" or in need of a conservator or guardian. Baxter does argue that she is a layperson, not a lawyer, and does not have the legal training that would qualify her to draw binding legal conclusions. *See Shields v.*

S.C. Dep't of Highways & Public Transp., 303 S.C. 439, 443, 401 S.E.2d 185, 188 (Ct. App. 1991) ("As a general rule, a witness will not be permitted to state a conclusion, or opinion of law …"), *citing* 32 C.J.S. *Evidence* § 453 at 91 (1964).

Furthermore, contrary to McCrabb's suggestion, Baxter's "deposition responses" did not "amend" her responses to Requests to Admit Nos. 1 and 3. Instead, pursuant to Rule 36, "[a]ny matter admitted under this rule *is conclusively established* unless the court on motion permits withdrawal or amendment of the admission." Rule 36(b), SCRCP. Furthermore, McCrabb is plainly incorrect that the oral "requests to admit" posed to Baxter at her deposition went unchallenged. Baxter's counsel consistently objected to each of these questions, after having first objected to the initial question regarding the process of answering the Requests to Admit on the grounds of attorney client privilege. (Dep. p. 23, line 2 – p. 26, line 12).

Although all that is needed to defeat summary judgment in a negligence case in South Carolina is a mere scintilla of evidence, *e.g.*, *Hancock v. Mid-South Mgmt. Co.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009), here, the conflict between Baxter's responses to Requests to Admit Nos. 1 and 3, and her deposition testimony, particularly given the probative weight of admissions, *see Airco*, 850 F.2d at 1036; *Scott*, 353 S.C. at 647, 579 S.E.2d at 155; Rule 36(b), SCRCP, provides more than a scintilla of evidence.[2] Therefore, summary judgment should not have been granted even on liability.

[2] McCrabb's argument that "a lawyer cannot artificially manufacture a factual issue by responding to requests for admission in place of the client," is misplaced. First, Baxter's responses to the Requests to Admit were served on McCrabb prior to the deposition, not after in an attempt to "artificially manufacture a factual issue." Second, as noted above, it is normal and expected that counsel will craft the responses to requests for admission given their legal significance and binding nature. Third, it is McCrabb's counsel who

II. The Circuit Court erred in granting summary judgment because the evidence the court relied on, in part, is inadmissible.

McCrabb contends that Baxter's argument that the Circuit Court relied, in part, on inadmissible evidence in the form of the police "collision report" is unpreserved and should not be considered by this Court. However, until the Circuit Court issued its ruling, Baxter had no way of knowing that the Court would rely on the inadmissible collision report.[3] Because McCrabb's Motion for Partial Summary Judgment was decided without a hearing, there was no opportunity to object to the Court's reliance on the collision report prior to the Rule 59(e) Motion. Baxter raised the issue immediately once the Circuit Court filed its decision granting partial summary judgment based, in part, on inadmissible evidence, *i.e.*, in her motion for reconsideration. Furthermore, in *Trivelas*, this Court declined to hear an argument raised on appeal by the appellant noting that it had not been raised to the lower court, had not been addressed in the summary judgment order, and, critically, appellant "failed to raise this matter in any post-trial motion," 348 S.C. at 131, 558 S.E.2d at 274, clearly implying that there are some instances where issues that could not or reasonably would not have been raised prior to rehearing may still be considered on appeal where argued in a Rule 59(e) motion. This

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created the conflict in evidence by asking Baxter to "re-answer" the Requests to Admit in a way that better suited McCrabb's case.

[3] Belatedly, McCrabb admits she "attached the wrong 'collision report'"—the FR-10 report instead of the TR-310 report—to her memorandum in support of partial summary judgment, arguing that information contained in the TR-310 "would be admissible even though the report itself is not." (Resp. Br. p. 14). In other words, McCrabb acknowledges that, in her attempt to gain a litigation advantage, she submitted inadmissible evidence to the Circuit Court, on which the Circuit Court relied, in part, in granting her partial summary judgment.

Court should reverse the grant of summary judgment because the Circuit Court relied, in part, on inadmissible evidence.

CONCLUSION

For all the reasons stated herein and in Appellant's Brief, this Court should reverse the grant of summary judgment and remand to the Circuit Court for further proceedings.

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April 30, 2021

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PROOF OF SERVICE

I certify that I have served the **Initial Reply Brief of Appellant** Christine Baxter on the other parties to this appeal by emailing a copy of each document addressed to their attorneys of record as follows:

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VIA S.C. COURTS E-FILING
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RE: Elizabeth McCrabb v. Christine Baxter
Civil Action No.: 2019CP1005613 (Charleston)
Date of Incident: October 27, 2017
Carrier Claim No.: H2J5957
MGC File No.: 20527.19544
Appeal No.: 2020-001679

Dear Ms. Kitchings:

Enclosed for filing please find the Initial Reply Brief of Appellant Christine Baxter and Appellant's Proof of Service.

Please do not hesitate to contact me if you have any questions.

Very truly yours,

Helen F. Hiser

Enclosures
cc: Michael T. Cooper, Esq.
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