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**SC Court of Appeals**

IN THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

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APPEAL FROM CHARLESTON COUNTY  
Court of Common Pleas

The Honorable Bentley D. Price, Circuit Court Judge

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Appeal No. 2020-001679

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Elizabeth McCrabb, Plaintiff .....Respondent,

v.

Christine Baxter, Defendant.....Appellant.

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FINAL RESPONSE BRIEF OF RESPONDENT

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## STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE COURT OF APPEALS SHOULD ENTERTAIN AN APPEAL THAT SUGGESTS THE TRIAL COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT ONLY ON THE ISSUE OF LIABILITY ADDITIONALLY GRANTS SUMMARY JUDGMENT ON ISSUES OF PROXIMATE CAUSE AND DAMAGES?
- II. WHETHER THE TRIAL COURT'S GRANT OF PARTIAL SUMMARY JUDGMENT ON THE ISSUE OF LIABILITY SHOULD BE UPHeld WHERE THERE IS NO GENUINE DISPUTE OF FACT AS APPELLANT CRASHED HER CAR INTO THE BACK OF RESPONDENT'S CAR AND APPELLANT ADMITS LIABILITY UNDER OATH?
- III. WHETHER THE TRIAL COURT'S ORDER SHOULD BE REVERSED WHEN APPELLANT FAILED TO TIMELY OBJECT TO RESPONDENT'S INCLUSION OF THE FR-10 COLLISION REPORT AND SUMMARY JUDGMENT WAS OTHERWISE APPROPRIATE WITHOUT SUCH EVIDENCE?

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## STATEMENT OF THE CASE

Appellant Christine Baxter, Defendant (hereinafter “Baxter” or “Defendant”) filed the instant appeal seeking a review of the trial court’s grant of partial summary judgment on the question of liability in favor of Respondent Elizabeth McCrabb, Plaintiff (hereinafter “McCrabb” or “Plaintiff”). (Notice of Appeal; Initial Brief of Appellant). Plaintiff initiated this personal injury civil action by filing her Summons and Complaint on October 24, 2019. (Complaint, R. pp. 13-17). Plaintiff alleges that Defendant caused personal injuries resulting in both economic and non-economic harm when Defendant failed to keep a look out and crashed into the back of Plaintiff’s car while Plaintiff was stopped at a red light. (Complaint, R. pp.13-17). Defendant answered Plaintiff’s Complaint on November 19, 2019 and then filed an Amended Answer with consent of Plaintiff on May 27, 2020. (Answer, R. pp.18-22; Amended Answer, R. pp. 25-29). When Plaintiff served her Summons and Complaint, she also served discovery requests that included three Requests for Admission. (Plaintiff’s Motion for Partial Summary Judgment R. pp.30-31; Memorandum in Support of Motion for Partial Summary Judgment, R. pp.32-59; Response in Opposition to Defendant’s Motion for Reconsideration, R. pp.73-116).

On May 26, 2020, after exchanging discovery and deposing Defendant, Plaintiff moved for partial summary judgment on the issue of liability. (Plaintiff’s Motion for Partial Summary Judgment, R. pp. 30-31). Plaintiff filed a memorandum in support of her motion on June 10, 2020. (Plaintiff’s Memorandum in Support of Motion for Partial Summary Judgment, R.pp.32-59 (“MIS of Motion for Partial Summary Judgment”)). On June 19, 2020, Defendant filed her memorandum in opposition to Plaintiff’s motion. (Defendant’s Memorandum in Opposition to Plaintiff’s Motion for Partial Summary Judgment, R. pp.60-65 (“MIO to Motion for Partial Summary Judgment”)).

The trial court issued its ruling on the parties' written motions based upon the parties' mutual agreement and consent and based on the Supreme Court's April 03, 2020 Order Re: Operation of the Trial Courts During the Coronavirus Emergency, Subsection (c)(4), which provided that "[a] trial judge may elect not to hold a hearing when the judge determines the motion may readily be decided without further input from the lawyers."<sup>1</sup> The trial court granted Plaintiff's motion on a Form 4 Order and then supplemented its ruling with a written order filed on July 13, 2020. (Form 4 Order, R. pp. 2-4; R. pp.10-12; Order Granting Partial Summary Judgment, R. pp. 5-9). The trial court granted partial summary judgment on the issue of liability. (Order Granting Partial Summary Judgment, R. pp. 5-9). The trial court did not rule upon proximate cause or damages. *Id.* The trial court expressly left the issues of proximate cause and damages to be decided at trial. (*Id.* at pg. 8).

On July 15, 2020, Appellant filed a motion to reconsider pursuant to Rule 59(e) the order granting partial summary judgment. (Defendant's Motion to Reconsider, R. pp.66-67). On November 24, 2020, Appellant filed her memorandum of law in support of the motion to reconsider. (Defendant's Memorandum in Support of Motion to Reconsider, R. pp.68-72). Appellant raises the admissibility of the collision report for the first time in her motion to reconsider. (Def. Motion to Reconsider, R. pp. 66-67). On December 04, 2020, Respondent filed her response to Appellant's motion to reconsider. (Plaintiff's Response in Opposition to Defendant's Motion to Reconsider, R. pp.73-116). On December 18, 2020, the trial court denied Appellant's motion to reconsider by filing a Form 4 Order. (Order Denying Motion to Reconsider,

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<sup>1</sup> To the degree Appellant implies the trial court's ruling without oral argument was improper by using the phrase, "[w]ithout holding any hearing," this implication is wholly without merit as Appellant agreed the issue should be ruled upon without oral argument.

R. pp. 2-4). On December 22, 2020, Appellant initiated the present appeal by letter to the Honorable Jenny Abbot Kitchings.

### **STATEMENT OF FACTS**

On the date of the collision, Respondent was stopped at a red light at the intersection of St. Andrews Blvd. and Sycamore Dr. in Charleston, South Carolina. (Complaint, R. p. 15; Plf. MIO to Def. Motion Reconsider, Exhibit 6, Travelers Claim File, R. pp. 113-114). Appellant was driving in the same direction on St. Andrews Blvd. as Respondent. Appellant was not looking and crashed her car into the back of Respondent's. (Complaint, R. p. 15; Plf. MIO to Def. Motion Reconsider, Exhibit 5, Travelers Claim File, R. pp. 110-111).

The photographs taken of the Appellant's car and Respondent's car show that the front end of Appellant's car is smashed and the rear-end of Respondent's car is smashed. (Plf. MIS to Motion for Summary Judgment, Exhibits 2 & 3, Photographs, R. pp. 40-47). Appellant testified in her deposition about the damage to her car saying, "Based on the front of the car, the passenger's side was the side that took the damage . . . but the hood on the passenger's side was – it was like an accordion where it hit, buckled in." (Plf. Resp. in Opp. to Def. Motion to Reconsider, Exhibit 3, Baxter Deposition, R. p.95).

Appellant sat for a deposition on May 14, 2020 and provided sworn testimony regarding the collision and the present civil action. Respondent asked Appellant, "Was the collision with Ms. McCrabb your fault?" And Appellant affirmed it was, "Yes." (Plf. MIS to Motion for Summary Judgment, Exhibit 4, R. p. 50 ll. 7-9). Respondent then asked, "Do you believe that Ms. McCrabb was at fault in any way for the collision?" Appellant answered, "No." (*Id.* at ll. 10-12). Snuffing out any doubt about any possible comparative negligence by Respondent who was simply stopped at a red light at the time of the wreck, Respondent asked, "Do you believe that you are a

hundred percent at fault in the collision with Ms. McCrabb?” Appellant said, “Yes.” (*Id.* at p. 51 ll. 17-21).

During the deposition Respondent also asked Appellant about the Requests for Admission that were submitted to her for response. When asked about whether she remembers receiving and answering the Requests for Admission, Appellant said, “Well, I sent that to my lawyer, and she told me she would take . . .” (Plf. MIS of Motion for Summary Judgment, Exhibit 4, Baxter Deposition, R. p. 54, ll.13-14). If Appellant had been allowed to complete her response, the only reasonable inference is her testimony would have been “Well, I sent that to my lawyers, and they said that they would take care of it.” (Plf. Resp. in Opp. to Def. Motion to Reconsider, R. p.76). Respondent asked Appellant if she “actually answered the Requests for Admission on her own,” and Appellant responded, “No.” (Plf. MIS to Motion for Summary Judgment, Exhibit 4, R. p.54, ll. 21-23). Respondent’s counsel then went through Appellant’s responses to the Requests for Admission to find out how Appellant would have answered them if she had been the one to respond instead of her lawyers. Appellant confirmed that she understood what the words admit and deny meant. (*Id.* at p. 55 ll. 4-21). Respondent said, “All right. So my question to you is, do you admit or do you deny that you, Christine Baxter, were solely at fault in the collision with Plaintiff Elizabeth McCrabb?” Appellant admitted that she was solely at fault. (*Id.* at p. 55 l. 22 – p. 56 l. 2). Next Respondent’s counsel submitted the other Request for Admission that was denied by Appellant’s lawyers. Respondent asked her, “Do you remember denying this Request to Admit?” Appellant said, “No.” (*Id.* at p. 57 ll. 2-7). Again, wanting to know how Respondent would have answered the Request to Admit, Respondent asked, “So as we sit here today, do you admit, or do you deny that Ms. McCrabb was not liable in any way for the collision between your car and between her car?” Appellant said, “I admit.” (*Id.* at ll. 14-19).

While it is not in the record on appeal Appellant now alleges that because she is a retired teacher that she is incapable of responding to these straightforward questions. Appellant does not assert that she is incompetent or incapable of meaningful participation in this litigation. She does not have a conservator. She does not have a power of attorney. She does not have a guardian. No objection was ever made regarding the Requests for Admission. No protective order was ever sought.

After Appellant's deposition, Respondent moved for partial summary judgment on the question of liability. The parties briefed the issue. The trial court granted Respondent's motion. Appellant filed a Rule 59(e) motion. Respondent filed her response in opposition. The trial court denied the motion to reconsider. The parties are now before this Honorable Court asking whether the trial court erred by granting partial summary judgment on liability where the Appellant crashed her car into the back of Respondent's car while Respondent was stopped at a red light.

### **STANDARD OF REVIEW**

"When reviewing the grant of a summary judgment motion, the appellate court applies the same standard [that] governs the trial court under Rule 56(c), SCRPC: 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." *BPS, Inc. v. Worthy*, 362 S.C. 319, 324, 608 S.E.2d 155, 158 (Ct. App. 2005).

### **ARGUMENT**

The trial court's grant of partial summary judgment on the issue of liability should be affirmed and this appeal should be dismissed. There is no genuine dispute of the material facts in this matter: Appellant crashed her car into the back of Respondent's car while Respondent was stopped at a red light. The undisputed facts lead to one inference or conclusion. Appellant is liable

in the collision. It is not a question the parties should use either the court's time or juror's time to decide.

### **Summary Judgment**

“A party seeking to recover upon a claim . . . may, at any time after the expiration of 30 days from the commencement of the action . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.” Rule 56(a), SCRPC. Summary judgment is appropriate if “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact. . . .” Rule 56(c), SCRPC. “A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.” *Id.* “When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.” Rule 56(e), SCRPC. “Summary judgment can be granted when plain, palpable and indisputable facts exist on which reasonable minds cannot differ.” *Byerly v. Connor*, 415 S.E.2d 796, 799 (1992).

### **Issue Preservation**

“It is axiomatic that an issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.” *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733-34 (1998); *Elam v. South Carolina Dept. of Transp.*, 361, S.C. 9, 23-25, 602 S.E.2d 772, 779-80 (2004). “An objection must be sufficiently specific to inform the trial court of the point being urged by the objector.” *Id.* South Carolina appellate courts do not recognize the “plain error rule,” wherein the appellate court may review an

error not raised below by the objector. *Dykema v. Carolina Emergency Physicians, P.C.*, 348 S.C. 549, 554, 560 S.E.2d 894, 896 (2002). “A motion to alter or amend the judgment shall be served not later than 10 days after receipt of written notice of the entry of the order.” Rule 59(e), SCRPC. “A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not.” *Poch v. Bayshore Concrete Products*, 386 S.C. 13, 31, 686, 699 S.E.2d 689 (Ct. App. 2013) (citing *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59, SCRPC, motion is not preserved for review); *Kiawah Prop. Owners Grp. v. Public Serv. Comm’n.*, 359 S.C. 105, 113, 597 S.E.2d 145, 149 (2004) (stating an issue raised for first time in petition for rehearing not preserved); *Stevens & Wilkinson of South Carolina, Inc. v. City of Columbia*, 409 S.C. 563, 566-67, 762 S.E.2d 693, 695 (2014) (finding City failed to preserve issue when raised for first time in Rule 59 (e) motion to amend judgment after trial court granted partial summary judgment in favor of plaintiff).

**I. The Present Appeal Should be Dismissed because Appellant Presents Issues on Appeal that Were Not Ruled Upon by the Trial Court**

Because Appellant does not raise an issue ruled upon by the court below, Appellant’s present appeal should be dismissed or denied. The issue on appeal must have been presented to and ruled upon by the trial court to be preserved for appellate review. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733-34 (1998).

Appellant frames her appeal as if the trial court ruled upon questions about proximate cause and damages or that the trial court found “negligence” as a matter of law. However, the trial court did not make any such ruling. Respondent undeniably moved for partial summary judgment on the issue of liability. (Plf. Motion for Partial SJ, R. pp.30-31; Plf. Memo in Support of Motion for Partial SJ. R. pp. 32-59). The relief sought by Respondent was for “an Order granting partial

summary judgment as to the issue of liability in this case.” (Plf. Memo in Support of Motion for Partial SJ, R. p. 36). The trial court’s order grants partial summary judgment on the issue of liability, saying “Defendant is solely liable for the injuries proximately caused and which Plaintiff may prove at the trial of this case.” (Order, July 13, 2020, R.p.8). The 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.” Rule 56(c), SCRC.P. The grant of summary judgment on liability does not implicate proximate cause or damages.<sup>2</sup> These are separate legal concepts. *See e.g., Lampley v. Hulon*, 432 S.C. 566, 570-71, 854 S.E.2d 489, 492 (Ct. App. 2021) (“Because the issue of property damage was allowed to go to trial and the jury found Lampley and the deputy sheriff were equally responsible for the accident, we need not remand for a determination of liability. We remand the case for a determination on the amount of damages for bodily injury based on the jury’s finding of equal liability.”); *e.g., Brockbank v. Best Capital Corp.*, 341 S.C. 372, 385-86, 534 S.E.2d 688, 695 (2000) (“In light of the undisputed fact that Creditor failed to give the required notice to Debtor, the trial judge erred in denying Debtor’s motion for partial summary judgment on liability in the Article 9 cause of action. We remand this case to the circuit court for a determination of the statutory damages . . . .”); *cf., Trivelas v. South Carolina Dept. of Tranp.*, 348 S.C. 125, 132-37, 558 S.E.2d 271, 274-77 (Ct. App. 2001) (The Court of Appeals reversed the trial court’s ruling that “the driver of the DOT vehicle violated §§ 56-5-1560 and 56-5-1920, thus constituting negligence as a matter of law” because there was a factual issue whether the exception “when

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<sup>2</sup> If liability means proximate cause and damages, then what does it mean when defense counsel stands up at the beginning of trial and says, “We admit liability?” Does that end the whole thing? By admitting liability, does the defendant admit proximate cause and damages? Of course, the answer is no.

reduced speed is necessary for safe operation or in compliance with law” excused DOT’s conduct and there was a genuine factual dispute about which party was the proximate cause of the collision.); *cf.*, *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 147-48, 352 S.E.2d 488, 493 (Ct. App. 1986) (The Court of Appeals affirmed the denial of defendant’s JNOV motion that argued the proximate cause of plaintiff’s death was “his own voluntary consumption of the alcohol and not the furnishing of it by Sigma Nu’s active brother.” “The jury was entitled to find that the purpose for which, the manner in which, and the extent to which the active brother furnished alcoholic liquors and beverages to [plaintiff] and the other pledges proximately caused [plaintiff’s] death.”).

If Appellant were confused about the effect of the trial court’s order, the appropriate motion would have sought clarification of the order through Rule 59(e) or Rule 60(a). However, this is not what happened. Instead, Appellant chose to argue that in granting partial summary judgment on liability, the trial court somehow bound the jury on issues of proximate cause and damages. (Def. Motion to Reconsider). Or that proximate cause and damages are so integral to liability that Respondent had to prove proximate cause and damages before the court could grant summary judgment on liability. *Id.* Appellant’s contentions are in clear contradiction with the plain language of Rule 56(c), which expressly allows the court to grant summary judgment on liability and present only the issue of damages to a jury. Rule 56(c), SCRPC. Because Appellant’s appeal does not relate to any ruling the court in fact made, her appeal should be dismissed or denied.

## **II. The Trial Court’s Grant of Partial Summary Judgment on Liability Should be Affirmed because There Is No Genuine Dispute of Material Fact**

Because the only reasonable inference from the undisputed facts about the collision is that Appellant is liable for the injuries, if any, that Respondent may prove and that the jury may find, the trial court’s order should be affirmed. The trial court’s grant of partial summary judgment on

liability was supported by the uncontroverted facts presented by Respondent. After Respondent proved that Appellant crashed her car into the back of Respondent's while stopped at a red light, Appellant offered no evidence to contradict or question these facts. (Plf. Memo in Support of Partial SJ, R. pp.32-59; Def. Memo in Opp. R. pp.60-65). The language of Rule 56(e) provides:

“When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate **shall** be entered against him.”

Rule 56(e), SCRCP (emphasis added). "Summary judgment can be granted when plain, palpable and indisputable facts exist on which reasonable minds cannot differ." *Byerly v. Connor*, 415 S.E.2d 796, 799 (1992).

Respondent provided the photos of the damage to Respondent's car. (Exhibit 2, Plf. MIS of Motion, R. pp. 40 - 42). The photos show the back end of Respondent's Jeep SUV to be caved in. *Id.* Respondent provided photos of the damage to Appellant's car. (Exhibit 3, Plf. MIS of Motion R. pp.43 - 47). The photos show the front end of Appellant's Jeep SUV to be crushed. *Id.* Respondent provided sworn testimony from Appellant's deposition. (Exhibit 4, Plf. MIS of Motion, R. pp. 48 - 59). Appellant said, "yes," when she was asked, "was the collision with Ms. McCrabb your fault?" *Id.* p. 50, ll. 7-9. Respondent asked, "Do you believe that Ms. McCrabb was at fault in any way for the collision?" Appellant said, "no." *Id.* p. 50, ll. 10-12. Appellant agreed that she was a hundred percent at fault in the collision. *Id.* p. 51, ll. 17-21.

Respondent also provided the deposition testimony of Appellant's responses to the Requests for Admission served upon her. Appellant argues there is a genuine dispute of material fact in this case because Appellant's lawyers "took care" of the written responses in one instance and Appellant provided different responses under oath in the other. Appellant testified that she did not answer the written requests for admission. (Exhibit 4, R. p. 54, ll. 11-23). While

Appellant's sworn testimony contradicts the responses provided by her lawyers, a lawyer cannot artificially manufacture a factual issue by responding to requests for admission in place of the client. It is not the lawyer that answers these discovery requests, it is the party: "A party may serve upon any other **party** a written request for admission . . . of the application of law to fact . . ." Rule 36(a), SCRCF (emphasis added). Under the rule, the "matter is admitted unless . . . the **party** to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or his attorney . . ." Rule 36(a), SCRCF (emphasis added). "The written or electronic signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion or other paper; that to the best of his knowledge, information and belief there is good ground to support; and that it is not interposed for delay." Rule 11(a), SCRCF.

Appellant's deposition testimony admissions took place after the written responses were returned to Respondent by Appellant's counsel. Appellant cannot contradict herself in a way that creates a genuine dispute of material fact. Instead, Appellant's deposition responses amend those provided earlier by her lawyers. After her deposition Appellant did not file any motion to amend her testimony or the admissions contained therein.

If Appellant believed she was incompetent to state whether she was at fault in the collision, as she now argues, or that Respondent's written requests for admission were improper, Rule 36(a) allows a party to object to a request and provide the reason for that objection. Rule 36(a), SCRCF. Appellant did not raise an objection to any of Respondent's requests for admission. (Plf. MIO to Def. Motion to Reconsider, Exhibits 1 & 2, R. pp. 80 -89).

Even if Appellant had raised a timely objection, the requests submitted by Respondent were proper. In *Scott v. Greenville Housing Authority*, the plaintiff served requests for admission that

“asked [defendant] to admit that it was responsible and liable for all of [plaintiff’s] damages and that its conduct was the sole proximate cause of any and all damages he suffered.” *Scott v. Greenville Housing Authority*, 353 S.C. 639, 642, 579 S.E.2d 151, 152 (Ct. App. 2003). The defendant argued that plaintiff would not be prejudiced by allowing amendment of its responses, “because the deemed admission of liability was at the crux of the case.” *Id.* at 642-43, 579 S.E.2d at 152. The Court of Appeals held that the trial court abused its discretion in allowing the defendant to amend the requests that went to the very heart of liability and proximate cause and that were deemed admitted by the defendant’s failure to respond. *Id.* at 645, 579 S.E.2d at 154.

The court in *Scott v. GHA*, identified the purpose and function of requests for admission:

Through such definition and limitation, admissions promote both efficiency and economy in resolving disputes. If a point is conceded, litigants need not expend effort in investigation concerning it nor incur expense in presenting evidence to prove it. Judicial administration is also aided. Admissions reduce the time required to try a case. Indeed, they often make summary judgment possible. Finally, admissions encourage litigants to evaluate realistically the hazards of trial, and thus tend to promote settlements.

*Id.* at 649, 579 S.E.2d at 156. The court also recognized that “admissions are not objectionable merely because they go to ultimate facts or other issues that must be proven by the plaintiff.” *Id.* (citing *Cereghino v. Boeing Co.*, 873 F.Supp. 398, 403 (D.Or. 1994) (“[A] request for admission under Rule 36, and a resultant admission, are not improper merely because they relate to an ultimate fact or prove dispositive of the entire case.”)). The court then reversed the “trial court’s finding that the ultimate issue could not be determined by the admission because it was ‘superfluous’ to the pleadings” that denied liability. *Id.* Respondent’s request that Appellant admit fault in the collision was proper and supported by law.

Finally, Appellant did not present any evidence that would tend to contradict that which was offered by Respondent. (Def. MIO to Plf. Motion, R. pp.60 - 65; Def. MIS to Motion to Reconsider, R. pp.68 - 72). Appellant offers no contradictory evidence because there is none.

Appellant cannot, in good faith, deny fault. Appellant crashed into Respondent's car while stopped at a red light. The only reasonable conclusion is Appellant is liable for the injuries, if any, caused by the collision. Because there is no dispute, only delay, the trial court's grant of partial summary judgment should be affirmed.

### **III. Appellant's Objection to Respondent's Use of the Collision Report Was Neither Timely Nor Ruled Upon So this Issue Is Not Preserved**

Because Appellant only raised her objection to the inclusion of the police report in her Rule 59(e) motion to reconsider, this issue was not properly presented to the trial court and is not preserved for appeal. "[A]n issue cannot be raised for the first time on appeal but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733-34 (1998); *Elam v. South Carolina Dept. of Transp.*, 361, S.C. 9, 23-25, 602 S.E.2d 772, 779-80 (2004). "A party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the judgment but was not." *Poch v. Bayshore Concrete Products*, 386 S.C. 13, 31, 686, 699 S.E.2d 689 (Ct. App. 2013) (citing *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005) (finding issue raised for first time in Rule 59, SCRPC, motion is not preserved for review)).

Respondent admittedly attached the wrong "collision report" to her memorandum in support of the motion for partial summary judgment. Respondent attached the FR-10 report instead of the TR-310 report. The TR-310 report contains a diagram of the collision and a brief narrative of what happened based upon the police officer's observations. The FR-10 does not. It only has information about insurance and who was deemed "contributing." The FR-10 does not contain any useful information for the trial court. The TR-310 contains information that would be admissible even though the report itself is not. *See e.g., Ellison v. Pope*, 290 S.C. 100, 106-108, 348 S.E.2d 367, 371-72 (Ct. App. 1986).

When Appellant failed to raise this objection, that failure did not provide Respondent or the trial court with an opportunity to address the specific objection. Additionally, the trial court did not issue a ruling on Appellant's objection set forth in her motion to reconsider. The court issued a Form 4 denying the motion to reconsider. The order did not address Appellant's objection. Because Appellant failed to raise a timely objection and because this issue was not ruled upon by the trial court, the issue is not preserved for review. And because South Carolina does not recognize the "plain error rule," Appellant's issue on this matter should be denied and dismissed.

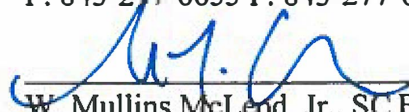
Finally, Respondent met its burden of demonstrating there was no genuine issue of material fact on the question of liability without reference to the FR-10 collision report. Appellant failed to offer any evidence that would show otherwise. Because the report was immaterial to the trial court's ruling, the order granting partial summary judgment should be affirmed regardless of preservation.

### **CONCLUSION**

For all the reasons stated herein, Respondent respectfully requests the Court of Appeals affirm the trial court's order granting partial summary judgment on liability or dismiss the present appeal and remand the case for trial on the issues what injuries were proximately caused by the collision and the amount of damages that should be awarded for any economic or non-economic damage as decided by a jury. There is no genuine dispute of fact about what happened in the collision. The undisputed facts prove Appellant was at fault and is liable to Respondent for the damages that the finder of fact may determine were proximately caused by the collision. Pursuant to Rule 220(c), SCACR Respondent requests this Court affirm the trial court's order upon any ground(s) appearing in the Record on Appeal but not directly addressed herein. Rule 220(c), SCACR.

Respectfully submitted,

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Charleston, South Carolina