

Rel: March 29, 2024

Notice: This opinion is subject to formal revision before publication in the advance sheets of **Southern Reporter**. Readers are requested to notify the **Reporter of Decisions**, Alabama Appellate Courts, 300 Dexter Avenue, Montgomery, Alabama 36104-3741 ((334) 229-0650), of any typographical or other errors, in order that corrections may be made before the opinion is printed in **Southern Reporter**.

SUPREME COURT OF ALABAMA

OCTOBER TERM, 2023-2024

SC-2023-0476

Donijah Virgo

v.

Heather Michelle Roberts and GEICO Casualty Company

**Appeal from Mobile Circuit Court
(CV-22-36)**

PARKER, Chief Justice.

Donijah Virgo appeals from a partial summary judgment entered by the Mobile Circuit Court in favor of Heather Michelle Roberts, which disposed of his counterclaim against her alleging negligence and which

the circuit court certified as final pursuant to Rule 54(b), Ala. R. Civ. P.

We affirm the judgment of the circuit court.

I. Facts

In October 2020, Virgo was working as an automobile-repair technician in Mobile. Virgo was driving a Crown Victoria automobile in the early morning, attempting to diagnose a mechanical problem. The sun was not yet fully risen. The weather was clear and the road conditions were good. The terrain is flat where Virgo was driving, and there were no obstructions to visibility for a long distance.

The car stalled out as Virgo drove it on Rangeline Road, and he maneuvered the car into the median left-turn lane and stopped there. He turned on the car's flashing hazard lights, opened the trunk lid, and waited in the turn lane for about 10 minutes for the traffic to clear. When he thought the northbound traffic was clear, Virgo began to push the Crown Victoria across the northbound lane of Rangeline Road. As he was pushing the car across the road, Roberts's vehicle collided with the car that Virgo was pushing. The collision caused major damage to the car that Virgo was pushing and knocked him unconscious. Virgo sustained serious injuries as a result of the collision. He was taken to the University

of South Alabama Hospital and treated for his injuries. He incurred over \$100,000 in medical expenses, and has suffered severe pain as a result of the injuries he sustained. He was also out of work for eight months while recovering from his injuries. Roberts sustained major damage to her vehicle and unspecified personal injuries.

Roberts sued Virgo and GEICO Casualty Company in the Mobile District Court, alleging claims of negligence and wantonness against Virgo and a claim for underinsured/uninsured-motorist benefits against GEICO. Virgo, appearing pro se, filed an answer and a counterclaim, alleging negligence on the part of Roberts. He sought damages for his medical bills, lost wages, pain and suffering, and mental anguish. He also moved to transfer the case to the Mobile Circuit Court. The district court granted that motion and transferred the case to the circuit court.

After the case was transferred, Roberts and GEICO settled the claim against GEICO and jointly stipulated to dismiss that claim. Roberts then moved for a summary judgment on Virgo's counterclaim. Virgo opposed the motion. After a hearing, the circuit court granted the motion and issued a summary judgment in Roberts's favor on Virgo's counterclaim. The circuit court then certified its summary judgment as

final under Rule 54(b). Virgo subsequently filed a "motion to reconsider," which the circuit court denied. Virgo then appealed to this Court.

II. Standard of Review

When reviewing a Rule 54(b) certification, we must determine if the circuit court exceeded its discretion. See Alabama Ins. Underwriting Ass'n v. Skinner, 352 So. 3d 688, 690 (Ala. 2021).

"This Court's review of a summary judgment is de novo. We apply the same standard of review as the trial court applied. Specifically, we must determine whether the movant has made a prima facie showing that no genuine issue of material fact exists and that the movant is entitled to a judgment as a matter of law. In making such a determination, we must review the evidence in the light most favorable to the nonmovant. Once the movant makes a prima facie showing that there is no genuine issue of material fact, the burden then shifts to the nonmovant to produce 'substantial evidence' as to the existence of a genuine issue of material fact. '[S]ubstantial evidence is evidence of such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.'"

Dow v. Alabama Democratic Party, 897 So. 2d 1035, 1038-39 (Ala. 2004)

(citations omitted).

III. Analysis

Before we can reach the merits, we must first address this Court's jurisdiction. See, e.g., Rogers v. Cedar Bluff Volunteer Fire Dep't, [Ms.

SC-2022-0439, June 30, 2023] ___ So. 3d ___, ___ (Ala. 2023) ("Although none of the parties contested this Court's jurisdiction to decide this appeal or addressed the propriety of the trial court's certification of finality pursuant to Rule 54(b) [, Ala. R. Civ. P.,] in their briefs on appeal, it is well settled that this Court is "'duty bound to notice ex mero motu the absence of subject-matter jurisdiction.'" (citation omitted)). This is an appeal of a partial summary judgment; Roberts's claims against Virgo remain pending below. Such summary judgments are ordinarily not final unless certified as final in accordance with the trial court's express finding that there is no just reason for delay. Rule 54(b). Trial courts have discretion to make this determination and certification. However, trial courts should make Rule 54(b) certifications only in exceptional cases because of "this Court's stated policy disfavoring appellate review in a piecemeal fashion." Smith v. Slack Alost Dev. Servs. of Alabama, LLC, 32 So. 3d 556, 562-63 (Ala. 2009).

A. The Rule 54 (b) Certification Was Proper Because There Was No Risk of Inconsistent Results.

A Rule 54(b) certification is improper when "'the issues in the claim being certified and a claim that will remain pending in the trial court '" are so closely intertwined that separate adjudication would pose

an unreasonable risk of inconsistent results."" Fuller v. Birmingham-Jefferson Cnty. Transit Auth., 147 So. 3d 907, 911 (Ala. 2013) (citations omitted; emphasis added). When considering whether the circumstances present an unreasonable risk of inconsistent results, this Court has adopted a test consisting of five factors, which, for purposes of this opinion, we will refer to as "the Fuller factors":

""(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the [trial] court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in a set-off against the judgment sought to be made final; (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.'""

Fuller, 147 So. 3d at 912 (citations omitted).

Virgo's adjudicated counterclaim accused Roberts of negligence arising from the facts surrounding their car collision. Roberts's remaining claims accuse Virgo of negligence and wantonness arising from the same facts. The adjudicated and unadjudicated claims are thus closely related. But under Alabama's contributory-negligence rule, that does not present a risk of inconsistent results.

In Alabama, "'[c]ontributory negligence is an affirmative and complete defense to a claim based on negligence.'" Norfolk S. Ry. Co. v. Johnson, 75 So. 3d 624, 639 (Ala. 2011) (citation omitted). Alabama has not abandoned the old rule of contributory negligence in favor of the newer comparative-negligence system. Williams v. Delta Int'l Mach. Corp., 619 So. 2d 1330, 1333 (Ala. 1993). Consequently, the adjudication of a negligence claim in favor of the defendant on summary judgment does not necessarily bear on the adjudication of any opposing claim arising from the same facts. If a party was contributorily negligent, he simply cannot recover, regardless of any negligence of the other party. Johnson, 75 So. 3d at 639. Thus, there is no chance of inconsistent results with competing negligence claims. Alabama Power Co. v. Kendrick, 219 Ala. 692, 696, 123 So. 215, 219 (1929) (Bouldin, J., concurring, joined by Thomas, J.) (pointing out that "[i]n negligence cases no right of action can arise in favor of both").

If, at the trial on Roberts's claims, it is found that Virgo was negligent, then that result will be consistent with the summary judgment in favor of Roberts as to Virgo's counterclaim. If it is found that Virgo was not negligent, then that will not be inconsistent. The fact of an accident

is not sufficient to prove negligence of any party. Mobile Press Register, Inc. v. Padgett, 285 Ala. 463, 468, 233 So. 2d 472, 475 (1970). Upon the finding of a close relationship between the adjudicated and unadjudicated claims, this factor would normally weigh in favor of our dismissing this appeal, but in this case it is rendered neutral by the impossibility of inconsistent results despite the close relationship of the claims.

As to the second Fuller factor, no issue in this appeal is likely to be mooted by further proceedings in the circuit court if we decide the appeal now. The issue on this appeal is not whether Virgo or Roberts is liable to the other for negligence, but whether Virgo presented legally sufficient evidence to raise a genuine issue of material fact as to his counterclaim. See Dow, 897 So. 2d at 1038-39.

To survive Roberts's motion for a summary judgment, Virgo did not need to prove that Roberts was liable to him for negligence. He merely needed to present sufficient evidence to show that there was a genuine issue of material fact on that point. Dow, 897 So. 2d at 1038-39. As shown below, Virgo presented almost no evidence that Roberts was negligent. Whether Roberts can present sufficient evidence at trial to prove that

Virgo is liable to her for negligence is entirely another matter, one upon which this Court's decision in this appeal has no bearing.

This last point also goes to the third Fuller factor. This Court will not likely have to decide these same issues again if we decide them now. The issue on appeal is whether Virgo presented legally sufficient evidence to raise a genuine issue of material fact as to his counterclaim. This issue is not presented by Roberts's claims against Virgo. Virgo presented no genuine issue of material fact in this case, let alone a genuine issue of material fact as to whether Roberts was liable to him for negligence. This does not mean that Roberts has automatically proven that Virgo is liable to her for negligence. If we affirm the trial court's summary judgment on Virgo's counterclaim now, and either party later appeals a judgment on Roberts's claims, the issue whether Virgo sufficiently pleaded his counterclaim cannot arise in that appeal.

As to the fourth Fuller factor, Virgo's counterclaim is a negligence claim. This factor therefore is not applicable, because the presence or absence of any potential setoffs does not apply. Kendrick, 219 Ala. at 696, 123 So. at 219 (Bouldin, J., concurring, joined by Thomas, J.). Under

Alabama's contributory-negligence rule, mutual negligence of the parties results in zero recovery by either. Id.

The fifth Fuller factor is ""'miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.'"" This factor weighs in favor of our deciding this appeal now, while it is here. If we dismiss this appeal now, Virgo would likely bring the same appeal again after the trial is over. If the circuit court sets aside the partial summary judgment before the end of the trial (which, as discussed below, would probably be erroneous), and ultimately entered a judgment in favor of Virgo on his counterclaim, Roberts would likely appeal that decision. An appeal will likely come before us at some point either way, and, if decided now, the issue whether the trial court properly entered a summary judgment on Virgo's counterclaim will not come before us again. The circuit court no doubt understood this when it certified its judgment as final under Rule 54(b).

In summary, the first Fuller factor is rendered neutral by the nature of competing negligence claims under Alabama's contributory-negligence rule. The second, third, fourth, and fifth Fuller factors all

weigh in favor of a Rule 54(b) certification. And the Rule 54(b) certification in this case does not present any risk of inconsistent results. We therefore conclude that the circuit court did not exceed its discretion in making its Rule 54(b) certification and that this Court has jurisdiction to hear this appeal.

B. The Circuit Court Did Not Err in Entering a Summary Judgment.

In her summary-judgment motion, Roberts alleged (1) that Virgo had a duty to yield the right-of-way to her before pushing the Crown Victoria out from the median left-turn lane; (2) that Virgo breached that duty by pushing the car out in front of her vehicle without yielding; (3) that Virgo's failure to yield the right-of-way to Roberts proximately caused the collision; and (4) that Roberts was injured and her property damaged as a result of the collision.

""To establish negligence, the plaintiff must prove (1) a duty to a foreseeable plaintiff; (2) a breach of that duty; (3) proximate causation; and (4) damage or injury."" Hilyer v. Fortier, 227 So. 3d 13, 22 (Ala. 2017) (citations omitted).

Roberts presented sufficient evidence to make a prima facie showing that there were no genuine issues of material fact. She

supported her factual allegations with citations to Virgo's own deposition. Virgo agreed that he had the duty to yield the right-of-way to Roberts. He admitted that he did not have any evidence indicating that Roberts was speeding, other than a postcollision photograph of the car he was pushing. He also admitted that he could not say for sure whether the headlights of that car were on. And his response to Roberts's motion for a summary judgment was devoid of any facts that Roberts disputes.

With Roberts's prima facie showing, Virgo was required to present "substantial evidence" in his favor to defeat her motion for a summary judgment. Dow, 897 So. 2d at 1038-39. In his pro se response to her motion, his entire facts section, entitled "Narrative of Disputed Facts," reads:

"On Oct 20, 2022, Heather Roberts had an accident. Accident at issue here she collided with stopped vehicle, causing pedestrian injuries. Mr. Virgo was walking along side by vehicle, when he was struck [by] Mrs. Roberts. With the driver door open, trunk hood open he was clearly visible. Mrs. Roberts did not have the right of way to strike a pedestrian."

Additionally, the entirety of Virgo's handwritten answer and counterclaim reads:

"On October 20, 2020, I sustained major injuries by a negligent driver (Heather Roberts) who appeared to be distracted. Plaintiff Heather Roberts struck me with her

vehicle while I was a pedestrian that caused me to be unconscious at the scene. I was picked up [by] USA hospital paramedics, where I received major back surgery that resulted in over \$100,000 worth of medical bill debt. I was also out of work for eight months for recovery. I am seeking a counter claim for medical bill debt, pain and suffering, punitive damages, and lost wages."

Reading those claims as broadly as possible due to Virgo's status as a pro se defendant, and counterclaim plaintiff, Virgo's factual allegations were simply that

1. Virgo was a pedestrian;
2. Virgo was beside the Crown Victoria when it was hit;
3. That car was stopped when it was hit;
4. The driver's side door and trunk of that car were open when it was hit;
5. Virgo was "clearly visible";¹
6. Roberts's vehicle struck the Crown Victoria;
7. Roberts "appeared to be" distracted;
8. Roberts was negligent; and

¹Virgo raised this allegation in his response in opposition to Roberts's motion for a summary judgment. He does not raise it in his initial brief on appeal. Therefore, he has waived that argument before this Court, and it is not properly before us.

9. Virgo was injured (including being knocked unconscious at the scene, needing major back surgery, being out of work for eight months, and incurring more than \$100,000 of medical-bill debt).

Roberts did not dispute allegations 1-4. She did not dispute that her vehicle struck the Crown Victoria, or that Virgo was injured. The only disputed allegations Virgo raises on appeal are (1) that Roberts was speeding and "appeared to be" distracted, (2) that the headlights of the Crown Victoria were on, (3) that Roberts was negligent, and (4) that Virgo had the right-of-way as a pedestrian at the place of the collision.

Virgo alleges that Roberts was speeding at the time of the accident. His only evidence of this is (1) his own deposition testimony and (2) a postcollision photograph of the car he had been pushing, showing its front end smashed in. In his testimony, Virgo admitted that he had no actual knowledge of Roberts's speed and that any estimate he could make would be merely a guess. A "guess" is hardly "substantial evidence." And the photograph of the car by itself is insufficient reasonably to establish Roberts's speed. See, e.g. Campbell v. Barlow, 274 Ala. 627, 628, 150 So. 2d 359, 360 (1962) (differentiating between an opinion of a driver's speed "based only on ... observations [including observations of vehicle damage] at the scene of the wreck, where there were no skid marks leading up to

the point of impact," and "any skid marks or other evidence from which a reasonable opinion as to speed could be predicated" (second emphasis added)).

Virgo argues that Roberts "appeared to be" distracted at the time of the collision. However, Roberts points to Virgo's deposition testimony, in which he admitted that, while he had seen Roberts's vehicle just before the collision, he never saw Roberts in it. He stated that he did not know what Roberts looked like, that he had never seen her in her vehicle, and that he would not know if she was sitting in the courtroom. Virgo produced no evidence indicating that Roberts was distracted, and thus there is no genuine issue of material fact as to this assertion by Virgo.

Virgo argues that the headlights of the Crown Victoria were on at the time of the collision. However, Roberts points out that Virgo testified in his deposition that he did not remember whether the headlights of that car were on at the time. Roberts maintains that the headlights were not on. She also produced the statement of the one eyewitness to the collision, Catherine Miller. That statement reads as follows:

"I was in the turning lane to turn left across Rangeline onto the Service Rd.

"There was a gold/tan car in front of me that I didn't see until he pulled out into traffic. NO LIGHTS. My lights caught him just as he was hit. Even after impact, couldn't see the car in the dark (about 6:35-6:40)."

(Capitalization in original.) Against these positive denials that the headlights were on, Virgo opposes his own deposition testimony, in which he responded "I don't recall. I cannot tell," when asked whether the headlights were on. This is not "substantial evidence" sufficient to create a genuine issue of material fact on this point.

Virgo argues that Roberts was "negligent." His pleadings do not specify exactly which of Roberts's actions were allegedly negligent. In his pleadings and his briefs before this Court, he seems to rely on a sort of "res ipsa loquitur" analysis. He argues that Roberts owed him a statutory duty to "avoid colliding with any pedestrian in the road." Virgo's brief at 8. He further argues: "The fact that Driver Roberts hit Pedestrian Virgo makes abundantly clear that she violated her duty to him." Id.

Virgo misunderstands the duty owed by drivers to pedestrians. It is not a strict-liability-style duty to avoid colliding with pedestrians but, rather, a duty of reasonable care to avoid colliding with pedestrians. Shafer v. Meyers, 215 Ala. 678, 680, 112 So. 230, 232 (1927). His argument that the fact of the collision is proof that Roberts breached her

duty is therefore legally incorrect. Mere proof of the occurrence of an accident and injury is not legally sufficient to prove negligence. Mobile Press Register, 285 Ala. at 468, 233 So. 2d at 475. ("The plaintiff must prove the negligence of defendant, and proof of accident and injury alone will not be sufficient to establish negligence."); Mobile City Lines, Inc. v. Proctor, 272 Ala. 217, 222, 130 So. 2d 388, 392 (1961) ("[N]egligence will not be inferred by the mere showing of an accident resulting in personal injury."); Marshall Durbin Co. v. Hartley, 392 So. 2d 240, 241 (Ala. Civ. App. 1980) ("[N]egligence will not be inferred from a mere showing of an accident and injury.").

The only other genuine dispute that Virgo presents (and on which both parties spend much of their briefs) concerns a question of law, not of fact. Virgo argues that, as a pedestrian, he had the right-of-way to cross Rangeline Road and that Roberts, a motorist, did not have the right-of-way. He relies on § 32-5A-211, Ala. Code 1975, for this proposition. That Code section provides that pedestrians have the right-of-way on all marked crosswalks or unmarked crosswalks at intersections.

Besides being a dispute over legal conclusions rather than facts (that Virgo was a pedestrian and Roberts a motorist are undisputed), this

argument fails. Virgo does not allege that there was a marked crosswalk at the scene of the collision. A photograph of the scene of the collision that Virgo agreed was accurate does not show any crosswalk at all. The car Virgo was pushing was in the median left-turn lane, not in anything that could justly be termed a "crosswalk." In fact, it was not even in an "intersection," as that term is defined by § 32-1-1.1(28), Ala. Code 1975. It was merely in a turn lane between two directional lanes in a divided highway. It is undisputed that Roberts was not subject to any stop sign or traffic signal. There was no intersecting street connecting to the turn lane. Therefore, the turn lane was not an "intersection" for purposes of § 32-5-211 and could not have had an "unmarked crosswalk" for purposes of that Code section.

Section 32-5A-212, Ala. Code 1975, is clearly more applicable to this case. It provides: "Every 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." § 32-5A-212(a). Roberts, not Virgo, had the right-of-way here as a matter of law. Baker v. Helms, 527 So. 2d 1241, 1244 (Ala. 1988) ("Alabama's Rules of the Road impose a duty on the pedestrian to yield the right-of-

way to all vehicles upon the roadway when the pedestrian is crossing at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection." (citing § 32-5A-212, Ala. Code 1975)).

Virgo raises a number of other arguments for the first time in this appeal. He argues that Roberts had a duty to sound her vehicle's horn to warn him of her approach. He further argues that her alleged negligence in failing to sound her vehicle's horn removes any liability he may have for contributory negligence in pushing the Crown Victoria into her lane of travel. He also argues that, even if Roberts did have the right-of-way, he yielded the right-of-way to her by remaining stationary for more than 10 minutes in the turn lane before attempting to push the car across the road. He also argues that Roberts's contributory-negligence defense to his counterclaim should not have been disposed of by summary judgment. He argues that "[t]he issue of contributory negligence is generally one for a jury to decide." Hawkins v. Simmons, 295 So. 3d 683, 688 (Ala. Civ. App. 2019) (quoting Norfolk S. Ry., 75 So. 3d at 639).

Virgo raised none of these arguments before the circuit court at any time. He mentioned some of them in his deposition testimony, but they are utterly absent from any of his pleadings before any court, other than

his briefs in this appeal. They were not even raised in his postjudgment motion. Therefore, this Court can consider none of them. Andrews v. Merritt Oil Co., 612 So. 2d 409, 410 (Ala. 1992). Also, beyond mere assertions, Virgo presents no "substantial evidence" for any of the factual allegations underpinning these arguments, nor does he show how such allegations, if true, are "material fact[s]." Dow, 597 So. 2d at 1038-39. He therefore fails to show that the circuit court erred in entering a summary judgment in favor of Roberts on his counterclaim.

IV. Conclusion

For the foregoing reasons, we affirm the circuit court's summary judgment in favor of Roberts on Virgo's counterclaim.

AFFIRMED.

Mendheim and Mitchell, JJ., concur.

Shaw and Bryan, JJ., concur in the result.