THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2009-CP-37-1058

Ernest L. Cobb and Nancy Cobb . . . . . **Respondents,**

v.

Dan M. Lafoy . . . . . **Appellant.**

RESPONDENTS' FINAL BRIEF

Larry C. Brandt (S.C. Bar #856)
Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Boulevard
Walhalla, SC 29691
864/638-5406 (telephone)
864/638-7873 (facsimile)
lcb.brandtlawfirm@att.net
Attorney for the Respondents Ernest L. Cobb and Nancy Cobb

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STATEMENT OF FACTS

On July 5, 2007, at approximately 5:47 p.m., Respondent, Ernest Cobb, was standing on the driver's side of his parked pickup truck pumping gas into his truck at Head's Superette in Walhalla, South Carolina, well outside the right-of-way of S.C. Highway 28 **(R.,pp. 356-364; R.,p.78, l.17-p.79, l.25),** when the Appellant, Dan M. LaFoy, failed to maintain control of his automobile and drove it into the right rear or passenger side of Mr. Cobb's truck **(R.,p.155, l.24-p.156, l.6)** causing Mr. Cobb's truck to hit Mr. Cobb and knock him a considerable distance from the pumps. **(R.,p.156, l.25-p.157, l.3)** He was rendered unconscious, sustained a severe closed head injury and is unable to recall anything during the three (3) days immediately following the accident. **(R.,p.48, ll.7-22)** Also, his memory has been severely affected and he is now incapable of continuing his employment as a school bus driver and/or performing his secondary job/hobby as an auto mechanic.

According to Mr. LaFoy, he was driving west on S.C. Highway 28 when he felt an urge to go to the bathroom and started to turn into Head's Superette for that purpose. **(R.,p.207, ll.14-23)** Although Mr. LaFoy denied any recollection of striking Mr. Cobb's vehicle, he did remember a police officer banging on the window of his vehicle **(R.,p.153,ll.21-23)** and telling the police officer that he passed out. **(R.,pp.190-191)** Mr. LaFoy also vividly recounted his interaction with the officer at the scene **(R.,p.207, l.22-p.208, l.13; p.210, ll.5-24)** and admitted that he was able to respond appropriately to everything that was asked of him. **(R.,p.209, ll.20-21)** Officer Joshua Sample, the investigating officer, testified that the call of the

accident came to him at 5:47 p.m. and he was on the scene at approximately 5:49 p.m., roughly two (2) minutes after he received the call. **(R.,p.189, ll.20-23)** He further testified that Mr. LaFoy was not unconscious when he arrived, that Mr. LaFoy was wide awake when he got there, was coherent and able to communicate with him at the scene. **(R.,p.190, ll.20-23; p.191, ll.18-20)** Mr. LaFoy also readily rendered his driver's license and wallet to him when he asked for them **(R.,p.192, ll.8-10)** and was responsive to everything he asked. He further stated that he did not find any evidence of anybody passing out **(R.,p.195, ll.12-18)** and that the collision occurred on private property out of the travelled portion of the roadway **(R.,p.193, ll.8-10);** that Mr. LaFoy was "heading up the mountain, which is west," and that the west bound lane of travel was "the lane opposite the gas pumps" with the lane of travel closest to the pumps being the "east bound" lane. **(R.,p.194, l.23-p.195, l.8);** and that Mr. LaFoy "was certainly left of the center line of the roadway that he was travelling and on private property when the accident occurred." **(R.,p.200, ll.11-14)** The only other witness who testified as to the condition of Mr. LaFoy at the accident scene was Respondent, Nancy Cobb, the wife of Ernest Cobb, who was sitting in the truck when the collision occurred. She stated that as she tried to get out of her vehicle, she saw the Defendant with his **hands on the steering wheel** as he was "raising up" with **his eyes open** looking straight at her. **(R.,p.153, ll.17-20; p.157, ll.8-13)**

There is no evidence whatsoever that anything occurred in the roadway to cause a sudden emergency which required Mr. LaFoy to react in any way and/or

to cause him to strike Mr. Cobb's truck. **(R.,p.207, ll.6-21)** Neither is there any evidence that Mr. Cobb and/or Mrs. Cobb were negligent or contributed to the accident in any way. The sole defense for Mr. LaFoy was that he experienced a sudden incapacity to control his vehicle because, as he put it, he "blacked out" and, therefore, the accident was unavoidable. His attorney told the jury in his opening statement that Mr. LaFoy was claiming that he was not responsible for the accident because he had "blacked out" and that they would have to decide if he did or not to find Mr. LaFoy liable for Mr. Cobb's injuries. **(R.,p.96, ll.5-17)**

At the close of the Defendant's case, Plaintiff's attorney made a motion for a directed verdict on the issue of liability as to all causes of action in both cases because Defendant had failed to carry his burden of proof on the sudden incapacity defense as set forth in ***Boylston v. Baxley, 243 S.C. 281, 133 S.E.2d 796*** and further defined or clarified by ***Collins v. Frasier, 376 S.C. 249, 662 S.E.2d 464 (Ct. App. 2008)***. Although Mr. Cobb's counsel's argument and discussion were mostly centered on the sudden incapacity defense, the entire discussion, read and considered as a whole, makes it clear that the Motion for Directed Verdict was not simply to sudden incapacity defense but was aimed at the entire liability issue for without that defense there was nothing left for the jury to decide. **(R.,p.219, ll.15-21; p.223, ll.15-22)**[1] The Trial Judge, after much discussion with the attorneys, agreed with Mr. Cobb's attorney and struck the defenses of sudden incapacity and

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[1] This is also supported by the arguments on the defense Motion for Directed Verdict. **(R.,p.185, l.17-p.187, l.18)**

unavoidable accident stating that the Defendant had not presented evidence, other than his self-serving statement, that he blacked out and the evidence was not, as a matter of law, sufficient to support the claim. He also ruled that unavoidable accident was not applicable under the facts of the case as there was no evidence that anyone had done anything in the roadway to cause a sudden emergency. As a result, Judge Macaulay refused to charge the jury on either defense. **(R.,p.224, l.5-p.244, l.14)** He also refused to grant Respondents' counsel's Motion for Directed Verdict on Liability and his Motion to strike the testimony of Dr. Hanke and to instruct the jury to disregard her testimony and tell it that it could not consider sudden incapacity or unavoidable accident in its deliberations. **(R.,p.244, l.15-p.248, l.7 and l.14-p.250, l.20)**

Following deliberations by the jury, defense verdicts as to liability on both causes of action were rendered and the Cobbs thereafter timely filed a Post-Trial Motion for Judgment Notwithstanding the Verdict on Liability and Damages, or in the alternative, a Motion for Judgment Notwithstanding the Verdict on Liability and a New Trial on Damages Only, or in the further alternative, a Motion for New Trial Absolute. A hearing on those Motions was held before the Honorable Alexander S. Macaulay on May 29, 2012, and Mr. and Mrs. Cobb's Motion for New Trial Absolute based on the South Carolina Thirteenth Juror Doctrine **(R.,p.50, l.3-p.51, l.21)** was granted. A formal written Order to that effect was signed by Judge Macaulay on July 6, 2012 and Mr. LaFoy timely appealed.

STANDARD OF REVIEW

Upon review, a trial judge's order granting or denying a new trial is to be upheld unless the order is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. The appellate court's review is limited, therefore, to consideration of whether evidence exists to support the trial court's order and even if there is conflicting evidence, a trial judge's grant of a new trial is not to be disturbed. ***Lane v. Gilbert Construction Company, Ltd., 383 S.C. 590, 681 S.E.2d 879 (2009)***

ARGUMENT

THE TRIAL COURT DID NOT ERR IN STRIKING APPELLANT'S DEFENSE OF SUDDEN UNFORESEEN INCAPACITY, REFUSING TO CHARGE THE JURY ON SUCH DEFENSE AND IN GRANTING RESPONDENTS' MOTION FOR A NEW TRIAL

As set forth in the Appellant's Brief, ***Boylston v. Baxley, 243 S.C. 281, 133 S.E.2d 796 (1963)*** holds that ***"the operator of a vehicle is not ordinarily chargeable with negligence because he is suddenly stricken by a fainting spell or loses conscious from some other unforeseen cause and is unable to control the vehicle."*** The one who relies upon this principle to avoid liability has the burden of proving sudden incapacity by a preponderance of the evidence. The case of ***Collins v. Frasier, 376 S.C. 249, 662 S.E.2d 464 (Ct. App. 2008)***, however, further defines the defense and holds that in order to create a jury question as to sudden unforeseen incapacity, defendant's self-serving statement is insufficient and there must be credible and competent medical testimony or evidence of an underlying physical or medical condition which could cause a loss of consciousness to remove the defense from the realm of conjecture into the field of permissible inference. In the ***Collins*** case, the defendant stated that he blacked out and at the hospital his doctor, through medical tests and examination, determined that Mr. Frasier unknowingly had hypoglycemia, a condition supported by symptoms that he exhibited prior to the accident and which were consistent with a hypoglycemic event which, in fact, would and could have rendered him incapable of safely operating his motor vehicle at the time the accident. In this case, the

Defendant LaFoy merely offered his testimony and the testimony of Officer Joshua Sample and Dr. Jennifer Hanke in his effort to meet his burden of proof. The analysis of the evidence, however, clearly shows that his self-serving claim that he passed out was not corroborated by any scientific evidence or supported by expert medical evidence of an underlying problem or condition as all statements and/or opinions of Officer Sample and Dr. Hanke were wholly based or founded upon Mr. LaFoy's self-serving statement. Judge Macaulay, in his colloquy with the attorneys and particularly with Mr. LaFoy's attorney **(R.,p.223, l.23-p.238, l.13),** discussed the evidence presented in detail and agreed with Respondents' counsel that the proof on the sudden unforeseen incapacity did not meet the ***Collins*** test as Dr. Hanke's opinion, although expressed by her to a reasonable degree of medical certainty, was not founded on a diagnosed underlying medical cause or condition which could have caused the syncope episode but was merely rendered upon her belief that Appellant was telling the truth when he claimed he "blacked out." Recapping her testimony once again, it becomes even more patently clear that her opinion, derived solely from Mr. LaFoy's self-serving statement, was not based upon medically reliable evidence and Mr. LaFoy's claim was not corroborated in anyway.

Dr. Hanke's testimony was that she only saw Mr. LaFoy one (1) time in the emergency room following the accident on July 5, 2007 **(R. p.325, ll.20-23)** and most of what she knew was from the history and physical that she performed on Mr. LaFoy. **(R.,p.326, ll.5-7)** She stated that he was brought into the emergency department and was found to be lucid upon his arrival **(R.,p.326, ll.15-17),** that Mr.

LaFoy did not really have that much recollection which she attributed to "just because he, you know, stated that he lost consciousness." **(R.,p.326, ll.22-24)** Dr. Hanke opined, based merely upon what Mr. LaFoy told her, that he had become somewhat diaphoretic, that is, started sweating, and then had the sudden urgent need to defecate **(R.,p.327, ll.2-7)** but admitted that the diaphoretic condition or sweating could happen for a variety of reasons, from a sudden adrenaline response to heart attack to "you know, a change in temperature." **(R.,p.327, ll.8-16)** She testified that Mr. LaFoy was checked for seizures but they were ruled out. She stated, "he did not seem to demonstrate seizure as he was completely coherent as he recalled someone tapping on his window and transporting him to the emergency department and he was completely coherent once he got to the emergency department." **(R.,p.326, ll.5-17)** She further stated that "usually after a seizure, even though you're aroused, you're not completely lucid, but, he did not demonstrate that." **(R.,p.328, ll.3-14)** She said that Mr. LaFoy was kept for observation for two (2) days following his visit to the emergency room because of the bloody stool but she did not follow him after admission and never saw or examined him after July 5, 2009. **(R.,p.327, l.5-p.328, l.24)** Dr. Hanke opined that Mr. LaFoy had diarrhea in the car prior to transport by the EMT which "could be consistent with someone who had lost consciousness indicating they could have had anything from a stroke to a seizure to, you know, a syncopal episode from some other type of neurological problem" **(R.,p.330, ll.4-12);** however, in later testimony she stated that stroke and seizure were ruled out and they found no

neurological problems to suggest a syncopal episode. **(R.,p.331, ll.1-21)** When specifically asked whether any objective evidence was found that would support Mr. LaFoy's claim that he "blacked out before the accident occurred," she stated, "I mean the only thing that I would have, you know, just like anyone that would come with snycope we, you know, usually **take their word for it." (R.,p.331, ll.18-21)** She also stated that her opinion was merely based on the fact that he had **"the bloody diarrhea, the sweatiness and everything, you know, and just his story."** She admitted that she could not say 100% but, again, candidly said they didn't doubt his story at all and when asked **"But you're basically taking a patient's word for it," she answered "Right." (R.,p.332, ll.14-16)** She candidly admitted that she basically took his word for it that he passed out and operated on that premise **(R.,p.333, ll.9-17),** and said that she only came on the scene after the ***"presumption"*** was made by the ER physician to believe him that everything was authenticated. **(R.,p.333, ll.2-5)** She was specifically asked by Mr. Brandt **(R.,p.334, ll.3-16):**

QUESTION: Point to me in the medical records the parts of that record that would support the theory that he blacked out before impact?

ANSWER: I suppose you can't.

QUESTION: Okay.

ANSWER: I mean, we can only ***allude*** to the fact that there was some other precipitating illness. You know, he was evaluated and because of his bloody diarrhea. I mean, like I mentioned, I mean, there's other things going on. So, you know, it wasn't that the accident would have caused him to have this, you know, sudden bloody diarrhea. You know, he had an acute illness that we **assume** caused him to be involved in this car accident."

She then goes on to say that while in the emergency room, some hours after the accident, Mr. LaFoy did have a significant drop in his blood pressure and that "the systolic blood pressure dropped from, I believe, the 140s to 120s indicating some, what's called, arthostatic hypertension which can result from dehydration that can also be a contributor to syncopal episodes;" however, he was not treated for dehydration nor found to be dehydrated. **(R.,p.336, l.17-p.337, l.4)** Dr. Hanke also admitted that heart attack was ruled out **(R.,p.337, ll.16-21)** and in regards to the possibility of an adrenaline rush, she said, "Yes, that can, you know, cause if you're, you know, what we call fight or flight mechanism where all of a sudden, you know, you're scared, frightened, anxious, you can break out in a sweat" **(R.,p.337, l.22-338, l.3),** but when pressed that an adrenaline rush would wake one up, not put one to sleep, her answer was: "well, not always." **(R.,p.338, ll.4-11)** She then explained that hypoglycemia, a low blood sugar state, could cause syncope but said that before someone passes out from a low blood pressure event they typically become sweaty, nauseated and vomit before passing out and then stated that his initial labs showed his blood sugar was 129 which is normal non-fasting blood sugar. **(R.,p.338, ll.6-16)** She was then asked "So we can rule out the hypoglycemia?" She replied "Right." **(R.,p.338, ll.17-20)**

Dr. Hanke further stated the syncopal episode, as related to her by Mr. LaFoy, was never questioned by her because they saw the bloody diarrhea. She candidly admitted that she did not know when the bloody diarrhea occurred, whether it was before impact or after impact **(R.,p.339, ll.13-22)** and, again, stated

that she took his word for it. **(R.,p.340, l.2)** She further stated that blood thinners were not a problem as his INR was normal and she admitted she assumed that he continued to have loss of consciousness after impact **(R.,p.342, ll.1-16).** Officer Sample, however, testified that he was awake, alert and coherent at the scene, and Mr. LaFoy admitted that he responded appropriately to all of Mr. Sample's directions and questions. **(R.,p.209, ll.15-21)** Dr. Hanke also confirmed that there was not a significant change or decomposition of anything while he was in the emergency department. **(R.,p.343, l.23-p.344, l.7)** She stated "his vital signs remained, you know, pretty much stable, the exact same almost throughout his stay in the emergency department." **(R.,p.344, ll.8-13)** She was further asked about the internal bleeding and the cause for it and stated there was no reason found for bloody stools even though stool cultures were done. Although she said that there was a potential for some type of food borne illness from Applebees where he had eaten lunch prior to the accident, she also said that "it does not typically happen that quickly." She added that the most common cause for bloody stool is hemorrhoidal bleeding or diverticulitis. **(R.,p.345, ll.4-23)** She was then asked by Mr. Brandt:

QUESTION: Based upon what's in the record do you have an opinion today as to what would have introduced the blood in the stool?

ANSWER: I do not know for a hundred percent certain, no."
(R.,p.345, l.24-p.346, l.3)

Her testimony then ended with the following colloquy with Mr. Brandt:

QUESTION: Now, the syncope is his story that he related to you --

ANSWER: Yes.

QUESTION: – based on purely what he said?

ANSWER: Correct. Since there wasn't an eye witness in the car.

QUESTION: And then you had -- and then you had other problems he would have been admitted to the hospital for anyway?

ANSWER: More than likely, yes, you know. At 81 years of age if someone has, you know, bright red blood in their stool, we typically would not send them home from the emergency department.
(R.,p.347, l.18-p.348, l.6)

Clearly, Judge Macaulay correctly analyzed Dr. Hanke's expert testimony and determined that without Mr. LaFoy's own self-serving statement there was no basis whatsoever for Dr. Hanke's opinion that Mr. LaFoy had blacked out and was unconscious at the time of the collision and/or incapable of operating his automobile. Her testimony had no scientific or medical basis and did not meet the test of reliability as she could never determined any potential cause for the syncope episode but, rather, merely took Mr. LaFoy's word for it that it did, in fact, occur. Certainly, medical experts are permitted to use "reliable differential diagnosis" in their approach to diagnosing problems but, in doing so, each potential cause must be eliminated until arriving at one that cannot be ruled out or concluding that of those that cannot be ruled out one is most likely. This, Dr. Hanke did not do as all the potential causes were ruled out; therefore, her testimony was unreliable and irrelevant and should have been stricken by Judge Macaulay along with the instruction that her testimony was not to be considered on the issue of liability. **(See: *Graves v. CAS Medical Systems, Inc., 2012 WL 6212885 (S.Ct., Dec.***

2012) Since Judge Macaulay granted a new trial absolute to Mr. Cobb, that issue is not before this Court, but it is certainly germane to Judge Macaulay's analysis of the evidence under the Thirteenth Juror Doctrine and his determination of whether the evidence is legally sufficient to sustain a verdict. Clearly, Judge Macaulay was convinced that a new trial is necessitated on the basis of the facts of the case as he believed that the evidence did not justify the verdict **[*Folkens v. Hunt, 300 S.C. 351, 387 S.E.2d 265 (1990)].*** **(R.,p.49, l.8-p.51, l.21)** Accordingly, Judge Macaulay did not err in striking sudden incapacity defense and his decision to invoke the Thirteenth Juror Doctrine and grant a new trial absolute was not only well within his discretion but justice demanded it.

CONCLUSION

Determination of the major issue of this case, -i.e. whether sufficient evidence was presented to create a jury question as to whether Mr. LaFoy suffered a sudden unforeseeable incapacity to operate a vehicle had a reliable basis, required Judge Macaulay to conduct an in-depth review of all the evidence without regard to Mr. LaFoy's claim and determine whether the remaining evidence was credible and sufficient enough to remove the claim from the realm of conjecture into the field of permissible inference as set forth in ***Collins v. Frasier, 376 S.C. 249, 662 S.E.2d 464 (Ct. App. 2008).*** This he did and correctly found that the evidence was woefully insufficient. Officer Sample merely testified that he found no evidence to support Mr. LaFoy's claim and Dr. Hanke's expert opinion was based solely on her belief that Mr. LaFoy's claim was true. Dr. Hanke ruled out all possible

underlying medical conditions or causes for an alleged syncope episode and expressly testified that without Mr. LaFoy's statement there was nothing in the medical records to suggest that he did, in fact, "black out" and/or was incapable of safely operating a vehicle at the time of the collision. Judge Macaulay's grant of a new trial absolute, therefore, was required because the evidence did not support the verdicts.

It is, therefore respectfully submitted that the Order granting to Mr. and Mrs. Cobb a new trial absolute should be affirmed.

Respectfully submitted,

LARRY C. BRANDT, P.A.

By: _____

Larry C. Brandt (S.C. Bar #856)
P.O. Box 738
3691 Blue Ridge Boulevard
Walhalla, SC 29691
864/638-5406 (telephone)
864/638-7873 (facsimile)
lcb.brandtlawfirm@att.net
Attorney for the Respondents, Ernest L. Cobb and Nancy Cobb

May 14, 2013

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CERTIFICATE OF COUNSEL
(Respondents' Final Brief)

The undersigned certified that ***RESPONDENTS' BRIEF*** complies with Rule 211(b), SCACR.

May 14, 2013

Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Blvd.
Walhalla, SC 29691
864/638-5406

By: Larry C. Brandt
Larry C. Brandt, Attorney
S.C. Bar #856

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PROOF OF SERVICE
(Respondents' Final Brief)

I certify that I have served ***RESPONDENTS' FINAL BRIEF*** upon the ***Appellant by and through his attorney of record*** by depositing a copy of it in the United States Mail, postage prepaid, on ***May 16, 2013,*** addressed as follows:

Robert D. Moseley, Jr. (#64084)
Joseph W. Rohe (#79313)
Smith Moore Leatherwood LLP
P.O. Box 87
Greenville, SC 29602-0087
Attorneys for Appellant

May 16, 2013

Larry C. Brandt, P.A.
P.O. Box 738
3691 Blue Ridge Blvd.
Walhalla, SC 29691
864/638-5406

By: Debra C. Miller
Debra C. Miller, Paralegal