ORIGINAL

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. 2012-212693

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

Dan M. Lafoy ..... Appellant.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT OF ISSUES ON APPEAL

1. Did the Trial Court err in striking and refusing to charge Appellant's defense of sudden incapacity when the defense was supported by expert independent medical testimony?

2. Did the Trial Court err in granting a new trial based on the thirteenth juror doctrine when under its mistaken interpretation of the standard for applying a sudden incapacity defense?

STATEMENT OF THE CASE

On August 25, 2009, Plaintiffs/Respondents Ernest L. Cobb and Nancy Cobb (collectively "Plaintiffs") filed suit against Defendant/Appellant Dan M. Lafoy ("Defendant") in the Court of Common Pleas of Oconee County, South Carolina, alleging Defendant was negligent in the operation of his vehicle, which resulted in injuries suffered by Plaintiffs.[1] (R. pp. 7-13) Defendant timely answered, raising affirmative defenses of sudden emergency and unavoidable accident as a continuation of the initial sudden emergency as a result of his loss of consciousness. (R. pp. 14-23) The parties filed cross motions for summary judgment, both of which were denied.

This matter was tried before the Honorable Alexander S. Macaulay and jury during the January 9, 2012 term of court. Following deliberation, the jury returned a verdict in favor of the Defendant on both Plaintiff Ernest L. Cobb's cause of action for negligence and Plaintiff Nancy Cobb's cause of action for loss of consortium. Following the conclusion of evidence, Plaintiffs made a single Motion for Directed Verdict on the issue of Defendant's defense of sudden incapacitation and/or loss of consciousness. (See R. p. 219, line 14-p. 239, line 16) Plaintiffs' Motion for Directed Verdict was granted,

[1] Plaintiff Nancy Cobb filed suit solely on a loss of consortium cause of action. Unless otherwise specifically noted, any references to "Plaintiff" are to Ernest L. Cobb only.

and the Court struck the defense of sudden incapacity. However, Plaintiffs did not make a motion for directed verdict on the matter of liability with respect to either the negligence cause of action or the loss of consortium cause of action.

Following deliberations, the jury returned a defense verdict on both causes of action. Plaintiffs filed several Post-trial Motions, to wit: Plaintiffs' Motion for Judgment Notwithstanding the Verdict on Liability and Damages; Plaintiffs' Motion for Judgment Notwithstanding the Verdict on Liability and New Trial on Damages Only; and Plaintiffs' Motion for New Trial Absolute. (R. pp. 24-28) In response, Defendant filed a Memorandum in Opposition to Plaintiffs' Post-trial Motions. (R. pp. 29-35) A hearing was held before the Honorable Alexander S. Macaulay on May 29, 2012 at which time Judge Macaulay granted Plaintiffs' Motion for New Trial based on South Carolina's "Thirteenth Juror" doctrine. (R. p. 51, lines 10-21) The trial court's Order Granting New Trial Absolute on Liability and Damages was entered July 6, 2012. (R. pp. 3-5) Defendant timely filed a Notice of Appeal.

STATEMENT OF THE FACTS

Defendant is an 86 year-old retiree who on July 5, 2007 was driving westbound on Highway 28 when he felt a sudden urge to use the bathroom. (R. p. 207, lines 14-21) As he made a left turn into the parking lot of Head's Superette for that purpose, he lost consciousness. (R. p. 207, lines 19-23) The Defendant's vehicle struck the Plaintiffs' vehicle, which in turn struck the Plaintiff Ernest Cobb—as he was standing beside his vehicle and near the gasoline pumps. (See Pls.' Compl. ¶ 4, R. pp. 7-8) At trial, Plaintiff had no recollection of stopping to get gas or of the accident. (R. p. 101, lines 8-25) Plaintiff testified that his first memory was three days later. (R. p. 102, lines 7-9)

Following the collision, Defendant came to and realized he was sitting with the front end of his vehicle on the right hand rear side of Plaintiffs' vehicle. Defendant does not remember striking the Plaintiffs' vehicle and testified that after passing out, the next thing her remembered was a police officer banging on the window of his vehicle. (R. p. 207, lines 21-23)

Within moments of the accident, Defendant explained to the investigating officer that the accident occurred because he passed out. (R. p. 190, line 16-p. 191, line 4)

Apart from the Defendant, the only other witness who was actually present at the time of the accident was Plaintiff's wife, Nancy Cobb. At the time of the collision, Nancy Cobb was in the vehicle but did not suffer any physical injury. However and notwithstanding that she was sitting in the vehicle, Nancy Cobb did not actually see the accident occur.

> ...so I had undone my seat belt to put [the check] up on the sun visor to fill the amount out, and [Plaintiff Ernest Cobb] had just got out of the truck.
>
> And I heard this noise, and it shook the whole truck. And I -- it was like, What happened? You know. I knew there had been an accident but I didn't think about, you know, it just kind of shook me up good because I didn't have my seat belt on.

(R. p. 153, lines 9-16) Nancy Cobb first saw Defendant upon exiting her vehicle. (R. p. 153, lines 17-18) She testified that, after she opened the door and got out of the vehicle, she saw Defendant with his hands on the steering wheel as he was "raising up." (R. p. 153, lines 18-19) Moreover, Plaintiff Nancy Cobb confirmed Defendant's testimony that someone—although she did not know if it was a police officer or not—had to knock on Defendant's window following the collision. (R. p. 182, lines 18-21)

STANDARD OF REVIEW

Granting of Directed Verdict as to Sudden Incapacity

"When considering a directed verdict motion, the trial court is required to view the evidence and the inferences that can be drawn from that evidence in the light most favorable to the nonmoving party." Jones v. Lott, 387 S.C. 339, 345, 692 S.E.2d 900, 903 (2010)(citing Hinkle v. Nat'l Cas. Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003)). The appellate court "will reverse the trial court's rulings on these motions only where there is no evidence to support the rulings or where the rulings are controlled by an error of law." Id.

Failure to Charge Sudden Incapacity

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Id.

Granting of New Trial Based on Thirteenth Juror Doctrine

In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. The doctrine "entitles the judge to sit, in essence, as the thirteenth juror when he finds 'the evidence does not justify the verdict,' and then to grant a new trial based solely 'upon the facts.'" Norton v. Norfolk So. Ry. Co., 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002)(citing Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990).. As the thirteenth juror, the trial judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict. Id. Upon review, a trial judge's order granting or denying a new trial will be upheld unless the order is wholly unsupported by the

evidence, or the conclusion reached was controlled by an error of law. Norton, 350 S.C. at 478, 567 S.E.2d at 854.

ARGUMENT AND CITATIONS OF AUTHORITY

I. THE TRIAL COURT ERRED IN STRIKING APPELLANT'S DEFENSE OF SUDDEN INCAPACITATION AND IN REFUSING TO CHARGE THE JURY ON SUCH DEFENSE.

A. The Trial Court applied an overly strict test for sudden incapacity, and in doing so, improperly struck the defense which was supported by medical and other independent testimony.

It is well-established in South Carolina that "the operator of a vehicle is not ordinarily chargeable with negligence because he is suddenly stricken by a fainting spell, or loses consciousness from some other unforeseen cause, and is unable to control the vehicle." Boyleston v. Baxley, 243 S.C. 281, 284-5, 133 S.E.2d 796, 797 (1963). Defendant recognizes and acknowledges that "one who relies upon this principle, in explanation of apparently negligent conduct, has the burden of proving sudden incapacity." Id. at 285, 133 S.E.2d at 797. However, in order to create a jury question as to sudden, unforeseeable incapacitation, the Defendant need only present evidence "which remove[s] his sudden, unforeseeable incapacity defense from the realm of conjecture into the field of permissible inference." Collins v. Frasier, 378 S.C. 249, 251, 662 S.E.2d 464, 465 (Ct. App. 2008).

In *Collins*, the Court of Appeals—affirming the trial court's denial of the plaintiff's motions for directed verdict and post-trial motions for JNOV, new trial absolute, and to alter or amend—found that

> the record contains ample support for [the jury's finding of a sudden unforeseeable incapacity.] Frasier testified he felt fine while driving until suddenly he felt all of his energy drain and saw fuzz...Dr. Richey testified to his knowledge

> Frasier had not exhibited signs of fainting prior to the accident. Following the accident, Dr. Richey administered a glucose tolerance test. The test indicated Frasier suffered from hypoglycemia. Dr. Richey explained a hypoglycemic event can result in loss of consciousness and the medicine Frasier was taking at the time of the accident could mask hypoglycemia.

Id. at 252, 662 S.E.2d 466. Similar to the *Collins* case, Defendant testified that he felt fine while driving until he suddenly felt "the extreme urge to go to the bathroom" just before he "passed out...fainted" (R. p. 207, lines 14-21) There was no evidence that Defendant had ever experienced signs of fainting prior to the accident. (R. p. 202, lines 12-17; R. p. 318, line 13; R. p. 318, line 23-p. 319, line 4) Following the accident, Defendant suffered from a bloody stool, which Dr. Hanke testified was an indication of loss of consciousness. (R. p. 215, lines 14-18; R. p. 330, lines 4-12; R. p. 331, lines 22-24) In addition, upon admission to the hospital Defendant was suffering from blood pressure fluctuations, which Dr. Hanke likewise testified could be an indication of loss of consciousness. (R. p. 215, lines 14-18; R. p. 336, line 24-p. 337, line 4) Upon cross-examination, Dr. Hanke testified that

> [she] would feel very confident in saying that the syncopal episode occurred before the accident, given this surrounding circumstances being the acute illness, the bloody diarrhea. And then later noted in the record by the nursing staff was the fact that he did have a significant drop in his blood pressure...what's called orthostatic hypotension which can result from dehydration, which it can also be a contributor to syncopal episodes.

(R. p. 215, lines 14-18; R. p. 336, line 19-p. 337, line 4) Finally, the investigating officer—Walhalla City Police Officer Joshua L. Sample—acknowledged and confirmed that there were no "black marks or anything from anybody trying to stop the vehicle to keep from a collision." (R. p. 194, lines 11-14) The Officer also acknowledged that he arrived a few minutes of receiving the call and that the Defendant explained that the

accident happened because he lost consciousness. (R. p. 190, line 16-p. 191, line 4) This eliminates the likelihood that the sudden unconsciousness was contrived.

During the directed verdict stage of the trial, counsel for Plaintiff made considerable mention of the fact that the medical providers were unable to identify any root cause of the sudden loss of consciousness. (See R. p. 221, lines 3-6; R. p. 223, lines 3-5) Moreover, the trial Court—quite erroneously—agreed with counsel that this factor was significant as an element under the authority of *Collins*. (See R. p. 224, lines 5-8 ("without a cause you are left with (reading): Self-serving testimony is insufficient by itself to create a question of fact as to the defense.")) While the *Collins* case did involve an identified cause of the defendant's loss of consciousness, it did not establish as a rule that the root cause of the loss of consciousness must be identified in order to create a question of fact for the jury. What the *Collins* court held was that "a defendant's own, self-serving testimony is insufficient by itself to create a question of fact as to the defense [of sudden, unforeseen incapacity]." Collins, 378 S.C. at 252, 662 S.E.2d at 466. All that is required to create a question of fact for the jury is evidence "which remove[s] [Defendant's] sudden, unforeseeable incapacity defense from the realm of conjecture into the field of permissible inference." Id. at 251, 662 S.E.2d at 465.

In a related line of argument, Plaintiffs claimed that the expert testimony of Dr. Hanke was based solely upon the subjective statements of Defendant. Again, the trial court clearly agreed with this point and relied heavily upon in it granting Plaintiffs' motion for directed verdict on the defense of sudden incapacitation. (See R. p. 225, lines 8-9 ("what you have really, [Dr. Hanke's] whole testimony was based on a single self-serving statement.")) While Defendant did inform Dr. Hanke that he passed out or

blacked out just prior to the collision, the bloody stool and blood pressure fluctuations—which Dr. Hanke testified were indications of a loss of consciousness—are entirely and unquestionably objective evidence wholly separated from Defendant's own purportedly "self-serving" testimony. Again, this is sufficient evidence "which remove[s] [Defendant's] sudden, unforeseeable incapacity defense from the realm of conjecture into the field of permissible inference." Collins, 378 S.C. at 251, 662 S.E.2d at 465

Finally, both Plaintiffs and the trial court placed considerable weight on the issue of eyewitness testimony and its impact on Dr. Hanke's expert testimony—specifically testimony of Nancy Cobb. (See R. p. 224, lines 16-18; R. p. 225, lines 11-12) However and notwithstanding the fact that both Plaintiffs and the trial court label Mrs. Cobb's testimony as "eyewitness," she clearly testified that she did not see Defendant's vehicle until *after* the impact. (R. p. 153, lines 9-18)[2] Thus, Mrs. Cobb's "eyewitness" testimony was limited to what happened after the impact—which is not, of course, determinative or even relative to the issue of whether or not Defendant was "suddenly stricken by a fainting spell, or los[t] consciousness from some other unforeseen cause" immediately prior to and at the time of impact. See Boyleston, 243 S.C. at 284-5, 133 S.E.2d at 797. Simply put, the fact that Defendant was conscious after the accident is irrelevant.

Accordingly, there was clear and independent evidence of Defendant's loss of consciousness sufficient to "remove[...Defendant's] sudden, unforeseeable incapacity defense from the realm of conjecture into the field of permissible inference." See Collins, 378 S.C. at 251, 662 S.E.2d at 465. As such, there was sufficient evidence to create a

[2] Mrs. Cobb supports Defendant's defense of sudden incapacity in that she says she saw Defendant's head "raising up." (R. p. 153, lines 18-19) In order for his head to raise up, it must have been down.

factual question for the jury and it was an error of law for the Trial Court to disregard this evidence and grant Plaintiffs' Motion for Directed Verdict – thereby striking Defendant's defense.

B. The Trial Court erred in refusing to charge the jury on sudden incapacity when the defense was supported by independent evidence of Defendant losing consciousness.

Absent the Trial Court's error in striking Defendant's defense of sudden incapacity as further outlined in Section 1.A., above, Defendant would have been entitled to a jury charge on sudden loss of consciousness. "The trial judge is required to charge the current and correct law." Koutsogiannis v. BB&T, 365 S.C. 145, 149, 616 S.E.2d 425, 427 (2005). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." Id. at 149, 616 S.E.2d at 427-8. "To warrant reversal, the refusal to give a requested charge must have been erroneous and prejudicial." Id.

Plainly put, if the Trial Court erred in striking Defendant's defense of sudden incapacity, then it likewise erred in refusing to charge the jury on the same as the defense would have been a "controlling legal principle" of the case. Prior to the charge conference, Defendant submitted a number of requests to charge to the Trial Court, including charges on sudden emergency and loss of consciousness (the "Charges"). These particular Charges were discussed during the charge conference following the striking of Defendant's defense of sudden incapacity, and were ultimately discarded by the Trial Court. (See R. p. 240, lines 8-12; R. p. 242, lines 4-17) Accordingly and as Defendant's request was both timely made and involved a controlling legal principal of the case, the refusal to charge constituted reversible error. Moreover, this error was

clearly prejudicial to Defendant as it formed the basis for the Trial Court's application of the "Thirteenth Juror" doctrine upon a finding that "the evidence [did] not justify the verdict." (R. p. 50, lines 15-17; R. p. 51, lines 10-12) Had the jury been charged on sudden incapacity, loss of consciousness and/or unavoidable accident, there would have been absolutely no basis for the grant of a new trial absolute.

Accordingly and based upon the foregoing, it was reversible error for the Trial Court to grant Plaintiffs' Motion for Directed Verdict—thereby striking the defense of sudden incapacity—and in refusing to charge the jury on such defense.

II. THE TRIAL COURT ERRED IN ITS GRANT OF NEW TRIAL BASED ON THE THIRTEENTH JUROR DOCTRINE BECAUSE THE COURT'S REASONING WAS PERMEATED WITH THE MISAPPLICATION OF THE SUDDEN INCAPACITY DEFENSE.

"[T]he thirteenth juror doctrine is a vehicle by which the trial court may take its own view of the evidence and grant a new trial if it disagrees with the jury's verdict." RFT Mgmt. Co., LLC v. Tinsley & Adams, LLP, 399 S.C. 322, 334, 732 S.E.2d 166, 172 (2012)(citing Folkens v. Hunt, 300 S.C. 251, 387 S.E.2d 265 (1990)). "This is also called granting a new trial upon the facts...[and t]he effect is the same as if the jury had failed to reach a verdict." Id.

"The granting of a new trial upon the facts is not the equivalent of granting a directed verdict." Id. (citing McEntire v. Mooreguard Exterminating Servs., Inc., 353 S.C. 629, 632, 578 S.E.2d 746, 748 (Ct. App. 2003)). "The question of whether the evidence is legally sufficient to sustain a verdict, a question of law [applicable to a directed verdict motion], is distinguishable from the question [applicable to a motion for new trial upon the facts] of whether a fair preponderance of the evidence supports a verdict, which is a matter involving the exercise of discretion." Id. "Stated another way,

a party's evidence might make a case one for the jury, but the evidence might be so outweighed by the countervailing evidence that, in the exercise of its discretion, a trial court could choose to set aside the verdict under the thirteenth juror doctrine." Id.

In ruling on the Post-trial Motions, the Trial Court—without providing its reasoning for doing so[3]—was "convinced that a new trial is necessitated on the basis of the facts in the case...[a]nd...that justice has not prevailed in this case." (R. p. 51, lines 16-19.) The Trial Court's Order Granting New Trial Absolute on Liability and Damages further provided that

> it is the opinion of this Court that a new trial absolute is warranted and should be granted. The law is clear that a trial court, pursuant to the thirteenth juror doctrine, may grant a new trial absolute when the evidence does not justify the verdict...the trial court must only concern itself with whether the evidence justifies the verdicts and cannot second guess the jury's actions or motives for its verdicts.

(R. pp. 3-4)

It may be clearly garnered from the transcript that the Trial Court's application of the "Thirteenth Juror" doctrine and grant of new trial absolute was based upon a finding that "the evidence [did] not justify the verdict." (See R. p. 49, line 8-p. 51, line 21) Plaintiffs' counsel unequivocally argued this during the post-trial motion hearing, stating that

> the only relevant evidence—and once you take out the sudden unforeseeable incapacity to operate a vehicle, once that's gone, the only verdict a reasonable jury could reach was in favor of the Plaintiffs on the issue of liability.

(See R. p. 43, lines 7-11)

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[3] Defendant acknowledges that the Trial Court is not required to provide a recitation of its reasoning for evoking the "Thirteenth Juror" doctrine.

Because—as argued in Section 1, above—it was error for the Trial Court to strike Defendant's sudden incapacity defense and refuse to charge the jury on the same, it was likewise reversible error to evoke the "Thirteenth Juror" doctrine and grant a new trial absolute on the basis that "the evidence [did] not justify the verdict." Had the directed verdict motion been denied and the jury properly charged on the law as supported by the evidence submitted at trial, there certainly would have been evidence upon which the jury could have returned a defense verdict.[4]

As such, the grant of a new trial was controlled by an error of law and the Trial Court should be reversed.

CONCLUSION

Accordingly, it is clear that the Trial Court should not have granted the directed verdict as to the defense of sudden incapacity, and that this error led to the granting of the new trial based on the thirteenth juror doctrine. Therefore, this honorable Court should reverse the decision of the Trial Court granting a new trial absolute and reinstate the jury's verdict for the Defendant. In the alternative, this Court should reverse the Trial Court's striking of the sudden incapacity defense and remand the case to the Trial Court for further proceedings based on the Motion for New Trial.

[4] Notwithstanding the issue of striking Appellant's defense of sudden incapacity, Appellant maintains that the jury was correct in finding for the defense on the basis that Plaintiffs' failed to meet their respective burdens of proof.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief and Final Reply Brief of Appellant comply with Rule 211(b) of the South Carolina Appellate Court Rules.

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PROOF OF SERVICE

The undersigned counsel for Appellant Dan M. Lafoy hereby certifies that on the 8th day of May, 2013, he caused to be served upon counsel for Respondents the **BRIEF OF APPELLANT and REPLY BRIEF OF APPELLANT** by United States mail, addressed to:

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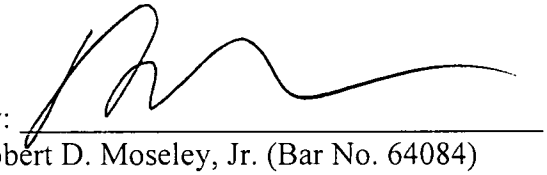
By: 

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