STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-9917

Rolando Santiago, as the Personal Representative of the Estate of Jose Hernandez-Arizmendi a/k/a Eduardo Gomez-Ortiz, ... Appellant

vs.

Chloe Engel, U.S. Group, Inc., Southern Concrete and Construction, Inc., Sanders Brothers Construction Company, Inc., J. Moore Electrical Contractors, Inc., and Charleston County, ... Defendants

of whom
Chloe Engel is ..... Respondent.

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Did the trial court err in denying Decedent's motion for new trial where the court refused to admit the coroner's report or the autopsy report during Decedent's cross-examination of defendant's expert witnesses?

STATEMENT OF THE CASE

On November 29, 2010, Rolando Santiago, as the Personal Representative of the Estate of Jose Hernandez-Arizmendi, a/k/a Eduardo Gomez-Ortiz ("Decedent"), brought an action against Chloe Engel ("Engel") as well as U.S. Group, Inc., Southern Concrete and Construction, Inc., Sanders Brothers Construction Company, Inc., and J. Moore Electical Contractors, Inc. (collectively "Contractors"). Decedent brought claims arising out of a fatal incident on December 27, 2009 wherein Decedent was killed when struck by a car driven by Engel after falling off of his bicycle while trying to avoid a hazard created by Contractors, who were working on the sidewalk area of the Wappoo Cut Bridge on Folly Road/Highway 171 in Charleston, South Carolina. Decedent asserted the Contractors were negligent in failing to warn of the construction work, failing to guard the construction site from use by pedestrians and others, and creating a hazardous condition with the sidewalk construction. Decedent alleged Engel was negligent in, among other things, operating her vehicle, failing to keep a proper lookout, and failing to take evasive measures to avoid hitting Decedent. Decedent sought actual and punitive damages for wrongful death and survival. (Complaint). In an amended complaint Decedent stated claims against the County of Charleston.

All defendants filed answers to the Amended Complaint. The parties thereafter engaged in extensive discovery. Prior to trial Decedent reached settlements with all defendants except for Engel.

The case proceeded to trial and on July 25, 2012, the jury returned its verdict finding Engel was not negligent or that any negligence was not the proximate cause of

Decedent's injuries. (Verdict Form). Decedent requested 10 days to file post-verdict motions but the court denied that request. Decedent moved for a new trial based upon an evidentiary ruling and the trial court denied that motion and entered a Form 4 order on July 30, 2012.

This appeal follows.

FACTS

James I. Middleton testified as an accident reconstruction expert for plaintiff. (Tr. p. 84, l. 13 - p. 87, l. 8). He reviewed the accident report, associated photographs, the Decedent's autopsy report, and the depositions of Ms. Engel, her passenger and three defense experts. (Tr. p. 87, l. 9 - p. 88, l. 12). The Court qualified him as an expert in the field of engineering and accident reconstruction. (Tr. p. 88, ll. 16-21).

Middleton testified in his opinion, both Decedent and Ms. Engel were traveling in the same direction, and Ms. Engel was operating her vehicle in the outside lane closest to the sidewalk. (Tr. p. 89, ll. 12-20; p. 92, l. 13 - p. 93, l. 10; p. 102, l. 17 - p. 103, l. 8). Decedent approached the "broken out" portion of the sidewalk (Tr. p. 90, ll. 9-13) and hit a small "lip," which threw him from the bicycle. (Tr. p. 93, l. 20 - p. 94, l. 22). Ms. Engel's vehicle struck Decedent without striking the bicycle. (Tr. p. 96, l. 3 - p. 98, l. 15). The car struck Decedent in head. (Tr. p. 99, ll. 6-13).

Middleton opined that Decedent "was in the process of getting up and was - - his right arm was down and he was turned somewhat lifted up like - - in other words ... basically on his hands and knees." (Tr. p. 103, l. 15 - p. 104, l. 3). The car was damaged on the bumper and the fender demonstrating the impact was "from the front of the vehicle towards the rear." (Tr. p. 104, ll. 16-25). The vehicle, a Jeep, has "several inches of ground clearance" so that Decedent could not have been lying down when he was hit or these portions of the car would not have been damaged. (Tr. p. 105, ll. 1-13; p. 106, l. 13 - p. 107, l. 7). Decedent's head could not have hit the ground and bounced high enough to cause the damage that the vehicle suffered. (Tr. p. 107, l. 8 - p. 110, l. 5).

Middleton read Decedent's autopsy report, which indicated the injuries were "pretty much from chest, torso, up." (Tr. p. 110, ll. 9-16). This was consistent with somebody being "struck" rather than "run over." (Tr. p. 110, ll. 17-20).

Decedent offered photographs of Decedent and Ms. Engel objected. (Tr. p. 110, l. 23 - p. 118, l. 4). The following colloquy took place out of the presence of the jury:

The Court: Well, the bottom line is that picture is not going to show a layperson whether he was hit or whether he was rolled over. All it's going to show is a bloody head.

Decedent: No. They said it was - - run over his chest. They said the wheel ran over his chest.

The Court: That's not what you just said - - I understand that part, but that's not what you're seeking to introduce that picture of his face or.

Decedent: Well, there - - is there a photo that shows like his - - there - - this one shows [his] face versus his chest. There's no significant injury from - -

The Court: Well, that's not true if he has internal injuries; correct?

Decedent: Well, he has minor internal injuries.

The Court: Do you have a doctor who's going to say whether it was major or minor?

Decedent: Well, the defense experts - -

The Court: They're not doctors. Are you going to have somebody who provided the forensic - - who's going to provide some forensic testimony about what his injuries were ?

Decedent: We don't have a doctor, no.

Engel: Just the autopsy report.

The Court: That can't come in. It's hearsay. It's an objective opinion. Who did the autopsy?

Engel: Somebody at MUSC.

Decedent: A Charleston guy.

Decedent: Yeah, at MUSC. They're relied on by all three of the defense witnesses. That's - -

The Court: Doesn't matter.

Decedent: - - really what we're - -

The Court: They can rely on them without a jury seeing them. So that doesn't make them admissible. Photographs are a whole different bowl of soup.

Decedent: Yes, ma'am. I don't disagree.

The Court: And a lot of these are cumulative. For example, these are all the same photographs.

* * *

The Court: - - what purpose would you be seeking to introduce that?

Decedent: In Charlotte Infinger's deposition testimony, as well as her statement at the time, she indicates - - as well as her recorded statement to the adjuster, she indicated that the person she saw was all one shape, one color * * * dark color, and that she - - that - - and because of that, that's why she believed he was traveling south, the same direction as the vehicle. We would like to show, for purposes of cross-examination, of the - -

Decedent: She actually said - - in a little more detail. She said, I didn't see his face and I would have expected to see his face but I saw all dark and all green.

Decedent: And the very white front of the hat we believe shows that it would have reflected in the headlights.

(Tr. p. 118, l. 6 - p. 122, l. 2).

The Court: Now, for what purpose would you be seeking to introduce Number

50?

Decedent: That the visible injuries are consistent with the visible damage of the car if he was in a kneeling position, which is what - - which is what Mr. Greene - - exactly what Mr. Greene testified to.

The Court: How does that show that without a forensic pathologist to say what the nature of his injuries are? All I see is a deceased face. I guess I've been looking at a whole lot of photographs for a whole lot of years and I've seen far more gruesome ones than these. I hate to have to admit it, but I have.

The only thing this shows me is a distended face, it doesn't - - with blood on it. It doesn't tell me how he was hit, where he was hit. You really would need whoever performed the autopsy to say what the nature of the injuries were and a forensic pathologist that can say how they were inflicted and what the trajectory was.

Decedent: Yeah, they could. Again, all the experts have used the pathologist's report. I don't know [defense counsel's] position on it, but we would - -

The Court: How are they going to use the pathologist's report?

Decedent: Each of them have used it as a business record that they relied upon it and said it's the type of - -

The Court: How are they going to use it for the basis of their opinion?

Decedent: Because the pathologist's report indicates findings, factual findings. For instance, he had a broken nose, he had a broken mandible, a broken maxilla. So those are - - each of them draws their, then, conclusion from that piece of fact.

* * *

The Court: It's uncontradicted that he suffered a significant injury to his head region and his torts; correct?

Engel: Correct.

* * *

The Court: The only way * * * the findings, the specific findings, of that forensic pathologist is going to come in is if he or she testifies. Those - - the others can testify as to the foundation of their opinions, but not subjective opinions.

Decedent: They can testify as to what opinions they drew based on - -

The Court: That is correct - -

Decedent: - - the pathologist.

The Court: - - but that doesn't [give] them the right to repeat somebody else's subjective opinions. When you start talking about doctors, it's a whole other category of testimony. So are you - - but certain things are objective, such as broken nose, broken jaw, broken - - those are not subjective.

Decedent: Findings, measurements.

(Tr. p. 124, l. 7 - p. 127, l. 9). The trial court ultimately permitted Decedent to use the autopsy photographs during Middleton's examination. (Tr. p. 132, ll. 3-12).

After the jury returned, Middleton testified the injuries depicted in the photographs were consistent with Decedent being struck in the chest by the bumper. (Tr. p. 147, ll. 12-24). Middleton also opined that Ms. Engel could have avoided the collision. (Tr. p. 147, l. 25 - p. 150, l. 23; p. 178, ll. 5-6; p. 179, ll. 3-13).

Richard Kimball testified that he had been retained as a defense expert. (Tr. p. 205, ll. 15-17; p. 210, ll. 8-11). He testified without objection as an accident reconstructionist. (Tr. p. 213, ll. 3-6). Mr. Kimball stated he believed the car's tire traversed the Decedent's entire body. (Tr. p. 213, l. 13 - p. 214, l. 2). He agreed that in his deposition he testified that if Decedent had been in the roadway for more than two seconds, Ms. Engel would have had an obligation to take some kind of evasive action.

(Tr. p. 215, l. 15 - p. 216, l. 8). He also opined that Decedent was in a sitting or kneeling position when he was hit by the right bumper. (Tr. p. 217, ll. 9-12). Mr. Kimball also opined that "there was no reaction on the part of the driver prior to the impact with the decedent...." (Tr. p. 223, ll. 4-7). Mr. Kimball stated he relied upon the pathologist's report in forming his opinions. (Tr. p. 217, ll. 21-23).

Michael Lamont testified for Ms. Engel. (R. p. 288). He was a licensed private investigator at the time of the trial. (Tr. p. 289, ll. 1-2). Mr. Lamont had been a police officer with the City of Charleston's Fatal Accident Construction Team (FACT) at the time of the incident in this case. (Tr. p. 289, ll. 8-25). He supervised two FACT teams. (Tr. p. 290, ll. 1-5). He was offered as an accident reconstruction expert without objection. (Tr. p. 293, ll. 12-16).

Mr. Lamont was in charge of the accident reconstruction team for the incident in this case and went to the scene that night. (Tr. p. 293, ll. 17-22; p. 294, ll. 15-17). Mr. Lamont described the activities he and other officers did to investigate the scene. (Tr. p. 294, l. 15 - p. 299, l. 3). He stated he was passionate about his investigations of car wrecks. (Tr. p. 300, ll. 13-15). He opined that Decedent was the sole cause of the collision. (Tr. p. 302, ll. 23-25; p. 306, ll. 1-5).

On cross-examination, Mr. Lamont agreed that a statement the driver and passenger gave at the scene indicated Decedent had fallen and was attempting to get up when he was struck. (Tr. p. 316, l. 8 - p. 317, l. 18). Decedent asked Mr. Lamont why was changed two and one-half years after the incident and he responded:

Well, I didn't change his opinion. We didn't have all the information that

> was there like, you know, I had left probably before the coroner's report got there and I wanted to know if his opinion - - with the coroner's report is it possible that he wasn't trying to make an attempt to sit up or at least, you know, maybe look up.

(Tr. p. 321, ll. 17-22). Mr. Lamont agreed that the autopsy was completed the day after the incident. (Tr. p. 323, ll. 5-7). Decedent asked Mr. Lamont "what did the coroner's report tell you that was different than the autopsy report?" to which he replied "I don't recall exactly." (Tr. p. 323, ll. 10-12).

Mr. Lamont was asked why he persuaded the investigating officer, Wilson, to change his opinion and he replied, "I asked him if his opinion would be different if he had spent some time with the coroner's report." (Tr. p.329, ll. 13-20). Mr. Lamont "wanted to know what he remembered and if this additional information would have been helpful to him." (Tr. p.330, ll. 1-4).

Decedent then asked Mr. Lamont if he had the autopsy report at the time of the incident and Mr. Lamont stated he did not think so and did not recall if he had access to it. (Tr. p.330, ll. 5-24). Decedent then produced the autopsy report but Ms. Engel objected because "it's not in evidence." (Tr. p.331, ll. 2-4). The Court responded, "It is not. You can allow him to use it to refresh his memory, if it formed the basis of his opinion, but you can't publish it to the jury." (Tr. p. 331, ll. 5-8). The Court added, "It's not in evidence and it contains subjective opinions." (Tr. p.331, ll. 10-11).

Mr. Lamont then agreed the autopsy report was done December 28, 2009, the day after the incident. (Tr. p.331, ll. 18-22). He also agreed that he thought "the coroner's report had more information for" him. (Tr. p.331, ll. 23-25). When asked what was in the

coroner's report that was so important to him, Mr. Lamont responded "I really can't interpret the coroner's report, because I'm not a pathologist, but it's necessary to have anything pertaining to this accident in the original case file." (Tr. p.332, ll. 1-6). Decedent then presented the coroner's report and asked Mr. Lamont "to find where it says anything that could change anyone's opinion about how this man was injured," and Ms. Engel objected. (Tr. p.333, 1-10). The Court ruled, "you need to establish that he relied on it in formulating his opinions." (Tr. p. 333, ll. 11-12).

The following colloquy then took place:

Decedent: Mr. Lamont, did you testify previously that the reason that you were delayed in getting back to Officer Wilson, instead of two and a half years earlier, was waiting for this report; correct?

Mr. Lamont: No. We just didn't have the report. And I just started doing some work on this a couple of months ago or three months ago, whenever it was. You know, earlier in the year.

Decedent: Well, let's go back to your report here.

Mr. Lamont: Okay. Do you want me to read this?

Decedent: No. Let's look at this here.

Mr. Lamont: Okay.

Decedent: You say right there: without further evidence, such as the coroner's report - - Your Honor, that's our basis right there.

The Court: Are you arguing with the Court?

Decedent: I'm sorry. I was - -

The Court: You need to propound a question to the witness.

Decedent: Your report right there says that's what you were waiting on was the evidence such as the coroner's report; correct?

Mr. Lamont: Uh-huh.

Decedent: That's what it says.

Mr. Lamont: Okay.

Decedent: May I publish, Your Honor, to the jury?

The Court: Is it in evidence?

Decedent: It's not in evidence, but I just want to publish. It's for demonstrative evidence. Well, we would move - - we would move it into evidence and see he's relied on it.

The Court: Any objections? Please show it to [defense counsel] - -

Engel: Objection.

The Court: - - what you're relying on.

Engel: Objection.

The Court: Look at the document first, please.

Engel: I know what the document is.

The Court: Then let me see the document. Under what rule of evidence, would this be admissible?

(Tr. p. 333, l. 18 - p. 335, l. 13). The Court then removed the jury from the courtroom and asked Ms. Engel's counsel to state the basis of the objection. (Tr. p. 335, ll. 21-23). Counsel responded:

> The basis of the objection is that this is Mr. Lamont's notes of a telephone conversation. The witness is on the stand. The notes have been shown to him. He's asked him to - - he's asked to explain it. He's explained it. And I don't believe his notes properly into - - would properly be admissible into evidence.

(Tr. p. 335, l. 24 - p. 336, l. 5). The Court ruled:

> The coroner's report is not going to be admissible. It wouldn't be admissible even if he relied on it as the foundation of his opinion. It's hearsay. Experts can rely on hearsay in forming the basis of their opinion. They can - - they can refer to it, they can rely on it, but it doesn't make it an admissible document. The rules provide that they can rely on hearsay in formulating the basis of an opinion. If you want to ask him questions along those lines as to how he formulated his opinion based on the coroner's report, you can. But it doesn't make the document admissible. It's still hearsay. It's the subjective opinions of someone else made outside of court, that cannot be cross-examined, that are offered for the truth.

(Tr. p. 336, ll. 9-25).

Charlotte Infinger was a passenger in the Engel vehicle that night. (Tr. p. 415; p. 416, ll. 11-13). Engel testified she heard Infinger scream "and I saw something out of the corner of my eye, and then I heard something hit the right front bumper, and I just stopped and tried to pull over." (Tr. p. 444, ll. 18-23; also p. 447, ll. 3-6).

At the close of the evidence the court denied Engel's motion for directed verdict. (Tr. p. 455, l. 8 - p. 456, l. 9). The parties then gave closing statements. Decedent argued to the jury, among other things, that Mr. Lamont was a fact witness who became a paid expert witness for the defense. (Tr. p. 519, ll. 2-16).

The case was submitted to the jury. About an hour and a half into deliberations, the jury sent the trial judge the following question:

> Your Honor, the jury requests to review the original written statements of the driver, the passenger, and the reporting officer, as well as the police report from the accident.

(Tr. p. 540, ll. 18-21). The trial judge responded:

> Madam Forelady, ladies and gentlemen of the jury, there are certain determinations that I make as the judge of the law concerning the admission of documents based on the rules of evidence and rules of procedure. All of the documents that you are entitled to review are with

you in the jury room. You are not to speculate or draw[] any inferences or conclusions as to why the document has not been sent in with you for ... purposes of your deliberations. If you desire to have any of the testimony replayed, please advise the bailiff and we will accommodate your request.

(Tr. p. 540, l. 22 - p. 541, l. 8). The judge sent this instruction to the jurors in writing. (Tr. p. 541, ll. 14-19; Court's Exh. No. 11). Thereafter the jury returned its verdict approximately 26 minutes later, finding Engel was either not negligent or any negligence was not the proximate cause of Decedent's injuries. (Tr. p. 543, ll. 3-7).

Decedent requested 10 days to make post-trial motions but the judge denied that request. Decedent therefore moved for a new trial regarding "the rulings on the inadmissibility of both the coroner's report and the autopsy report...." (Tr. p. 546, ll. 19-25). The trial judge denied the motion, stating:

> There's been a motion for a new trial based on a lack of admissibility of the coroner's report and the autopsy report. The Court does not find any merit to that argument, one. Neither one of them came within the rules of being admissible.
>
> In addition to that, based on the jury's questions, it does not seem that those were anything that they gave any particular attention to. It appears, as my perception - - from the beginning is that this came down to a credibility contest of whose version of events the jury believed and based on the questions that they asked during the course of their deliberations, my suspicion regarding that is reinforced and confirmed.
>
> The coroner's report: the plaintiffs were not precluded from asking about the substance of the coroner's report. The admissibility of the actual document was not permitted. The rules provide that an expert can testify based on hearsay. It does not provide that the documents themselves come into evidence. And there are certain limitations on that testimony. It has to be that the expert relied on the hearsay to form the foundation of their opinion, and none of the witnesses were restricted from testifying in that regard. They all testified regarding the foundation of their opinion, how they came to that opinion, and what they relied on in coming to that opinion.

In addition, there's nothing that precluded the plaintiffs from calling the coroner to testify, not calling the forensic pathologist that performed the autopsy to testify. Both are in Charleston, available, and could have been subpoenaed, and that was a tactical decision that you-all made in not doing that. So there are other means by which you could have - - even if they had testified, however, their reports still would not have been admissible, as they contain subjective opinions. And they were present, available to testify, and would have been subject to cross-examination.

But all of those are peripheral and superflouous issues. The major issue is whether your experts had the ability to testify regarding the information contained in those reports and the extent to which they relied on them in formulating the basis of their opinions. And they were allowed to do that.

Therefore, the Court finds, again, no merit in the motion for a new trial and therefore denies it.

(Tr. p. 547, l. 17 - p. 549, l. 14). The judge filed a Form 4 order on July 30, 2012, reflecting the denial of post-trial motions.

ARGUMENT

THE TRIAL COURT ERRED IN DENYING DECEDENT'S MOTION FOR NEW TRIAL WHERE THE COURT REFUSED TO ADMIT THE CORONER'S REPORT OR THE AUTOPSY REPORT DURING DECEDENT'S CROSS-EXAMINATION OF DEFENDANT'S EXPERT WITNESSES

The trial court denied Decedent's motion for a new trial based upon the trial court's exclusion of both the coroner's report and the autopsy report. This Court should reverse and remand for a new trial.

Expert evidence is governed primarily by the South Carolina Rules of Evidence. Rule 703, SCRE provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 705, SCRE provides:

> The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.

Under Rule 705, a cross-examiner is permitted "to ask the expert to reveal otherwise inadmissible underlying information to the jury." *State v. Slocumb*, 336 S.C. 619, 628, 521 S.E.2d 507, 512 (Ct. App. 1999) (citing 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 705.05 (Joseph M. McLaughlin ed., Matthew Bender 2d ed. 1999)). The *Slocumb* Court added:

> The scope of a cross-examiner's right under Rule 705 is best stated in McCormick's treatise on evidence:
>
> > On cross-examination in the process of probing the

> witness' qualifications, experience, bases, and assumptions opposing counsel may require the expert to disclose the facts, data, and opinions underlying the expert's opinion not previously disclosed. With respect to facts, data, or opinions forming the basis of the expert's opinion, disclosed on direct examination or during cross-examination, *the cross-examiner may explore whether, and if so how, the non-existence of any fact, data, or opinion or the existence of a contrary version of the fact, data, or opinion supported by the evidence, would affect the expert's opinion*. Similarly the expert may be cross-examined with respect to material reviewed by the expert but upon which the expert does not rely. Counsel is also permitted to test the knowledge, experience, and fairness of the expert by inquiring as to what changes of conditions would affect his opinion, and in conducting such an inquiry, subject to the requirements of Fed. R. Evid. 403, the cross-examiner is not limited to facts finding support in the record.
>
> 1 Kenneth S. Broun et al., *McCormick on Evidence* § 13, at 56-57 (John William Strong ed., 4th ed. 1992).

Slocumb, at 628, 521 S.E.2d at 512.

In *Slocumb*, the defendant was charged with a number of crimes. He presented the testimony of Dr. James Merikangas as an expert witness in neurology and psychiatry. In evaluating Slocumb, Dr. Merikangas ordered an MRI, a SPECT scan, and several blood tests on Slocumb. In addition to these test results, Dr. Merikangas reviewed numerous reports and records which included interviews with Slocumb's family members, DJJ psychiatric records, DJJ service notes and behavior reports, DJJ medication and medical records, State hospital evaluations, a report from Dr. James Evans, an expert in neuropsychology, and the notes and reports of two other professionals, Dr. Donald William Morgan and Dr. Donna Schwartz-Watts. He also interviewed Slocumb and

conducted a neurological examination.

Dr. Merikangas opined Slocumb had organic brain abnormalities as the result of a head injury he suffered as a child. He diagnosed Slocumb with a "chronic, long-standing" mental illness. As a result of this mental disease or defect, Dr. Merikangas believed Slocumb was legally insane at the time he committed the offenses for which he was on trial. He also stated Slocumb lacked sufficient mental capacity to conform his conduct to the requirements of the law. He attributed Slocumb's conduct in part to a withdrawal from medication Slocumb had been receiving for the treatment of his mental illness.

Dr. Merikangas disagreed with the opinions of Dr. Morgan, Dr. Schwartz-Watts, and Dr. Tiller, a doctor also on the team that evaluated Slocumb. Specifically, he disagreed with their opinion that Slocumb was sane at the time of the crime and that Slocumb was cyclothymic.

Over defense counsel's objection, the State cross-examined Dr. Merikangas concerning Slocumb's DJJ incident reports. Dr. Merikangas stated he had seen the documents prior to trial. After the assistant solicitor read excerpts from the reports, Dr. Merikangas testified this conduct was not aggressive sexual behavior. However, he also admitted some of these incidents were inappropriate and some were not normal.

On appeal, Slocumb argued the trial judge erred in allowing the DJJ incidents through the State's cross-examination of Dr. Merikangas. This Court reviewed Rules 703 and 705 and held:

> The DJJ incident reports comprised a significant segment of the records Dr. Merikangas reviewed in formulating his opinion. As his testimony indicated, he discounted the reports given they did not affect his

> opinion that Slocumb was insane at the time he committed the offenses. *By cross-examining Dr. Merikangas with these reports, the State was able to demonstrate that some of the underlying data used in reaching his opinion about Slocumb's mental state was directly contrary to or called into question that opinion.* Accordingly, cross-examination was proper to explore the basis for Dr. Merikangas's opinion, particularly where Slocumb relied on the defense of insanity. Therefore, *these reports were relevant to the jury's assessment of Dr. Merikangas's opinion.*

Slocumb, at 631-632, 521 S.E.2d at 513-514 (emphasis added).

In this case, the expert Lamont agreed that the reports prepared at the time of the incident (including the autopsy report) indicated Decedent had fallen and was getting up at the point Engel struck him. He then stated that the coroner's report contained more information that caused the investigating officer to change the report to indicate the impact was instantaneous and not avoidable. Decedent offered both the autopsy report and the coroner's report into evidence to demonstrate that Mr. Lamont's testimony was not believable – the autopsy report prepared at the time of the incident contained much more detailed information about Decedent's injuries than the coroner's report, and the jury should have been permitted to see the documents to assist it in evaluating Mr. Lamont's testimony.

Decedent's theory of the case was that he fell into the roadway, and was in the process of getting up when Engel struck him such that there was sufficient time for her to use evasive maneuvers to miss him. The defense was that the impact was instantaneous with the fall so that there was no time for Engel to react. Mr. Lamont was the supervisor of the investigating officers and, as such, carried a certain imprimatur of the government with his testimony. Mr. Lamont's testimony left the jury with the impression that the

coroner's report clarified the autopsy report, and Decedent should have been permitted to present the actual documents to the jury for it to decide the veracity of that testimony.

South Carolina's rule is identical to the Federal Rule. *See* Rule 705, SCRE, Note ("The rule is identical to the federal rule."). The Seventh Circuit Court of Appeals noted:

> Once an expert gives an opinion based upon inadmissible hearsay, the question whether the jury should be provided with the otherwise inadmissible information often arises. Rule 703 does not directly address this problem, nor does Rule 705. Courts considering this question have concluded that the inadmissible hearsay used by an expert may be admitted solely to illustrate and explain the expert's opinion. It is not otherwise admissible as evidence.

Nachtsheim v. Beech Aircraft Corp., 847 F.2d 1261, 1270 n. 12 (7th Cir. 1988) (citing American Bar Association, *Emerging Problems Under the Federal Rules of Evidence* 209 (1983)). See also *Henry v. Brenner*, 138 Ill. App.3d 609, 486 N.E.2d 934 (Ill. App. 1985) (affirming trial court's ruling that inadmissible hearsay used by expert could be admitted solely to illustrate and explain his opinion); *Primavera v. Celotex Corp.*, 415 Pa. Super. 41, 608 A.2d 515 (Pa. Super. 1992) (trial court properly permitted the testifying experts to rely on the disputed reports and properly allowed the jury to see the reports during deliberations).

The jury itself demonstrated it was interested in seeing these documents through the question it sent to the court. Its inability to compare the two documents deprived it of evidence essential to its evaluation of Mr. Lamont's testimony on the critical issue in this case – whether Engel had sufficient time to see Decedent and engage evasive maneuvers to avoid the impact.

The trial court ruled that the documents themselves were simply not admissible at

all. This ruling amounted to error as a matter of law because although the contents of the reports may have been hearsay, the reports were admissible for another reason that to establish the truth of the matters contained therein. Decedent should have been permitted to show the reports to the jury so that it could evaluate Mr. Lamont's testimony.

Trial courts are vested with broad discretion in the admission or exclusion of evidence. *Historic Charleston Holdings, LLC v. Mallon*, 381 S.C. 417, 434, 673 S.E.2d 448, 457 (2009) ("[t]he admission of evidence is a matter left to the discretion of the trial judge and will not be disturbed on appeal absent an abuse of discretion"). However, a failure to exercise discretion amounts to an abuse of that discretion. *Samples v. Mitchell*, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). *See also Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987) ("When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred."); *CEL Prods., LLC v. Rozelle*, 357 S.C. 125, 130, 591 S.E.2d 643, 645 (Ct. App.2004) ("When a trial judge is vested with discretion but his ruling reveals no discretion was in fact exercised, an error of law has occurred."); *Balloon Plantation v. Head Balloons*, 303 S.C. 152, 155, 399 S.E.2d 439, 441 (Ct. App.1990) (quoting *State v. Smith*, 276 S.C. 494, 498, 280 S.E.2d 200, 202 (1981) ("It is an equal abuse of discretion to refuse to exercise discretionary authority when it is warranted as it is to exercise the discretion improperly.")).

Even the trial court acknowledged the case involved competing versions of the events, and Mr. Lamont's credibility was a crucial point. The Court should reverse the denial of Decedent's new trial motion and should remand the matter for a new trial.

CONCLUSION

For the reasons stated this Court should reverse the trial court's order and should remand the matter for a new trial absolute.

Respectfully submitted,

June 3, 2013

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STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
Deadra L. Jefferson, Circuit Court Judge

Case No. 2010-CP-10-9917

Rolando Santiago, as the Personal Representative of the
Estate of Jose Hernandez-Arizmendi a/k/a Eduardo Gomez-Ortiz, ... Appellant

vs.

Chloe Engel, *et. al*, ... Defendants
of whom
Chloe Engel is ..... Respondent.

DESIGNATION OF MATTER
TO BE INCLUDED IN THE RECORD ON APPEAL

Appellant proposes the following be included in the Record on Appeal:

1. Form 4 Order of July 25, 2012, entered July 30, 2012;
2. Verdict Form of July 25, 2012;
3. Transcript of proceedings pp. 84-90, 92-94, 96-99, 102-122, 124-127, 132, 147-150, 178-179, 205, 210, 213-217, 223, 288-290, 293-300, 302, 306, 316-317, 321, 323, 329-336, 415-416, 444, 447, 455-456, 519, 540-541, 543, 546-549;
4. Complaint;
5. Court's Exh. No. 11;
6. Autopsy Report;
7. Coroner's Report.

I certify that this designation contains no matter which is irrelevant to this appeal.

June 3, 2013

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THE STATE OF SOUTH CAROLINA
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a/k/a Eduardo Gomez-Ortiz, ... Appellant,

vs.

Chloe Engel, U.S. Group, Inc., Southern
Concrete and Construction, Inc., Sanders Brothers
Construction Company, Inc., J. Moore Electrical
Contractors, Inc., and Charleston County, ... Defendants,

of whom
Chloe Engel is ..... Respondent.

PROOF OF SERVICE

The undersigned hereby certifies that on the date indicated below she served counsel for the Respondent with a copy of the *Initial Brief of Appellant and Designation of Matter to be Included in the Record on Appeal* by mailing copies of the same by United States Mail with first class postage prepaid to the following address:

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