THE STATE OF SOUTH CAROLINA
In the Court of Appeals

68965

APPEAL FROM ORANGEBURG COUNTY
Common Pleas Court
Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-38-1258

Aubrey Alexander.................................. Respondent

v.

South Carolina Department of Transportation......Appellant,

APPELLANT'S PETITION FOR REHEARING

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SC Court of Appeals

Pursuant to Rule 221, South Carolina Appellate Court Rules, (SCACR), Appellant, South Carolina Department of Transportation (SCDOT), petitions this Honorable Court for Rehearing. The bases for this Petition are as follows:

I. In affirming the Trial Court's denial of Motions for Directed Verdict and JNOV, the Court of Appeals has apparently overlooked or misapprehended that the Respondents presented no evidence that the omitted warning signs and/or left-rear flag, was a contributing proximate cause of the accident.

II. In affirming the Trial Court's denial of Motions for Directed Verdict and JNOV, the Court of Appeals has apparently overlooked or misapprehended that the Respondents presented no evidence of any duty owed to Respondents.

ARGUMENT

I. In affirming the Trial Court's denial of Motions for Directed Verdict and JNOV, the Court of Appeals has apparently overlooked or misapprehended that the Respondents presented no evidence that the omitted warning signs and/or left-rear flag, was a contributing proximate cause of the accident.

The Court of Appeals affirmed the trial court's denial of Appellant's directed verdict and JNOV motions, on the issue of whether or not Respondent presented any evidence that the omissions of warning devices were a proximate cause of the collision, saying: "a trial court's denial of a JNOV will only be reversed when there is no evidence to support the denial or when the denial is governed by an error of law", citing Keeter v. Alpine Towers, Int'l., Inc. 399 S.C. 179, 730 S.E.2d 890(Ct. App. 2012). Appellant respectfully asserts that the Keeter

condition for reversal was met in this case; that Respondent failed in its burden of presenting evidence that SCDOT's having not placed the advance signs "Mowing/Next 3 miles", was a proximate cause of the collision. There is no evidence in the record which can support the logical connection between the lack of "Mowing/Next 3 miles" roadside signs and Respondent's collision with the SCDOT mower. The testimony of respondent revealed he could see ahead about one-quarter of a mile . (R.p. 95, ll. 1 -10) and he had "pretty good visibility of the location where the mower was, even though it was within that cloud of dust".(R.p. 102, ll. 9 – 12). Ms. Patricia Walls, called as a witness for Respondent, was immediately behind the Respondent's vehicle, and testified that it appeared to her that Respondent was aware there was a mowing tractor in front of him (R. p. 52, ll. 6 – 8), and on the matter of visibility of the mower:

> Q: With him knowing that there was a mowing tractor in front of him creating a cloud of dust, what, what value would it be to having a sign a mile or two or three miles back saying, mowing ahead, what more information would get from the sign than from seeing the mower right in front of you?
> A: None. It was obviously there.

R. p. 52, ll. 9 – 15.

Ms. Walls further said "You couldn't miss it". R.p. 52, ll. 22, and acknowledged that it would have been easier to see the tractor than a little sign on the side of the road two or three miles earlier. R.p. 52, l. 23 – p. 53, l. 2.

Respondent similarly presented no evidence of a causal connection between the failure to observe the left-side red flag and the collision. The closest

Respondent came to relating the missing left-side flag to the collision is his speculation that if he had seen the flag, he didn't know what he would do, unless he would have slowed down and tried to miss it. (R.p. 77, ll. 13 – 16). He acknowledged, however, that the presence of the flag would make no difference because he would not have been able to see it or the back end of the mower because of the cloud of dust. (R.p.104, ll. 13 – 21).

Nowhere is there any evidence in the record which suggests that the Respondent would have acquired any more notice of the mowing operation by virtue of placement of the "Mowing/Next 3 miles" sign, than he already had through his own visual observation. Nor is there any evidence that presence of the left-side red flag would have made any difference in the outcome. Respondent has presented this case as lack of notice; however, based on the trial testimony, it is apparent that Respondent had more than sufficient notice of the mowing operation, and chose to drive through the cloud of dust. Neither the roadside advance sign, nor the left-side red flag could have overcome that decision. In view of Respondent's lack of evidence to connect the omission of the road-side warning signs or the rear, left-side flag, to the collision, Appellant asserts that Keeter's requirement for reversal of directed verdict/JNOV (absence of any evidence to support the decision) have been met.

II. In affirming the Trial Court's denial of Motions for Directed Verdict and JNOV, the Court of Appeals has apparently overlooked or misapprehended that the Respondents presented no evidence of any duty owed to Respondents.

The Court of Appeals affirmed the trial court's denial of Appellant's directed verdict and JNOV motions, on the issue of whether or not Respondent presented evidence of the applicable standard of care, saying: "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or *a defendant's own policies and guidelines",* citing Madison ex rel. Bryant, 371 S.C. 123, 638 S.E.2d 650 (2006).

Appellant respectfully asserts that, notwithstanding the Madison reference to establishing a standard of care by a defendant's own policies, and Respondent's introduction of Appellant's Vegetation Management Guidelines (Exhibit P-1, R.p. 303 – 344), the Respondent has not established the standard for the mower's encroachment over the edge of paving on highways such as Highway 451 in this case. The relevant portion of the Guidelines states: "Mowing operations on the interstate should be conducted such that equipment does not encroach upon the travelway. On other roads, encroachment on the travelway should be held to the minimum possible to satisfactorily accomplish mowing". (R.p. 310).

While this statement of SCDOT's own Guidelines furnishes a partial description regarding the mower's encroachment, it does not quantify the maximum acceptable encroachment, but leaves this as a judgment call for the operator. It merely requires that the encroachment be kept at a minimum, to sufficiently accomplish the mowing, without establishing a specific dimension for overlap. Respondent called no witness to describe the proper method for grass-

cutting on highway shoulders, nor to identify the actual encroachment at the time of the collision as inconsistent with or in excess of that contemplated by the Guidelines.

Respondent's only effort to define the applicable standard of care as to mower encroachment was the above-described portion of the Vegetation Management Guidelines. Because the SCDOT Guidelines only describe the need for exercise of judgment by the operator under prevailing circumstances, it was incumbent on Respondent to present evidence of that dimension which would be the minimum encroachment to satisfactorily accomplish mowing.

CONCLUSION

Appellant respectfully urges the Court to reconsider its opinion of June 19, 2013, by which the trial court's denial of SCDOT's motions for directed verdict and JNOV. With respect to proximate causation, there is no evidence upon which it could be found that the lack of the "Mowing/Next 3 miles" sign contributed to causing Respondent's collision. Similarly, there is also a lack of evidence from which it could be concluded that the unobserved left-side red flag was a part of the causal chain of the collision. To the contrary, the evidence demonstrates that Respondent possessed more than sufficient notice of the mower directly ahead of him, when he consciously drove into the dust cloud.

On the matter of defining the duty to be observed by SCDOT for its mowing operation, Respondent's reliance on the passage from the Vegetation Management Guidelines only partially describes the duty. Omitted from the Respondent's presentation is that specific dimension of permissible encroachment for the circumstances at the location of the collision. Without that particular information, SCDOT's duty has not sufficiently been established.

For these reasons, Appellant respectfully requests that this Court rehear and reconsider the decision.

Respectfully,

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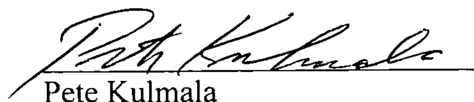

Pete Kulmala
ATTORNEY FOR APPELLANT

July 3, 2013
Barnwell, South Carolina

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PROOF OF SERVICE

I certify that I have served Appellant's Petition for Rehearing on Respondent's Counsel, C. Bradley Hutto and Paul Tinkler, by depositing a copy in the United States Mail, Postage prepaid, on July 3, 2013, addressed as follows:

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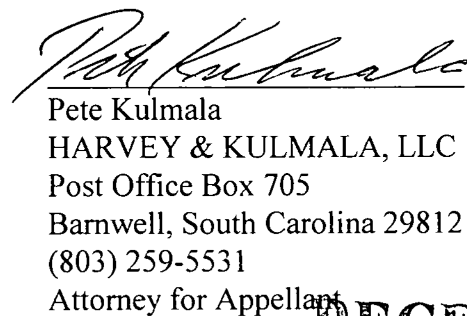

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