THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley Price, Circuit Court Judge

Unpublished Opinion No. 2023-UP-177 (S.C. Ct. App. filed May 11, 2023)

John Mayers, Petitioner,

v.

Konan Henthorn, Respondent.

PETITION FOR A WRIT OF CERTIORARI

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The Petitioner, John Mayers, respectfully submits this Petition for Writ of Certiorari under Rule 242, SCACR.

QUESTIONS PRESENTED FOR REVIEW

I. Did the trial court err in admitting (1) an unattributed, prejudicial medical note and (2) evidence and testimony of beer cans at the crash scene?

STATEMENT OF THE CASE

While driving his black Mustang on May 17, 2016, Respondent Konan Henthorn rear-ended bicyclist John "Chad" Mayers and seriously injured him. (R. p. 125, lines 8-18; p. 230, line 11-p. 233, line 12). During the subsequent trial, on February 19–20, 2020, (R. p. 71), the trial court made the evidentiary decisions that underlie this appeal.

Firstly, the court denied Mayers' motion to exclude certain medical records, including the prejudicial statement, "Patient drank approximately two 24-ounce beers." (R. p. 156, line 14-p. 159, line 13).[1] The court held that the statement fell under a hearsay exception: "[I]t's for diagnostic purposes because of course if you've been drinking alcohol you cannot go under anesthesia . . . I know that's exactly why they noted that for the [medical] records." (R. p. 156, lines 15-21). Shortly afterwards, the court reaffirmed that although the information proved unnecessary for treatment, it still fell under the hearsay exception as a statement for diagnostic purposes. (R. p. 157, line 8-p. 158, line 1).

The court also held that the statement passed the Rule 403, SCRE balancing test. The statement was "more probative than prejudicial" "for contributory negligence purposes," the court

[1] Apparently, this part of the record was inadvertently omitted from the Record on Appeal. Respondent's Motion to Supplement Record on Appeal claims to correct this error; however, the page included with the motion was evidently not the portion presented to the trial court, because that portion referred to the plaintiff as female. (R. p. 45, lines 19-25; p. 158, lines 12-19). Thus, this Petition relies on the wording from the transcript.

decided, given that "the on-scene nurse" was "going to indicate that [Mayers] smelled of alcohol"; that there were "two beer cans at the scene"; and that testimony indicated that Mayers "was wobbly." (R. p. 156, line 22-p. 157, line 3).

In making these holdings, the court failed to recognize that Defendant had not established who actually made the statement, or whether it was ever made at all. The court also glossed over the medical records' panoply of errors. The page that referenced the beers also called Mayers a female and a pedestrian, (R. p. 45, lines 17-25; p. 158, lines 12-19); other parts of the records called him "Platinum Doe" and said that he was one-hundred-and-five years old. (R. p. 263, lines 13-18). Meanwhile, the prejudicial statement itself appeared in a note that also said the case "present[ed] as auto versus pedestrian"; "Patient ha[d] obvious deformity to his upper right arm"; "Patient . . . ha[d] blood coming from his head"; and "Patient report[ed] that his pain [was] in his upper right arm but [said] he [was] in shock." (R. p. 45, line 13-p. 46, line 6).

Secondly, the court denied Mayers' motion to exclude evidence (including pictures) of unopened beer cans at the crash scene. (R. p. 106, line 11-p. 110, line 6; R. p. 180, line 17-p. 182, line 13). The court specifically held that the pictures were "more probative than prejudicial." (R. p. 182, lines 9-10).

In reaching this decision, the court apparently relied on additional evidence of impairment. (R. p. 106, line 11-p. 110, line 6). But that evidence is less conclusive than a first look may suggest. The court made its decisions during the first witness' testimony, and even at that point, the witness—Respondent—had agreed that Mayers' apparent "wobble" was normal, given that Mayers was twisting back to look over his shoulder. (R. p. 142, line 21-p. 143, line 6). Respondent had testified, too, that the weather was bad: not only was it "drizzl[ing]" at the time of the collision,

but it had also rained "for a couple of hours" prior. A wet surface presumably affects bicycling conditions.

Subsequent evidence confirmed that the court's initial decisions were premature—and incorrect. The beer cans at the scene were full (except for spillage where at least one can burst open); therefore, the cans themselves were not evidence of any consumption on Mayers' part. (R. p. 184, line 6-p. 185, line 7; p. 199, lines 18-25; p. 219, lines 6-9; p. 271, lines 8-15). In addition, Mayers clarified that any "wobbl[ing]" was due to pressure needed to keep the bicycle upright. (R. p. 228, lines 13-18). This issue presumably arose from wet (and possibly uneven) terrain; not only did Respondent testify to the foul weather, but another witness also testified that there was "a moderate rain," (R. p. 212, lines 10-15), and yet another testified that "[i]t was raining pretty hard," (R. p. 266, lines 7-8).

Furthermore, although the "on-scene nurse" (a bystander who happened to be a registered nurse, (R. p. 265, lines 17-21)) said she smelled alcohol on Mayers' breath, (R. p. 275, lines 9-23), she later clarified that she could not be sure the smell did not come from broken beer cans, (R. p. 277, lines 1-7).[2]

Finally, Mayers testified that he neither drank nor told ER personnel that he drank that day. (R. p. 229, lines 5-6; p. 256, lines 14-21; p. 263, lines 1-9). Respondent did not offer any testimony from ER personnel about the source of the information in the note.

Despite the slender evidence against Mayers, Respondent repeatedly elicited testimony on these prejudicial issues and then hammered the point home in closing. (R. p. 334, lines 17-25).

[2] Another witness provided similar testimony and a similar clarification. (R. p. 218, line 22-p. 219, line 3; p. 221, lines 10-21).

Ultimately, the jury found Respondent not negligent and returned a defense verdict. (R. p. 362, lines 2-7). The Court of Appeals heard oral argument in March 2023, affirmed the judgment on May 11, 2023, and denied Mayers' Petition for Rehearing on June 8, 2023.

ARGUMENT

I. Standard of Review

This Court reviews a trial court's evidentiary rulings for abuse of discretion; it may reverse such rulings if the trial court "clearly abused its discretion and the objecting party was prejudiced by the decision[s]." *MacKenzie v. C&B Logging*, 436 S.C. 122, 128, 871 S.E.2d 185, 188–89 (Ct. App. 2022) (quoting *Proctor v. Dep't of Health & Envtl. Control*, 368 S.C. 279, 313, 628 S.E.2d 496, 514 (Ct. App. 2006)). The objecting party is prejudiced if "there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005) (citations omitted).

II. The trial court erred in admitting (1) a prejudicial, unattributed medical note and (2) evidence of beer cans at the crash scene.

A. The note and the evidence of unopened beer cans were irrelevant.

The Uniform Act Regulating Traffic on Highways (Title 56, Chapter 5 of our legislative code) regulates both motor-vehicle operators and bicyclists. Although one section of that chapter, S.C. Code Ann. § 56-5-2930, establishes criminal penalties for "driv[ing] a motor vehicle" under the influence of alcohol or drugs, the chapter contains no corresponding duties or penalties for cycling under the influence. Therefore, bicyclists have no duty not to drink and ride. *Cf. Mayes v. Paxton*, 313 S.C. 109, 116, 437 S.E.2d 66, 70 (1993) (citations omitted) (finding that the plaintiff's "failure to wear a helmet [did] not constitute contributory negligence" where "the Legislature has enacted a statute requiring the use of helmets and has specifically elected not to extend that requirement to motorcyclists twenty-one or older").

S.C. Code Ann. § 56-5-3420, which states that a bicyclist "is subject to all of the duties applicable to the driver of a vehicle by this chapter, except . . . as to those provisions of this chapter which by their nature can have no application," is not to the contrary. The chapter teems with references to the duties required of "vehicle" drivers; by contrast, relatively few provisions refer to "motor vehicle" drivers. Even Article 23, which concerns "Reckless Homicide; Reckless Driving; Driving While Under the Influence of Intoxicating Liquor, Drugs or Narcotics," contains provisions that refer solely to "vehicles," not to "motor vehicles." *See* S.C. Code Ann. § 56-5-2910, -2920. A bicycle is not a motor vehicle. *See* S.C. Code Ann. § 56-5-160 ("A bicycle is a device propelled solely by pedals . . . ."). Because S.C. Code Ann. § 56-5-2930, which prohibits driving under the influence, refers specifically and solely to motor vehicles, the "provision . . . by [its] nature can have no application" to bicyclists.

And because bicyclists have no duty not to drink and ride, evidence suggesting alcohol consumption is irrelevant—at least without additional evidence of impairment. *See Kennedy v. Griffin*, 358 S.C. 122, 128–29, 595 S.E.2d 248, 251 (Ct. App. 2004) (holding that the trial court erred in admitting the driver's positive marijuana blood test without further evidence of the driver's impairment, because "evidence of the mere presence of marijuana . . . could mislead the jury." *Id.* at 128.

Here, the Court of Appeals found "sufficient evidence of impairment" where "there was testimony Mayers was operating his bicycle erratically" and two "witnesses said Mayers' breath smelled of alcohol." However, that evidence was inconclusive at best. Mayers did indeed wobble on his bicycle—when (as Respondent admitted) he glanced over his shoulder while operating a bicycle on wet terrain. Meanwhile, the "smell[] of alcohol" could easily have resulted from the broken beer cans.

Without conclusive additional evidence of impairment, the alcohol-related evidence was irrelevant and inadmissible. *See* Rule 401, SCRE (" 'Relevant evidence'" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more . . . or less probable . . . ."); Rule 402, SCRE ("Evidence which is not relevant is inadmissible."). Thus, this Court should reverse the trial court's decision to admit the medical note and the evidence of unopened beer cans.

Even if the additional evidence of impairment was not only conclusive, but also sufficient to make certain alcohol-related evidence relevant, it does not make the pictures of and references to ***unopened*** beer cans relevant.[3] Those pictures and references do not make Mayers' comparative negligence any more or less probable. Unopened beer cans may suggest an intention to imbibe in the near future, but—especially when no evidence indicates that the cans are part of an unfinished pack—such cans (unlike open, partially empty cans) reveal nothing about past alcohol consumption.

In short, the evidence of unopened beer cans has nary a shred of probative value for the comparative-negligence issue. Nonetheless, the Court of Appeals held that the trial court did not err in admitting that evidence where there was (in the Court's view) additional evidence of impairment.

In drawing this conclusion, the Court of Appeals relied on *Kennedy v. Griffin*'s key holding: that "evidence of the mere presence of [an intoxicant], without further indication of impairment, should generally be excluded because of its tendency to mislead the jury," 358 S.C. at 128–29, 595 S.E.2d at 251. But this holding only implies a court may, at times, may admit

[3] The cans could be relevant for one, and only one, reason: to show that Mayers smelled of alcohol because the contents of a broken can spilled on him. But that is not at issue here.

evidence of an intoxicant's mere presence when there is "further evidence of impairment." It does not even hint that a court ***must*** do so.

Additional evidence of impairment can illuminate whether the relevant intoxicant was "mere[ly] present" in a driver's body actually caused the crash. In *Kennedy*, for example, "further evidence of impairment" suggested that marijuana contributed to the accident. Similarly, in *Lee v. Bunch*, such evidence complemented the driver's blood-alcohol level and established that alcohol was not merely present in the driver's body, but instead contributed to the accident. 373 S.C. 654, 658–60, 647 S.E.2d 197, 199–200 (2007).

However, where (as here) the intoxicant was found outside the driver's body, the connection between "mere presence" and further evidence of impairment snaps apart. Absent this connection, evidence of impairment cannot add probative value to evidence of presence. Any suggestion that an unopened alcohol container, like a high blood-alcohol level, can contribute to an accident by its mere presence is a suggestion that beggars belief. Thus, evidence of unopened alcohol containers is irrelevant, no matter what other evidence of impairment the record unveils.

Because evidence of the beer cans at the scene was irrelevant, the trial court abused its discretion in admitting it. When the Court of Appeals failed to call the trial court to task for this abuse, its decision conflicted with cases including its own prior decision in *Kennedy*, and this Court's decision in *Lee*. Therefore, this Court should address that conflict.

B. Even if the medical note was relevant, it was inadmissible hearsay.

Suppose for a moment that the medical note was relevant. Even then, the trial court erred in admitting the statement, "Patient drank approximately two 24 ounce beers today," under Rule 803(4), SCRE.[4]

"Statements made for purposes of medical diagnosis or treatment are exempt from the rule against hearsay because of their general inherent trustworthiness: no sensible person genuinely seeking a doctor's help would speak falsely about his perception of his condition," *Glinyanay v. Tobias*, 436 S.C. 137, 145–46, 871 S.E.2d 193, 198 (Ct. App. 2022). Here, there is no assurance that the prejudicial statement conveyed Mayers' "perception of his condition." The statement was part of a medical note containing several other statements, some of which could only be the writer's physical observation (i.e., "obvious deformity to his upper right arm" and "blood coming from his head"), and one of which actually referenced what Mayers "report[ed]" and "[said]." The writer clearly knew how to attribute a statement to a patient—but he or she did not attribute the statement about beers to Mayers. This omission leaves the statement's attribution in doubt. It may even suggest that the comment had another source (perhaps personnel who observed the cans on the scene, which would remove it from the hearsay exception).

Dellenbach v. Robinson, from the Ohio Court of Appeals, is on point. In *Dellenbach*, the defendant argued that certain medical records were admissible under Ohio's Rule of Evidence 803(4).[5] 95 Ohio App. 3d 358, 370, 642 N.E.2d 638, 645 (1993). However, in its well-reasoned

[4] Rule 803(4)'s hearsay exception permits "[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

[5] Identical in pertinent part to Rule 803(4), SCRE.

opinion, the Ohio Court of Appeals held that the records were inadmissible hearsay where the plaintiff denied the statement in question (and other statements in the records) and where "[t]he information on the records was recorded not by the plaintiff but, rather, by an unknown third party" who "did not identify statements made by the plaintiff." *Id.* at 368–70, 642 N.E.2d at 644–45.

Here, Mayers denied the statement about the beer, and the information was recorded by an unknown third party who did not attribute that statement to anyone (although he or she clearly knew how to identify a patient's statement). Therefore, the statement was inadmissible hearsay under *Dellenbach*, which accords with *Glinyanay's* commonsensical explanation of the Rule 803(4) exception's purpose.

As an aside, even if the statement fell within the exception, the trial court let defense counsel use an improper mechanism to introduce it.[6] "It is improper to cross-examine in a way that requires a witness to attack another witness's credibility." *State v. Benning*, 338 S.C. 59, 63–64, 524 S.E.2d 852, 855 (Ct. App. 1999). Here, defense counsel's cross-examination required Mayers to attack the credibility of the declarant (presumably a person involved in Mayers' medical treatment) and was therefore improper.

South Carolina courts have not yet addressed the question of whether an unattributed medical note falls under the Rule 803(4) exception. However, this question implicates key public-policy concerns. In admitting prejudicial statements, Rule 803(4) relies on a patient's self-interest in seeking medical care, but when—as here—the statement in question has neither express nor implied attribution, that foundation crumbles. Therefore, the Court should address this novel issue of law.

[6] Mayers raised this argument in his brief, but (as mentioned in the Petition for Rehearing) the Court of Appeals did not address it.

C. Even if the medical note and the evidence of unopened beer cans were relevant and otherwise admissible, the trial court erred in holding that they passed the Rule 403, SCRE balancing test.

Even if evidence is relevant, Rule 403, SCRE may still defeat admissibility if "the danger of unfair prejudice . . . or misleading the jury" "substantially outweigh[s]" probative value.

Three cases, including *Kennedy* and *Lee*, shed light on how much probative value may be necessary to survive Rule 403. In *Kennedy*, the Court of Appeals held that the trial court erred in admitting a positive marijuana blood test where "the test did not measure the quantity of marijuana in [the plaintiff's] system or how recently [the] plaintiff had been exposed to marijuana"; "no evidence . . . indicated whether the marijuana was of such a level as to impair [the plaintiff's] judgment"; "[n]o marijuana was found in or near [the plaintiff's] truck and there was no testimony that [the plaintiff] smelled of marijuana"; and "[a]lthough witnesses noticed that [the plaintiff] delayed in applying his brakes, [his] actions did not necessarily suggest that he was driving under an impairment." 358 S.C. at 128–29, 595 S.E.2d at 251. As noted above, the Court held that "[u]nder these circumstances, evidence of the mere presence of marijuana" in the plaintiff's body, "without further indication of impairment, could mislead the jury." *Id.* at 128.

Several years later, this Court held evidence of alcohol consumption admissible where the plaintiff "admitted drinking shortly before the accident"; where expert evidence, based on a blood test, showed that the plaintiff's blood alcohol level was high enough to "negatively affect[] [the plaintiff's] judgment and his ability to multi-task, thus impairing his motorcycle driving skills"; and where the plaintiff was speeding and "the impact occurred left of the center line." *Lee*, 373 S.C. at 658–59, 647 S.E.2d at 199–200.

Then, in *Johnson v. Horry County Solid Waste Authority*, the Court of Appeals examined a case where the facts fell "between *Lee* and *Kennedy*." 389 S.C. 528, 534–36, 698 S.E.2d 835, 838–39 (Ct. App. 2010). Specifically, there was "more corroborating evidence than in *Kennedy*"

where the toxicologist's "deposition testimony indicated Decedent had ingested marijuana and cocaine within hours of her death" and had a "blood alcohol level . . . well in excess of the limit for driving under the influence"; where "Decedent's ex-husband testified she was at a bar from approximately midnight until 4 a.m. the night of the accident"; where a police officer testified "that the circumstances of" the first part of the "accident indicated it occurred because [the decedent] was intoxicated or possibly fatigued"; and where an expert "placed Decedent at least partially in the road at the time of impact." *Id.* at 535–36, 698 S.E.2d at 839.

However, in *Johnson*, "there [was] no 'smoking gun' like in *Lee*, when the accident inarguably occurred to the left of the center line"; there was "no expert testimony regarding how [the decedent's] judgment would have been impaired"; and "[a]lmost all the expert testimony placed Decedent within the safe zone at the time of impact." *Id.* at 536, 698 S.E.2d at 839. Therefore, the evidence in *Johnson* was "substantially more prejudicial than probative" and thus inadmissible. *Johnson*, 389 S.C. at 534–36, 698 S.E.2d at 838–39.

Here, assuming *arguendo* that in the problematic pieces of evidence are relevant and otherwise admissible, the scenario is much like *Johnson*: the facts lie between *Kennedy* and *Lee*. The scene smelled of alcohol, and testimony also suggested that Mayers' breath smelled of alcohol; the medical record states "Patient drank approximately 2 24-ounce beers"; and Mayers appeared to "wobble" on his bike.

At the same time, none of these issues constituted an "inarguabl[e]" "smoking gun." No one was sure whether the smell came from Mayers' breath or from a broken beer can. Mayers denied telling ER staff that he drank the beers; the medical records failed to attribute that statement to Mayers; and those same records contained other ludicrous errors. Respondent admitted that the "wobble" was not unusual for a bicyclist looking over his shoulder under normal circumstances,

and here, the terrain was doubtless very wet. Significantly, unlike *Kennedy*, *Lee*, or *Johnson*, there was no direct medical proof (such as a blood test) that alcohol was present inside Mayers' body. Under *Johnson*, then, the trial court abused its discretion in admitting the medical note and evidence of the beers. But the Court of Appeals failed to acknowledge this. In so doing, it created a conflict with its own prior decisions in *Kennedy* and *Johnson* and with this Court's decision in *Lee*. It is up to this Court to address and resolve that conflict.

D. The trial court's abuse of discretion prejudiced Mayers.

As the *Kennedy* line of cases suggests, evidence of alcohol consumption will almost certainly prejudice a jury and influence the verdict. Given widespread public awareness of "drunk driving," pictures of and references to alcohol at a crash scene are calculated to inflame a jury. The medical note is even more prejudicial, because jurors are likely to deem statements "inherent[ly] trustworthy" if they believe a patient made them for medical diagnosis or treatment. *See Glinyanay*, 436 S.C. at 145–46, 871 S.E.2d at 198.

Individually, these errors seriously prejudiced Mayers, in contravention of public policy and this Court's decision in *Lee*. Combined, they cost him his right to a fair trial. Now, they mandate reversal.

CONCLUSION

For the foregoing reasons and for any other reason that may be evident from the record, this Court should reverse the decision below and remand the case for a new trial.

CERTIFICATION

The undersigned hereby certifies that a petition for rehearing was made and finally ruled upon by the Court of Appeals.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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v.

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PROOF OF SERVICE

Pursuant to Rule 262(c), SCACR, I certify that I have served John Mayers' Petition for Writ of Certiorari on Respondent by Electronic Mail on July 3, 2023, addressed to Respondent's attorneys of record, William Joseph Horvath of Turner Padget Graham & Laney, PA, and Michael T. Coulter of Clarkson, Walsh & Coulter, P.A.

[SIGNATURE ON FOLLOWING PAGE]

Respectfully submitted,

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John Mayers v. Konan Henthorn - Petition for Writ of Certiorari

1 message

Angeline Larrivee <angeline.larrivee@akimlawfirm.com> Mon, Jul 3, 2023 at 1:14 PM
To: whorvath@turnerpadget.com, upstatecoulter@clarksonwalsh.com
Cc: Roy Willey <roy@akimlawfirm.com>, Eric Poulin <eric@akimlawfirm.com>, Tom Kyle <tom.kyle@poulinwilley.com>

Dear Mr. Horvath and Mr. Coulter:

We hope this letter finds you well. Enclosed for service upon you is John Mayers' Petition for a Writ of Certiorari.

Sincerely,
--

Angeline Larrivee
Staff Attorney
800-313-2546 Charleston
POULIN | WILLEY ANASTOPOULO

2 attachments

CL to OC - Petition for Cert.pdf
114K

Petition for Writ of Cert.pdf
256K

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*OF COUNSEL

July 3, 2023

Sent via E-Mail supctfilings@sccourts.org
The Honorable Patricia A. Howard
Clerk of Court, Supreme Court of South Carolina
Supreme Court of South Carolina
Post Office Box 11330
Columbia, SC 29211

RE: *John Mayers v. Konan Henthorn*
Appellate Case No.: 2020-000534

Dear Ms. Howard:

Attached for filing, please find John Mayers' Petition for a Writ of Certiorari and the associated Proof of Service. A check in the amount of $250.00 for the filing fee is being mailed. Please let us know if you need any additional information.

Sincerely,

s/Angeline Larrivee

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July 3, 2023

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RE: *John Mayers v. Konan Henthorn*
Appellate Case No.: 2020-000534

Dear Ms. Kitchings:

Attached for filing, please find John Mayers' Petition for a Writ of Certiorari and the associated Proof of Service. Please let us know if you need any additional information.

Sincerely,

s/Angeline Larrivee