THE STATE OF SOUTH CAROLINA
In the Supreme Court

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S.C. SUPREME COURT

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Honorable Bentley Price, Circuit Court Judge

Civil Action No. 2017-CP-10-5824
Appellate Case No.: 2020-000534

John Mayers Petitioner,

v.

Konan Henthorn Respondent.

RESPONDENT'S RETURN TO PETITION FOR A WRIT OF CERTIORARI

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II. STATEMENT OF THE CASE

This matter arises out of a motor vehicle accident that occurred on or about May 17, 2016 in which a bicycle being operated by Appellant, John Chad Mayers, collided with Respondent, Konan Henthorn's, automobile. On November 9, 2017, Mr. Mayers filed a lawsuit against Mr. Henthorn, seeking recovery for the bodily injuries he alleges he sustained as a result of the accident.

On December 11, 2017, counsel for Mr. Henthorn timely filed an Answer to the Summons and Complaint and specifically denied liability. [Answer]. On March 13, 2018, Mr. Henthorn was personally served with the Summons and Complaint and, despite having an attorney on record, was also served with Interrogatories and Requests for Production. [Affidavit of Konan Henthorn]. Mr. Henthorn was not personally served with Requests for Admissions ("RFAs"). [Affidavit of Konan Henthorn]. On November 30, 2018, counsel for Mr. Henthorn notified Mr. Mayers' counsel that they had not received any discovery requests, including the RFAs. [Trial Transcript 12: 1-3]. However, it was not until approximately two months later, on January 30, 2019, that counsel for Mr. Henthorn was served with RFAs seeking admissions of liability for the accident. [Plt.'s RFA]. On February 1, 2019, Mr. Henthorn, by way of counsel, timely responded to the RFAs. [Def. Resp. to Plt.'s RFA]. Consistent with his Answer, Mr. Henthorn denied liability for the accident in his responses to the RFA's. [Def. Resp. to Plt.'s RFA].

The matter was set for a jury trial before the Honorable Roger M. Young, Sr. on April 17, 2019. Judge Young heard pre-trial motions, including Mr. Mayers' motion alleging that the RFA's should be deemed admitted because they were allegedly personally served on Mr. Henthorn, prior to being served on Mr. Henthorn's counsel. Judge Young denied the motion, ruling that the RFAs were not deemed admitted as Rule 5(b)(1), SCRCP requires service be made on a represented party's attorney rather than the party himself and that the RFA's were timely answered once

properly served on Mr. Henthorn's counsel. Judge Young continued the trial allow for discovery on the contested issue of liability. [Transcript of April 17, 2019, Jury Trial, p. 37-38, lines 22-12].

On February 19, 2020, this matter came to a jury trial before the Honorable Bentley Price. On February 21, 2020, the jury found for Mr. Henthorn. [2.21.2020 Order]. The Court of Appeals heard oral argument, and affirmed the lower court's judgment on May 11, 2023, and denied Mayers' Petition for Rehearing on June 8, 2023.

III. STANDARD OF REVIEW

"The standard of review for an appeal of an action at law tried by a jury is restricted to corrections of errors of law. A factual finding of the jury will not be disturbed unless there is no evidence which reasonably supports the findings of the jury." Felder v. K-Mart Corp., 297 S.C. 446, 448, 377 S.E.2d 332, 333 (1989).

The admission of evidence is a matter left to the discretion of the trial judge. Carlyle v. Tuomey Hosp., 305 S.C. 187, 407 S.E.2d 630 (1991). Therefore, on appeal, an appellate court will not disturb a trial court's evidentiary rulings absent a clear abuse of discretion. R&G Constr., Inc. v. Lowcountry Reg'l Transp. Auth, 343 S.C. 424, 439, 540 S.E.2d 113, 121 (Ct. App. 2000); American Federal Bank v. No. 1 Main Joint Venture, 321 S.C. 169, 467 S.E.2d 439 (1996); "For this Court to reverse a case based on the admission of evidence, both error and prejudice must be shown." Seabrook Island Prop. Owners' Ass'n., 365 S.C. 234 at 242, 616 S.E.2d 431 at 435 (Ct. App. 2005). Generally, appellate courts will not set aside judgments due to insubstantial errors not affecting the result. State v. Sherard, 303 S.C. 172, 176, 399 S.E.2d 595, 597 (1991). The admission of improper evidence is harmless where the evidence is merely cumulative to other evidence. State v. Blackburn, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978).

IV. ARGUMENT

A. The Lower Court Did Not Abuse its Discretion and It Properly Allowed into Evidence the Testimony Regarding Beer Cans At the Scene of the Accident and References to the Beer Cans Contained in Medical Records Because the Evidence Was Relevant and Admissible.

Petitioner has continuously argued that the medical note containing information regarding Petitioner's alcohol consumption, as well as photographs of beer cans at the scene of the accident are not relevant because there is no statutory duty that requires bicyclists to not drink before operating a bicycle. However, what Petitioner fails to grasp is that liability has been denied throughout this case. Therefore, Respondent denied that he was at fault for the accident, and instead argued that it was the fault of Mr. Mayers that caused the collision. As such, any evidence or testimony presented at the trial of this case, which tended to show that Mr. Mayers had comparative fault for the accident, was relevant pursuant to Rules 401 and 402, South Carolina Rules of Evidence ("SCRE"). The admissibility of evidence lies within the sound discretion of the trial court whose decision will not be overturned on appeal absent a clear abuse of that discretion. Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996); Washington v. Whitaker, 317 S.C. 108, 451 S.E.2d 894 (1994); Carlyle v. Tuomey Hosp., 305 S.C. 187, 407 S.E.2d 630 (1991).

The trial court did not abuse its discretion in allowing Mr. Mayers' medical records and evidence of beer cans into evidence. These same issues of law were raised on appeal by Mr. Mayers, who argued that the trial court erred in its decision. However, the Court of Appeals correctly agreed with the trial court's decision, as well as the arguments raised in Mr. Henthorn's appellate brief. The Court of Appeals held that the evidence of beer cans at the scene of the accident were admissible because of the corroborating testimony from two witnesses that testified regarding Mr. Mayer's erratic behavior in operating his bicycle, as well as the smell of alcohol on his breath.

Further, the Court of Appeals correctly held that the medical records containing a statement regarding Mr. Mayers' alcohol intake was admissible under Rule 803(4), SCRE. Lastly, the Court of Appeals correctly held that there was sufficient evidence supporting the jury's determination.

1. Photographs of Beer Cans at the Accident Scene

Mr. Mayers argues that the photographs that depicted the beer cans found at the scene of the accident were not admissible in this case because there is no statutory duty that would require Mr. Mayers to not drink before operating a bicycle. [Pet. Brief p.4-5]. However, Section 56-5-3420, states that a person riding a bicycle on a roadway is subject to the same duties as a person driving a motor vehicle. (S.C. Code Section 56-5-3420). As such, a person riding a bicycle on a roadway has a duty to operate it safely on the roadways. (S.C. Code Section 56-5-3420). Whether or not Mr. Mayers was impaired at the time of the accident is relevant and therefore, should be considered by a jury when determining whether or not Mr. Mayers was breaching his duty to properly and safely operate a bicycle on the roadway.

Under South Carolina law, only relevant evidence that tends to prove or disprove the existence of a material fact is admissible. Jamison v. Ford Motor Co., 644 S.E.2d 755, 766 (S.C. Ct. App. 2007) (citing SCRE 401). "Evidence which is not relevant is not admissible." Doe v. Doe, 634 S.E.2d 51, 59 (S.C. Ct. App. 2006) (quoting SCRE 402). Evidence of the mere presence of alcohol without further indication of impairment should generally be excluded because of its tendency to mislead a jury. *See* Kennedy v. Griffin, 358 S.C. 122, 128–29, 595 S.E.2d 248, 251 (Ct. App. 2004). As Mr. Mayers points out, in Kennedy, the Court of Appeals held that the trial court erred in admitting a positive marijuana blood test because the evidence of the mere presence of marijuana in the plaintiff's body without any further indication of impairment could mislead a

jury. In its reasoning, the Court of Appeals stated that "no marijuana was found in or near [the plaintiff's] truck and there was no testimony that [the plaintiff] smelled of marijuana." Id. at 251.

Here, prior to the photographs or any testimony elicited regarding the beer cans, testimony had been given regarding Mr. Mayers appearing unsteady on his bicycle. Counsel for Mr. Mayers, chose to call Mr. Henthorn as his first witness to the stand. Upon direct examination and further on the cross-examination, Mr. Henthorn testified that he recalled observing Mr. Mayers "wobbling" on his bicycle before "abruptly" entering into Mr. Henthorn's lane of travel. [Trial Transcript, p. 72-73, lines 24-9 and p. 106-107, lines 3-4]. An eyewitness, Ms. Williams, testified that she observed Mr. Mayers unsteady while operating his bicycle in the median. [Trial transcript, p. 147, lines 4-17]. Ms. Williams also testified that at the scene of the accident she observed the beer cans and smelled alcohol on Mr. Mayers breath. [Trial Transcript, p.143, lines 10-19 and p. 148-149, lines 22-3]. Further, another eyewitness, Ms. Police, testified that she was kneeling down speaking to Mr. Mayers following the accident and clearly smelled alcohol on his breath. [Trial transcript, p. 204, lines 12-23].

Here, the lower court, in its sound discretion, and after hearing corroborating testimony, agreed that the photographs tended to prove that Mr. Mayers was impaired and not operating his bicycle safely on the road, which therefore, was relevant and admissible in order to show comparative fault on behalf of Mr. Mayers. In addition, the Court of Appeals, in its sound discretion, agreed with the lower court's reasoning, that two witnesses at trial testified about their interactions with Mr. Mayers shortly after the crash, which included smelling alcohol on his breath and observing Mr. Mayers operating his vehicle "erratically." [*See* Unpublished Opinion No. 2023-UP-177]. The Court of Appeals correctly held that the record contained sufficient evidence of impairment. Id.

"Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." (SCRE 403). Here, the lower court correctly found that the photographs of the beer cans found at the scene of the accident are, without a doubt, probative. The lower court also correctly found that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. This was upheld by the Court of Appeals.

2. The Medical Records

Petitioner argues that the medical note containing information regarding his alcohol consumption was not relevant and constituted as inadmissible hearsay. The lower court and the Court of Appeals, in its sound discretion, correctly found that the medical records, which stated, "Patient drank approximately 2-24 ounce beers", were relevant, and therefore, admissible in order to show comparative fault on behalf of Mr. Mayers. Additionally, the lower court did not abuse its discretion in finding the statement contained within the medical records was an exception to hearsay under SCRE 803(4), and therefore admissible.

SCRE 803 provides several hearsay exceptions, including "statements for purposes of medical diagnosis or treatment", which, does not require the declarant to be available as a witness. SCRE 803(4) allows for the admission of hearsay involving, "statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment."

This Court ruled in Todd v. Joyner that hearsay exception for statements for purposes of medical diagnosis or treatment applied to passenger's statements to physicians in passenger's

medical records, and thus statements were admissible in personal injury action arising from automobile accident. Todd v. Joyner (S.C. 2009) 385 S.C. 421, 685 S.E.2d 595.

Here, the statement in question comes from an orthopedic consult note contained in Mr. Mayers' medical records from his treatment on the day of the accident. Mr. Mayers was being treated for his injuries, which included a broken arm that required surgery to repair. As the lower court pointed out, information regarding alcohol consumption is relevant in medical treatment due to the affects alcohol may have on anesthesia. [Trial Transcript p. 86, lines 16-21].

Petitioner asserts that the statement may have had another source, and argues that the writer did not attribute the statement to Mr. Mayers by specifically indicating in the record that Mr. Mayers "reported" or "said" that information. Petitioner argues that someone from the scene of the accident could have relayed that information. [Pet. Brief p. 8]. However, as mentioned, the statement comes from an orthopedic consult note from Mr. Mayers' treatment concerning his arm injury. Therefore, the orthopedic physician examined Mr. Mayers personally and likely obtained information directly from Mr. Mayers, including information regarding his alcohol consumption.

The statement is consistent with the photographs that depict two, 24 ounce beers, which were photographed at the scene of the accident. Additionally, Ms. Williams testified having observed the 24 ounce beer cans at the scene. Therefore, the court did not abuse its discretion when allowing into evidence the statements made in the medical records as there was evidentiary support for that finding.

The lower court's decision in finding the medical records were relevant and fell under SCRE rule 803(4) was well reasoned and absent of any clear abuse of discretion. On appeal, the Court of Appeals agreed with the lower court in finding that the statement was admissible as a

statement made for purposes of medical treatment, and concerned Mr. Mayers' present symptoms. Therefore, as the law cited above provides, the trial court's decision should be affirmed.

B. The Trial Court's Rulings Did Not Prejudice Mayers.

Assuming the evidence of the beer cans at the scene of the accident and medical records were inadmissible, they were merely cumulative. The remaining evidence was more than sufficient to show that Mr. Henthorn was not negligent.

First, Mr. Henthorn's testimony provides that he had been well established in his lane of travel when Mr. Mayers, who was on his bicycle in the median, abruptly swerved into his lane while attempting to cross the roadway, causing the collision. [Trial Transcript, p. 72-73, lines 24-9 and p. 106-107, lines 3-4]. Throughout the trial, both parties presented photographs of the location of the accident to the jury, and both Mr. Mayers as well as Mr. Henthorn described what occurred leading up to the collision. Second, both Mr. Henthorn and eyewitness, Ms. Williams, testified that Mr. Mayers appeared unsteady on his bicycle. [Trial transcript, p. 147, lines 4-17]. Mr. Mayers did not present any eyewitness to the accident that testified otherwise.

The lower court and the Court of Appeals held that fault in this case was plainly a jury question. [*See* Unpublished Opinion No. 2023-UP-177]. Further, the Court of Appeals agreed with the lower court that there was evidence in the record to support the jury's determination. It is clear that there was more than enough evidence proved that Mr. Henthorn was not negligent, supporting the jury's finding.

V. CONCLUSION

The lower court and Court of Appeals further correctly found the evidence of the presence of empty beer cans at the scene, testimony regarding impairment, and Mr. Mayers' medical records related to the accident were relevant to the issue of liability, were not substantially outweighed by the danger of unfair prejudice, and admissible. Therefore, Respondent respectfully requests the

trial court's February 21, 2020 Order/Verdict Form and the March 4, 2020 Order, as well as the Court of Appeal's May 11, 2023 Order all be affirmed.

Respectfully Submitted by:

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