THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BERKELEY COUNTY
Court of Common Pleas

The Hon. Deadra L. Jefferson, Circuit Court Judge

Case No.: 2010-CP-08-1801

Levern McCray,.....Respondent,

vs.

Jose W. Valle,.....Appellant,

INITIAL REPLY BRIEF

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I. The Appellant did not concede or admit to "driving under the influence" at trial.

In his brief, the Respondent relies primarily on an argument that if any legal errors occurred, they were harmless because the Appellant conceded the issue of "driving under the influence" through a "judicial admission." The Respondent bases that assertion on a single passage from the opening statement by the Appellant's trial counsel. This argument overlooks the nature and context of that one passage, and it exaggerates the passage's impact. Thus, this Court should reject the Respondent's position on this issue.

During his opening statement, the Appellant's trial counsel said the following:

> The plaintiff's lawyer just said that my defenses are going to be that the defendant wasn't that drunk and that wasn't that serious of an injury, that's not true. I think he was drunk and that he, these are serious injuries, but again what we disagree about is a fair number to compensate the plaintiff for the injury that he had as a result of this accident.

[Trial Trans., p. 76, lines 14-21.] This passage was representative of trial counsel's entire opening statement, which stressed that the jury's job was to determine a reasonable amount of money to compensate the plaintiff for his injury. [*See* Trans., pp. 73-77.] The passage did not concede any issues of recklessness or driving under the influence, despite the Respondent's arguments to the contrary.

As a threshold matter, the Respondent's argument on this issue overlooks a small but important part of trial counsel's statement. Trial counsel did not state as established fact that the defendant was "drunk." Rather, he said only, "*I think* he was drunk ...." [Trial Trans., p. 76 (emphasis added).] This qualification makes it clear that trial counsel

was only expressing a personal belief; he was not making an assertion of any fact and he certainly was not making any admission to bind the defendant.

This distinction is significant because the Respondent has cited no South Carolina authority for the proposition that an attorney's *personal opinion* in an opening statement binds his or her client. Indeed, even the two out-of-state cases cited by the Respondent address "clear and unambiguous statements of *fact*." Neither case holds that an attorney's subjective *opinion* or *belief* contained in an opening statement binds that attorney's client. *See Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261 (1881); *U.S. v. Blood*, 806 F.2d 1218 (4th Cir. 1986). Those cases deal only with an admission of fact, which did not occur here.

It appears South Carolina's courts have not squarely addressed the issue of whether an attorney's opening statement binds his or her client.[1] There is analogous case law, however, to suggest South Carolina would not apply the type of broad rule upon which the Respondent relies. For example, in *Lytle v. Reagan*, 256 S.C. 269, 182 S.E.2d 302 (1971), the Supreme Court rejected the proposition that a party is always bound by its own testimony that is favorable to the adverse party. The Court specifically declined to give automatic binding effect to a statement that "consists mainly of estimates, opinions and conclusions, rather than actual facts within [the party's] knowledge." *Id.* at 274, 182 S.E.2d at 305.

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[1] *See Stephens v. CSX Transp., Inc.*, 400 S.C. 503, 519-520, 735 S.E.2d 505, 514 (Ct. App. 2012). In *Stephens*, the appellant argued the defendant was bound on an issue of liability by a portion of its attorney's opening statement. This Court ultimately concluded the issue was not preserved for review, but before reaching that conclusion, the Court stated, "*Even if Stephens is correct* about the significance of what CSX's counsel said ...." *Id.* (emphasis added). This statement implies the premise underlying the appellant's unpreserved argument was at most debatable under South Carolina law as recently as 2012.

Citing *Lytle*, this Court reached a similar conclusion in *Wright v. Hiester Constr. Co.*, 389 S.C. 504, 698 S.E.2d 822 (Ct. App. 2009). In *Wright*, the defendant's principal testified about what he believed caused a fire, based on his discussions with fire investigators. The Court found the defendant was not bound by that testimony because it involved a statement of the witness' personal opinion, rather than an established fact. *Id.* at 519, 698 S.E.2d at 830.

As these cases demonstrate, South Carolina's courts are reluctant to give binding effect even to opinion *testimony*. It follows that our courts would be more disinclined to give such effect to opinions expressed in opening statements, which are not even evidence. The Appellant respectfully submits that without any previous case law to that effect, it would be improper to bind the Appellant based on an opinion expressed by trial counsel during the opening statement.

Furthermore, when properly viewed in the context of the entire opening statement, the passage quoted above does not go nearly as far as the Respondent contends. The Appellant's trial counsel intended only to inform the jurors that they would not have to decide who was at fault in the accident. Under the defense's theory of the case, the jury's sole function was to award a fair and reasonable amount of *actual* damages. Taken in that context, the quoted passage was not an admission that the case was about "driving under the influence" or that any kind of reckless or grossly negligent conduct was involved. The passage was merely trial counsel's way of conceding that the issues of fault for the accident (*i.e.* simple negligence) and actual damages were not disputed. The passage did not admit anything else, nor was it intended to. Thus, even if the passage could be taken as some sort of "judicial admission," it did not admit anything

other than the fact that the Respondent was entitled to a reasonable award of actual damages. This is something the Appellant has never disputed, even in this appeal.

The Respondent's Brief repeatedly claims that trial counsel admitted the defendant was "driving under the influence of alcohol." [*See, e.g.*, Respondent's Brief, p. 18.] This assertion is incorrect. Although the Appellant's trial counsel said the word "drunk" in his opening statement, he did not use or reference the phrase "driving under the influence." Trial counsel also never said or agreed that an alcohol-related impairment caused the accident. The Respondent's Brief overlooks this important fact.

The Respondent apparently assumes the use of the word "drunk" necessarily implied "driving under the influence," but that is not the case. While those terms might sometimes be synonymous in lay parlance, they are very different in a legal sense. "Drunk" is a colloquial word used to describe someone who has consumed "too much" alcohol. However, there is no commonly accepted norm for determining how much is "too much," and as a result, the word means different things to different people. Stated another way, the word "drunk" has no established definition or legal ramifications. "Driving under the influence," on the other hand, is a much more serious and significant phrase. It has a specific legal definition, implicates a criminal activity, and leads to consequences that are much more severe. For legal purposes, therefore, "drunk" and "driving under the influence" are not the same things.

This position draws an admittedly fine line, but the close distinction is necessary because of the Respondent's argument. Again, the Respondent claims the Appellant's trial counsel conceded the accident was caused by "driving under the influence," but that is simply untrue. While trial counsel said he thought the defendant was "drunk," he went

no further than that. This use of this single, common-usage word was not sufficient to establish the type of all-encompassing legal admission for which the Respondent now argues. The basic fact is that the Appellant's trial counsel never admitted or conceded the legal issue of "driving under the influence."

Finally, it is also important to consider the procedural posture of the case when the Appellant's trial counsel made the supposed admission. The defense had filed and argued a pretrial motion *in limine* to exclude evidence of the defendant's blood alcohol level. The trial judge had considered arguments from both sides, but had declined to make any kind of ruling until later in the trial when the Respondent actually introduced the evidence. The lack of a ruling placed the Appellant's attorney in an untenable position. If he failed to address the alcohol issue in his opening statement and then the judge admitted the BAC evidence, trial counsel ran the risk of the jury seeing him (and, by extension, the defendant) as being deceptive and trying to "cover up" a possible crime. Thus, trial counsel had no choice but to reference the alcohol issue in his opening statement in such a way as to minimize its potential impact. This is why trial counsel used to word "drunk," but stopped short of saying the defendant was "driving under the influence." It was the only tactic he could use in light of the trial judge's failure to rule on the motion *in limine*.

Ultimately, the Appellant's trial counsel said only that he *thought* the defendant was "drunk." The Respondent wants to transform that simple, subjective statement into a binding admission that the defendant was "driving under the influence" – *i.e.* committing a criminal offense. Yet, the Respondent offers no relevant authorities to support this kind of legal alchemy. Given the absence of such authorities, it would be harsh and unfair to

impose a binding effect upon trial counsel's brief and limited statement. Therefore, this Court should reject the Respondent's arguments that a "judicial admission" rendered the trial court's errors harmless.

II. The trial court erred in charging the jury based on the criminal "permissible inference" statute (S.C. Code § 56-5-2950).

The Appellant argues the trial judge erred by instructing the jury that it could infer the defendant was driving under the influence of alcohol based on his BAC level. The basis for this argument is that General Assembly expressly limited the statute creating the inference to criminal prosecutions. *See* S.C. Code Ann. § 56-5-2950. The Respondent claims this position fails due to the Supreme Court's decision in *Hartfield v. The Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 697 S.E.2d 558 (2010). The Respondent's reliance on *Hartfield* is misplaced, however, for at least two reasons.

First, the Court in *Hartfield* dealt with a very specific cause of action that is not involved in the present case (*i.e.* a dram shop claim). In order to establish a dram shop claim under South Carolina law, a plaintiff must establish that the defendant sold alcohol to an intoxicated person. Proving a criminal act is a necessary element of a dram shop claim. That fact makes criminal statutes relevant to civil dram shop claims. The Court elaborated on this point as follows:

> Because South Carolina does not have a Dram Shop Act, our civil remedy arises out of criminal statutes. ... Similarly, a trial judge in a civil action should be able to aid the jury in assessing whether a bartender knowingly sold alcohol to an intoxicated individual by charging the jury on permissible inferences regarding 'being under the influence of alcohol' under our criminal laws. *The civil remedy is predicated on criminal statutes, thus it should be permissible for a trial judge to charge on the permissive inference of intoxication under our criminal statutes.*

388 S.C. at 417, 697 S.E.2d at 563 (emphasis added) (internal citation omitted). Thus, the quasi-criminal nature of a dram shop claim guided the Court's decision to allow a jury charge based on the permissible inference statute.

No dram shop claim was involved in the case at bar. The Respondent alleged only a standard negligence claim arising from a car wreck. That claim did not require the Respondent to prove a violation of any criminal statutes, especially since the defendant admitted fault for the accident. For this reason, the rationale that shaped the Supreme Court's decision in *Hartfield* does not apply here. As a result, *Hartfield* is distinguishable both legally and factually.

Second, the Court in *Hartfield* did not address the specific argument raised by the Appellant in the present case. According to the Court, the appealing parties in *Hartfield* claimed the decision to charge the statute was error because "the charge was not relevant in a civil case." 388 S.C. at 416, 697 S.E.2d at 563. There is no indication that those appellants argued the statute's plain language made it applicable only to criminal prosecutions. Certainly the majority never addressed (or even mentioned) such an argument in its opinion. It is this argument – apparently not raised in *Hartfield* – upon which the Appellant relies in the current appeal.

Significantly, the only Supreme Court Justice to discuss this issue in *Hartfield* actually adopted the Appellant's argument in this case. After disagreeing with the majority's decision on the stated issue (*i.e.* whether the charge was relevant), Justice Pleicones provided an alternative basis for reversing the trial court's decision. As Justice Pleicones explained:

> Moreover, in my view, to apply the criminal inference in a civil matter would run contrary to the intent of the General

> Assembly. The criminal statute, as it existed at the time of the accident, provided as follows:
>
> (b) *In the criminal prosecution* for a violation of [statutes] relating to driving a vehicle under the influence of alcohol, drugs, or a combination of them, the alcohol concentration at the time of the test, as shown by a chemical analysis of the person's breath or other bodily fluids, gives rise to the following:
>
> . . . .
>
> (3) If the alcohol concentration was at that time ten one-hundredths of one percent or more, it may be inferred that the person was under the influence of alcohol.
>
> S.C. Code Ann. § 56-5-2950 (2003) (emphasis added).
>
> **The express language of the statute specifies that the inference applies in a criminal prosecution and to apply the inference in a civil case contradicts the statute. ... I note that my position is in accord with that of the majority of other jurisdictions that have dealt with this issue.** See 16 A.L.R.3d 748 § 9.

388 S.C. at 423-424, 697 S.E.2d at 566-567 (Pleicones, J. dissenting) (boldface added). This is precisely the argument the Appellant is asserting in this Court.

The Respondent apparently contends the majority in *Hartfield* disagreed with Justice Pleicones' analysis on this point. As discussed above, however, the majority never addressed the issue of the statute's limiting language. The appellants did not raise that issue, and the majority did not rule on it. Thus, it would be inaccurate to suggest that the majority reached a different conclusion than the dissent on this specific point. Indeed, there is no indication the majority reached any conclusion at all on this issue.

Two points lend additional credence to this reading of *Hartfield*. First, the majority did not even mention, let alone criticize or disagree with, Justice Pleicones' analysis of the limiting clause. Had it believed Justice Pleicones was misinterpreting that

language, the majority almost certainly would have said so. Second, the majority did not cite or overrule *Gulledge v. McLaughlin*, 328 S.C. 504, 510, 492 S.E.2d 816, 819 (Ct. App. 1997), in which this Court stated that "the inferences of intoxication in the implied consent statute, S.C. Code Ann. §56-5-2950 (Supp. 1996), are not charged" in civil cases. If the Supreme Court had intended its decision in *Hartfield* to go as far as the Respondent argues, it could not have left that language from *Gulledge* undisturbed. Consequently, the Court's silence about *Gulledge* speaks volumes about the intended scope and effect of *Hartfield.*

Furthermore, even if it could be argued the Supreme Court in *Hartfield* impliedly addressed the limiting clause of §56-5-2950, an important question would remain unanswered: Are jury charges based on that statute proper in *all* civil cases, or only in dram shop cases? The stated rationale for the Court's decision suggests the answer is the latter. The Court allowed the jury charge in *Hartfield* because it determined dram shop claims were inextricably linked with criminal statutes. The same is not true for standard negligence causes of action. Thus, the most logical way to harmonize *Hartfield* and *Gulledge* is to conclude that the Supreme Court approved charging the jury based on §56-5-2950 *only* in dram shop cases. Reading *Hartfield* any more broadly than that would completely undermine the stated intent of the General Assembly, as Justice Pleicones noted.

There is no applicable authority supporting the trial judge's decision to charge the inferences of §56-5-2950 in this car wreck case. The Respondent has cited only *Hartfield*, which is properly limited to dram shop cases. On the other hand, the statute expressly limits the applicability of its inferences to criminal prosecutions, and this Court

has previously noted that the inferences are not charged in civil cases. Therefore, the trial court erred in charging the inferences of §56-5-2950, and that error was prejudicial for the reasons set forth in the Appellant's Brief. As a result, this Court should reverse and remand for a new trial.

III. The trial court erred in allowing the investigating officer to testify regarding the facts of the accident.

In his brief, the Respondent focuses on the fact that the trial court allowed the investigating law enforcement office to testify not as an expert, but as someone giving lay opinion testimony pursuant to Rule 701, SCRE. The Respondent claims this decision was correct because the officer gave factual testimony as opposed to expert opinions. This assertion misses the point of the Appellant's argument on this issue. The question is not whether the trial court should or should not have qualified the officer as an expert. Rather, the real question is whether the officer should have been allowed to give an opinion as to the cause of the accident when he had not first been qualified as an expert.

As discussed in the Appellant's Brief, South Carolina's courts have repeatedly answered this question in the negative. *See, e.g., State v. Kelly*, 285 S.C. 373, 374, 329 S.E.2d 442, 443 (1985) ("A police officer may not give his opinions as to the cause of an accident. He may only testify regarding his direct observations unless he is qualified as an expert."); *Gulledge v. McLaughlin*, 328 S.C. 504, 508, 492 S.E.2d 816, 818 (Ct. App. 1997) ("a long line of South Carolina decisions has excluded the opinions of investigating police officers in automobile accident cases"). The Respondent does not address this rule in his brief, let alone explain why it should not apply here.

The Respondent also overlooks the point that the investigating officer did not merely testify as to facts he observed when he arrived at the scene. The officer went

further and expressed an opinion about how and why the accident occurred. Despite not witnessing the accident or any of the events leading up to it, the officer testified that the defendant caused the accident by driving his vehicle across the center line. [*See* Trial Trans., p. 92.] Because it was not based on first-hand knowledge, this statement was necessarily the officer's opinion about the cause of the accident. As previously noted, the case law is clear that this type of causation opinion testimony by an officer is improper unless the officer is first qualified as an expert. Here, the trial court declined to qualify the officer as an expert – a decision neither party has challenged. In light of that decision, it was plainly erroneous for the trial court to allow the officer to give his opinion as to the cause of the accident.

The trial court's reliance on Rule 701, SCRE, does not remove the error. Although Rule 701 allows for lay witnesses to provide opinion testimony in some situations, it does not override the rule against police officers testifying about the cause of an accident. This rule is firmly established, and the trial court erred by not following it. Moreover, that error was prejudicial for the reasons discussed in the Appellant's Brief, and this Court should reverse and remand for a new trial.

IV. The trial court erred in admitting the results of the defendant's blood alcohol test.

The Appellant's Brief addresses the applicable case law regarding the admission of blood alcohol tests, and the Appellant will not repeat that discussion here. For present purposes, it is enough to note that South Carolina law requires independent evidence of impairment in order for BAC levels to be admissible in civil cases. More specifically, in wreck cases, there must be some evidence linking the BAC level to the cause of the accident. It is not enough for a party to show there was an accident and the other driver

had a high BAC level. Rather, the party must connect the heightened BAC level to the accident. The Respondent failed to do that in this case.

The Respondent relied almost exclusively on the defendant's BAC level to establish "impairment." There was testimony that the defendant crossed the center line, and the investigating officer said he smelled alcohol on the defendant's person after the accident. But there was no evidence – expert or otherwise – to establish that a person with the defendant's BAC level would be prone to crossing the center line while driving. In other words, there was no evidence the defendant crossed the center line *because of* an alcohol-related impairment. For all the record showed, the defendant could have crossed the center line for any number of other reasons.

Based on the absence of such evidence, the jury had no reasonable basis upon which to evaluate the defendant's BAC level and its impact (or lack thereof) on the accident. The Respondent presented the BAC level simply as a number. No witness explained what types of physical or mental impairments, if any, would be the expected result of that BAC level. No witness testified that it would be unsafe for someone with that BAC level to drive a vehicle, or that someone with that BAC level would be likely to cross the center line while driving. Thus, the BAC level gave the jury nothing more than a jumping-off point for speculation about the defendant's degree of impairment and how it contributed to the accident. This demonstrates why the trial court should not have admitted the BAC level.

Furthermore, the trial court compounded that error by also charging the "permissible inference" statute to the jury. This statute, which expressly applies only to criminal prosecutions, gave the jury the ability to infer the defendant was impaired by

alcohol, even though no admissible evidence supported that conclusion. These two errors worked in tandem to make this a "DUI" case despite the Respondent's failure to present the evidence necessary to prove such a case.

Under the case law, it is clear what the Respondent needed to do in order to prove the defendant caused the accident by driving under the influence of alcohol. The Respondent needed to show more than just fault for the accident (*i.e.* crossing the center line) and a heightened BAC level. The Respondent was also required to present testimony that someone with that type of BAC level would suffer mental lapses and/or diminished motor skills and reflexes, which in turn would likely cause that person to cross the center line while driving. The trial court should have held the Respondent to that burden of proof, but it did not. Instead, the trial court did the Respondent's work for him by not only admitting the BAC level, but also charging the "permissible inference" statute. These errors were prejudicial, as they turned a standard wreck case into something much more serious in the eyes of the jury. For this reason, the Court should reverse and remand for a new trial.

V. The Appellant is entitled to elimination or reduction of the punitive damages award and/or a new trial due to the excessive overall damages award.

The Appellant anticipated and addressed the Respondent's arguments on the damages issues in the Appellant's Brief. In order to save time and space, the Appellant will not repeat all of those arguments here. However, the Appellant does wish to reiterate and emphasize that the damages awarded by the jury were at least excessive, if not grossly so, and were not supported by the record evidence.

The only realistic explanation for the amounts of actual and punitive damages awarded by the jury is the Respondent's focus on "driving under the influence." This

strategy inflamed the jury and caused it to award damages based on passion rather than the actual evidence. Furthermore, as discussed above, the trial court's errors compounded the problem by giving the Respondent a greater ability to raise and rely upon "driving under the influence" arguments. Had the trial court properly excluded the BAC level evidence, or at least refrained from charging an inapplicable criminal statute, the resulting verdict would have been much different. For this reason, the Appellant is entitled to a new trial absolute or a new trial *nisi remittitur* or, in the alternative, the Appellant is entitled to the elimination or reduction of the punitive damages award. This Court should reverse and remand accordingly.

CONCLUSION

The Respondent's Brief goes out of its way to demonstrate that the Respondent was a hard-working man who sustained a quantifiable injury through no fault of his own. The Appellant did not dispute those characterizations to any great extent at trial, and it is unnecessary to do that on appeal because the proper focus is no longer on the Respondent. The real question not whether the Respondent is an innocent victim or whether the defendant is blameworthy. Rather, the question before this Court is whether the Appellant received a fair trial under the circumstances, and the answer is no.

As demonstrated above and in the Appellant's Brief, the trial court made numerous errors that assisted the Respondent in transforming a simple wreck case into a case about driving under the influence. The Respondent failed to lay the proper foundation for such a case, and the trial court should recognized that deficiency and acted accordingly. Instead, the trial court committed errors that inflamed the jury and deprived

the Appellant of a fair trial. Therefore, this Court should reverse the verdict for the Respondent and remand for a new trial.

Respectfully submitted,

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PROOF OF SERVICE

The undersigned, an attorney in this matter for the Appellant, certifies that I have this **18th day of October, 2013**, served a copy of the Appellant's **Initial Reply Brief** upon counsel for the Respondent by causing it to be deposited in the United States mail with sufficient postage affixed, addressed to: Pamela Mullis, Esq., Mullis Law Firm, P.A., P.O. Box 7757, Columbia, SC 29202.

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