

THE STATE OF SOUTH CAROLINA
In The Court of Appeals
No. 2012-212062

71788

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

DeAndrea G. Benjamin, Circuit Court Judge

Case No.: 2010-CP-40-5460

Trumaine V. Moorner,

Respondent,

v.

Norfolk Southern Railway Company,

Appellant.

PETITION FOR REHEARING WITH SUPPORTING MEMORANDUM

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APR 03 2014
SC Court of Appeals

PLEASE TAKE NOTICE that the Appellant herein hereby moves for rehearing of the captioned Appeal pursuant to Rule 221, SCACR. The basis for this Petition is set forth in the Memorandum below.

SUPPORTING MEMORANDUM

On March 19, 2014, this Honorable Court issued its *Per Curiam* decision affirming the verdict issued against Norfolk Southern Railway Company (“Norfolk Southern”). Norfolk Southern maintains that the Court has misapprehended several issues which require further analysis, consideration and review. First, the Order held that the Circuit Court did not err in charging the jury, citing *Stokes v. Spartanburg Reg’l Med. Ctr.*, 368 S.C. 515, 629 S.E.2d 675, 678 (Ct. App. 2006) (erroneous jury charge will not result in the verdict being reversed unless the charge prejudiced the appellant’s case). However, the trial court incorrectly instructed the jury on the fundamental issues of duty and breach arising under FELA. App. Br. pp. 46-47; App. Reply pp. 8-10. When fundamental issues of duty and breach are not properly instructed by the trial judge, only extreme prejudice can result to a party. Accordingly, the issue should be re-evaluated. The Order also made reference to *Berberich v. Jack*, 392 S.C. 278, 709 S.E.2d 607, 613 (2011) regarding the preservation of instructions. Appellant respectfully requests the Court review citations related to preservation of issues at App. Br. pps. 39-40.

Secondly, the Court has misapprehended the significance of the failure of Plaintiff to prove notice of condition or duty to act to establish a claim for negligent assignment. The Order cites *Fletcher v. Union Pac. R.R. Co.*, 621 F.2d 902 (8th Cir. 1980) (“The railroad is negligent if it knew or should have known that its assignment exposed the employee to an unreasonable risk of harm.”). However, the evidence is undisputed that

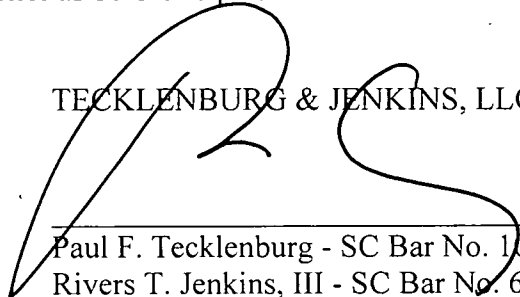
Norfolk Southern did not have notice of any restriction on Plaintiff's fitness for work and had no duty to act differently than honoring the treating physician's return to work form. App. Br. pp. 13-16; App. Reply pp. 1-7. Therefore the issue of notice was not addressed. Further, there are significant policy considerations if a company's medical department is found to have a duty to second guess a treating physician's clearance of an employee.

Third, the Order misapprehends Appellant's position on the obligation of Appellee to prove notice of a condition and does not address the effect of exculpation as an impediment in establishing a cause of action for failure to render prompt aid. *See Bell v. Norfolk Southern Ry. Co.*, 476 S.E.2d 3, 4 (Ga.Ct.App.1996). Nevertheless, there was no evidence establishing sufficient notice had been provided to Norfolk Southern chargeable with notice, i.e., personnel who were not exculpated. Numerous citations in the Order failed to address specifically the issue of notice and exculpation. App. Br. pp. 26-30; App. Reply pp. 10-11.

Finally, the Order misapprehends Appellant's argument with respect to Dr. Paula Lina's disqualification letter, as its admission and failure to allow further explanation was an error of law. The Order cites *State v. Jennings*, 349 S.C. 473, 716 S.E.2d 91 (2011) ("An abuse of discretion occurs when a trial court's ruling is based on an error of law..."). Failure of the trial judge to allow explanation of Dr. Paula Lina's disqualification letter was an error of law that requires reversal. App. Br. pp. 36-37; App. Reply pp. 12-13.

For the foregoing reasons, Norfolk Southern respectfully requests rehearing of this Appeal, and for granting of relief as before requested.

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April 3, 2014

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Trumaine V. Moorner,

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Norfolk Southern Railway Company,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing *Petition for Rehearing with Supporting Memorandum* was served upon all counsel of record this 3rd day of April 2014, via U.S. First Class Mail, postage pre-paid, and addressed as follows:

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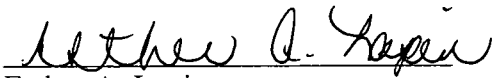
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SC Court of Appeals

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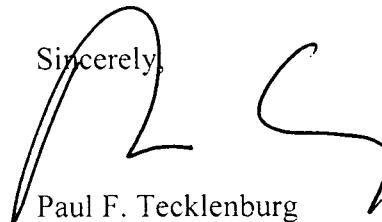
RE: *Trumaine V. Moorer v. Norfolk Southern Railway Company*
Court of Appeals Case No.: 2012-212062
Common Pleas Case No.: 2010-CP-40-05460
Our File No.: 1002.45

Dear Ms. Allen:

Please find enclosed the original and six copies of the Appellant's Petition for Rehearing With Supporting Memorandum and this firm's check in the amount of \$25.00 in payment of the filing fee. Please file this Petition with the Court and provide a date-stamped copy of same to our courier.

With kindest regards, I am

Sincerely,



Paul F. Tecklenburg
pft@tecklaw.net

PFT/eal

Enclosures

Copy w/encl via email: John A. Moss, Esquire
John E. Parker, Esquire

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