THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2013-002474

Catherine Virginia Cox, Appellant,

v.

Kenneth L. Pinckney, Sr.,
And Stacy Marie St. Pierre, Respondents.

FINAL BRIEF OF APPELLANT

Kimberly L. Smith, Esquire
Moss, Kuhn & Fleming, P.A.
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373 Telephone
(843) 524-1302 Facsimile

Attorneys for the Appellant

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2013-002474

Catherine Virginia Cox, Appellant,

v.

Kenneth L. Pinckney, Sr.,
And Stacy Marie St. Pierre, Respondents.

FINAL BRIEF OF APPELLANT

Kimberly L. Smith, Esquire
Moss, Kuhn & Fleming, P.A.
Post Office Drawer 507
Beaufort, South Carolina 29901
(843)524-3373 Telephone
(843) 524-1302 Facsimile

Attorneys for the Appellant

INDEX

TABLE OF AUTHORITIES

Cases: Page:

Other: Page:

STATEMENT OF ISSUES ON APPEAL

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF THE RESPONDENT STACY MARIE ST. PIERRE ON APPELLANT'S NEGLIGENT ENTRUSTMENT CAUSE OF ACTION

STATEMENT OF CASE

A. HISTORY OF PROCEEDINGS

This action arises out of an automobile accident that occurred on July 11, 2012, involving the Appellant and Respondent Kenneth L. Pinckney, Sr., ("Pinckney"). Respondent Stacy Marie St. Pierre ("St. Pierre") owned the vehicle driven by Pinckney and the Appellant alleged a cause of action against the Respondent St. Pierre for negligent entrustment. The action was commenced by a filing of a Summons and Complaint on September 10, 2012. [ROA, pg. 35]. In her Complaint, the Appellant alleges that the Respondent St. Pierre allowed Pinckney to drive her vehicle when she knew that Pinckney did not have a driver's license as his license had been suspended as a result of substantial driving violations in the past. On October 19, 2012, Respondent St. Pierre filed her Answer to the Complaint. [ROA, pg. 42]. On or about December 20, 2012, Appellant responded to Respondent St. Pierre's Requests to Admit. [ROA, pg. 49].

Respondent filed a Motion for Summary Judgment on January 31, 2013. [ROA, pg. 26]. The Motion for Summary Judgment was scheduled for hearing in the Beaufort County Court of Common Pleas before the Honorable D. Craig Brown on September 20, 2013. Judge Brown heard arguments from counsel for the Appellant and the Respondent and subsequently signed an Order Granting Respondent's Motion for Summary Judgment on October 4, 2013, and filed on October 16, 2013. [ROA, pg. 11]. On October 16, 2013, Appellant filed a Motion to Reconsider the Order Granting Respondent's Motion for Summary Judgment. [ROA, pg. 15]. An Order Denying Appellant's Motion for Reconsideration was imposed by Judge Brown on October 23, 2013, and received by Counsel on October 30, 2013. [ROA, pg. 9]. On November 13, 2013, the Appellant filed her Notice of Appeal to the South Carolina Court of Appeals. [ROA, pg. 1].

B. STATEMENT OF FACTS

This action arises from an automobile accident on July 11, 2012, involving the Appellant and the Kenneth Pinckney, Sr. Mr. Pinckney was operating Respondent St. Pierre's vehicle at the time of the collision that caused severe and permanent bodily injury to the Appellant. Mr. Pinckney was traveling on Robert Smalls Parkway in Beaufort, South Carolina, when in a careless and reckless manner he was attempting turn his vehicle right, and then without warning swerved back into the left lane where the Appellant was located. Appellant had yielded the right of way to Respondent and established that lane as her lane of travel. As a result of the collision, Appellant was transported by helicopter from the scene to Memorial Medical Center in Savannah, Georgia, for immediate medical treatment.

Respondent St. Pierre gave her fiancé, Mr. Pinckney, permission to drive her vehicle on the day of the accident. Respondent St. Pierre knew that Mr. Pinckney was prohibited from driving because of control substance violations and various traffic infractions. In fact, Respondent St. Pierre stated in her recorded statement to the insurance company following the accident that she gave permission to Pinckney to drive her vehicle even though she knew that he did not have a valid driver's license as it was indefinitely suspended for repeat controlled substance violations and traffic violations. As a result, Appellant alleged a cause of action for negligent entrustment against Respondent St. Pierre.

I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF RESPONDENT STACY MARIE ST. PIERRE ON APPELLANT'S NEGLIGENT ENTRUSTMENT ACTION

A. South Carolina Courts have applied various liability standards in negligent entrustment cases

The Honorable Ralph King Anderson defines "negligent entrustment"- in his book of jury charges as follows:

> "The owner or one in control of a vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment. The theory of negligent entrustment is based on the negligence of the entrustor. If a person entrusts a dangerous instrumentality to a person knowing of that person's lack of competency in respect to the instrumentality, the entrustor assumes responsibility for injury caused a third person through the unskillful operation of the instrumentality by the entrustee."

SC-JICIV 28-10, Anderson, S.C. Requests to Charge – Civil, §28-10 (2009).

To assert as the Respondent has in her Motion for Summary Judgment and the Court held in granting summary judgment in the case at hand, that the Supreme Court intended to eliminate the cause of action set forth above by Judge Anderson flies in the face of reason and public policy in South Carolina. However, it is quite fair to say that South Carolina courts have applied various liability standards in negligent entrustment cases.

The first case in South Carolina to recognize the tort of negligent entrustment was *Nettles v. Your Ice Co.*, 191 S.C. 429, 4S.E.2d 797 (1939). Since *Nettles*, South Carolina courts have addressed negligent entrustment decisions and have applied various tests for liability depending upon the factual situation in the cases. In *American Mutual Fire Insurance Company v.*

Passmore, 275 S.C. 618, 274 S.E.2d 416, 418 (S.C. 1981), the South Carolina Supreme Court stated that "the theory of negligent entrustment provides: the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment." The Court in *Passmore* emphasized the element of control in negligent entrustment cases.

> "The theory of negligent entrustment provides: 'the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment.'" Id. at 418, citing 19 A.L.R.3d 1175, 1192, cited in *Bahm v. Dormanen*, 543 P.2d 379 , 381 (Montana 1975).

The next negligent entrustment case was *McAllister v. Graham*, 287 S.C. 455, 339 S.E.2d 154 (Ct. App. 1986). The South Carolina Court of Appeals in *McAllister*, citing *Passmore* and *Nettles*, set forth a narrower standard for determining liability for negligent entrustment of a vehicle **in cases where the party in control of the vehicle entrusts it to an intoxicated individual**. The Court set forth the following elements for a negligent entrustment cause of action under the circumstances in that case: (1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking; (2) that the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver. *Id.* at 156. This ruling is the current test for liability used in negligent entrustment cases **involving use of an automobile by an intoxicated driver**. The problem that resulted after the ruling in *McAllister* was whether the *McAllister* ruling was at odds with the *Passmore* test in that while citing *Passmore*, the Court clearly stated its test in terms of the facts as presented in the case rather than the underlying theory of *Nettles* and *Passmore*.

During the same term as *McAllister*, the South Carolina Court of Appeals cited the aforementioned *McAllister* test as the basis for its ruling in *Price v. Jackson,* 288 S.C.377, 353 SE2d 603 (1986), but never discussed the first element of the test in its analysis. This case arose out of an accident whereby Roosevelt Jackson was instantly killed when his truck collided head-on with an automobile driven by Charles Price and owned by Randall Davis. Jackson's estate brought an action against Price and Davis. In *Price*, the Court of Appeals held that Davis negligently entrusted his car to Price, in that even though Davis knew Price had consumed three beers within an hour and a half of the accident, he permitted him to drive his car. 288 S.C.377, 382, 353 SE2d 603, 631. While the Court of Appeals cited the *McAllister* test, they did not address all of elements as they applied to the *Price* case. Further, the Court failed to discuss the first element, namely that Mr. Davis had knowledge that the driver was addicted to intoxicants or had the habit of drinking. Instead, the Court's opinion and subsequent holding would lend one to believe that Davis was negligent in entrusting his vehicle to Price regardless of whether Davis had the aforementioned knowledge as required under the *McAllister* test. Further, it is plausible that the Court's holding is actually based on the broader standard of negligent entrustment as defined under the Restatement and not *McAlister*.

In *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003), the South Carolina Supreme Court held that Lydia could not recover on a first party negligent entrustment cause of action. The Court declined to extrapolate a first party claim for negligent entrustment from the Restatement. The Court's declining to extend the Restatement application of the law of negligent entrustment in *Lydia* was based on the specific facts presented in that case and not because of the *McAllister* ruling. Id. at 754.

In 2007, the South Carolina Supreme Court, under the criteria in *McAllister* and citing *Jackson*, held in *Gadson v. ECO Services of South Carolina, Inc.*, 374 S.C. 171, 648 S.E.2d 585, 588 (S.C. 2007), that "according to our case law, the elements of negligent entrustment are: (1) the knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking; (2) the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver. The Court again declined to adopt sections 308 and 390 of the Restatement in automobile accident **cases involving negligent entrustment and alcohol intoxication**. In *Gadson*, the Court based its holding on the fact that the facts presented in the case failed to satisfy the first element of the *McAllister* test. The Court stated in *Gadson*:

> "...there was no evidence as to John's drinking habits or his driving record. The sole evidence supporting the claim for negligent entrustment against Petitioner is the fact John had one or two wine coolers prior to driving. Knowledge that a driver has had a drink or two is a far cry from meeting the first element of negligent entrustment that there be knowledge or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking."

Id. at 588, 589.

The Supreme Court goes on to hold in *Gadson* that the Court of Appeals erred in applying the Restatement (Second) of Torts §§ 308 and 390, "which extend liability when the owner knew or had reason to know that such person is likely because of his youth, inexperience, or otherwise, to create an unreasonable risk of physical harm to himself or others." The Supreme

Court further stated that they "decline to adopt sections 308 and 390 of the Restatement based on this **set of facts."** Id. at 588. The Supreme Court makes it quite clear in *Gadson* that the Court is applying the McAllister test to the facts and circumstances of the case because it was an intoxication case.

Possibly of even more consequential value is Justice Pleicones' concurring opinion in *Gadson*. In his concurring opinion, Justice Pleicones stated:

> ".....I believe we should adopt Restatement (Second) of Torts, §§ 308 and 390 as alternative methods of proving negligent entrustment. I fear that our current formulation would not admit of liability where a person permitted an individual to drive an automobile knowing that the driver was intoxicated, but where there no evidence the supplier knew the driver was a habitual drinker or addicted to alcohol. In my view, adoption of sections 308 and 390 would eliminate this loophole."

Id. at 589.

Justice Pleicones concurred in that he thought the case was correctly decided under either standard; however, Justice Pleicones raised the serious public policy concerns with not adopting the Restatement in negligent entrustment cases where *McAllister* would not apply as in the case at hand where alcohol was not involved.

Based on the ruling in *Gadson v. ECO Services of South Carolina, Inc.*, numerous Defendants, as Respondent St. Pierre, have taken the position that the Supreme Court overruled the test set forth in *Passmore*. In *Becker v. Estes Exp. Lines, Inc.*, 2008 WL 701388, the Defendant asserted the position that *Gadson* overruled *Passmore* and as a result concluded that South Carolina only recognized a negligent entrustment cause of action in situations involving an

intoxicated driver. However, the Court in *Becker* did not agree with the Defendant and held "that the South Carolina Supreme Court did not overrule the definition of negligent entrustment found in *Passmore* in its entirety." Judge Herlong in *Becker* goes on to distinguish *Gadson* from the case before him:

> "Significantly, the negligent entrustment claim in *Gadson* was based on allegations that the driver of the vehicle was intoxicated when the accident occurred. Therefore, the South Carolina Supreme Court has never determined whether the negligent entrustment factors set forth in *Gadson* limit the claim in South Carolina to situations only involving an intoxicated driver. Further, there is no evidence in *Gadson* that the court intended to create such a limitation. In fact, the court explicitly stated in the opinion that it declined to adopt the broader definition of negligent entrustment set forth in the Restatement **"based on this set of facts."** *Gadson*, 648 S.E.2d at 588.....As stated above, the facts the South Carolina Supreme Court refers to in *Gadson* involved allegations of entrustment to an intoxicated driver. *Id.* at 587. Therefore, the court concludes that the South Carolina Supreme Court appears to limit its holding to the set of facts involved in the *Gadson* case, namely those involving allegations of an intoxicated driver."

The Court in *Becker*, denied the Defendant's motion for summary judgment as they declined to find that South Carolina had limited negligent entrustment claims to those situations solely involving an owner's entrustment of a motor vehicle to an intoxicated driver. The Court further stated in its holding that "the South Carolina Supreme Court has never explicitly held that the *Gadson* elements must apply in every negligent entrustment case, effectively limiting the claim to situations involving allegation of an intoxicated driver."

The Respondent St. Pierre argued at the hearing on the Motion for Summary Judgment that *Becker* has no precedential value and as such should not be considered by the Court. While understanding that it has no precedential value, one should tread lightly when discounting the legal instruction of a distinguished jurist from the district. Judge Herlong's analysis addressed an overwhelming concern that would be present in South Carolina should such a narrow view of negligent entrustment be adopted by our Courts.

In 2009, the Court of Appeals held in *Jones ex rel. Jones v. Enterprise Leasing Company-Southeast*, 383 S.C. 259, 678 S.E.2d 819 (2009), that "[w]hile case law in our state has tended towards the tort of negligent entrustment that compromises an element of drinking, sections 308 and 390 of the Restatement (Second) of Torts (1965), involve the application of negligent entrustment to situations that do not involve the presence of alcohol." The Court differentiates the case in *Jones* from the previous holdings in *Lydia* and *Gadson* by holding that "[h]ere, unlike in *Lydia* or *Gadson*, where a negligent entrustment claim could be decided under the elements established in *McAlister,* there is no suggestion that alcohol played any role in this accident." The Court ultimately granted summary judgment on the basis that Jones could not prove the compulsory element of ownership or control of the vehicle and therefore, it was not necessary to adopt sections 308 and 390 for purposes of that appeal. Id. at 823. The holding in *Jones* simply supports the Appellant's contention that the Court can apply the broader standard under the Restatement in negligent entrustment cases not involving intoxicated drivers but if that essential element of "control" is not present then the defendant shall not be liable.

Based on the aforementioned case law, it is quite clear that the Courts have applied and cited the *McAllister* test as the "standard" in negligent entrustment cases involving intoxicated drivers and alcohol consumption; however, it is not certain that the Courts in South Carolina

meant to eliminate negligent entrustment where alcohol is not involved. While almost all of the negligent entrustment cases that have been decided in recent years have involved intoxicated drivers, the Courts in South Carolina have not explicitly eliminated all other negligent entrustment causes of actions as the Respondent asserted in her motion for summary judgment. Therefore, a cause of action for negligent entrustment of a vehicle does in fact exist under the current case law where alcohol is not involved based on the particular factual situation in each case.

B. The negligent entrustment standard set forth in Sections 308 and 390 of the Restatement of Torts is consistent with South Carolina jurisprudence

It stands to reason that a person who entrusts the operation of his vehicle to another person is bound to exercise reasonable care to see to it that the driver is not likely to use the vehicle in a manner harmful to others. Accordingly, an owner should be held liable when entrusting his vehicle to someone the owner knows, or should know, is unskilled, incompetent to drive, or reckless in the operation of the vehicles. It is respectfully submitted that the Court erred in granting Summary Judgment as to Appellant's claim for negligent entrustment as to Respondent St. Pierre. Respondent St. Pierre moved for summary judgment on the basis that South Carolina limits the cause of action for negligent entrustment to situations involving an owner's entrustment of a motor vehicle to an intoxicated driver and therefore, Plaintiff has no basis for her negligent entrustment claim as to Defendant St. Pierre. To assert this contention and for the Court to adopt this position as the basis for its ruling would completely disregard the existence of Sections 308 and 390 of the Restatement (Second) of Torts. In fact, the Court of Appeals stated in *Jones*:

> "While case law in our state has tended towards the tort of negligent entrustment that compromises an element of drinking, sections 308 and 390 of the Restatement (Second) of Torts (1965), involve the application of negligent entrustment to situations that do not involve the presence of alcohol."

Jones ex rel. Jones v. Enterprise Leasing Company-Southeast, 383 S.C. 259, 265, 678 S.E.2d 819 (2009).

Sections 308 of the Restatement (Second) of Torts provides:

> It is negligence to permit a third person to use a thing or to engage in an activity which is under the control of the actor, if the actor knows or should know that such person intends or is likely to use the thing or to conduct himself in the activity in such a manner as to create an unreasonable risk of harm to others.

*Restatement (Second) of Torts §308 (*1965).

Sections 390 of the Restatement (Second) of Torts provides:

> "One who supplies directly or through a third person a chattel for the use of another whom the supplier knows or has reason to know to be likely because of his youth, inexperience, or otherwise, to use it in a manner involving unreasonable risk of physical harm to himself and others whom the supplier should expect to share in or be endangered by its use, is subject to liability for physical harm resulting to them."

Restatement (Second) of Torts §390 (1965).

While the majority of recent cases dealing with negligent entrustment have dealt with accidents involving intoxicated drivers, the cause of action for negligent entrustment still exists

in cases not involving intoxicated drivers and those aforementioned cases do not bar the negligent entrustment cause of action established under Restatement 308 and 390 and eliminate negligent entrustment actions involving vehicles in other contexts. In fact, South Carolina has applied a negligent entrustment standard similar to the Restatement 308 and 390 in cases other than those involving automobiles and intoxicated drivers on the basis that the entrustor had the right to control the entrusted chattel.

In *Howell v. Hairston*, 261 S.C. 292, 199 S.E.2d 766 (1973), the South Carolina Supreme Court recognized negligent entrustment of a dangerous instrumentality, other than an automobile, may give rise to liability under the standard in the Restatement. In *Howell*, the Plaintiff's son was injured when the Defendant's son shot him with an air rifle. The Supreme Court held that the air rifle was "an instrument of dangerous propensities and potentialities, and that it was negligently entrusted by the defendants to a person, who on account of his youth and want of experience was incapable of evaluating the dangerous incident to its use." Id. at 770. Simply, the Supreme Court deduced that because the Defendant had control over the air rifle, they had a duty of due care in exercising that control and entrusting that instrumentality to their young son.

In *James v. Kelly Trucking Co.*, 377 S.C. 628, 661 S.E.2d 329 (2008), the South Carolina Supreme Court recognized the general theory that an employer may be liable for negligently entrusting its employee with a dangerous instrumentality. The Court held that "where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an **unreasonable risk of harm to the public**." Id. at 330.

Further, the Court in *Jones* candidly admits that the elements needed to prove negligent entrustment have varied among the Court of Appeals and the Supreme Court over the last several years but suggests that the facts in *Jones* would support the adoption of the Restatement standard as it applies to the facts in *Jones* and those cases of negligent entrustment where there is not an element of drinking present.

The importance of adopting the definition of negligent entrustment under Restatement 308 and 390 is far reaching and only promotes the public policy goals of the state of South Carolina. This standard forces citizens to make informed decisions by holding them responsible and accountable for the safety of others and protects those who are injured should those citizens choose not to act responsibly and exercise appropriate judgment or due care.

CONCLUSION

It is respectfully submitted that the Court erred in granting summary judgment to the Respondent. Negligent entrustment is based upon a principle that one who has control of a vehicle should exercise that control reasonably and responsibly and should be held liable when they do not regardless of whether the driver of the vehicle was intoxicated as is the case at hand. The Respondent St. Pierre knew that the Kenneth Pinckney was prohibited from driving her vehicle in the State of South Carolina and she negligently entrusted this instrumentality anyway to Mr. Pinckney to the detriment of the Appellant in this case. To affirm the lower Court's ruling based solely on the Appellant failing to prove that Pinckney was intoxicated or addicted to intoxicants on the day in question simply punishes the Appellant for the negligence of others, namely Respondent St. Pierre when she allowed Pinckney to operate her automobile even though he was forbidden by South Carolina law to do so. To affirm the lower Court's ruling does not deter future reckless, dangerous conduct nor does it protect innocent people on the roadways, as

the Appellant, from the negligence of repeat dangerous driving offenders, as Mr. Pinckney, and the negligent people, as Respondent St. Pierre, who entrust their vehicles to such reckless individuals.

It is accordingly respectfully requested that the Order granting summary judgment be reversed, and this case be remanded back to the Beaufort County Court of Common Pleas.

Respectfully submitted,

MOSS, KUHN & FLEMING, P.A.

By: 

Kimberly L. Smith
MOSS, KUHN & FLEMING, P.A.
Post Office Drawer 507
1501 North Street
Beaufort, South Carolina 29901-0507
Telephone: 843-524-3373
Facsimile: (843) 524-1302

Attorney for Appellant

Beaufort, South Carolina
June 2, 2014

CERTIFICATE OF SERVICE

Undersigned certifies that the Final Brief of Appellant, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Adam J. Neil, Esquire
Post Office Box 6648
Columbia, South Carolina 29260

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on June 4, 2014.

MOSS, KUHN & FLEMING, P.A.

By: Sue Radford
Sue Radford

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
JUN 06 2014
SC Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2013-002474

Catherine Virginia Cox, Appellant,

v.

Kenneth L. Pinckney, Sr.,
And Stacy Marie St. Pierre, Respondents.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

MOSS, KUHN & FLEMING, P.A.

By: _____

Kimberly L. Smith
MOSS, KUHN & FLEMING, P.A.
Post Office Drawer 507
1501 North Street
Beaufort, South Carolina 29901-0507
Telephone: 843-524-3373
Facsimile: (843) 524-1302

Attorney for Appellant

Beaufort, South Carolina
June 2, 2014

CERTIFICATE OF SERVICE

Undersigned certifies that the Certificate of Counsel, to which this certificate is affixed, was served upon the party (s) to this action by hand delivery or by depositing a copy of same, enclosed in a first class, postpaid wrapper properly addressed to the attorney(s) of record:

Adam J. Neil, Esquire
Post Office Box 6648
Columbia, South Carolina 29260

in a post office or official depository under the exclusive care and custody of the United States Postal Service, on June 4, 2014.

MOSS, KUHN & FLEMING, P.A.

By: Sue Radford
Sue Radford