IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

James D. Fowler, Respondent,

v.

Nationwide Mutual Fire Insurance Company and Andrew Flanangan, Defendants,

Of Whom Nationwide Mutual Fire Insurance Company is the Appellant.

Appellate Case No. 2012-213250

M3285

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SC Court of Appeals

Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

Opinion No. 5256

Heard April 9, 2014 – Filed August 6, 2014

PETITION FOR REHEARING *EN BANC* AND MEMORANDUM IN SUPPORT

Pursuant to Rule 221, SCACR, Respondent, James D. Fowler, respectfully petitions the Court of Appeals for a rehearing *en banc* as to the Court's decision filed August 6, 2014. Said decision reversed and remanded for a new trial the results of the jury trial in 2011 regarding a home fire in January of 2009.

The trial in 2011 was conducted by a very experienced Circuit Judge who had been on the bench since 1994. It lasted five days. There is a lot of significant evidence in the record which was overlooked or misapprehended by the appellate panel and to which the evidence said to be objectionable was cumulative. Any error in the trial

court's discretionary rulings to admit the evidence is, therefore, harmless and not grounds for reversal.

For the reasons set forth below, the Respondent homeowner respectfully asks that the decision of August 6 be vacated, that the defendant insurance company's other grounds for appeal be duly considered and then denied, that the verdict and the judgment thereon be reinstated, in whole or perhaps in such part as the Court deems just, and that the case be ended now, more than five years after it began.

1. CHIEF WRIGHT WAS NOT THE ONLY WITNESS

Very respectfully, the Court in its decision of August 6 overlooked or misapprehended the number of, and the quality of the testimony of, the witnesses who testified at trial as to the fire, the observable evidence as to where and what it burned, and its cause. Volunteer Fire Chief Wright was not the only witness. Unfortunately, however, the August 6 decision limits its analysis of the trial to the testimony of this single witness. It also misapprehends his explanation of the Truck Report which he was required by State regulation to complete.

The witnesses on these topics (the fire, where and what it burned, and its cause) presented by the Respondent homeowner included not only Chief Wright, but also both Mr. Fowler and plaintiff's expert witness with superlative credentials and many years' experience named Doug Ross. In addition, the witnesses presented by the defendant are also important insofar as their testimony actually bolstered the plaintiff's case on the points in question and render harmless the alleged deficiencies of Chief Wright's testimony.

Most important perhaps as regards the portions of the testimony of Chief Wright that the August 6 decision says he was not supposed to give, as an experienced observer but not an expert witness, is the strong testimony of Mr. Ross. Mr. Ross was not mentioned in the August 6 decision. Mr. Ross had credentials at least equal to, but really better than, those of the insurance company's regularly hired expert witness, Mr. Byers. Mr. Ross was an educator of fire investigators as well as one himself, whereas Mr. Byers had worked 59 cases for Nationwide alone in the immediately preceding 48 months. Mr. Ross explained industry standards for fire investigations set out in Publication 921 of the National Fire Prevention Association. Mr. Ross fully explained the v-factor analysis, which the August 6 decision says Chief Wright should not have explained. Mr. Ross explained the photos taken by both investigations and the areas of heaviest damage. Very importantly, he explained the significance of the negative lab test results for all six debris samples taken for the insurer. All of this was overlooked by the appellate Court.

As to the v-pattern as an indicator of the fire's location of origin, the August 6 decision also overlooks the testimony by defense witness Gilden. Mr. Gilden was one of Nationwide's investigators. He said he was not an expert. Mr. Gilden testified, however, that he was familiar with the v-pattern (sic) as a way to trace the origin of a fire. R. p. 891, lines 1-3. He also said that he and defense witness Byers had looked at the v-pattern at the site, and Gilden took photos. R. p. 891, lines 4-11.

Very respectfully, the August 6 decision should not have ruled that Chief Wright could not testify about the location of the v-pattern he observed or what it meant. Expertise was not required to give the testimony as to where the v-pattern was located.

Even if expertise were required to testify as to what the v-pattern meant, the Chief as an onsite observer could testify as to where he personally observed the v-pattern. Any theoretical harm resulting from his saying what it meant was completely eliminated (1) by the testimony of Ross explaining what it meant and (2) by the testimony of Gilden saying what it meant. The jury's verdict was solidly based on a sufficiency of evidence, and it should not be reversed

Looking next at the other witnesses presented by the defendant, there is little wonder that the jury obviously chose to discount or disregard the testimony of Nationwide's Mr. Byers. In addition to his bias, the record shows that (1) Byers formed his opinion and wrote his report before he received the negative test results of all six of the debris samples taken by him from the spots he considered most likely to contain accelerants, (2) he did not bother to amend his report when the negative test results were received, and (3) he admitted that he did not follow the industry standards for proper fire investigation procedures. To wit, Byers clearly violated the rule of National Fire Prevention Association Publication 921, since the term "pour pattern" should not have been used without the corroboration of positive test results for debris samples.

Defense witness Holecek was also overlooked, or his testimony was misapprehended. Mr. Holecek said he was a member of the National Fire Prevention Association. He confirmed that Publication 921 sets the industry standard and is the guidebook he uses. Mr. Holecek was not mentioned in the August 6 decision.

Thus, Mr. Byers, who was the defendant's only expert witness as to the cause and origin of the fire, was thoroughly discredited. His testimony would not justify

reversal of the jury verdict in favor of the homeowner, even if it was the only expert opinion evidence in the record.

The credibility of the homeowner is the single most important item for the jury to consider in reaching its verdict. Mr. Fowler, whose testimony is not even mentioned in the August 6 decision, denied that he set the fire and explained why setting fire to the house he was known to be preparing for sale would have made no sense. There was testimony that he had offered to take a polygraph, which the insurer's records corroborated and its witnesses admitted. The results of a polygraph may be admissible only in the limited circumstances where both sides consent. An innocent person, however, would not make the offer. There was detailed testimony that the fire destroyed the entire contents of the home, including all Mr. Fowler's items of sentimental value. While "opportunity" was never in doubt, the testimony of the homeowner that he had no "motive" to burn his home and all its contents was fully corroborated. The insurer's arson defense completely failed.

Not only the jury in reaching its verdict, but also the trial judge in exercising his discretion in admitting other evidence and in evaluating the insurance company's motion for a new trial, had seen and heard Mr. Fowler testify in person. The appellate panel lacked this opportunity, of course, but it should not have overlooked this testimony in deciding that the trial judge abused his discretion. The verdict in favor of the homeowner was well supported by the entirety of the evidence and, very respectfully, it would have been an abuse of the court's discretion to set the verdict aside, as the trial judge correctly ruled.

Very respectfully, the appellant panel should not have focused only on the testimony of Chief Wright and the claimed imperfections in his testimony. It should not have overlooked the entirety of the testimony at trial, because doing so caused the appellate panel to mistakenly find an abuse of the trial judge's discretion in admitting testimony and to mistakenly find that the appellant insurance company was prejudiced by the testimony which came to the jury in many other ways as well.

The August 6 decision also failed to observe and to follow the rule that when improperly admitted evidence is merely cumulative, no prejudice exists, and, therefore, the admission is not reversible error. *Conway v. Charleston Lincoln Mercury, Inc.*, 363 S.C. 301, 609 S.E.2d 838 (Ct.App. 2005). *Ramos v. Hawley*, 316 S.C. 534, 451 S.E.2d 27 (Ct.App. 1994).

2. <u>CHIEF WRIGHT WAS PRESENT, NOT JUST HIS TRUCK REPORT</u>

Very respectfully, the Court in its decision of August 6 also overlooked or misapprehended the significance of fact that Chief Wright was present in Court to testify and to explain both (1) what he saw on the day of the fire and (2) the answers he was required by State law and regulation to give in completing the Truck Report as to what he observed about the fire. The Truck Report was not introduced into evidence <u>alone</u>, pursuant to an exception to the hearsay rule.

The appellate Court acknowledged in the August 6 decision that the admission of evidence is within the Circuit Court's discretion. It further acknowledged that the Circuit Court's ruling to admit or exclude evidence will be reversed only if it constitutes an abuse of discretion amounting to an error of law. The decision cites *R&G*

Construction Company, Inc. v. Lowcounty Reg'l. Transportation Authority, 343 S.C. 424, 540 S.E.2d 113 (Ct.App. 2000). This is well established law.

Unfortunately, however, the appellate Court failed to give proper deference to the very experienced Circuit Court and the rulings committed to his discretion.

The significance of the fact that Chief Wright was present is that he was not speaking only through a written report prepared elsewhere and presented by others without his being in Court to be cross examined. Therefore, his testimony is not hearsay at all, because the very nature of hearsay is "out of court testimony". No exception to the hearsay rule is required.

In this regard, the appellate Court mistakenly relied upon the case of *State v. Morris*, 376 S.C. 189, 656 S.E.2d 359 (2008). In *Morris*, the bankruptcy examiner's report (which was described as containing "a great deal of investigative opinion, legal analysis, and possible conclusions" 376 S.C. at 207) was offered in evidence as a document, but the bankruptcy examiner himself was not present. This is a crucial distinction. Once again, Chief Wright was present. He was cross-examined. He explained what he was required to do with the Truck Report and why he answered as he did. He did not offer legal theories or go beyond the specific questions on the form.

3. THE TRIAL JUDGE EXCLUDED EXHIBIT 16

Very respectfully, the appellate Court also overlooked the fact and misapprehended the significance of the fact that the trial judge excluded Exhibit 16, which was the final version of the Truck Report. The record clearly shows that the trial judge was presented with two versions of the Truck Report, which is a public record or report and therefore generally admissible as an exception to the hearsay rule. SCRE

Rule 803(8). After much discussion, the trial judge ruled that Exhibit 16, which was the second or final version of the Truck Report, would not be admitted, because it contained a narrative with notes as to the investigation at the bottom of the page. He only allowed into evidence Exhibit 6, the initial version of the Truck Report, because it did not have the notes at the bottom. This exclusion of the final version Truck Report gives deference to the proviso at the end of SCRE Rule 803(8) which says that:

> "Provided, however, that investigative notes involving opinions, judgments, or conclusions are not admissible." (Emphasis added.)

The trial court would not let the notes be read. Only Exhibit 6 was admitted, since it did not have the notes. The judge just allowed the Chief to testify as to, and explain, the specific answers he was required by the State to give on the required form.

In this regard, the appellate Court herein mistakenly relies upon *SC Department of Motor Vehicles v. McCarson*, 391 S.C. 133, 705 S.E.2d 425 (2011). *McCarson* involved the suspension of a driver's license based on a traffic incident report prepared by an officer who was not present to testify at the administrative hearing. The report contained notes as to the officer's investigative findings and her observations as to Mr. McCarson's erratic driving prior to the officer's arrival at the scene. The South Carolina Supreme Court held that the officer's report was "quintessential" hearsay (391 S.C. at 146, 705 S.E.2d at 430) because she was not present to testify; as such, the report was not admissible in the administrative hearing which could result in the termination of an important interest of the licensee. The Supreme Court in a footnote (note 11, 391 S.C. at 147, 705 S.E.2d at 430) rejected the Department's argument that SCRE 803(8) permitted the report to be admitted, because, as the Court said, "investigative notes involving opinion, judgments, as conclusions are not admissible."

The *Fowler* case is different, because, of course, Chief Wright was present. The Truck Report was based on what he saw when he was present at the scene of the fire. He explained it. He was cross-examined.

Judge Macaulay, however, excluded Exhibit 16, because the second version of the Truck Report had notes at the bottom, which he deemed to be investigative notes. This was a proper effort by the Judge Macaulay to give deference to the hearsay rule. Even if the appellate Court were not sure about the correctness of this ruling, it should have given deference to the trial judge in making rulings on the admission of evidence. *R.G. Construction, Inc., supra*. There was no clear error here, and no abuse of discretion by such a conscientious judge as Judge Macaulay.

The appellate Court also mistakenly relies upon the Illinois case of *Bloomgren v. Fire Insurance Exchange*, 162 Ill. App. 3d 594, 517 N.E.2d 290 (Ill.App.Ct. 1987). As an Illinois case, *Bloomgren* is not binding authority in South Carolina. *Bloomgren*, however, is a strange and distinguishable case. In *Bloomgren*, the homeowner had failed to disclose his income from illegal drug sales and other income, which was one of the defenses. The insurance company presented as witnesses both a certified arson investigator and a chemist who testified, respectively, that the fire was not an electrical fire and that the carpet samples from the house had remnants of gasoline "in fairly large concentration". 162 Ill.App. at 598, 517 N.E.2d of 292.

In response, the homeowner offered in evidence an official fire incident report stating that it was an electrical fire, relying upon an exception to the hearsay rule for official records required by statute or authorized to be maintained. There was "an

exception to the exception" if the records concerned cause and effect, unless the official who authored the report would be qualified to testify at trial.

The appellate Court in Illinois noted that "without the fire incident report, however, there was no other expert testimony to contradict the testimony of Charles Hoffman (the insurance company's certified fire investigator) that the fire was intentionally set." The appellate Court in Illinois then ruled that "given the substantial amount of evidence in the record indicating that the fire of an incendiary nature, we find that the trial court abused his discretion and committed reversible error in admitting the fire incident report into evidence and in relying upon it in reaching its decision". 162 Ill. App.3d at 600, 517 N.E.2d at 290.

The strange factual and evidentiary situation in *Bloomgren* bears no resemblance and has no relevance to the Fowler case at bar. There is no proper basis for saying that *Bloomgren* supports a finding that Judge Macaulay abused his discretion in this case in admitting only Exhibit 6, the first version of the Truck Report.

4. THE TESTIMONY OF CHIEF WRIGHT WAS LIMITED TO THE REPORT AND WHAT HE SAW

Very respectfully, the appellate Court misapprehended the limited nature of the testimony of Chief Wright regarding the completion of the Truck Report. Chief Wright modestly said that he was not an expert in fire investigations, obviously comparing himself to Mr. Ross and the later discredited Mr. Byers. He was required by regulation, however, to make observations at the time of the fire and to report to SLED any suspicious fires. The regulations required him to answer certain questions. He did so to the best of his ability. He modestly explained the answers he had given and the observations upon which they were based. He also explained that he had marked

"undetermined" as to some questions. This is a part of the history of the day of the fire, which the jury was entitled to know, just as much as the defendant was entitled to have the jury hear the Chief admit he was not a certified expert like Ross or Byers.

The Chief also testified that he was familiar with the smell of gasoline, as would be members of the jury or the bar or the bench, and he smelled none on the day of the fire.

The Chief was specifically required to look for anything suspicious, and to report to SLED if he found something suspicious. He properly said he found nothing suspicious.

The testimony about what constitutes a v-pattern is understandable and does not require an expert. So, too, the testimony about where the greatest burning occurred was understandable and did not require an expert, just someone present like Chief Wright (or Mr. Gilden). When the testimony was presented by Chief Wright, it was clear that he was giving his observations as to what he saw. He was not trying to overwhelm the jury with a claim of expertise. Thus, the trial judge did not abuse his discretion in allowing the testimony.

Very respectfully, the appellate Court mistakenly relies upon the case of *State v. Kelly,* 285 S.C. 373, 329 S.E.2d 442 (1985). *Kelly* was a criminal case in Magistrate's court, the charge being failure to stop for a stop sign. The officer who testified about the conclusions he drew from his direct observations had not been qualified as expert. However, he was not testifying from a report form required by State law or regulation, and he was not just explaining the specific answers he was required to give. This is entirely different from the limited testimony Judge Macaulay allowed Chief Wright to

give. Moreover, in *Kelly,* there was no other witness, like Mr. Ross, to give expert testimony to explain the meaning of the officer's observations, as well as his own observations when he examined at the scene himself.

The trial judge had the opportunity to observe Chief Wright. He also had the opportunity to select which version of the Truck Report would be put in evidence. He had the discretion to control the evidence which was introduced and the testimony thereon. It is quite clear that he exercised his discretion in an appropriate, conscientious, balanced manner, and there was no abuse of discretion on his part. There was no error of law.

5. <u>THE CLOSING ARGUMENT WAS NOT LEGALLY PREJUDICIAL NOR GROUNDS FOR REVERSAL</u>

Very respectfully, the appellate Court overlooked or misapprehended the limited role any deficiencies in Chief Wright's testimony about the Truck Report played in the closing arguments. As set forth above, it is submitted that there was no error in the admission of Exhibit 6 and the explanatory testimony. As also set forth above, the evidence was cumulative and, therefore, its admission was not reversible error. *Conway v. Charleston Lincoln Mercury, Inc.*, supra and *Ramos v. Hawley, surpra.* Nevertheless, assuming *arguendo* that there was any error, the closing argument of *Fowler* covered many topics, and the brief comments about Chief Wright were neither improper, nor do they constitute a reasonable basis for the Court to reverse the verdict based on so much else in the record and as well as in the argument.

Chief Wright was cited in the closing argument as being independent, as was the scientist who tested the debris samples taken by Mr. Byers. It is true that Chief Wright was independent. He had a job to do, with the duties he could properly explain

in his testimony, as well what he did to carry out his duties. There was no error in letting Chief Wright testify where he observed the fire coming out of the roof, where he observed the v-pattern just below, and where the damage was the heaviest. He could also describe his duty as fire chief to look for anything suspicious to report to SLED.

That is the reference in the portion of *Fowler*'s closing found on page 1130 of the transcript and quoted in part in the August 6 decision:

> "(Chief Wright) has plenty of <u>common sense</u>, he has plenty of experience to do his job, plenty of <u>common sense</u> and experience to answer the key question in this case. <u>And that is: Is there any reason to suspect arson?</u> <u>Because he's required to investigate that and report it to SLED also</u>". (Emphasis added, and please note that the last two sentences cited and emphasized are not included in the quotation of the argument printed in the decision of August 6). R. p. 1130, lines 12-19.

This closing argument is factual and is soundly based in State regulations which were discussed in the testimony by Mr. Ross, Chief Wright, and others.

A referral to SLED by the Chief would, as the Chief explained, defer to SLED the obligation to do expert analysis. The Chief was described as having common sense, not expertise, to do his job.

So, there was no reversible error in the closing argument based on this factually correct reference to Chief Wright. Far more damaging to the insurer's defense were the glaring deficiencies in the testimony of its witness Byers. Byers violated industry standards by using the term "pour pattern" in his report without having corroboration by positive test results for the debris samples he took; Byers wrote his report before getting the test results; Byers did not amend his report after getting the negative test results for all six samples he took, nor did Byers bother to explain in his report why the negative results were not important. The tests cost $100 per sample.

No. The reference in closing to Chief Wright was not improper and it is not what made the insurer lose the arson defense on which it had the burden of proof. There is no reversible error.

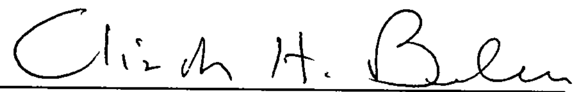
So, too, there was reference to Chief Wright in the cross examination of Mr. Byers, but Mr. Byers was grilled mainly and at great length on his extensive work for insurance companies, his failure to follow industry standards set forth in Publication 921, the deficiencies in his work in this case, and the discrepancies in his own report. There was no reversible error in the cross examination, particularly since there was no reversible error in the admission of the testimony of Chief Wright and Exhibit 6 (only).

CONCLUSION

In conclusion, the Respondent homeowner asks the appellate Court to grant a rehearing as to its August 6 decision, to consider all the evidence and arguments overlooked or misapprehended therein, to duly consider and then deny the Appellant's other grounds for appeal, to reinstate the verdict and the judgment thereon, and to end and this litigation.

Respectfully submitted,

BELSER & BELSER, P.A.



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August 20, 2014.

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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Appellate Case No. 2012-213250

Appeal from Oconee County
Alexander S. Macaulay, Circuit Court Judge

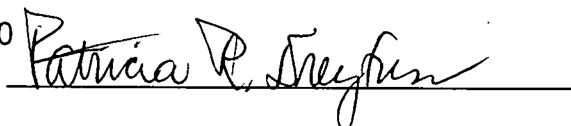
Opinion No. 5256

Heard April 9, 2014 – Filed August 6, 2014

CERTIFICATE OF SERVICE

PERSONALLY APPEARED BEFORE ME, Patricia R. Dreyfuss, who being duly sworn, deposes and says that she is an employee of the law firm of Belser & Belser, P.A., and that she has on this 20th day of August, 2014, served John Robert Murphy, Esquire and Wesley Brian Sawyer, Esquire with the foregoing Petition for Rehearing *En Banc* and Memorandum in Support, in the above-referenced case, by mailing a copy of the same by United States Mail, with sufficient First Class Postage affixed, at the following address:

Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260



SWORN TO and SUBSCRIBED BEFORE me this
20th day of August, 2014.

Notary Public for South Carolina
My Commission Expires: 11/30/17

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August 20, 2014

VIA HAND DELIVERY
Honorable Jenny Abbott Kitchings, Clerk
South Carolina Court of Appeals Clerk
1015 Sumter Street
Columbia, South Carolina 29201

RE: James D. Fowler v. Nationwide Mutual
Appellate Case No. 2012-213250

Dear Ms. Kitchings:

Enclosed for filing please find an original and seven copies of Respondent James D. Fowler's Petition for Rehearing *En Banc* and Memorandum in Support in the above referenced case, along with a Certificate of Service, and our filing fee check for $25.

Please clock one copy and return it to me in the enclosed self-addressed envelope.

Thank you very much.

Sincerely,

Clinch H. Belser, Jr.

CHB,JR/prd
Enclosures
cc: John Robert Murphy, Esquire (via U.S. Mail & electronic mail)
Wesley Brian Sawyer, Esquire (via U.S. Mail & electronic mail)
Mydocs/ser/09024/coc appeals 140820

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