

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

The Honorable James R. Barber III, Circuit Court Judge

Opinion No. 4933

Elizabeth Fettler,.....Respondent,

v.

Frederick W. Gentner,..... Petitioner.

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

Counsel for Petitioner hereby certifies that the Petition for Rehearing was made and finally ruled on by the Court of Appeals on March 2, 2012.

QUESTIONS PRESENTED

- I. DID THE COURT OF APPEALS ERR IN HOLDING THAT THERE WAS NO NEGLIGENCE ON THE PART OF THE DRIVER OF APPELLANTS CAR?
- II. DID THE COURT OF APPEALS ERR IN HOLDING THAT APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT WAS PRESERVED FOR APPELLATE REVIEW?
- III. DID THE COURT OF APPEALS ERR IN HOLDING THAT THE TRIAL JUDGE INCORRECTLY CHARGED THE JURY AND THAT APPELLANT'S ARGUMENTS WERE PROPERTY PRESERVED FOR APPELLATE REVIEW?

STATEMENT OF THE CASE

The Court of Appeals reversed the judgment of the Circuit Court. Elizabeth Fettler v. Frederick Gentner, Op. No. 4933 (S.C. Ct. App. Filed January 25, 2012).

Petitioner seeks a Writ of Certiorari to review that decision.

TABLE OF AUTHORITIES

CASES

Pridgen v Ward, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (Ct.App. 2010) 2

Gibson v. Bank of America, N.A., 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct.App. 2009) 2

Burnett v. Family Kingdom, Inc., 387 S.C. 183, 691 S.E.2d 170 (Ct.App.2010) . . . 2, 5, 8

Still v. Blake, 255 S.C. 95, 177 S.E.2d 469 (1970) 11

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Estate of Carr ex rel. Bolton v. Circle S. Enterprises, Inc., 379 S.C. 31,39,664 S.E.2d 83, 86 (Ct. App. 2008). 3

Manios v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 142, 697 S.E.2d 644, 652 (Ct. App. 2010). 7

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ARGUMENT

I. THE COURT OF APPEALS OVERLOOKED OR MISAPPREHENDED THAT THERE WAS SOME INFERENCE OF EVIDENCE OF NEGLIGENCE ON BEHALF OF THE DRIVER OF APPELLANT'S VEHICLE.

The evidence in this case is susceptible to more than one reasonable inference, and thus the issue of negligence was properly submitted to the jury. "When reviewing a trial court's ruling on a directed verdict motion, this court will reverse if *no* evidence supports the trial court's decision or the ruling is controlled by an error of law." Pridgen v Ward, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (Ct.App. 2010) (quoting Gibson v. Bank of America, N.A., 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct.App. 2009). Burnett v. Family Kingdom, Inc., 387 S.C. 183, 188-89, 691 S.E.2d 170, 173 (Ct.App. 2010) (internal citations omitted) (emphasis added). "When reviewing the trial court's decision on a motion for directed verdict, this court must employ the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party." Id. A directed verdict motion *must* be denied when the evidence, without regard to credibility issues or conflicts in testimony, yields more than one inference or its inference is in doubt. Id. (emphasis added).

The Court's decision focuses on the lack of more than one reasonable inference that could be drawn from the evidence. It is clear that the evidence in this case is susceptible to more than one reasonable inference and thus the trial judge properly denied the motion for a directed verdict. In its decision, the Court of Appeals noted that Gentner argued that there was evidence in the record supporting the

inference that Mrs. Fettler's husband's negligence caused or contributed to the accident by unnecessarily stopping at the yield sign. The Court of Appeals also noted that the only evidence supporting negligence on behalf of Mrs. Fettler's husband was Gentner's personal testimony. However, the Petitioner's wife testified about the negligence of Mrs. Fettler's husband. This testimony, alone, is sufficient to support the trial judge's denial of the motion for directed verdict because "[a]n appellate court will only reverse the trial court's ruling when there is no evidence to support the ruling." *Id.*

Mr. Genter testified that he was ten car lengths behind the Fettlers' vehicle and that Mr. Fettler's stopping at the yield sign caused or contributed to the accident. Furthermore, "[w]hen considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Estate of Carr ex rel. Bolton v. Circle S. Enterprises, Inc.*, 379 S.C. 31, 39, 664 S.E.2d 83, 86 (Ct. App. 2008). Thus, the jury was properly charged on the issue of negligence.

Contrary to the testimony of Mrs. Fettler and the driver of the car in which she was riding, the Petitioner testified that Fettler's car was a "considerable distance" in front of him as he approached the location of the accident. (R.p.23, lines 9-11). The Petitioner testified that he did, in fact, see the vehicle referred to by Mrs. Fettler and her driver and that the vehicle had made a left turn to enter the ramp. However, the Petitioner testified that the vehicle which was making the left turn had already entered the entrance ramp and as Fettler's vehicle approached the ramp "there were no

vehicles in front of them, [and] no vehicles turning left at the time that they were on the ramp." (R.p.23, lines 7-9, 12-16).

The Petitioner testified that there was no reason for the driver of Fettler's vehicle to be stopped at the location and at the time when the accident occurred unless the vehicle itself was having problems. (R.p.24, lines 3-7). The Petitioner unequivocally testified that there were no cars in front of Fettler's vehicle which would have required the driver of Fettler's vehicle to stop or which would have prevented Fettler's vehicle from entering the interstate ramp. (R.p.24, lines 15-18; p.28, lines 8-9; p.33, lines 18-21). The Petitioner further testified that immediately prior to the accident, he did not observe any brake lights or flashing lights on Fettler's vehicle. (R.p.24, lines 8-10).

In addition to the Petitioner's testimony, the passenger in the Petitioner's car also testified that she did not see any reason that would have caused the driver of Fettler's car to be stopped on the entrance ramp at the time of this accident. (R.p.34, lines 1-4).

At the conclusion of the evidentiary portion of the case, Petitioner's counsel argued that the testimony in the case established that there was no reason for the driver of Fettler's vehicle to have stopped at a yield sign as there was no approaching or merging traffic and, therefore, the Petitioner had the right to rely on the fact that the driver of Fettler's vehicle would continue to merge onto the entrance ramp so the Petitioner could direct his attention towards potential traffic approaching from his left to ensure that he properly yielded to oncoming traffic and merged safely.

Counsel argued that it was the negligence of the driver of Fettler's vehicle, in stopping where no stop was required or under conditions in which a following vehicle

would not anticipate a vehicle to be stopped, which caused this accident. (R.p.43, lines 16-25; Supp.R. p.1, lines 1-6; Supp.R. p.1, lines 17-20; Supp.R. p.2, lines 2-7; Supp.R. p.2, line 24-p.3, line 4; Supp.R. p.3, lines 9-14; Supp.R. p.4, lines 8-17; Supp.R. p.4, line 25-p.5, line 7).

The sole question before this court is whether there was any evidence to support the trial court's decision. Specifically, whether based upon the testimony set forth above, without weighing the credibility of the witnesses or attempting to resolve conflicting accounts, that there was one or more inferences as to the cause of this accident. Burnett, 387 S.C. at 188-89, 691 S.E.2d at 173.

As the testimony clearly demonstrates when taken in the light most favorable to the Respondent, there are clear inferences that the actions of the driver of Fettler's vehicle could have caused or contributed to this accident as a result of his stopping the vehicle on the entrance ramp without cause. As noted in the transcript, the affirmative defense of comparative negligence was inappropriate in this case as Mrs. Fettler was a passenger in the vehicle. (R.p.38, lines 12-18). Accordingly, the passenger had the right to choose who to bring causes of action against for her alleged injuries. Mrs. Fettler could have brought an action jointly against both the driver of her vehicle and the Petitioner and have allowed a jury to determine fault between the two. However, Mrs. Fettler chose not to proceed in this manner. The Answer filed on behalf of the Petitioner properly raised the affirmative defense that the Petitioner alleged any of Mrs. Fettler's alleged injuries were not a result of any negligence on behalf of the Petitioner, but rather was due to the sole negligence of the driver of the Fettler's vehicle.

The Court of Appeals has quoted and cited extensively to discussions between counsel and the trial court concerning whether a directed verdict on the issue of negligence was warranted. (Appellant's Final Brief, pp.4-6). However, as noted once in the Petitioner's brief and which is evident when reviewing the transcript citations, most of the conversations generalized or characterized the testimony offered. Contrary to the dialogue, the Petitioner did not admit fault for this accident. The Petitioner did not admit to causing or contributing to this accident. The Petitioner consistently maintained that there was no reason to expect the Fettle's vehicle to be stopped in the road when the accident occurred. Moreover, based upon the testimony set forth above, there was a genuine jury issue as to whether the driver of the Fettle's vehicle was slowing or stopped. There was also a jury issue raised as to whether Mrs. Fettle witnessed the vehicle she alleged was entering the ramp as she testified that she was applying makeup at the time and so she "never saw" (R.p. 13, lines 17-19; p. 16, line 22).

Based upon the conflicting evidence and the lack of an admission as to fault by any person, there clearly exists evidence which yields more than one inference as to whether the Petitioner was responsible for this accident or whether the accident was caused by the negligence of the driver of the Fettle's vehicle. Therefore, the trial court properly denied Mrs. Fettle's motion for a directed verdict as to the issue of negligence.

Id.

Based upon the foregoing argument, this court should affirm the trial court's denial of Mrs. Fettle's motion for a directed verdict because there was a reasonable

inference of some negligence of Mr. Fettle and the verdict for the Petitioner is supported by some evidence.

II. THE JURY CHARGE ON NEGLIGENCE WAS NOT PREJUDICIAL OR ERRONEOUS.

“Evidence of an independent negligent act of third party is directed to the question of proximate cause.” Manos v. Nelson, Mullins, Riley & Scarborough, LLP, 389 S.C. 126, 142, 697 S.E.2d 644, 652 (Ct. App. 2010) (quoting Matthews v. Porter, 239 S.C. 620, 628, 124 S.E.2d 321, 325 (1962)). “Ordinarily, proximate cause is a question for the jury.” Id. (citing McKnight v. S.C. Dep’t of Corr., 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct. App. 2009)).

The Court of Appeals held that the issue of Mr. Gentner’s negligence should have been resolved by a directed verdict in favor of Mrs. Fettle and thus there was no evidence in the record to support a jury charge of negligence. For the reasons previously stated in Section I, the jury charge on negligence was not prejudicial or erroneous. Based on the testimony of Mr. Gentner and Mrs. Gentner, an inference could be drawn that Mr. Fettle caused or contributed to the accident by stopping at the yield sign when there was no reason that he did not move forward. Because more than one reasonable inference could be drawn from the evidence, the motion for directed verdict was properly denied by the trial judge, and the jury was properly charged on the issue of negligence.

The Court of Appeals indicated that the jury charge may have confused the jury and that it had a “strong possibility of confusing the jury and effecting the outcome of

the trial.” The basic negligence charge of the Trial Judge and the statutes are not confusing. There is no evidence in the record that the jury was confused. An erroneous jury instruction is not reversible error unless it causes prejudice to the appealing party. Cole v. Raut, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008). There is no evidence in the record that the jury charge caused prejudice to Mrs. Fettler. However, the verdict for the Petitioner is reasonable if the jury was not persuaded that Mrs. Fettler’s injuries and damages were proximately caused by this minor automobile accident with the Petitioner.

III. MRS. FETTLER’S ARGUMENT THAT THE TRIAL COURT ERRED IN DENYING HER MOTION FOR A JUDGMENT NOTWITHSTANDING THE VERDICT IS NOT PRESERVED FOR APPELLATE REVIEW

The Petitioner testified that the vehicle which was making the left turn had already entered the entrance ramp and Fettler’s vehicle approached the ramp, there were no vehicles in front of them [and no vehicles turning left at the time they were on the ramp.] (R.p. 23, line 7-9, 12-16).

The sole question before this Court is whether there was any evidence to support the Trial Court’s decision. Specifically based upon the testimony set forth above with weighing the credibility of the witnesses or attempting to resolve conflicting accounts, that there was one or more inferences to the cause of this accident. Burnette v. Family Kingdom, Inc., 387 S.C. 183, 188-189, 691 S.E.2d 170, 173 (Ct. App. 2010).

As the testimony clearly demonstrated and taken in the most favorable light to the Petitioner, there is an inference that the actions of the driver of the Appellant’s

vehicle could have caused or contributed in the result of stopping the vehicle on the roadway with any cause.

Mrs. Fettle set forth in the caption of his first argument that the trial court erred in denying her motion for a JNOV. However, this issue was neither set forth in the Statement of Issues on Appeal in the Mrs. Fettle's Initial Brief nor was it actually argued in the brief. Simply as a matter of addressing the allegation, following the jury verdict Mrs. Fettle's counsel moved for a JNOV. The trial court properly noted that motion for a JNOV is simply restating the grounds made for a directed verdict and, in this case, the grounds for the directed verdict only addressed the issue of negligence and did not go to either causation or damages. Therefore, the court stated that the motion for a JNOV would be treated as a motion for a new trial under the thirteenth juror doctrine. Mrs. Fettle's counsel consented. (R p.53, line 19-p.54, line 11).

Therefore, any argument that the motion for a JNOV was either not ruled upon or ruled upon incorrectly were not preserved for appellate review. Chapman v. Upstate RV & Marine, 364 S.C. 82, 88, 610 S.E.2d 852, 856 (Ct.App.2005).

IV. THE TRIAL COURT CORRECTLY CHARGED THE JURY AND MRS. FETTLER'S ARGUMENTS ARE NOT PRESERVED FOR APPELLATE REVIEW

Mrs. Fettle argues the trial court erroneously charged the jury by giving a complete charge for all of the elements of negligence. (Appellant's Initial Brief, p.7).

This issue was not raised to or ruled upon by the trial court and, therefore, this argument is not preserved for appellate review.

Rule 51, SCRPC, states in pertinent part the following: “. . . No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds for his objection. Opportunity shall be given to make the objection out of the hearing of the jury.” Moreover, where there is no objection to an improper jury instruction, where the trial court fails to give a ruling, or where counsel fails to pursue a ruling, the issue is not preserved for appellate review. Orangeburg Sausage Co. v. Cincinnati Ins. Co., 316 S.C. 331, 347, 450 S.E.2d 66, 76 (Ct.App.1994) (internal citations omitted).

In the present case, the trial court offered the parties the opportunity to raise any issues as to the instructions and law charged to the jury prior to informing the jury to begin its deliberations. (R.p.49, lines 20-21). Mrs. Fettle did not raise any issues to the trial court that are raised in her initial brief to the court.¹ (R.p.49, line 22-p.50, line 9; p.51, lines 3-4). Accordingly, any arguments concerning allegations that the trial court abused its discretion by failing to charge or improperly charging the jury are not preserved for appellate review.

Accordingly, this court should find that the allegations that the trial court abused its discretion by improperly charging the jury are not preserved for appellate review.

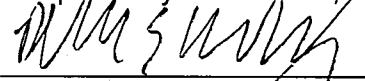
The Petitioner would note that the Mrs. Fettle's Initial Brief states that the trial court gave a "full instruction" on negligence and that the trial court's instructions "appear to be quoted essentially verbatim from the case of Still v. Blake, 255 S.C. 95, 177 S.E.2d 469 (1970).

The Petitioner respectfully requests that this court find that the trial court did not err in denying Mrs. Fetter's motion for a directed verdict as to sole issue of negligence negligence (duty and breach of duty) and affirm the jury's verdict in favor of the Petitioner.

CONCLUSION

For the reasons stated, Petitioner asked the Court to grant the Petition for a Writ of Certiorari.

Respectfully Submitted,



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May 7, 2012

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In The Supreme Court

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APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

S.C. Supreme Court

James R. Barber III, Circuit Court Judge

Case Number 2006-CP-40-3615R

Elizabeth Fettler,..... Respondent,

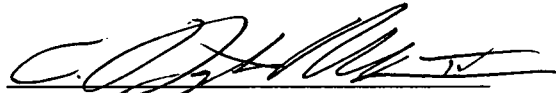
v.

Frederick W. Gentner,..... Petitioner.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Petition for a Writ of Certiorari and Respondent's Appendix was hand delivered to the Supreme Court/Plaintiff's attorney, on the 7th day of May, 2012.

cc: Everett Hope Garner
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May 7, 2012

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Columbia, SC 29211

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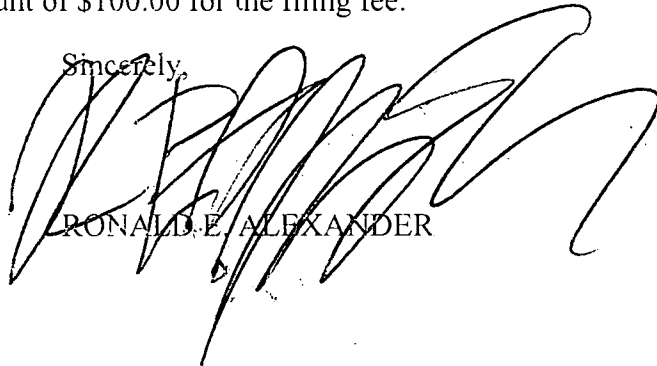
S.C. Supreme Court

RE: Elizabeth Fettle v. Frederick Gentner
Case Number: 2009-123167

Dear Clerk:

Please find enclosed one (1) unbound and one (1) bound copy of the Respondent's Appendix and Certificate of Counsel with proof of service on the Appellant's counsel. Also enclosed is one (1) original and seven (7) copies of the Petition For a Writ of Certiorari. Please return a stamped copy of the Petition For a Write of Certiorari and Certificate of Service with my courier. Enclosed is a check in the amount of \$100.00 for the filing fee.

Sincerely,



RONALD E. ALEXANDER

REA/scc

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check # 233488
\$100.00



The Supreme Court of South Carolina

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05/07/2012

RECEIPT #64153

Case No: 2012-210446
Case Short Title: Fettler, Elizabeth v. Gentner, Frederick
Event:
Fee Type: Case Initiation Fee
Amount: \$100.00
Payment Type: Check
Reference No: 233488
Check/Money Order Date: 05/07/2012
Comments: