THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5055 (S.C. Ct. App. Filed November 28, 2012)

Appellate Case No: 2013-000674

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc and Edgar Rivera,

Petitioners.

BRIEF OF NEWTON PETITIONERS

J. Dwight Hudson, Esquire
Hudson Law Offices
1203 48th Avenue North
Suite 111
Myrtle Beach, SC 29577
SC Bar # 2753
T: (843) 692-9889
F: (843) 692-9190
E: hudsonlaw@sc.rr.com
Attorney For Petitioners Newton, Newton's Farms, J&J Logging, Inc.

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STATEMENT OF ISSUES ON APPEAL

I. The Court of Appeals erred in holding that it need not determine if the trial court erroneously concluded that it should have granted the Petitioner's directed verdict motion because the new trial was granted on the facts. The trial court granted a new trial based upon its erroneous change of heart with respect to the directed verdict motion and had the court granted the directed verdict, it would have committed reversible error.

II. In upholding the trial court's reliance upon Howard v. Roberson, 376 S.C. 143, 656 SE2d 877 (S.C. App. 2007), which it does not appear that this Court has yet addressed, the Court of Appeals effectively discarded the necessity for a passenger to meet a burden of proof. Such a fundamental change, assuming it could be made at all, would properly be for the Supreme Court and not the Court of Appeals.

STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on August 29, 2005 at the intersection of Pennyroyal Road and Stoney Brook Lane in Georgetown County, SC. The Respondent was a passenger in a 1997 Nissan being driven by her brother, co-Petitioner Edgar Rivera, when that vehicle struck a tractor/trailer hauling a loader operated by Petitioners Newton, J&J and Newton's Farms (Hereinafter, "Newton"). The Respondent filed a Complaint arising from the MVA on November 1, 2005, alleging negligence by all Petitioners. **(R.p.10-14)**

Petitioner Rivera filed his Answer on December 15, 2005, generally denying the allegations of the Complaint and alleging the Sole Negligence of a Third Party, Unexpected

Emergency and the Unconstitutionality of Punitive Damages. **(R.p.24-28)** Petitioners Newton filed an Answer on January 26, 2006, generally denying the allegations of the Complaint and alleging the Sole Negligence of co-Petitioner Rivera, the Respondent's Contributory/Comparative Negligence/Assumption of the Risk and her Failure To Wear A Seatbelt as being the proximate cause of her injuries, all Rule 8 and 12 Defenses, Sudden Peril or Emergency, Unavoidable Accident, Lack of Causation of Injuries, Reservation of Right To Amend and a Punitive Damages Defense alleging the unconstitutionality of Punitive Damages. **(R.p.15-23)**

The case came on for trial during the term or week of March 15-20, 2010 before Judge Benjamin H. Culbertson. At the close of the Respondent's case, all parties moved for a Directed Verdict. The Court denied all motions, after giving some consideration to granting the Motion of Co-Respondent Rivera. **(R.p.225,l.24 - p.240, l.13)** At the close of the evidence, the Respondent made a Motion to Strike and/or for a Directed Verdict for the Plaintiff as to the defenses of Comparative Negligence and the Court granted the Motion. **(R.p.349,l.24-p.353,l. 4)** Petitioners Newton renewed their prior Motion for Directed Verdict(s) and the Court denied the same. **(R.p.353, l.14-p.355,l.12)** The Respondent waived punitive damages. **(R.P.355, l.15-19)** Petitioner Rivera renewed his prior Motions for Directed Verdict(s) and the Court denied the same. **(R.p.355, l.20-24)** As jury charges were being finalized, the Respondent moved that unavoidable accident be struck because there was no natural event involved in the MVA so it had to have been avoidable. The Court ruled that for an accident to meet the criteria of being potentially unavoidable it had to involve a "natural occurrence that is not attributable to any person or any Defendant (Petitioner) that made the accident unavoidable, a tree, lightning strikes

a tree and falls across the road or you have a landslide or something of that nature" and the Court struck unavoidable accident. **(R.p.364,l.3 - p366, l.13; quote at p.365, l.2-6)**

As to the verdict form, the Respondent objected to Number 4 on the form which allowed a defense verdict and moved that because the Court struck the defense of unavoidable accident, and refused to charge it that it had to hold at least one of the Petitioners liable because if the accident could have been avoided at least one of the Petitioners must be liable and yet, #4 on the verdict form allowed the jury to return a defense verdict. The Court refused to change the verdict form **(R.p.366, l.20-p.368,l.19)** In so holding, the Court stated as follows: " ... I have number four in there is because of the jury instruction that says, in the law that says the Plaintiff has to prove their case. I think you can have negligent Defendants, you can have a wreck that is not the product of an unavoidable accident, but you could also have a Plaintiff that just didn't prove their case for whatever reason, which would result in a verdict for the Defendants." **(R.p.367, l.6-13)**

The jury was charged and began deliberating at 3:10 pm on March 19, 2010. It sent out a note at 4 pm that said "transcript Officer Surratt." **(R.p.389, l.1-2)** From the note, the Judge determined that the jury wanted to hear the testimony of Trooper Surratt again and he called the jury and had the full testimony replayed after confirming that such was the jury's request. **(R.p.389, l.1-8; p.393,l.5-10)** At 5:40 pm the jury sent out a question and a request. The request was for a complete definition of the term intersection as it applied to this intersection on the night of this accident. The Court's response was as follows:

> "In this case the right-of-way can best be defined as follows: the right-of-way is the legal right for a Defendant to travel in the direction in which he was traveling, whether that be the Defendant, Edgar Rivera, traveling down Pennyroyal Road or the Defendant, Warren Jared Newton, turning onto

Pennyroyal Road. As I previously instructed you, travelers on favored and un-favored highways must use ordinary care in keeping a proper lookout for vehicles approaching an intersection. Therefore, the driver on the un-favored highway has a duty to stop and yield his right-of-way to any vehicle approaching the intersection on the favored highway when that vehicle is so close that it would be an immediate hazard. On the other hand, the driver on the un-favored highway has a right to enter the intersection if there is no traffic approaching that is so near as to constitute an immediate hazard and it becomes the duty of those approaching the intersection on the favored highway to yield his right-of-way to the driver entering the favored highway."

(R.p.393, l.22- p.394,l.21)

Respondent's Attorney objected to the language and asked that the Court "clarify" the prior charge by adding criteria that the jury could consider time of day, lighting, etc. He wanted some language about "blocking" of the road even though counsel conceded that there is no statutory law on that and asked the Court to supplement with "common law" that the Newtons' truck didn't have the right to "stay out there" at night without warnings. The Court overruled this objection. **(R.p.395, l. 7-p.397, l.20)**

The 5:40 pm jury question was for "A copy of or read again the Judge's reading to the jury before deliberations." **(R.p.397, l.21-23)** The Court sent a copy of the full jury instructions back to the jury with a curative instruction that the charges must be considered as a whole. **(R.p.397, l.21- p 402, l.21)** At 7 pm the Court sent the jury home for the night. **(R.p.403, l.24- p. 405, l.12)**

The next morning, March 20, 2010, jury deliberations resumed at 10:08 a.m. At 2:32 pm on March 20, 2010, a verdict was reached and read into the record as follows "County of Georgetown, Hazel Jeisel Rivera versus Warren Jared Newton, J & J Logging, Inc., and Edgar

Rivera, case number 2008-CP-22-466, we, the jury, find in favor of the Defendants, foreperson Sarrah E. Grimes." **(R.p.406, l.16- p 407, l 4; quote at p. 407, l.1-4)** [The Defendants at trial are the Petitioners, Newton, and co-Petitioner, Edgar Rivera, in the present matter.]

Subsequently, the Respondent filed a Motion for a New Trial and the Petitioners Newton and co-Petitioner Edgar Rivera filed Memoranda opposing the Motion for a New Trial **(R.p.101-102; p. 105-117; p.119-122; p.123-128)** By Order recorded on July 11, 2010, the Court granted a New Trial. **(R.p.5-6)** Thereafter, on July 19, 2010, Petitioners filed and served a Motion To Alter/Amend/Reconsider Order and/or For Relief From Order and the Court denied the same by Form Order filed July 30, 2010. **(R.p.130-136; p. 8-9)**

The Court of Appeals affirmed the Trial Court by its Opinion filed November 28, 2012 **(Appx.p.2-12)** with Judge Konduras dissenting as to the trial court's grant of the Respondent's new trial motion. **(Appx.p.12)** The Court of Appeals denied the Newton Petitioners' Petition for Rehearing by its Order filed March 5, 2013 and this Petition for Certiorari was filed on March 27, 2013. This Court granted the Petition by its Order of October 8, 2014.

STATEMENT OF THE FACTS

Jarred and Joel Newton are brothers who grew up in Georgetown Count, born to parents involved in the logging industry. The Newtons have worked in that field for most of their lives. **(R.p.241, l.2-17)** At the time of this accident, August, 9 2005, they had a company known as J&J Logging which just finished logging a tract off Pennyroyal Road and they had moved most of their equipment to their next tract. **(R.p.246, l.14- p.247, l.6)** They returned to the Pennyroyal site in the evening to get the loader. **(R.p.246, l.20-24)**

Working at night isn't unusual for loggers as some of them run crews 24 hours a day. Also, because most area loggers are delivering to International Paper in Georgetown, which stays crowded during the day, many of them deliver at night when it is cooler, there is less traffic and it is easier to get in and out of the IP mill quicker. **(R.p.242, l.25-p.241, 1.16)** Log trucks come in and out of the woods 24 hours a day and on the first day of trial and on the second, when he testified, Jared Newton rose at 2 a.m. and 2:30 a.m., respectively, picked up logs in Summerville and drove them to International Paper in Georgetown. **(R.p.245, l.3- p.246, 1-3)** And it wasn't unusual to move this loader at night - they had done it before. **(R.p.247, l.13-20)**

On the evening of August 5th, 2005, they were leaving with Jared driving the tractor/trailer carrying the loader and Joel following in a pick-up truck. **(R.p.252, l.5-7)** They pulled up on Stoney Brook Lane to where it intersects with Pennyroyal Road and stopped to wait for traffic to clear which took a few minutes. Pulling out took between 15 to 25 seconds and is similar to driving a pickup pulling a boat trailer. **(R.p.252; p.297 l.11-12)** At this spot on Pennyroyal Road a truck could not pull out straight. **(R.p.252, l.12-16)** To pull out of Stoney Brook Lane and end up on Pennyroyal the truck had to perform the following maneuver - as described by Jared Newton while reviewing photographs for the jury:

> A. .... So, we would hug the right-hand side of the road when you come out right here and kind of turn back to your right, drive down on this side over here, back the truck back up ---
>
> Q Let's let these ladies see.

A Back the truck up and then get off the, get off the edge of the road, just make a, make a wide swing and the trailer will come right on out behind you.

Q All right, and about how long would this process take to get out generally with this maneuver?

A Twenty-five, 30 seconds, they don't take much longer than it does a car or a pickup with a boat.

Q All right.

A And you just back up that one time.

(R.p.254, l.24 -p255, l.11)

After traffic cleared, Jared pulled straight across the road, pulled down into the ditch, cut the wheels, put it in reverse and was backing up to straighten up when cars came around the curve. **(R.p.252, l.17-19)** Jared thought, "well, you know, they can see me, they'll stop. I pulled it, pulled it down in low. Soon as I started moving they never slowed down. They was still coming. So, I flickered the lights, nothing. I was still moving. I started to toot the horn and that's when they hit me. **(R.p.252, l.19-24)**

Jared Newton was confident that the oncoming car would see him and stop and it should have because the tractor and trailer were well marked and well lighted and the area was lighted. The trailer had red and white reflective tape down the side. **(R.p.249, l.8-p.250, 1.2)** The trailer had 2/1 to 3 inch lights in the middle and at either end. **(R.p.249, l.20- p.250, 1.7)** Mr. Newton's tractor also had a number of lights, as per the following testimony:

> They come with roof lights, they call them clearance lights. Most trucks have five, you know, two on either side and one in the middle, then your standard headlights, park lights, taillights. I like to add some to them. I had

three on either side of the bottom of the bumper that light up when you blink along with the turn signal. They call them earrings, they hang off the bottom of the mirrors so they light up the side of the truck, you know, they look kind of good when you cut them on, plus four down the steps of the fuel tanks where you climb in the truck. The two in the middle would blink. There's a headache rack you have to have behind the cab just to get in the mill because if something happens, wood will squish you. You got to have one and I put four lights on either side of them. They light up, plus, your taillights and running lights on the back.

Q All right, the evening at the time of this accident, how many lights on your tractor and/or trailer were blinking?

A Two on either corner of the bumper, your two regular park lights beside the headlights was blinking, the two on the mirrors were blinking and then the two tail, two of taillights was blinking.

Q All right.

A Plus the ones on the trailer.

Q Were all of them working that evening?

A Yes, sir.

Q All right

A If they're not working, the DOT will shut you down.

(R.p.250, l.13- p.251, l.14)

Per the Respondent's cross-examination of Jared Newton, between the tractor and the trailer, there were 51 lights on the rig. **(R.p.289.1-p.289.9)** Additionally, Joel was driving a pick-up truck right behind the tractor trailer. It had running lights on top of the roof plus it had the headlights and hazard lights on. **(R.p.252, l.25 -p.253, l.6)** The involved truck was pulling out from Stoney Brook Lane onto Pennyroyal Road, right across from Saint Michael's AME Church and there was a light on a pole in the churchyard that also illuminated the area. **(R.p.253, l.10- p. 255, l. 25)** The light from the Church provided a light source illuminating the tractor/trailer as

though it were in a typical parking lot, per expert testimony from Petitioner's expert mechanical engineer/accident reconstructionist, Mike Dickinson. **(R.p.319, l.16- p.320, l.23)** Dickinson conducted field tests in the area at the time of night of the accident and discovered that the Church light provided enough illumination to allow him to stand at the edge of the roadway, near the position of the tractor/trailer, and it provided enough light at night for him to be able to read deposition transcripts. **(R.p.313, l.14- p.321, l.4)** There were also warning signs posted by J&J to warn approaching traffic, like the cars heading straight for the tractor/trailer on the night of this accident. **(R.p.256, l.1-8; p. 258, l. 12-23)** These were signs bearing the advisory warning to traffic "Trucks Entering Highway" and they were posted in both directions of travel. The signs are reflective and the letters and border light up as a car's lights pass over them. **(R.p.268, l.11- p. 269, l.11)**

Yet on August 9, 2005 Jared Newton was already in the midst of the turning maneuver with the tractor/trailer extended across the well-lit truck in the well-lit roadway. When Jared Newton saw the oncoming vehicles, they were "nose to tail" in the left lane coming around the curve and then entering the 950 foot straight section of roadway approaching Petitioner's truck. **(R.p.258, l. 7- p. 259, l. 9; p. 328, l. 6-9; p. 313, l.5-8)** Usually cars approaching during this part of the maneuver would slow down to allow the J&J tractor trailer the additional 10 seconds necessary to straighten up in its lane of the roadway, but not these cars. **(R.p.259, l.14-17)** Nothing blocked the lead car's view and the truck's headlights weren't pointing straight at the car in any manner that might impede the driver's vision - the truck's headlights were pointing towards the woods, near an area between trees and the setback because the truck hadn't yet straightened up in the lane which would have been when the headlights were pointing straight down the road and the truck was on Pennyroyal, away from the intersection, heading towards the

Sampit/Andrews area. **(R.p.258, l.3-p260, l. 9)** Jared Newton flashed the lights at the cars speeding towards his rig at a rate of 65 to 70 miles per hour and started sounding the horn, but then the cars hit the trailer. **(R.p.259, l. 20-22; p. 260, l.1-5 and l. 6-13)**

By the time Jared Newton could get out of his truck to check on the occupants of the two cars that hit his trailer the occupants of the second car were climbing out and either they helped co-Petitioner Rivera, the driver of the first car, out or he got out on his own. The Respondent was the passenger in the first car and she was the only person ejected from the vehicle, having been ejected through the front windshield of the car. **(R.p.266, l.13-20)** According to Jared Newton and neighbor Terry Ward, who heard the accident and was the first person to arrive on the scene, after the accident, before EMS or the police arrived, several other cars approached the scene, saw the tractor/trailer, and turned around and none struck the rig. **(R.p.263, l. 5-11; p. 368, l 7-24)** Terry Ward, like Petitioner's expert, testified that the area was well lighted and Mr. Ward says that "pretty much you could see down the road a good little ways." **(R.p.290, l.11-22; p. 406, l.14-p. 321 l.4)**

Why then did the Rivera car strike the Petitioners' tractor trailer? The highway patrolman, Trooper Surratt, never saw the truck lights illuminated because paramedics asked Newton to turn off the truck for fear of a gas leak or explosion while they were treating the Respondent. **(R.p.262, l. 10- p.265, l. 9)** The Trooper's diagram on the accident report show the truck lights pointed straight down the road in the direction from which the Rivera vehicle came, but that diagram was wrong and the Trooper never saw the truck lights illuminated until the scene was being broken down and the truck had been moved. **(R.p.262, l.10- p.265, l. 9; p. 272, l.3-25)** The Trooper didn't see the truck lights turned on while the truck was in its original position after the accident, but the independent witness, Terry Ward saw the position of the truck lights. Mr.

Ward testified that the truck lights were pointing towards the woods. And Mr. Ward lived right across from the Church, had lived there for years, was familiar with the area and knew none of the parties involved in the accident. **(R.p.293, l.7- 13; p. 362, l. 2-7; p. 364, l. 8- p. 370, l. 13)**

The Respondent's theory was that the truck lights blinded co-Petitioner Rivera so that he couldn't see the tractor trailer. However, the testimony of Newton and the independent witness is that the truck lights were shining into the woods. **(R.p.293, l.7- 13; p. 362, l. 2-7; p. 364, l. 8- p. 370, l. 13)** Petitioner's expert's testimony, confirmed by his visit to the scene at the same time of night, is that co-Petitioner Rivera should have been able to see the tractor/trailer in plenty of time. **(R.p.299, l.25 - p. 348, l.14)** That expert, Mr. Dickinson, opined that Edgar Rivera caused the accident because he failed to reduce his speed despite "the presence of a number of visual clues that such a reduction in speed would be prudent" with some of these clues being the nature of the road, the presence of residences, plant entrances, a Church and warning signs from Petitioners Newton. **(R.p.333,l.25-p.334, l.25)** Dickinson further testified as follows regarding the other driver, Edgar Rivera:

> As he approached the tractor trailer loader and pickup truck down there at the scene, as he got closer it became obvious that that vehicle wasn't moving if he'd been paying proper attention. The illumination provided by the various sources that we discussed, just the presence of a pickup truck with its flashers on and a tractor trailer with flashers on and the thing's not moving in the middle of the road, has got to put you on notice that you need to be slowing, you need to be doing something to get ready for whatever's coming because it's not obvious. It's not obvious what's out there, but that puts the burden on the driver to slow down enough that he doesn't get surprised when he gets to that spot.
>
> **(R.p.335, l.1 -12)**

Why then did Rivera's car hit the tractor/trailer? Shortly before the Riveras left their residence, they got a call advising that their Father had been mugged and Edgar Rivera and his sister, with another car following, left to go to his aide. **(R.p.171,l.11-p.173,l.12)** The Respondent said that she and her brother were watching TV when Edgar got a call from their Uncle saying that their Father was unconscious. The Plaintiff said Edgar did not want to tell her about the call so she wouldn't be frightened but she'd overheard. While Edgar went to change his shirt the Respondent got the car keys and was outside beside the car with the keys, refusing to give them to her brother unless he took her with him. The Petitioner testified that she made sure that her brother Edgar had to take her. **(R.p.213, l.1-25)**

Edgar Rivera was born on December 24, 1986 which would have made him 18 on 8/09/2005. **(R.p.166, l.3-4)** The Respondent was two (2) years older, having been born on August 30, 1984. **(R.p.211, l.1-6;p.493)** After the accident, one of the other car's occupants asked the independent witness, Mr. Ward, about him leaving to go and get the Respondent's driver's license from their house. Apparently, they wanted someone in the car to have a license before the Trooper arrived, but Mr. Ward told them it was best not to leave the scene. **(R.p.294, l.12 -16)** So the Respondent may have had a driver's license that wasn't with her, but Edgar Rivera was completely unlicensed. That resulted in no one in the Rivera car having a driver's license, per the Trooper's testimony. **(R.p.165, l.24 - p. 166, l.1)**

At the time of the accident, the Plaintiff was busy talking on a cell phone. Edgar testified that at the time of the accident his sister was trying to call his mother. **(R.p.179, l.24 - p.187, l. 23)** At trial the Plaintiff testified that she was trying to call her Mother on the cell but couldn't reach her because her mother's phone was busy. **(R.p.213,l.25-p.214,l.8)** However, the Plaintiff's trial testimony contradicted her deposition testimony, which was read into the record in trial. In her deposition, the Plaintiff claimed that she didn't see too much before the accident because she was on the phone talking with her mother. **(R.p.219, l.18-p.220, l.6)** By way of

proffer after the Court sustained an objection, testimony was offered that the Plaintiff was not wearing a seatbelt at the time of the accident. **(R.p.223, l.l-18)**

Edgar Rivera, who had only been in the US for three (3) years prior to this accident, testified that he was speeding, and driving between 57-58 miles per hour but that he doesn't normally speed because he doesn't want to be stopped. **(R.p.171,l.12-p.173, l.12)** He first testified that he saw nothing until impact. **(R.p.173, l.5-p.174, l.11)** He then changed his testimony and said that he saw headlights but that his perception was that they were those of a car and that the car was not moving. **(R.p.176, l.6 - p. 178, l.24)** He testified that the headlights were pointed directly at him but didn't recall his deposition testimony that he saw the lights flashing. **(R.p.176, l.17-p.177, l.12)** Rivera testified that he did not believe he could have avoided the wreck. **(R.p.176, l.6 - p.178, l. 24)**

The Respondent testified on direct at trial that she doesn't remember the crash but only remembers seeing a dark shape and knowing they were going to crash and putting up her hand to protect her face. **(R.p.213, l.25-p.214, l.8)** Her deposition testimony was read into the record wherein she testified that she only saw the trailer, that they took a curve and she couldn't observe it well but that she was on the cell phone with her mother at the time. **(R.p.219, l.18 - p. 220, l.6)**

So what actually did cause this accident? Why did the Rivera car run into the trailer? Perhaps the key lies in the Respondent's deposition testimony, which was read into the record at trial. She admitted that she and her brother were in a hurry to get to her Father. **(R.p.217, l.3-8)**

And what caused the jury to return a defense verdict if by Rivera's own testimony he was speeding and by both his and his sister's testimony neither saw the truck in mid turn across the highway, although the independent witness, Ward, and the Petitioners' expert, Dickinson both testified that the area was well lit? Again, the key lies in the Respondent's testimony.

Q Okay, in fact, Edgar did nothing to cause this accident, correct?

A No.

Q Okay, and had you been driving instead of Edgar, you wouldn't have done anything differently?

A No.

Q Okay, and if I'm correct, you actually begged him to allow you to ride with him?

A I practically obligated him to.

Q Okay, and he relented?

A He didn't have any other way.

Q Not willingly?

A No.

Q Okay, and then you got into an accident and now you're suing him today?

A At first I didn't know, I didn't know that it was going to be like this, that I would be here suing my brother.

Q But you don't believe your brother did anything to cause the accident?

A No.

(R.p.221, l.8-p.222, l.2)

The Respondent testified that she forced her way into Edgar's car on the night of this accident and that she does not believe her brother did anything wrong. Essentially, she waived her claim against Edgar. That being the case, if the jury determined that the Respondent didn't meet her burden of proving that the Petitioners, Newton, were negligent, it would have returned a defense verdict as to Respondent's brother, co-Petitioner Edgar Rivera, based upon the Respondent's own testimonial waiver. Trooper Surratt testified that the Petitioners' truck was

entering Pennyroyal at a County-maintained road that qualified as an intersection in the State of South Carolina. **(R.p.168, l.24-p.169, l.2)**

The Trial Judge charged the jury that it was the sole judge of the facts. **(R.p.372, l.7-13)** The Judge charged that the Respondent had the burden of proving her case by a preponderance of the evidence and that "..if the facts sought to be proved by the Plaintiff are more likely not true than true or that the facts supporting the Defendant's case are equally as true then the Plaintiff has failed to meet her burden of proof and you must return a verdict for the Defendants." **(R.p.374, l.14 - p.373, l. 8)** The Judge told the jury that they were to determine credibility. **(R.p.373, l.9-24)** The Judge charged the jury that the Respondent had to prove all the elements of negligence. **(R.p.374, l.24 - p.379, l.1)**

The Trial Judge also charged the following;

> The driver on the un-favored highway has a duty to stop and yield the right-of-way to any vehicle approaching the intersection on the favored highway so closely as to constitute an immediate hazard. However, the driver on the un-favored highway has the right to enter the intersection if there is no traffic approaching so near as to constitute an immediate hazard, and it becomes the duty of those approaching the intersection on the favored highway to yield the right-of-way to the driver entering the favored highway.
>
> **(R.p.375, l.22 - p. 376, l. 5)**

At 2:32 pm on March 20, 2010, a verdict was reached and read into the record as follows "County of Georgetown, Hazel Jeisel Rivera versus Warren Jared Newton, J & J Logging, Inc.,

and Edgar Rivera, case number 2008-CP-22-466, we, the jury, find in favor of the Defendants, foreperson Sarrah E. Grimes." **(R.p.406, l.16- p 407, l.4; quote at p 407, l.1-4)** The Trial Judge thereafter granted the Respondent's Motion for a New Trial despite the Trial Court having earlier overruled Respondent's objections to the charge and the verdict form and having charged the jury that "..if the facts sought to be proved by the Plaintiff are more likely not true than true or that the facts supporting the Defendant's case are equally as true then the Plaintiff has failed to meet her burden of proof and you must return a verdict for the Defendants." **(R.p.374, l.14 - p. 373, l. 8)**

The Order granting the new trial states that the Court "erred in not granting the plaintiff's motion for directed verdict as to liability and in instructing the jury that it could return a verdict in favor of all defendants. See: Howard v. Roberson, 376 S.C. 143, 654 SE2d 877 (S.C.App. 2007). " **(R.p.5-6)** The Court of Appeals affirmed the Trial Court, upholding its citation to Howard v. Roberson, and holding, in pertinent part, that "In this case, we need not determine if the trial court erred in finding it should have granted Jeisel a directed verdict because the learned judge did not err in granting a new trial based on the facts. Therefore, we find no prejudicial error in its citation to Howard." **(Appx. p.11)**

However, Judge Konduras dissented from the Court of Appeals holding because the Trial Court's grant of a new trial was based upon its change of heart decision that it should have directed a verdict for the Respondent as to liability, making an analysis of the directed verdict issues critical to the case. Judge Konduras determined that a grant of directed verdict to the Respondent would have been an error because based upon the conflicting facts and the inferences possible from those facts, that the jury could have determined that the Respondent did not meet her burden of proof. **(Appx.p.12)**

Petitioners Newton sought this Court's review of both the directed verdict issues upon which the grant of a new trial was based and upon the trial court and the court of appeal's reliance upon its prior decision of Howard v. Roberson, which Petitioners contend this Court should examine, modify and/or overrule on the grounds that it eliminates or shifts a passenger's burden of proof. Petitioners Newton contend that the jury performed its constitutional duty in hearing the evidence, weighing the facts and evaluating the credibility of witnesses and that the jury determined that the Plaintiff had not met her burden of proving the liability of either of the Petitioners, and if the Court of Appeals decision in Howard shifts, dispenses with or in any way weakens this fundamental tenant of our judicial system, that this Court should overrule Howard.

Petitioners ask that this Court reverse the Court of Appeals and the Trial Court and reinstate the verdict entered by this diligent, careful jury.

STANDARD OF REVIEW

As to a directed verdict, the trial court must view the evidence and inferences reasonably drawn from that evidence in the light most favorable to the parties opposing the motion and it must deny the motion if the evidence allows more than one inference or inferences drawn therefrom are doubtful. Harvey v. Strickland, 350 S.C. 303, 308, 566 S.E.2d 529, 532 (2002) (citation omitted). Further, on directed verdict motions, neither the trial court nor an appellate court can decide or resolve credibility or conflicts in the testimony or evidence. *Id.* " In essence, the Court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. If the evidence is susceptible to more than one reasonable inference, the case should be submitted to the jury." Holmes v. Haynesworth, Sinkler & Boyd, 408 SC 620, 760 S.E.2d 399 (2014). An appellate

court will reverse a trial court's rulings on directed verdict motions if there is no evidence to support the rulings or if the rulings are controlled by an error of law. Jones v. Lott, 387 S.C. 339, 692 S.E.2d 900 (2010).

Further, since there was a verdict by a jury in this case, an appellate court must adopt "the view of the evidence most favorable to the verdict and give it the strongest probative force of which it will admit." Reid v. Swindler, 249 SC 483, 154 SE2d 910 (1967).

ARGUMENT

I. The Court of Appeals erred in holding that it need not determine if the trial court erroneously concluded that it should have granted the Petitioner's directed verdict motion because the new trial was granted on the facts. The trial court granted a new trial based upon its erroneous change of heart with respect to the directed verdict motion and had the court granted the directed verdict, it would have committed reversible error.

The Court of Appeals erred as to the directed verdict: (1) In deciding that it "need not determine" if the Trial Court erred in finding that it should have granted the Respondent a directed verdict; and (2) In finding that it need not consider the directed verdict issues because the Trial Court did not err in granting a new trial based upon the facts. As to all of the foregoing, the Court of Appeals erred by failing to give this jury's verdict the strongest probative force possible.

Judge Konduras dissented from the Court of Appeals holding as to the Trial Court's grant of Respondent's new trial motion, stating as follows:

> The trial court granted a new trial based on its failure to direct a verdict in Jeisel's favor as to the liability of one or both defendants. Because this was the basis of the order, as evidenced by its language and reliance on Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (Ct.App. 2007), I believe the

analysis as to whether the denial of directed verdict was appropriate is essential to the new trial question.

(Appx. p.12)

Petitioners submit that the Trial Court properly denied the Respondent's directed verdict motion and submitted the case to the jury. However, the Trial Court erred with its second thoughts after the defense verdict when it granted a new trial based upon its denial of a directed verdict. The Trial Court erred because a motion for a directed verdict goes to the whole case and it can only be granted if the evidence raises no issues for the jury as to liability. Lane v. Gilbert Construction, 383 SC 590, 681 SE2d 879 (2009).

When considering a directed verdict motion, the Court must view the evidence and all reasonable inferences from the evidence in the light most favorable to the non-moving party. If more than one inference can be reasonably drawn from the evidence then the case should be submitted to the jury. If the evidence as a whole is susceptible of more than one reasonable inference, the case should be submitted to the jury. Gamble v. Int'l Paper Realty Corp., 323 S.C. 367, 474 S.E.2d 438 (1996); Rice v. Multimedia, Inc., 318 S.C. 95, 456 S.E.2d 381 (1995); Creech v. South Carolina Wildlife & Marine Resources Dep't, 328 S.C. 24, 491 S.E.2d 571 (1997).

At the directed verdict stage, a Trial Court may only consider the existence or non-existence of evidence because the Court does not have the authority to decide credibility issues or to resolve conflicts in the testimony. Jones v. General Electric, 331 SC 351, 503 SE2d 173 (Ct.App. 1998) An appellate court reviewing the grant of a directed verdict should not ignore

facts unfavorable to the opposing party. Instead, it should determine whether a jury could reasonably return a verdict for the opposing party under those facts. *Id.*

In this case evidence existed such that the Trial Court properly denied a directed verdict. The fact that a directed verdict was properly denied means that the grant of a new trial was improper. There was conflicting testimony about all of the following, some of which was noted in Judge Konduras' dissent: (a) the lighting in the area; (b) the angle of the Newton truck's headlights; (c) co-Petitioner Edgar Rivera's responsibility [the Respondent testified that she did not consider him responsible for the accident]; (d) the position of the Newton's tractor trailer; (e) visibility in the area, including the visibility of the tractor trailer; (f) the speed of the Rivera vehicle; (g) accounts of the accident; and (g) conflicting opinions of experts for Petitioners Newton and the Respondents. **(Appx. p.12, and see the Statement of Facts: above)**

There were also credibility issues as a result of conflicts in the testimony and considering the impact of the widely varying expert opinions, but those were for the jury and not the Court. In ruling upon a directed verdict motion, the Court is concerned only with existence or non-existence of evidence and not its credibility or weight. S.C. Fed. Credit Union v. Higgins, 394 S.C. 189, 714 SE2d 550 (2011); Jones v. General Electric Co., 331 SC 351, 356, 503 SE2d 173, 176 (1998). At the directed verdict stage the Court must view the evidence and inferences from the evidence in the light most favorable to Petitioners Newton and co-Petitioner Rivera, the non-moving parties. Moore v. Levitre, 294 SC 453, 453-454, 365 352d 730 (1988). If more than one reasonable inference can be drawn, the case should be submitted to the jury. S.C. Fed. Credit Union v. Higgins, *supra.*

When ruling upon a directed verdict motion, a trial court errs by weighing the evidence presented, and this error justifies a reversal. S.C. Fed. Credit Union v. Higgins, *supra.* In granting the new trial, the Court found as follows:

> The only reasonable inference from the evidence presented at the trial of this case is that one or more of the defendants were at fault in causing the accident that injured the plaintiff. Further, no evidence was presented that showed the plaintiff at fault. Therefore, I find and conclude that the court erred in not granting the plaintiff's motion for directed verdict as to liability and in instructing the jury that it could return a verdict in favor of all defendants. See: *Howard v. Roberson, 376 SC 143, 654 SE2d 877 (S.C.App. 2007).*
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> **(R.p.6)**

The foregoing shows that the Court granted the new trial based upon its finding that it erred in not granting the Plaintiff's earlier directed verdict motion. Yet it does so by weighing the evidence, inferring that one or more of the defendants was at fault, and reversing the verdict of a jury presented with the same evidence. And it grants a generic, "one size fits all" directed verdict that, in actuality, directs a verdict against both defendants without directing a verdict against either of them individually. Had the evidence established the liability of one defendant or both at the directed verdict stage, then the Court could have directed a verdict against either or both of the defendants, based upon that evidence. If no evidence was presented sufficient to allow the Court to direct a verdict against Petitioners Newton or co-Petitioners Rivera, then the grant of a combined directed verdict is error.

Further, a directed verdict granted after the trial would, in actuality, be a JNOV and such can only be granted if no reasonable jury could have reached the challenged verdict. RFT Management, Co., L.L.C. v. Tinsley & Adams L.L.P., 399 SC 322, 732 SE2d 166 (2012). In the present case, the testimony of Petitioners Newton, bolstered by the testimony of their expert and

by the account of the independent witness justified this jury finding Petitioners Newton not liable for the accident. Similarly, the testimony might have justified a jury verdict against co-Petitioner Rivera and a finding that his inexperience in driving, excessive speed, and emotional distraction caused the present accident. However, the Respondent's testimony essentially absolved co-Petitioner Rivera of responsibility, so the jury returned a verdict for both Defendants, which was reasonable under the evidence presented in this case.

This Court has held that the grant of a new trial on the facts is not equivalent to the grant of a directed verdict motion. RFT Management, Co., L.L.C. v. Tinsley & Adams L.L.P., Id. A directed verdict considers whether the evidence is legally sufficient to sustain a verdict, which is a question of law. A grant of a new trial on the facts considers whether a fair preponderance of the evidence supports the verdict and is a matter of discretion. RFT Management, Co., L.L.C. v. Tinsley & Adams L.L.P., Id. "Stated another way, a party's evidence might make a case one for the jury, but the evidence might be so outweighed by the countervailing evidence that, in the exercise of its discretion, a trial court could choose to set aside the verdict under the thirteenth juror doctrine." RFT Management, Co., L.L.C. v. Tinsley & Adams L.L.P., Id.

Here, the Trial Court did not grant a new trial because a fair preponderance of the evidence failed to sustain the verdict; it granted a new trial because it found that it erred in not granted the Respondent's directed verdict motion. **(R.p.5-6)** The Court of Appeals found that the Trial Court granted a new trial to Respondent based on the facts under the thirteenth juror doctrine. **(Appx.p.11)** Trial Judges have more discretion in Thirteenth Juror grants of new trials because such a "decision by the trial judge will not be disturbed unless his finding is wholly unsupported by the evidence or the conclusion reached has been controlled by an error of law."

South Carolina State Highway Department v. Clarkson, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976).

It is of import to note that while a Trial Judge has the discretion to grant a new trial under the Thirteenth Juror doctrine, this discretion is "founded upon the facts, the evidence, the witnesses, the trial circumstances, the verdict and the judge's view of them." Fallon v. Rucks, 217 SC 180, 60 SE2d 88 (1950). In Fallon, a Trial Judge granted a new trial in a motor vehicle accident case based upon an error in the form of the verdict when the jury returned an award for the full damages requested, but failed to note if those damages where actual or punitive. Although with consent of Counsel the Judge re-submitted the case to the jury and the error was corrected before the verdict was published, the Judge thereafter granted a new trial. This Court held that a "jury's verdict should be upheld whenever it is possible to do so and carry into effect what was clearly the jury's intention" and reversed the grant of a new trial, finding that granting a new trial on the "wholly untenable ground" of objection to the verdict's form - after it was amended and corrected - did not involved judicial discretion and its purported exercise was error. *Id,* citing Joiner v. BeVier, 155 SC 340, 152 SE 652, 656 (1930)

While in this case Petitioners Newton contend that the grant of a new trial was controlled by an error of law, the Court of Appeals ruling is troubling and should be examined because it essentially allows a Trial Judge to do by the "back door" what he or she could not do by the "front door." Under the present posture, a Trial Judge could use the Thirteenth Juror doctrine to grant a new trial based upon a denial of a directed verdict motion, allowing the Judge to use the "facts" to allow him or her to do what "the law" would not. In this case, as in Fallon, the Trial Judge's grant of a new trial did not involve judicial discretion and its purported exercise was error.

For all of the foregoing reasons, this Court should reverse the Court of Appeals and the Trial Court, and reinstate the well-reasoned verdict of the jury in this case.

II. In upholding the trial court's reliance upon Howard v. Roberson, 376 S.C. 143, 656 SE2d 877 (S.C. App. 2007), which it does not appear that this Court has yet addressed, the Court of Appeals effectively discarded the necessity for a passenger to meet a burden of proof. Such a fundamental change, assuming it could be made at all, would properly be for the Supreme Court and not the Court of Appeals.

Howard v. Roberson involved a motor vehicle accident that occurred when Lawhorne was driving in traffic on a Highway, a third party vehicle was behind him and Roberson was driving behind the third party. Roberson moved to pass the third party at the same time that Lawhorne moved to make a left turn. There was a collision and Ms. Howard was injured. Howard v. Roberson, *supra.* At the close of the Defendants' case, Ms. Howard moved for a directed verdict against Roberson.

> The trial court granted Howard's motion for directed verdict but not against Roberson alone. Instead, the trial court granted the motion finding, "There is evidence of negligence on both or one of the defendants." The trial court later instructed the jury, "[Y]ou may find against the Defendant, Mr. Roberson, or you may find against the Defendant, Mr. Lawhorn, or you can find against both of them. You can find against one of the two or you can find against both."
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> *Id at p. 148.*

On appeal, the Court of Appeals upheld the directed verdict, finding that so long as the evidence presented no more than one inference that a jury issue was not created and that the evidence showed that both drivers breached statutory duties of drivers on South Carolina highways. *Id.* Roberson contended that because the Plaintiff moved for a directed verdict

against him alone, that the Trial Judge erred in granting the Motion holding either or both drivers negligent, and, as noted, the Court of Appeals upheld the Trial Judge.

The decision does not show that the appellant in Howard v. Roberson raised any constitutional, due process or burden of proof concerns and much of the opinion was concerned with new trial *nisi* additur issues. *Id.* Further, the appellate history of the case does not indicate that this decision was ever brought to the South Carolina Supreme Court for consideration or review. However, Petitioners Newton believe that there are serious constitutional/due process/burden of proof concerns raised by a Trial Judge directing a verdict in an alternative or joint fashion and instructing a jury that it must find one or both defendants liable and that it may not return a verdict for all defendants.

Essentially, in Howard v. Roberson as upheld and affirmed in its decision in this case, the Court of Appeals adopts the theory of Alternative Liability which has been a subject of contention in a number of states, and which is addressed in slightly different fashions in the Restatement of Torts Second (§433B) and Restatement of Torts Third (§28). Not only did the Court of Appeals apparently adopt this theory, it did so without consideration for burden of proof concerns because it addressed no boundaries or rules for when or if the burden of proof would shift to the Defendants. **(App.p.9)**. On the contrary, the Court of Appeals' opinion notes Petitioners Newton having raised issues and concerns about the grant of a new trial after the jury verdict indicating a finding that Respondent failed to meet her burden of proof. **(App.p.8)** In response, the Court of Appeals says that it disagrees and references disputed parts of the evidence and conflicting opinions of experts and use those to reach the confusing conclusion that the Respondent met her burden of proof. **(App. p.8-9).** The way the Court of Appeals ruled in Howard v. Roberson and in the present case uses a *res ipsa loquitur* analysis, when that doctrine

is not the law in South Carolina, and when, in the products liability arena, this Court has held as follows:

> Respondents may not rely solely on the fact that an accident occurred to prove their products liability case under a negligence theory since South Carolina does not follow the doctrine of res ipsa loquitur. 7 See Snow v. City of Columbia, 305 S.C. 544, n.7, 409 S.E.2d 797, n.7 (Ct. App. 1991) (noting that South Carolina does not recognize the rule of res ipsa loquitur). Thus, in the absence of any admissible evidence in the record to support their products liability claim, the jury impermissibly speculated as to the cause of the accident.
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> Watson v. Ford Motor Company, 389 SC 434, 699 SE2d (2010).

As to a Plaintiff's duty of proving negligence, this Court has held as follows:

> The plaintiff has the burden of proving each element of negligence, including the defendant's lack of due care. See: South Carolina State Ports Authority v. Booz-Allen & Hamilton, 289 S.C. 373, 346 S.E.2d 324 (1986); Carter v. Columbia Gas & Railway Co., 19 S.C. 20 (1883). This burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care. King v. J. C. Penney Co., 238 S.C. 336, 120 S.E.2d 229 (1961); Gilland v. Peter's Dry Cleaning Co., 195 S.C. 417, 11 S.E.2d 857 (1940). No inference of negligence arise from the mere fact of injury. Covington v. Atlantic Coast Line Railway Co., 158 S.C. 194, 155 S.E. 438 (1930), cert. denied, 282 U.S. 858, 75 L. Ed. 759, 51 S. Ct. 33 (1930). 7 The defendant is not required to present evidence to refute the plaintiff's allegations; he may elect to put the plaintiff to strict proof of all the elements of his cause of action. See, Carter v. Columbia Gas & Railway Co., supra.
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> Snow v. City of Columbia, 305 S.C. 544, n.7, 409 S.E.2d 797 (1991).

Even in *res ipsa* states, like Illinois, the doctrine of Alternative Liability as held by the Court of Appeals in Howard and in this case has been discarded in favor of an analysis more in line with the Restatement of Torts Second (§433B). Anderson v. Anderson and Fratto, 959 NE2d 1167, 2011 Ill. App. LEXIS 1058 (2011). In Anderson, the Illinois Court was faced with

a motor vehicle accident case involving two drivers and the Plaintiff was a passenger in one of the vehicles which collided after one driver (Fratto) changed lanes quickly at the same time that another driver (Anderson, in whose car the Plaintiff was a passenger) was making a left turn. *Id.* Two (2) suits were filed, Fratto against Anderson and the Anderson passenger Plaintiffs against Fratto and Anderson. The jury returned defense verdicts in both cases and the Trial Court granted a Motion for New Trial, holding that the "jury's finding that neither was negligent given the facts of the case is unreasonable and against the manifest weight of the evidence" and holding that "the jury had the discretion of apportioning the fault between the two parties," but "a wash of liability is not an option when the injured is not an active participant in the cause of the incident." *Supra.*

On appeal, the Anderson drivers challenged the trial court's finding that the verdicts were legally inconsistent and the Illinois Court stated its task in analyzing the issues as follows: "In this case, we must address the burdens of proof between innocent, injured parties who sued multiple potential tortfeasors. This raises the issue of alternative liability." Anderson at p. 32. The Court noted that in Illinois alterative liability may apply if all potentially liable parties are joined as defendants and the plaintiff, through no fault of her own, cannot identify which of the defendants caused her injuries and then the alternative liability rule from the Restatement (Second) of Torts would shift the burden of proof to each actor to prove that he did not cause the harm. *Id,* citing, *Restatement of Torts Second,* §433(B) (1965).

The Anderson Court noted that acceptance of alternative liability in a case does not mean that the defendants will be "delivered, trussed and gagged for the enrichment of the Plaintiff," but rather, the burden of proof even in alternative liability cases will not shift until the Plaintiff has proved her case by a preponderance of the evidence. *Id.* Prior to Anderson, and the Trial Court's

grant of a new trial, alternative liability had not been applied in Illinois to a vehicular tort case involving a two vehicle collision with passengers who alleged injuries. *Id.* In considering the application of alternative liability in a two-vehicle MVA with a passenger plaintiff, the Illinois Court surveyed courts in other jurisdictions who have addressed the issue in similar cases, and stated as follows:

> Other jurisdictions have addressed the issue of alternative liability in tort cases with facts similar to the instant case. *See* Porterie v. Peters, *111 Ariz. 452, 532 P.2d 514 (Ariz. 1975)*; Cuonzo v. Shore, *958 A.2d 840 (Del. 2008)*; Dennard v. Green, *335 Md. 305, 643 A.2d 422 (Md. 1994)*; Thodos v. Bland, *75 Md. App. 700, 542 A.2d 1307 (Md. Ct. Spec. App. 1988)*; Burke v. Schaffner, *114 Ohio App. 3d 655, 683 N.E.2d 861 (Ohio Ct. App. 1996)*; Peck v. Serio, *155 Ohio App. 3d 471, 2003 Ohio 6561, 801 N.E.2d 890 (2003)*. In each of these cases, two or more drivers were brought as defendants in a vehicle collision case by an innocent party that alleged injuries from the collision. In each case, the court found that the doctrine of alternative liability did not relieve the plaintiff of the burden of proving the negligence of each driver.
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> Anderson v. Anderson, *supra at p. 41*

A number of the relevant cases point to an exception in the Restatement providing that alternative liability has no application in cases where there is no proof that the conduct of more than one actor has been tortuous and in such cases the plaintiff has the burden of proof both as to the tortuous conduct and the causal relation. *Id,* citing, *Restatement of Torts Second,* §433(B)(3) (1965). The Anderson Court noted that Ohio utilizes alternative liability but requires proof: (1) that two or more Defendants acted tortuously; (2) that the Plaintiff was injured as a proximate result of one of the Defendant's acts -- and Ohio holds that the doctrine does not apply in cases where the proof does not establish that more than one of the Defendants acted tortuously. Anderson, *supra,* citing: Minnich v. Ashland Oil Co., 15 Ohio St.3d 396, 473 NE2d 1199-1200 (1984).

The Illinois Court adopted the Ohio version of alternative liability and then applied it to the case at bar. The Court noted numerous disputes and inconsistencies in the evidence and testimony and found that any such inconsistencies could impact the jury's impression of credibility, negligence and injuries. Anderson, *supra.* The Court found it **significant** that the passenger Plaintiff presented no evidence of the negligence of Anderson, the driver of the vehicle in which she was riding. Based upon this and other issues with the evidence, the Court found that the doctrine of alternative liability did not apply to shift the burden of proving causation. The Court, therefore, found that the defense verdicts in all cases were not inconsistent, as "it may be the case that the jury simply felt that there was insufficient evidence presented as to negligence, causation, injury, or all three." Anderson at p. 49. The Court's ultimate conclusion was that: "The jury's verdict was not against the manifest weight of the evidence, as the jury could reasonably have determined that the passenger plaintiffs failed to prove their cause against Fratto and Sean Anderson. The trial court abused its discretion by setting aside the jury verdict and granting the passenger plaintiffs' motion for a new trial."

A Maryland appellate Court faced a passenger appeal from her lawsuit against two drivers in an intersection/stop sign case where the jury returned a verdict for all defendants and the trial court denied a directed verdict and a JNOV motion. Dennard v. Green, 335 Md. 305, 643 A.2d 422 (1994). The Court upheld the defense verdict, the denial of directed verdict and the denial of the JNOV stating that under the evidence, the jury could have found either or both of the Defendants negligent but: "the jury did just the opposite. It failed to resolve the conflict at all, apparently believing the Plaintiff failed to meet her burden of proof. That is the only explanation for the jury's findings. The jury's failure to make an affirmative finding cannot enure to the petitioner's benefit." *Id* at p. 323.

In an Arizona case filed by a passenger involving a chain collision accident following a cattle truck overturning and a police cruiser being on the shoulder of the road investigating the same, the passenger Plaintiff appealed from a defense verdict, contending that the Restatement alternative liability should have applied. The Court held that Arizona law requires the Plaintiff has the burden of proving negligence and the Defendant does not have to prove the absence thereof and that the case would not fall into the Restatement Rule in any event because under the Restatement Rule "there are wrongful or negligent acts committed by all the defendants with only one act producing the plaintiff's injury. In the case at bar the proof is not clear as to which of the defendants, if any of them, committed an act of negligence which produced Plaintiff's injury." Porterie v. Peters, 111 Ariz. 452, 532 P.2d 514 (1975.)

Similarly, in a Delaware passenger traffic light negligence action, a Plaintiff appealed from a defense verdict and the Trial Court's denial of a new trial and the appellate court found that "the jury could have reasonably reached its verdict if it found that the evidence was evenly balanced and the Estate, therefore, had not met its burden of proof." Cuonzo v. Shore, 958 A.2d, 2008 Del. LEXIS 466 (2008).

This Court has previously held that the burden of proof in the sense of persuading the jury NEVER shifts. Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966) In that case, this Court noted that there are two meanings for "burden of proof": (1) the risk of not persuading the jury and (2) the duty to produce evidence to the judge. This Court went on to state that the burden of proof in the first sense never shifts but that it does shift in the second sense. Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966) In Grier, this Court quoted the following language from a North Carolina opinion with approval:

> The burden to prove his case is always on the plaintiff, whether the defendant introduces evidence or not. Where we have said, 'It is the duty of the defendant to go forward with his proof,' it was only meant in the sense that, if he expects to win, it is his duty to do so, or take the risk of an adverse verdict, and not that any burden of proof rested upon him. He pleads no affirmative defense but the general issue, and this puts the burden throughout the case on the plaintiff, who must recover, if at all, by establishing his case by the greater weight of evidence.
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> *Id at p. 533-534, 344*

According to this Court's prior decisions, the Plaintiff/Respondent, by her complaint, had the burden of proving that she was injured as a proximate result of the Newton Defendants' negligent acts or omissions because the Newton Defendants had denied it. *Id;* Hoffman v. County of Greenville, 242 SC 34, 129 SE2d 757 (1963) Shifting the burden of proof in this regard to the Defendants would be erroneous. State v. McDaniel, 68 SC 304, 47 SE 384 (1904); Strickland v. Capital City Mills, 70 S.C. 211, 49 SE 478 (1904) And, as noted above, this Court has previously held that the burden of persuading the jury never shifts. Grier v. Cornelius, *supra.*

Moreover, even under Alternative Liability theories in passenger negligence cases, the Respondent failed to produce evidence showing the liability of all defendants such that the burden might have shifted -- had this Court ever adopted such a Rule, which it has not. The Plaintiff testified that she forced her brother to let her ride with him on this occasion and that she does not blame him for the accident. (R.p.221, l.8 - p.222, l.2) There was testimony about Rivera speeding around the rather substantial curve that preceded this area and there was evidence that he was a young, inexperienced and unlicensed driver who was operating the vehicle in a state of high emotion based upon being en route to where his father had been mugged. (See: Statement of Facts) Based upon this evidence about Rivera's neglect, the jury

could have found him liable - except for the Plaintiff testifying that she did not hold her brother responsible. (R.p.221, l.8 - p.222, l.2) The Plaintiff absolving her brother, Petitioner Rivera, from liability is enough, on its own, to remove this case from any Alternative Liability rule which requires that all Defendants be negligent. Anderson, *supra.*

Another impediment to using the rule here, in a traffic case, is that there is more than one act - this is not a case where Defendants are all involved in the chain of manufacture of a drug that proves harmful; nor is this a case where three people fire amidst a crowd fire a pistol in the air and a bullet hits and injures a bystander. In such cases there may be some logic and justice consequent to applying an Alternative Liability rule. However, a core problem with applying it even in such cases in South Carolina is that although it is modified in one way or another by the various states that apply it and by the Restatement (Second) and Restatement (Third) of Torts, at its core, the theory is founded upon the principal of *res ipsa loquitur.* Anderson, *supra.* And South Carolina does not follow the doctrine of *res ipsa.* Watson v. Ford Motor Company, 389 SC 434, 699 SE2d (2010); Snow v. City of Columbia, 305 S.C. 544, n.7, 409 S.E.2d 797 (1991).

Given the conflicting evidence and reasonable inferences that could be drawn therefrom, given the conflicting testimony of the parties, the independent witness, the officers, and given the opposing opinions of the experts, the jury verdict in this case, as in the cases from other jurisdictions cited above and noted in the Anderson case, this jury could have found either or both of the Defendants negligent but it did the opposite and failed to resolve the conflicting evidence and issues because the Respondent failed to meet her burden of proof as a Plaintiff. In this case, as in the Maryland case of Dennard, the jury's failure to find either or both Defendants liable because the Respondent as a Plaintiff failed to meet her burden of proof cannot enure to her benefit by serving as grounds for a new trial. Dennard, *supra.*

Petitioners Newton respectfully contend that the Court of Appeals erred in its holding in Howard v. Roberson, upon which the pertinent rulings in this case were based. In that passenger lawsuit filed by Howard against two drivers, Roberson and Lawhorn, the Court of Appeals held as follows:

> In granting Howard's motion for a directed verdict, the trial court found either Roberson, or Lawhorn, or both, breached at least one duty on the night of the accident. The effect of the court's decision left the issue of who was liable open for determination by the trier of fact. The jury's task was to decide which driver, if not both, was at fault and to calculate damages.
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> The trial court properly directed a verdict for Howard on the issue of liability. The evidence presented at trial yielded only one conclusion--that the negligence of at least one driver, if not both, resulted in the accident causing Howard's injuries. The trial court did not err in granting a directed verdict on the issue of liability.
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> Howard v. Roberson, *supra* at p. 8-9.

Based upon this Court of Appeals ruling, the Trial Judge in this case held that "the only reasonable inference from the evidence presented at the trial of this case is that one or more of the defendants were at fault in causing the accident that injured the Plaintiff. Further, no evidence was presented that showed the plaintiff at fault. Therefore, I find and conclude that the court erred in not granting the plaintiff's motion for directed verdict as to liability and in instructing the jury that it could return a verdict in favor of all defendants." **(R.p.6)**

Although Petitioners Newton do contend that evidence of the Plaintiff's fault existed, as argued in their brief, even if a Plaintiff is a passenger, is not negligent and there is no Act of God involved when a traffic accident occurs, in South Carolina the Plaintiff must prove that negligence by one or more of the drivers proximately caused the accident and her injuries. This burden of persuading the jury never shifts. Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338

(1966). The holding of the Court of Appeals in Howard v. Roberson, upheld in the present case, shift a passenger Plaintiff's burden of proof to the Defendants in a fashion that violates the Defendants' rights to due process and a fair trial.

Petitioners Newton contend that an Alternative Liability rule does not exist in South Carolina and that based upon it being founded upon the doctrine of *res ipsa loquitur* that such a rule would be contradictory to the governing principals of negligence cases as previously declared by this Court. Even should one be declared or found to exist, Petitioners contend the rule should not apply in traffic accident cases because there is not a single act that injures the Plaintiff and because this Court has declared that the Plaintiff always has the burden of persuading the jury - a burden that the verdict in this case indicates the Respondent/Plaintiff failed to meet.

CONCLUSION

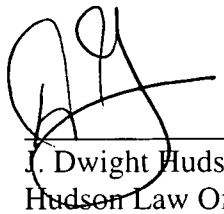
In this case the Trial Judge granted a new trial because he had second thoughts about his failure to direct a verdict for the Plaintiff on liability. **(R.p.5-6).** While the Thirteenth Juror doctrine allows a Trial Judge discretion to grant a new trial on the facts, this new trial motion was not granted on the facts and the Court of Appeals erred in so holding. A Trial Judge does not have the same discretion when considering a motion for directed verdict as he has under the Thirteenth Juror doctrine. In allowing this Trial Judge to grant a Thirteenth Juror Motion based upon the denial of a Directed Verdict and considering it under the discretion afforded by the Thirteenth Juror doctrine, the Court of Appeals erred in a fashion that dangerously erodes the boundaries of directed verdict rulings.

The Trial Judge granted a new Trial because he failed to direct a verdict pursuant to Howard v. Roberson. That Court of Appeals decision requires that in a passenger lawsuit, defendant drivers be "delivered, trussed and gagged for the enrichment of the Plaintiff." Anderson, *supra.* The Howard v. Roberson decision constitutes a large and expansive alteration of South Carolina law. It sneaks in by the back door a doctrine which this Court has refused to admit in our state's jurisprudence - the doctrine of *res ipsa loquitur.* And it shifts or eliminates a Plaintiff's burden of persuasion, which this Court has held always remains with a Plaintiff. Grier v. Cornelius, 247 S.C. 521, 148 S.E.2d 338 (1966). If any version of a doctrine of alternative liability were to be declared in South Carolina, Petitioners Newton contend that it should be done by this Court and should be in keeping with longstanding South Carolina law requiring a Plaintiff to prove her case by a preponderance of the evidence in order to persuade a jury.

This jury sat for a full week of trial, heard the arguments and testimony, assessed the weight of the evidence and the credibility of the witnesses, came back three (3) times with questions or requests to hear parts of the evidence or jury charge again and deliberated for a full day before returning with a verdict for both Defendants. The jury was not persuaded so the Respondent/Plaintiff failed to meet her burden of proof.

Petitioners Newton ask that this Court reverse the Court of Appeals and reinstate the jury verdict.

Respectfully submitted,



J. Dwight Hudson, Esquire
Hudson Law Offices
1203 48th Avenue North
Suite 111
Myrtle Beach, SC 29577
(843) 692-9889
T: (843) 692-9889
F: (843) 692-9190
E: Hudsonlaw@sc.rr.com

Attorney For Petitioners Newton, Newton's Farms, J&J Logging, Inc.

Dated: November 7, 2014

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5055 (S.C. Ct. App. Filed November 28, 2012)

Appellate Case No: 2013-000674

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc and Edgar Rivera,

Petitioners.

PROOF OF SERVICE

I certify that I have served one bound copy of the **Brief** of PETITIONERS NEWTON (WARREN JARRED NEWTON, NEWTON'S FARM AND J&J LOGGING, INC) on the parties by depositing a copy of the same in the United States Mail, postage prepaid, on November 7, 2014. Further, I certify that I have on the same date forwarded for or by way of filing to the South Carolina Supreme Court fifteen (15) bound copies of the said brief, one unbound copy of the brief and thirteen bound copies of the Appendix with service upon the parties made to the following addresses: by US Mail:

L. Sidney Connor IV Esq.
Kelaher, Connell & Connor
PO Drawer 14547
Surfside Beach, SC 29587-4547
Attorney for Respondent Hazel Jeisel Rivera

Brandon A. Smith Esq.
King, Love & Smith, LLC
PO Box 1764
Florence, SC 29503
Attorney for co-Petitioner Edgar Rivera

J. Dwight Hudson, Esquire
Hudson Law Offices
1203 48th Avenue North
Suite 111
Myrtle Beach, SC 29577
(843) 692-9889
T: (843) 692-9889
F: (843) 692-9190
E: Hudsonlaw@hudsonlawoffice.com

Attorney For Petitioners Newton, Newton's Farms, J&J Logging, Inc.

Dated: November 7, 2014

HUDSON LAW OFFICES
1203 48th AVENUE NORTH
SUITE 111
MYRTLE BEACH, SOUTH CAROLINA 29577
TELEPHONE (843) 692-9889
TOLL FREE: 1-877- 874-5256
FAX (843) 692-9190
www.hudsonlawoffice.com

SHALLOTTE OFFICE:
5101 SELLERS ROAD
SHALLOTTE, NORTH CAROLINA 28459
TELEPHONE: (910) 755-6543
FAX (843) 692-9190
TOLL FREE: 1-877- 874-5256

CONWAY:
BY APPOINTMENT ONLY
TELEPHONE: (843) 692-9889
FAX (843) 692-9190
TOLL FREE: 1-877- 874-5256

J. DWIGHT HUDSON*
MARY ANNE GRAHAM

EMAIL: hudsonlaw@sc.rr.com
OR: hudsonlaw@hudsonlawoffice.com

*ADMITTED IN S.C. AND N.C.

REPLY TO: MYRTLE BEACH OFFICE

November 7, 2014

The Hon. Daniel E. Shearouse
Clerk of the SC Supreme Court
1231 Gervais Street
Columbia, SC 29201

Re: ***Hazel Jeisel Rivera, Respondent v. Warren Jared Newton, Newton's Farm, J&J Logging, Inc. and Edgar Rivera, Petitioners***
Appellate Case No: 2013-000674

Dear Mr. Shearouse:

Enclosed for filing in the above-captioned matter are the following:

- Thirteen (13) copies of the **Appendix**;
- An original and a copy of a **Proof of Service** of the Brief of Petitioners Newton;
- Fifteen (15) Bound and one unbound **Brief of Petitioners Newton**, all containing original signatures;

I also enclose a SASE and would appreciate your returning a "clocked" copy of the Proof of Service.

By copy of this letter I serve the Brief of Petitioners Newton upon all counsel.

Thanking the Court for its consideration, and with best regards, I remain

J. Dwight Hudson, Esq.
J. Dwight Hudson, Esq.
Hudson Law Offices

JDH: mag
Enclosure(s): as stated
cc: L. Sidney Connor, IV, Esq.
Brandon A. Smith, Esq.

*Box 193