

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2008-CP-22-00466
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 PETITIONER
EDGAR RIVERA

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STATEMENT OF ISSUES ON APPEAL

- I. **DID THE COURT OF APPEALS ERR IN THE TRIAL COURT'S GRANT OF A NEW TRIAL ON THE LAW AS TO EDGAR RIVERA BECAUSE HAZEL RIVERA FAILED TO CARRY HER REQUISITE BURDEN OF PROOF AS TO HER CLAIM AGAINST EDGAR RIVERA IN HER CASE-IN-CHIEF?**

- II. **DID THE COURT OF APPEALS COMMIT ERROR IN AFFIRMING THE GRANT OF A NEW TRIAL ON THE LAW AS TO EDGAR RIVERA WHEN THE EVIDENCE WHOLLY UNSUPPORTED THE GRANT?**

- III. **DID THE COURT OF APPEALS ERR IN FINDING THAT EDGAR RIVERA ABANDONED HIS ARGUMENT THAT SUFFICIENT EVIDENCE OF THE NEGLIGENCE OF AN UNNAMED TORTFEASOR SUPPORTED THE JURY'S VERDICT WHEN EDGAR RIVERA CITED ALL NECESSARY LEGAL AUTHORITY IN HIS INITIAL BRIEF AND APPROPRIATELY REPLIED TO RESPONDENT'S BRIEF?**

STATEMENT OF THE CASE

The subject automobile accident occurred after dark on the evening of August 29, 2005. [R. p. 162, line 8, p. 189, lines 9-10, p. 214, line 13]. Hazel Rivera, a passenger in a vehicle being driven by her brother, Edgar Rivera, claimed injuries from the collision with the Newtons' vehicle.¹ [R. pp. 12-14]. The parties tried the case in the Georgetown County Court of Common Pleas during the week of March 15, 2010. Hazel Rivera presented testimony from an expert accident reconstructionist that supported Edgar Rivera's inability to perceive the Newtons' trailer until it would have been too late to brake. Hazel Rivera also relied on her testimony, the testimony of Edgar Rivera, the investigating South Carolina Highway Patrol trooper and several treating medical professionals. According to Hazel Rivera, Edgar Rivera had not acted negligently in causing her claimed damages and that he had acted reasonably under the circumstances. The Newtons refuted Hazel Rivera's expert with their own accident reconstructionist. Edgar Rivera presented evidence establishing a reasonable jury's conclusion that an unnamed party breached a duty to Hazel Rivera.

This Petitioner made motions for directed verdict at the end of the plaintiff's case-in-chief and the end of the evidence, respectively. The Trial Court entertained Edgar Rivera's argument that Hazel Rivera failed to make even a minimal showing of negligence against him before ultimately finding that the possibility that Edgar Rivera had been traveling two or three miles per hour over the posted speed limit was sufficient to deny his directed verdict motion. The Trial Court made this directed verdict motion despite the fact that Hazel Rivera failed to introduce any testimony supporting causation

¹ Warren Jared Newton was the operator of the Newtons' tractor-trailer at the time of the subject accident. [R. p. 252, line 5].

between Edgar Rivera's possible speed and any alleged negligence on his part. Hazel Rivera made a motion for directed verdict as to the liability of at least one of the Defendants, which the Trial Court denied.

The Trial Court submitted a Verdict Form to the jury allowing them to find: (1) against the Newtons, (2) against Edgar Rivera, (3) against both original defendants or (4) in favor of both original defendants. During the course of deliberations, the jury specifically requested the testimony of the investigating South Carolina Highway Patrol trooper to be replayed and to hear the Trial Court's jury charge defining an "intersection." The jury ultimately returned a verdict in favor of both Petitioners.

Hazel Rivera subsequently made a Motion for a New Trial. In addition to submitting a responsive memorandum to that motion, Edgar Rivera moved that the jury's verdict be upheld as to him. He argued that the evidence overwhelmingly supported, at a minimum, the jury's finding in his favor. The Trial Court granted Hazel Rivera a new trial as to her claims against both the Newtons and Edgar Rivera based on the finding that it had erred in response to her directed verdict motion. This appeal followed.

After hearing oral arguments, two of the three Court of Appeals Judges affirmed the Trial Court's post-trial Order. Judge Konduras dissented. The Court of Appeals subsequently denied Edgar Rivera's Petition for Rehearing on March 5, 2013

FACTS

While attempting to negotiate a wide left turn, the trailer portion of the Newtons' 18-wheeler, completely stopped, straddled both lanes of narrow Pennyroyal Road in rural Georgetown County at the time of the impact. [R. p. 189, lines 12-13, p. 214, line 18 – p.

215, line 8, p. 296, lines 7-15, pp. 432-433].² Edgar Rivera and his sister approached in the only westbound lane of Pennyroyal Road and impacted the left side of the Newtons' vehicle. [R. p. 160, line 23, p. 189, lines 19-21, p. 214, line 16- p. 215, line 20, p. 296, lines 23-24, pp. 432-433]. Both Hazel Rivera and Edgar Rivera testified that they were unable to perceive the Newtons' trailer until only milliseconds before the collision. [R. p. 178, lines 4-6, p. 214, lines 18-19, p. 215, lines 5-8]. They explained that this was due to the combination of the blinding headlights of the Newtons' vehicle, the lack of adequate lighting in the area and the lack of adequate safety actions taken by the Newtons. [R. p. 176, lines 6-15, p. 188, line 23 – p. 189, line 14, p. 214, lines 13-19, p. 215, lines 5-7]. Another vehicle traveling behind Hazel Rivera and Edgar Rivera applied brakes after recognizing the danger of the impact between Edgar Rivera and the Newtons' trailer. [R. p. 192, lines 2-8, p. 189, line 23- p. 190, line 1]. This third vehicle missed Edgar Rivera's vehicle but also struck the trailer portion of the Newtons' vehicle. [R. p. 189, line 23- p. 190, line 1].

Hazel Rivera presented testimony from an expert accident reconstructionist that supported her contention and Edgar Rivera's contention that Edgar Rivera would not have been able to perceive the Newtons' trailer until it would have been too late to brake. [R. pp. 194-202, pp. 204-206]. The other witnesses called by Hazel Rivera included: herself, Edgar Rivera, the investigating South Carolina Highway Patrol trooper and several treating medical professionals. [R. pp. 142-144]. Hazel Rivera specifically stated that Edgar Rivera had not acted negligently in causing her claimed damages and that he had acted reasonably under the circumstances. [R. p. 221, lines 4-10, p. 221, line

² In fact, Joel Newton testified that Warren Jared Newton was preparing to begin the process of backing to complete the three-point left turn when the accident occurred. [R. p. 271, lines 11-14, p. 296, lines 12-15].

25- p. 222, line 2].

The Newtons also introduced the testimony of an accident reconstructionist. This expert witness testified that Edgar Rivera should have been able to perceive the Newtons' vehicle as it straddled the roadway at night. [R. p. 333, lines 10-16, p. 334, lines 23-25]. In addition, Jared Newton testified that he witnessed Edgar Rivera traveling fifty-five (55) miles per hour. After Respondent's counsel attempted to lead this witness into placing Edgar Rivera's speed at faster than the applicable speed limit of 55 miles per hour, this witness responded "they was getting it, probably 65 to 70, somewhere in there." [R. p. 258, line 16 – p. 259, line 5]. It should be noted though that he prefaced this response by stating "[i]t's just a guess. . ." [R. p. 259, line 2].

Witness testimony differed as to the presence of temporary signs warning of the presence of trucks entering the roadway. However, Edgar Rivera testified that he was familiar with the area and had never seen large trucks exiting the adjacent woods onto the Pennyroyal Road after dark. [R. p. 173, lines 22-25, p. 189, lines 15-18].

ARGUMENT

I. THE COURT OF APPEALS ERRED IN AFFIRMING THE TRIAL COURT'S GRANT OF A NEW TRIAL ON THE LAW AS TO EDGAR RIVERA BECAUSE HAZEL RIVERA FAILED TO CARRY HER REQUISITE BURDEN OF PROOF AS TO HER CLAIM AGAINST EDGAR RIVERA IN HER CASE-IN-CHIEF

First, the Court of Appeals misapprehended how the grounds for Hazel Rivera's new trial motion and the resulting language utilized by the Trial Court established that Hazel Rivera moved for and received a new trial on the law.

SCRCP 59(a) permits a party to move for a new trial “for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State...” Obviously, the result of any properly-granted motion for a new trial is a new trial. SCRCP59.

A directed verdict motion by the close of the evidence is required before the trial court can entertain a motion under SCRCP 59 for a new trial based on an argument that the evidence does not support the verdict, as this post-trial motion is based on questions of law. *Peay v. Ross*, 292 S.C. 535, 357 S.E.2d 482 (Ct.App. 1987). The question of whether the evidence presented by a party can support a verdict in the party’s favor is a question of law. *McEntire v. Mooregard Exterminating Serv. Inc.*, 578, S.E.2d 746, 747, 353 S.C. 629, 632 (Ct.App. 2003). “In ruling on motions for directed verdict or judgment notwithstanding the verdict [JNOV], the trial court is required to view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions.” *Creech v. South Carolina Wildlife and Marine Resources Dep’t*, 328 S.C. 24, 29, 491 S.E. 2d 571, 573 (1997). “When evidence presented at trial yields only one conclusion concerning liability, a trial court may properly grant a motion for directed verdict.” *Howard v. Roberson*, 376 S.C. 143, 148-149, 654 S.E.2d 877 (Ct.App. 2007).

In essence, this motion for a new trial on the law becomes a renewal of a directed verdict motion. *McEntire* at 747-748, 632-633. As such, this type of new trial motion is subject to the same standard of review as a ruling on a directed verdict motion on JNOV under SCRCP 50(b). *Howard* provides a concise explanation of the appellate standard for a review for a directed verdict motion:

[w]hen reviewing a trial court's ruling on a directed verdict, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law. *Law v. S.C. Dep't of Corr.*, 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.*, 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). The appellate court must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts as liberally construed in his or her favor. *Pye v. Estate of Fox*, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006); *Erickson v. Jones St. Publishers, L.L.C.*, 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. *Proctor v. Dep't of Health and Envtl. Control*, 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct.App. 2006). A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. *The Huffines Co., LLC v. Lockhart*, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct.App. 2005). When 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. *Wright v. Craft*, 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct.App. 2006) (citing *Erickson*, 368 S.C. at 463, 629 S.E.2d at 663).

Id. at 148-149, 877.

The Court of Appeals confused this motion for a new trial on the law with a motion for a new trial on the facts. The latter, often referred to as a motion for a new trial under the thirteenth juror doctrine, can be entertained without the party having made a timely directed verdict motion. *McEntire* at 746-632-633. This type of new trial motion is made on the grounds that the verdict was contrary to the preponderance of the evidence. *Id.* Unlike a motion for directed verdict or JNOV, a motion for a new trial on the facts assumes the existence of sufficient evidence to warrant the case being sent to the jury but is based on the argument that the verdict is unreasonable or against the weight of the evidence. *Peay* at 537, 483-484; *McEntire* at 747-748, 632-633. In sum, the appellant bears a heavier burden in appealing an order granting a new trial upon the facts than with an appeal of an order granting a new trial on the law.

The Trial Court's Order granted Hazel Rivera's motion for a new trial on the law.

This Order being appealed states in part:

“[t]he 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. 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. pp. 5-6].

By referencing a denial of her directed verdict motions, Hazel Rivera made, and the Trial Court granted, a new trial based on the law by finding legal error in the denial of that purported directed verdict motion. In other words, the Trial Court granted the post-trial motion based on the finding that the evidence did not support the verdict, a ground based on a question of law. Furthermore, the Order granting a new trial was precipitated by and, therefore, based on the Trial Court's error of law in not granting Edgar Rivera's directed verdict motion.

The Court of Appeals failed to recognize that the Trial Court granted a new trial based on *at least* one error of law. First, the ruling was in error at least with regard to Edgar Rivera because the jury should not have been allowed even to consider a verdict against him. This Petitioner maintains that the Trial Court erred in not granting *Edgar Rivera's* directed verdict motion at the close of the plaintiff's case-in-chief. Edgar Rivera made this motion after Hazel Rivera failed to establish or even allege negligence against him. Second, the evidence presented at trial clearly yielded more than just the Order's conclusion regarding liability. Finally, the subject Order was made in error since it was procedurally defective and wholly unsupported by the evidence. In fact, the overwhelming majority of the evidence supported a finding in favor of Edgar Rivera.

It is elementary that the plaintiff has the burden of proving by a preponderance of the evidence all elements of a negligence claim against any defendant. *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 780 (Ct.App. 2009); *Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249, 252 (2009). However, a party opposing a dispositive motion “may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact.” *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct.App. 1991); *Sweatt v. Norman*, 283 S.C. 443, 322 S.E.2d 478 (Ct. App. 1984). A plaintiff’s failure to produce even a “scintilla of evidence” of negligence against a defendant would not allow the plaintiff to survive that defendant’s directed verdict motion. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-331, 673 S.E.2d 801, 802-803 (2009); SCRCP 50. SCRCP 50(a) allows a defendant to make a directed verdict motion at the conclusion of the plaintiff’s case when only questions of law exist. Stated differently, discretion to grant or deny a directed verdict motion at this point does not exist when no questions of fact exist.

The jury’s verdict in favor of Edgar Rivera made a renewal of the directed verdict motion through a SCRCP 50(b) JNOV illogical. Edgar Rivera did argue though in his Memorandum in Opposition to Plaintiff’s Motion for New Trial that, in the alternative, the Trial Court erred in not granting a directed verdict in his favor at the end of the plaintiff’s case. The Trial Court further erred by denying Edgar Rivera’s post-trial request.

In support of this argument, this Petitioner referred the Court of Appeals to the plaintiff’s case-in-chief, where Hazel Rivera specifically failed to carry her burden of

proof against Edgar Rivera. At no point in her case were any allegations of negligence leveled against Edgar Rivera. In fact, Hazel Rivera specifically testified that Edgar Rivera acted reasonably and did not breach any duty to owed to her:

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

A: No.

...

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

A: No.

[R. p. 221, lines 11-13, line 25 - p. 222, line 2]. She repeatedly provided testimony establishing that Edgar Rivera did not act unreasonably under the circumstances. *Id.*

The remainder of the plaintiff's case-in-chief was also void of any allegations of negligent actions by Edgar Rivera. Through the investigating officer, Hazel Rivera introduced no testimony or other evidence that could have implicated Edgar Rivera in any liability toward the Respondent. Edgar Rivera testified consistently with Hazel Rivera in that he had not acted unreasonably under the circumstances. [R. p. 174, line 7 – p. 175, line 11, pp. 188-192]. These fact witnesses detailed the lack of adequate lighting and reflective materials on the side of the Newtons' trailer. [R. p. 189, lines 12-24, p. 214, lines 18-19, p. 215, lines 5-8]. When questioned as to the existence of reflective tape on the Newtons' trailer, Edgar Rivera responded, “[n]o, it didn't have anything.” [R. p. 189, line 14]. The Newtons were also noted to have neglected to take any warning measures, including temporary flagmen, temporary warning lights, temporary flares or temporary signs, for approaching vehicles, such as Edgar Rivera's. [R. p. 175, line 25 – p.176, line 2, p. 189, lines 12-14, p. 203, lines 11-19, pp. 274-279]. Respondent's expert

accident reconstructionist, Thomas Onions, also gave qualified testimony relieving Edgar Rivera of any breach of duty to Hazel Rivera:

- Q: Okay, Mr. Onions, based on your understanding of the undisputed testimony in the record, which I think you reviewed prior to giving your report prior your deposition, it's fair to say that Edgar did nothing unreasonable at the time?
- A: Not that I'm aware of.
- Q: Okay, and it's also fair to say that what he encountered was essentially a trap in the road, correct?
- A: Yes.

[R. p. 207, lines 7-15]. Other witnesses called by Hazel Rivera in her case-in-chief were her treating medical providers, who were unable to provide any testimony as to Edgar Rivera's alleged breach of duty.

The majority found that Edgar Rivera's speed of two or three miles per hour above the speed limit of 55 miles per hour was sufficient to establish a minimal showing of negligence on his part. However, without any evidence to substantiate Edgar Rivera's speed or actions as a contributing factor to breach of duty or damages, the Court of Appeals ruling was made in error.³ Hazel Rivera failed to establish even an inference or scintilla of evidence that Edgar Rivera acted unreasonably under the circumstances, and directed verdict should have been granted for Edgar Rivera at the close of the *plaintiff's* case. The Newtons' subsequent presentation of evidence in their case-in-chief that may have established negligence on the part of Edgar Rivera is irrelevant when analyzing the

³ In that regard, any argument that Edgar Rivera was negligent *per se* for traveling slightly in excess of the speed limits fails. To recover in a case based on negligence *per se*, the plaintiff must establish that the defendant violated a relevant statute and that such violation was a proximate cause of the plaintiff's injury. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct.App. 2001); *Howard at 149*; *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847 (Ct.App. 1997); *Gulledge v. McLaughlin*, 328 S.C. 504, 492 S.E.2d 816 (Ct.App. 1997). Respondent did not base her case even partly on a negligence *per se*-based theory. Further, she did not request that the Trial Judge charge the jury as to negligence *per se*. Even if she had made such an argument, she still failed to demonstrate that a statutory violation on Edgar Rivera's part was the proximate cause of her injuries.

appropriateness of the Trial Court's denial of Edgar Rivera's first directed verdict motion.

This Petitioner would again contend that Judge Konduras' dissent reached the correct conclusion. Her dissent accurately noted that the Respondent clearly failed to carry her burden of proof against the original defendants at trial. This failure to carry her burden of proof is most evident as it relates to Respondent's claim against Edgar Rivera. Hazel Rivera's refusal even to rest on the allegations in her complaint or produce a scintilla of liability evidence against Edgar Rivera undoubtedly provided the basis for the jury's verdict in favor of Edgar Rivera. The jury obviously understood that the Respondent's failure to introduce any such evidence against Edgar Rivera required this finding. More importantly though, this should have resulted in a directed verdict in Edgar Rivera's favor at the end of the plaintiff's case-in-chief. The Court of Appeals failed to recognize that the Trial Court committed legal error by denying Edgar Rivera's motion at that point.

Even when analyzing the Trial Court's remedial action under the more stringent standard for a new trial on the facts, the Court of Appeals' ruling is still improper, as the discretion that the Trial Judge attempted to use was controlled by the manifest errors of law outlined above. Furthermore, the Court of Appeals failed to recognize that the Trial Court abused its discretion since the evidence wholly unsupported a directed verdict as to at least one of the defendants, especially as it pertained to Edgar Rivera. The overwhelming majority of evidence of breach of duty was directed either at the Newtons or an unnamed defendant. Even assuming *arguendo* that Edgar Rivera's initial directed verdict motion should not have succeeded, the Court of Appeals should have confirmed

and reinstated the original decision of the Trial Court to allow the option for the jury to find in favor of both original defendants.

In keeping with this theme, Hazel Rivera has continued to focus almost entirely on the negligence of the Newtons in her post-trial motion and throughout this appellate process. The overwhelming majority of Hazel Rivera's Motion for New Trial and supporting appellate briefs contain no argument as to a claim against Edgar Rivera.

II. THE COURT OF APPEALS COMMITTED ERROR IN AFFIRMING THE GRANT OF A NEW TRIAL ON THE LAW AS TO EDGAR RIVERA WHEN THE EVIDENCE WHOLLY UNSUPPORTED THE GRANT

Since a reasonable inference existed as to the negligence of an unnamed defendant tortfeasor, the Court of Appeals failed to recognize further error in the Trial Court's Order. While it could be argued that the Respondent failed to establish negligence by the requisite standard against either original defendant, Edgar Rivera directs this Court to the record, which is replete with evidence concerning the intersection at the time of the accident. Lay and expert testimony, in addition to photographs, detailed the lack of lighting in the area, the unsuitability of the intersection's design for the turn being attempted by the Newtons and the adequacy of warning signage for the Riveras' direction of travel. In turn, the jury was presented with an abundance of evidence for the negligence of an unnamed defendant, such as the State of South Carolina or Georgetown County in creating a defective intersection.⁴

Hazel Rivera and Officer Surratt both described the poor lighting in the area of the accident scene. [R. p. 162, lines 6-8, p. 220, lines 2-3]. Expert testimony from the

⁴ Officer Surratt testified that the location of the accident was a county-maintained road. [R. p. 168, line 24 – p. 169, line 2]

Respondent's accident reconstructionist supported these accounts, "[w]ell, the road was for all intents and purposes a dark, unlighted road with the exception of one little church parking lot light." [R. p. 202, lines 5-7].

Other variables, such as the lack of temporary or permanent signage, combined with the evidence of insufficient lighting to provide the jury with a reasonable inference of a third party's negligence. Officer Surratt testified that no signs warning of logging trucks entering onto Pennyroyal Road were present in the four (4) miles leading up to the accident scene from Edgar Rivera's direction of travel. [R. p. 170, lines 7-18]. Edgar Rivera confirmed that he had not been made aware of the possibility of logging trucks entering the roadway by any type of signage. [R. p. 175, line 25 – p. 176, line 2]. A jury could have further concluded the narrow two (2) lanes of Pennyroyal Road at the intersection location to have been defectively designed. Taken as a whole, the evidence created an obvious question of fact as to the negligence of an entity or entities other than the named defendants.

The Court of Appeals relied heavily on *Howard* in affirming the Trial Court's grant of a new trial. *Howard* is easily distinguishable from this case though. In that case, the Court of Appeals reviewed the plaintiff's directed verdict motion and held, "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 *Howard* record was void of any negligence of an unnamed defendant though. Here, in addition to the fact that Respondent failed to carry her necessary burden of proof against Rivera in her case-in-chief, this Petitioner submitted ample evidence of the potential negligence of an unnamed tortfeasor. Lay and expert testimony, in addition to photographs, detailed

the lack of lighting in the area, the unsuitability of the intersection's design for the turn being attempted by the Newtons and the adequacy of warning signage for the Riveras' direction of travel. In turn, the jury was presented with an abundance of evidence for the negligence of an unnamed defendant, such as the State of South Carolina or Georgetown County in creating a defective intersection.

In arguing the potential negligence of a third party during his closing argument that could certainly have led to a jury's reasonable conclusion that a third party breached a duty owed to Hazel Rivera, Edgar Rivera referred the jury to the evidence in the record:

[w]e know he didn't see it because of the lighting, and I'm going to touch upon this a little bit later on, but I want you to ask yourselves when you go back there who were the only two people that have come in here to testify that can say definitively what the roadway, what the condition before they reached this hazard, the truck straddled across the roadway, what those conditions were, what the lighting was in that direction, not speculate about how it may have been, not speculate as to what they may have seen. The only two people that can testify definitively as to those conditions are Ms. Rivera and Edgar. They're the only two one- the only two people. Nobody else can tell you what they encountered. Now, the experts can speculate and try to give you as good a sense as they can and the Co-Defendant can tell you, "Well, the lighting, you know, we have trucks, we have lights on our trucks and there was a light over there..."

[R. p. 360, lines 1-17].

...nothing wrong with making this turn, but maybe not at 10 o'clock at night, which we know is the time that it happened, and maybe with proper lighting, with proper signage trucks entering the roadway and proper lighting in the area, neither of which were available.

[R. p. 361, line 23 – p. 362, line 2].

Those are the only two people that you heard any testimony about with regard to signs of trucks entering the roadway. They never testified that they were there when Mr. Rivera passed, passed along the S-curve and ran into the trailer, couldn't testify about that but they're the only ones that said those signs had been put up...if those signs were there why weren't there any photographs of it, why weren't there any photographs of those signs that night? Because I submit to you, ladies and gentlemen, they

weren't there. The officer didn't see it, the officer who's trained to report what he sees didn't see them, and obviously Edgar never saw them.

[R. p. 363, lines 1-4].

These arguments made during closing summarized the previously-referenced evidence of an inherently dangerous roadway, by which the jury undoubtedly found that neither original defendant was negligent.

Even if the Petitioners' closing arguments had been void of assertions of the negligence of another specific party, the Respondent cannot support the significance of a "lack of assertion of negligence during summation" argument. Edgar Rivera and/or the Newtons could have even opted to waive the opportunity to make a closing argument without altering the evidence an unnamed party's negligence. Even had no closing argument been made placing blame on anyone other than Edgar Rivera's original co-defendant, a contention by the Respondent of the relevance of a lack of an argument during summation would be unfounded and serve only to distract from the issues at hand.

III. THE COURT OF APPEALS ERRED IN FINDING THAT EDGAR RIVERA ABANDONED HIS ARGUMENT THAT SUFFICIENT EVIDENCE OF THE NEGLIGENCE OF AN UNNAMED TORTFEASOR SUPPORTED THE JURY'S VERDICT WHEN EDGAR RIVERA CITED ALL NECESSARY LEGAL AUTHORITY IN HIS INITIAL BRIEF AND APPROPRIATELY REPLIED TO RESPONDENT'S BRIEF

Finally, the Court of Appeals erred in deciding that this Petitioner abandoned the argument that evidence existed as to the negligence of an unnamed defendant tortfeasor. The Court of Appeals found the issue to be deemed abandoned due lack of "citation to legal authority in his initial brief." In addition, they paraphrased *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) for the procedural rule that "an issue may

not be raised for the first time in a reply brief.” This Petitioner referenced all of the legal authority above in his Initial Brief and Final Brief to the Court of Appeals and based his theory of the jury’s potential reasoning behind their verdict on the simple principle of burden of proof. In his Reply Brief to the Court of Appeals, Edgar Rivera simply distinguished the present facts with the case law cited by Respondent in her Initial and Final Brief. SCACR 208(a)(3) allows an appellant to counter a respondent’s brief with a reply brief. An appellant cannot reasonably be expected to anticipate in his Initial Brief or Final Brief every argument that a respondent may make. The Court of Appeals mistakenly relied on this procedural argument in furtherance of their decision.

CONCLUSION

The Court of Appeals failed to realize that Hazel Rivera failed to carry her burden of proof, especially as it relates to Respondent’s claim against Rivera. As a result, the Court of Appeals should have remanded with a ruling that granted Edgar Rivera’s directed verdict motion after the Respondent’s case-in-chief. Even if Respondent’s case against Rivera could have proceeded to the jury’s deliberation, the jury’s verdict in favor of Rivera should not have been disturbed for the reasons set forth herein.

(SIGNATURE PAGE TO FOLLOW)

Respectfully Submitted,

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November 17, 2014

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THE STATE OF SOUTH CAROLINA
In The Supreme Court

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APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

S.C. Supreme Court

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2008-CP-22-00466
Appellate Case No. 2013-000674

Hazel Jeisel Rivera,..... Respondent,

v.

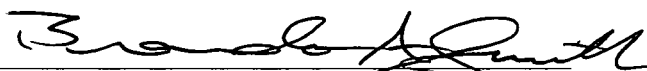
Warren Jared Newton, Newton's Farm, J&J
Logging, Inc. and Edgar Rivera Petitioners.

PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of King, Love & Smith, LLC, attorneys for the Petitioner Edgar Rivera and that he has served a copy of Petitioner Edgar Rivera's Brief on counsel listed below this 17th day of November 2014.

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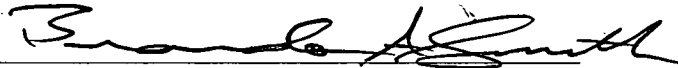
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CERTIFICATE OF COUNSEL

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

November 17, 2014



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