IN 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)

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 RESPONDENT

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STATEMENT OF THE CASE

I. Procedural History

Respondent (passenger) brought a Complaint against the Appellants alleging that their negligence caused an automobile wreck on or about August 29, 2005 resulting in personal injuries to Respondent. The case was tried by a jury during the week of March 15, 2010. Prior to the jury's deliberations, Respondent moved the court for an order holding that at least one of the Defendants had to be liable for the wreck. (R367)The Plaintiff based her motion on the case of Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (S.C.App. 2007), where the Court of Appeals had affirmed the finding of a directed verdict for the Plaintiff on the issue of liability, holding that "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 [the passenger's] injuries." 654 S.E.2d at 881. (The case was tried under the newly adopted comparative Fault Statute at S.C. Code §15-38-15, effective date of July 1, 2005.) The Plaintiff also objected to the trial court's jury verdict form which provided the jury with the option of returning a defense verdict for both Defendants. (R356, 366-368). The jury returned a verdict in favor of both Defendants.

The Plaintiff made a timely motion for a new trial. (R101) This motion for a new trial was granted by the Trial Judge. (RS) The Grant of a new trial was upheld by the South Carolina Appeals Court.

II. Statement of the Facts

On August 29, 2005, the Plaintiff, Hazel Rivera, and her brother, Edgar Rivera, were travelling west on Pennyroyal Road in Georgetown County. (R172, 189) Edgar was driving the vehicle and Hazel was a passenger in the front passenger seat. (R173,

214) Edgar and Hazel had received news that their father had been injured and they were travelling on Pennyroyal Road to see their father. (R172, 214)

On that same evening, the J & J Logging Defendants (also referred to as Newton Defendants) had been attempting to remove logging equipment from a logging site on Pennyroyal Road. (R252) The speed limit was 55 m.p.h. (R162, 174). The Defendants testified that they had put out signs warning of trucks entering the highway. (R256, 268) One of the pieces of equipment is known as a Prentice Log Loader. The Prentice Log Loader is attached to a standard ten wheel tractor truck by a fifth wheel assembly. (R248) The Log Loader is mounted to a trailer which is approximately 38 to 40 feet long and black in color. (See photograph at R505) Sometime after dark and approaching 10:00 at night (R197, 313) the Defendants drove the tractor with the Prentice Log Loader out onto Pennyroyal Road from a dirt road side street. The dirt road formed a T-Intersection at Pennyroyal Road. (R168-69) There were ditches on both sides of the dirt side road. From previous experience, the Defendants knew that they would have to pull the tractor rig out across Pennyroyal Road onto the other side of the road and then back it up in order not to cause the rear wheels of the trailer to become bogged down in the ditch. (R252) The Defendants were aware that pulling out onto the main road under these conditions would take approximately 25 to 30 seconds. (R255, 276-79) The Defendants had no one in a position to warn oncoming traffic, although they had done so in similar situations in the past. (R274-76)

The Defendants had to wait 10 minutes for traffic to pass by. (R297) The Defendant driver then pulled the tractor trailer rig out across Pennyroyal Road so that the cab was off of the opposite shoulder pointing in an easterly direction and the trailer was

across the road at a 45° angle. (R161, 432, 434) The lights of the cab were pointed in the general direction of oncoming traffic. (R167, 432, 434) Joel Newton testified that turning left onto Pennyroyal Road at night with a log loader was inherently dangerous. (R298) In this position, the black trailer rig was completely blocking both lanes of travel. (R434) The Defendant driver then put the truck in reverse and began to back the truck up in order to avoid putting the rear wheels of the trailer into the ditch. (R252) After he had backed the truck up several feet, he then put the tractor in low gear and began to pull forward again. (R252) He saw the Rivera vehicle coming toward him traveling in a westerly direction on Pennyroyal Road. (R252) He testified that he blinked his lights and attempted to blow the horn. (R252) He further testified that it was his opinion that the Rivera vehicle was going 65 to 70 m.p.h. (R263-64) There is some evidence of lighting in the area. (R253-54; 290, 295-96; 316-21) Newton also testified that there was another vehicle very close behind the Rivera vehicle. (R258)

Edgar Rivera "couldn't see anything until the impact." (R174) Edgar said he was travelling "between 57 and 58 miles" per hour. (R175) The Plaintiff testified that they were in a hurry to check on their father who had been injured. (R217) Edgar did not see any signs warning of trucks entering the highway. (R176) He thought the truck headlights were an oncoming vehicle. (R176) He did not see the lights flash on and off. (R177) According to Edgar, there was no one with a flashlight, no flares, no lighting on the trailer and no visible reflective material on the trailer. (R177-78; 281-82) The truck headlights blocked his view of the trailer which was across the road. (R189)

Plaintiff's expert, Thomas Onions, testified that the logging truck straddling the roadway at night presented a dangerous situation for oncoming traffic. (R201-202) The

situation could have been made less dangerous with a flagman, a flashlight, flares, or reflective triangles, but none of these were present. (R202).

When the Plaintiff's vehicle struck the trailer, the Plaintiff was ejected through the windshield. (R215, 220) Her body hit the trailer and she bounced backwards into the ditch on the side of Pennyroyal Road. (R267) The Plaintiff sustained severe injuries (R215, 216, 437-54). She incurred over $60,000 in medical bills. (R186, 455-92)

ARGUMENT

I. The Trial Court's grant of a new trial does not implicitly adopt the alternative liability doctrine, nor does it shift the burden of proving causation; therefore, it does not require any change in South Carolina law.

The Petitioner Newton now, for the first time, makes a new argument. The Petitioner claims that the trial court implicitly adopted the doctrine of alternative liability. The Petitioner did not make this argument to the trial court or to the Court of Appeals. Accordingly, this issue need not be considered because the Circuit Court did not rule on it and issues not ruled on are deemed abandoned and need not be addressed by the court. See Noisette v. Ismail, 304 S.C. 56, 403 S.E.2d 122 (S.C. 1991).

The Petitioner's discussion of the alternative liability doctrine is misplaced. Alternative liability is a rule of causation, not negligent action. In the present case, causation is not an issue. The Defendant Edgar Rivera drove his vehicle underneath a logging equipment trailer. The Defendant Newton stopped his trailer rig on the highway at night, blocking both lanes of travel. Together, these actions caused the Plaintiff to be thrown through the front windshield, resulting in severe injuries. Both of these actions meet the "But for" test and the substantial factor test. But for the Newton Defendant driving the trailer rig onto the highway, the Plaintiff would not have been injured.

Likewise, but for the Defendant Edgar Rivera driving his vehicle underneath the trailer, the Plaintiff would not have been injured. Both of these actions were a substantial factor in causing the injuries to the Plaintiff.

The Petitioner Newton suggests to the court that the Trial Judge's grant of a new trial represents a substantial change in South Carolina law. No change of law is required to affirm the grant of a new trial. The alternative liability theory suggested by Newton deals with causation, not negligent action. The most famous alternative liability case is Summers v. Tice, 199 P.2d 1 (Cal. 1948), which most every lawyer studied in law school. In Summers v. Tice the Plaintiff was injured when two hunters fired guns in his direction. In that case, negligent action was not an issue because both of the Defendants were negligent in firing their guns in the Plaintiff's direction. The question was one of causation. The shot from only one of the guns was the proximate cause of injury to the Plaintiff. The question was, "Which gun was it?"

The doctrine of Summers v. Tice was reiterated in the Restatement Second of Torts, §433(B) (1965). Subsection 3 states, "Where the conduct of two or more actors is tortious, and it is proved that harm has been caused to the Plaintiff by only one of them, but there is uncertainty as to which one has caused it, the burden is upon each such actor to prove that he has not caused the harm." (Emphasis added.) The case before the Court does not fit the parameters of the alternative liability rule as set forth in Summers v. Tice and the Restatement Second of Torts because the actions of both Defendants caused harm to the Plaintiff. The question is not whether their actions caused harm to the Plaintiff, but whether the actions themselves were negligent.

Newton is suggesting to the court that the trial court's grant of a new trial is a substantial change in South Carolina law because the alternative liability theory would shift the burden of proof back to the Defendant. The Trial Court's grant of a new trial, however, is wholly unrelated to the alternative liability theory of causation. There is no causation burden of proof to be shifted. This is not a case of two guns being fired in the Plaintiff's direction where only one of the guns actually causes an injury to the Plaintiff. In this case, the actions of both drivers caused the injuries to the Plaintiff. The actions of both drivers are the "but for" cause of injuries as well as a substantial factor in the causation of the Plaintiff's injuries.

The question here is whether the trial court abused its discretion in ordering a new trial. The facts of this case do not represent any change in South Carolina law and do not require this Court to address the causation issue of alternative liability.

II. The Trial Court did not abuse its discretion in granting a new trial.

An Order granting a new trial based upon questions of fact or upon both questions of law and fact, will not be reviewed by the Appellate Court unless there has been an abuse of discretion in granting the new trial. The South Carolina State Highway Department v. Clarkson, 267 S.C. 121, 226 S.E.2d 696 (1976). The Trial Judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. Lane v. Gilbert Construction Company, Ltd., 383 S.C. 590, 681 S.E.2d 879, 883 (S.C. 2009). "The doctrine entitles the Judge to sit, in essence, as the Thirteenth Juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts." (citations omitted) Id. "As the thirteenth juror, the Trial Judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." Id.

In its Order granting the Motion for a new trial, the Trial Court stated, "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." (R6)

The trial court did not abuse its discretion in granting a new trial. As the court stated, the only reasonable inference is that at least one, if not both, of the Defendants, were negligent and at fault in causing this wreck. The Trial Court found that there was no reasonable inference of any negligence on the part of the Plaintiff, especially since she was merely a passenger. The court likewise did not find any credible evidence that any nonparty could have been at fault, despite the arguments made by Edgar Rivera.

The Trial Court found this case to be very similar to the case of Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (S.C. App 2007). In Howard, the South Carolina Court of Appeals affirmed the finding of a directed verdict for the Plaintiff on the issue of liability holding that "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 [passenger's] injuries. The trial court did not err in granting a direct verdict on the issue of liability." 654 S.E.2d at 881.

In the Howard case, a following vehicle attempted to pass the front vehicle on a two-lane highway. The front vehicle turned left in its path, resulting in a collision which injured the Plaintiff who was a passenger in the left turning vehicle. The trial court found that there was evidence of negligence on the part of one or both of the Defendants. The trial court instructed the jury that they could find against one or both of the Defendants. The trial court did not give the jury the option of finding in favor of both Defendants.

The Appeals Court affirmed the trial court's rationale that both drivers owed a duty to the Plaintiff who was simply a passenger. The only reasonable reference to be drawn from the facts presented was that at least one of the drivers had to be negligent in order for the collision to have occurred.

Likewise, in the present case, the Plaintiff was merely a passenger in one of the vehicles involved in the collision. The court properly struck the Defendant's allegations of comparative and contributory negligence as to the Plaintiff since she was merely a passenger. (R352-53) The court further properly agreed not to charge the jury on the defense of "unavoidable accident." (R364-66) Therefore, since the Plaintiff was not at fault and the accident was not "unavoidable," the only reasonable inference is that the wreck was caused by the negligence of one or both of the Defendants.

The record in this case is filled with evidence of the negligence of the two Defendants. As to the Defendant Edgar Rivera, there was evidence which showed the following:

1. That he was travelling in excess of the speed limit;

2. That he was in a hurry to determine the extent of his father's injuries;

3. That he was an inexperienced driver, driving this particular vehicle for the first time;

4. That he failed to slow down when he saw the headlights of the truck;

5. That he failed to observe and heed signs which warned of trucks entering the highway;

6. That he failed to see the reflective tape on the side of the log loader;

7. That he failed to observe and heed the warning of Defendant Warren Jared Newton as he blinked the truck's headlights and blew the truck's horn;

8. That he failed to see the trailer across the road, even though there was an abundance of light in the area.

Likewise, the record is filled with evidence of the negligence of the Newton Defendants, including but not limited to, the following:

1. In pulling a tractor trailer truck rig out onto a dimly lit country road when they knew that it would take 25 to 30 seconds to pull the truck out and to back it up in order to be in a position to move down the highway;

2. In pulling a tractor trailer truck rig out onto the highway when they knew the trailer to the rig would be completely blocking both lanes for approximately 25 to 30 seconds before they could maneuver the truck into a position to travel down the highway;

3. In failing to post flagmen on either side of the tractor trailer rig when they knew it would take 25 to 30 seconds before the rig would no longer be blocking both lanes;

4. In failing to place any reflective triangular warning signs on the roadway;

5. In failing to place any flares along the highway;

6. In failing to contact authorities to obtain assistance from the Sheriff's Department in illuminating the area and providing warnings when they knew they would be pulling a dangerous rig into the highway at night;

7. In pulling a dark tractor trailer truck into the highway knowing that it would block the highway for 25 to 30 seconds when they could easily have waited until daylight to perform this function under less dangerous conditions; and

8. In otherwise failing to warn oncoming motorists of a dangerous condition which they had created.

The only reasonable inference from the evidence submitted at trial is that one or both of the Defendants was at fault in causing this wreck.

Despite the overwhelming evidence of negligence as to both Edgar Rivera and the Newton Defendants, both Petitioners cite to testimony of the Plaintiff as follows:

Q: O.K., 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)

The record reveals that the Plaintiff's primary language is Spanish. She is originally from Central America and not a U.S. Citizen. She was being cross-examined by a well versed English speaking attorney. It is only natural for her to agree with counsel's leading question. Her assent to this leading question, however, is not evidence. At best, her assent could only be described as an opinion. Her opinion is not evidence. Petitioners are using the Plaintiff's relationship with her brother to solicit an opinion that is irrelevant to the facts of the case. Her opinion is not a fact, nor is it evidence. The evidence of the numerous negligent acts of both Defendants are set forth above. Both Petitioners Edgar Rivera and Newton are grasping at straws when they seek to put forth an unfounded opinion of the Spanish speaking Plaintiff who is also the sister of the Defendant Edgar Rivera. If she had said it was her opinion that either Edgar or Newton had caused the accident, such an opinion would likewise have been irrelevant and of no probative value.

The Petitioner Edgar Rivera argues that there is a reasonable inference as to the negligence of an unnamed tort feasor. The Petitioner Edgar Rivera then focuses on the lack of lighting and road signs. Such an allegation is without merit. There is no obligation of the State of South Carolina or the County of Georgetown to provide any particular type of lighting on a secondary country road. The Petitioner Edgar Rivera

points to no such standard or law. In fact, the Petitioner Newton went to great lengths to prove that there was abundant light in the area.

There is no evidence that the signage was inadequate. Quite the contrary, there is ample evidence of road signs. There is no evidence that any required DOT signs were missing. Once again, the Petitioner Edgar Rivera is grasping at straws. The Petitioner Edgar Rivera refers to the lack of temporary signs regarding log trucks entering the highway. There is no requirement that the State of South Carolina or the County of Georgetown place temporary signs as to logging trucks where they enter and exit the highway. The obligation to place temporary signage as to logging trucks belongs to the logging truck company itself not to the State of South Carolina or the County of Georgetown. There is simply no evidence whatsoever of any duty that might have been breached by an unnamed tort feasor.

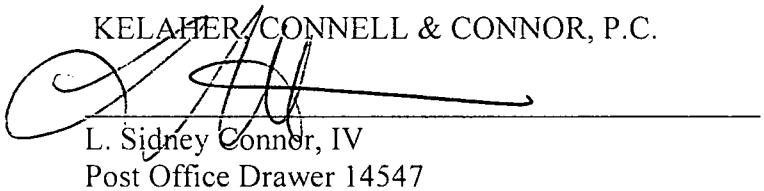
III. The Trial Court's grant of a new trial upholds the Respondent's constitutional right to remedy for a wrong.

The South Carolina Constitution provides a guarantee that every person shall have a remedy "for wrongs sustained." South Carolina Constitution Article I §9. In the present case, the Plaintiff was an innocent passenger. She was ejected from the vehicle through the front windshield. Her body struck the trailer of a log truck which was parked across the roadway at night. The force of her body striking the trailer propelled her into the ditch beside the road. She suffered severe scarring and disfigurement. Under the Petitioners' argument, this disfigured young woman would be denied any remedy. In ordering a new trial, the Trial Judge implicitly recognized Ms. Rivera's constitutional right to a remedy.

CONCLUSION

For the foregoing reasons, the Respondent requests this Court to affirm the Trial Court's grant of a new trial.

KELAHER, CONNELL & CONNOR, P.C.



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December 9, 2014

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Petitioners,

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent Hazel Jeisel Rivera's Brief complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of Kelaher, Connell & Connor, P.C., attorneys for the Respondent Hazel Jeisel River, and that he has served a copy of the BRIEF OF RESPONDENT counsel listed below this 9 day of December, 2014.

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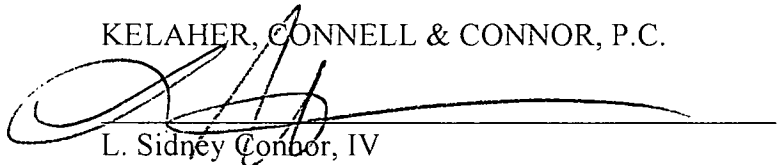

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December 9, 2014

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

Dear Mr. Shearouse:

Enclosed please find an original (unbound) and fifteen (15) bound copies of Brief of Respondent along with Proof of Service. Please return a clocked copy in the envelope provided.

I am, by copy of this letter, serving Brief of Respondent upon counsel.

With best wishes, I remain

Sincerely yours,

L. Sidney Connor, IV

LSCIV:lb
Enclosures

cc w/encl.: J. Dwight Hudson, Esquire
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