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.

REPLY BRIEF OF NEWTON PETITIONERS

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ARGUMENT IN REPLY

I. ***The Respondent's Statement Mischaracterizes The Facts:***

The Respondent's brief mischaracterizes the facts in a number of particulars, as to all of which, Petitioners Newton incorporate by reference herein the Statement of Facts from their brief, which is of record with the Court. However, it is important to emphasize a few of the particular mischaracterizations.

First, the Respondent contends that Edgar and Hazel's were making this journey because "they had received news that their father had been injured." **(Resp. Br. p.2)** This mischaracterization is important because it miscasts the emotional state and motivation of Edgar and Hazel. They were not merely traveling to see an injured relative. Edgar had just gotten a phone call that his father had been mugged and he'd just had a confrontation with his sister, Hazel, who hid the car keys to force him to take her with him. **(R.p.171,l.11-p.173,l.12; R.p.213, l.1-25)** That was the frame of mind of the driver and passenger when they set off in a tearing hurry followed by their cousins whose vehicle also impacted the trailer. **(R.p.258, l 7- p 259, l 9; p 328, l. 6-9; p 313, l 5-8; p. 259, l 20-22; p. 260, l 1-13)** The Respondent admitted that they were in a hurry to get to their father. **(R.p.217, l.3-8)**

Second, the Respondent attempts to convince the Court that moving a piece of logging equipment at night is an inherently dangerous maneuver. **(Resp. Br. p.2-3)** In fact, some loggers run crews 24 hours a day and local loggers are delivering to International Paper in Georgetown, which stays crowded during the day, so that many 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)** It wasn't unusual to move this loader at night - the Newtons had done it before. **(R.p.247, l.13-20)**

Third, in discussing Edgar's failure to perceive all of the warnings that he should slow down and stop, Respondent gives the impression that the warnings didn't exist. **(Resp. Br. p.2-3)** There were 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.257, l 12-3)** 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)** And, as Respondent's brief notes, Jared Newton blinked his lights and sounded his horn to warn the speeding Rivera vehicle. **(R.p.259, l.20-22; p. 260, l 6-13; p. 26, l 1-5)** Edgar Rivera and Hazel Rivera's failure to perceive and act upon these warnings does not mean that the rig wasn't visible, the area wasn't lighted or that due and proper warnings were not given. That is illustrated by the fact that after the accident, before police or emergency crews arrived, when there was no additional lighting or warning, several vehicles approached, saw the tractor/trailer and turned around without striking the rig. **(R.p. 265, l 10-19; p. 368, l. 7-17)**

Finally, the Respondent notes that her expert testified that a vehicle straddling the roadway at night presented a danger that could have been made less dangerous with a flagman, a flashlight, flares, or reflective triangles.. **(Resp. Br. p.4)** The Newtons' expert, Mike Dickinson, conducted field tests in the area at the time of night of the accident and discovered that a Church light provided enough illumination to allow him to stand at the edge of the roadway, near the position of the tractor/trailer, and read deposition transcripts. **(R.p.313, l 14- p 321, l 4)**

The Petitioners note that the strongest factor that would have reduced the risk of this accident would have been for Edgar Rivera to have traveled at a safe speed and to have paid attention to all of the warnings given by the Newtons - the posted warning signs, the flashing lights and the blaring horn. Then too, Hazel Rivera, herself, could have prevented this accident

by not insisting on riding with in this vehicle operated by her emotionally upset, unlicensed brother who was in a hurry to get to their father - or by paying attention to the road and traffic conditions instead of talking on a cell phone when circumstances required her close attention. **(R.p.294, l 12-16; p. 165, l. 24 - p. 166, l. 1; R. p. 219, l18- p. 220, l 8)**

II. ***The Respondent Incorrectly Contends That Petitioners' Burden of Proof/Alternative Liability/ Res Ipsa Loquitur Argument Is New:***

The Respondent incorrectly claims that Petitioners' Newton first made the argument about the Constitutional/Due Process concerns raised by removing or shifting the burden of proof (also known as the doctrines of alternative liability/*res ipsa loquitur*) in this Court and that the argument was not made below. In fact, these concerns were first raised to the trial court.

After the trial court reversed the jury verdict and granted a new trial based on Howard v. Roberson. 376 SC 143, 654 SE2d 877 (Ct.App. 2007), Petitioners Newton filed a Motion asking that the Court alter, amend or reconsider that ruling. **(R.p.130)** That motion contains three (3) specifications - numbers 6, 7 and 8 - which raise constitutional challenges to the trial court's rulings. **(R.p.133-134)**

Before the Court of Appeals, Petitioners contended that the Plaintiff in a negligence action, passenger or not, must meet her burden of proof and that this jury determined the Plaintiff did not meet her burden of proof and that the trial court's grant of a new trial based on Howard v. Roberson was an error of law. Further, Petitioner's brief specifically argued that the Howard case did not stand for the principal that a passenger does not have a burden of proof in a South Carolina negligence action. **(See: Petitioner's Brief to the Court of Appeals, p.27-30)**. Further, Petitioners' brief specifically stated as follows: "Whatever principles of law the Howard case stands for, it was surely not the intent of the Court of Appeals to reverse a substantial body

of common law that requires that a plaintiff meet her burden of proof for negligence by a preponderance of the evidence before she is entitled to a jury verdict." **(See: Petitioner's Brief to the Court of Appeals, p.34-35)**. [Unfortunately, the verdict of the Court of Appeals in this case appears to confirm its intent to remove/shift a plaintiff's burden of proof under principals of alternative liability or *res ipsa*.]

Petitioners Newton also raised burden of proof arguments in their brief replying to the Respondent. **(See: Petitioner's Reply Brief to the Court of Appeals, p.34-35)** Petitioners contended that the jury verdict established that the Respondent as Plaintiff did not met her burden of proof at trial and that this state's law is that a jury verdict should be upheld when it is possible to do so and carry into effect the jury's intent. Vinson v. Jackson, 327 SC 290, 491 SE2d 249 (1997)

III. ***The Respondent Misstates The Doctrines Of Alternative Liability/ Res Ipsa Loquitur And Misapprehend The Doctrines' Constitutional Effect On The Burden Of Proof In This Case:***

The Respondent contends that principals of alternative liability or *res ipsa loquitur* have no applicability to this case because the doctrine deals with causation. Respondent states as follows: "The case before the Court does not fit the parameters of the alternative liability rule set forth in Summers v. Tice and the Restatement Second of Torts because the actions of both Defendants caused harm to the Plaintiff." Summers v. Tice, 33 Cal2d 80, 199 P2d 1 (1948), Restatement of Torts Second (§433B). **(Resp. Br. p. 5-6)** And the Respondent also states as follows: "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." **(Resp. Br. p. 6)**

The quoted statements are indicative of the issue in this case. The Respondent Plaintiff states as a fact that the actions of both drivers caused harm to her. Obviously, the Plaintiff filed suit against both drivers in this two-vehicle MVA because that is her contention, although at trial the Plaintiff testified that she did not hold her brother responsible. **(R.p.221, l.8 - p.222, l.2)** However, a contention does not make a thing so for a contention is not proof and the Plaintiff, passenger or not, must prove that the actions of each driver caused her harm. As this Court has long held:

> The plaintiff has the burden of proving each element of negligence, including the defendant's lack of due care. See: ; . 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. ; . No inference of negligence arise from the mere fact of injury. , cert. denied, . 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,
>
> Snow v. City of Columbia, 305 S.C. 544, n.7, 409 S.E.2d 797 (1991).

Petitioners Newton agree with the Respondent that the doctrine of alternative liability or *res ipsa* should not apply to this case but Petitioners disagree with the Respondent's statement that in this case "there is no causation burden to be shifted." **(Resp. Br. p. 6)** The problem here is that the Respondent/Plaintiff, the trial court and the Court of Appeals are all treating this case as though it was a Summers v. Tice situation where two guns were shot into the air and someone in the crowd was struck by a bullet and they all fail to understand that in South Carolina, even if this was a Summers v. Tice situation, the Plaintiff would have to prove each Defendant's lack of due care.

Here the Plaintiff failed to prove that each Defendant caused her injury, and the Howard *v.* Roberson grant of a new trial said that the Plaintiff did not have to prove that each Defendant

caused her injury because she was a passenger. The trial court ruled 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 " and the trial court ruled that it had therefore erred in instructing the jury that it could return a verdict in favor of all Defendants", citing Howard v. Roberson. **(R.p.6)** If this case was tried to a jury verdict and the Court could not rule as a matter of law that both Defendants were liable, then the grant of a new trial was an error as a matter of law because the Plaintiff did not just fail to meet her burden of proof as to the jury, she also failed to convince the Court that each Defendant was liable.

The Plaintiff/Respondent had the burden of proving negligence under South Carolina law and the Defendants/Petitioners do not have the burden of proving the absence of negligence. The Howard v. Roberson case, and this one, shift to the Defendants the burden of proving that "the other guy did it" because the Court's holding is essentially that "one of the Defendants caused this accident" and the jury should determine whether one or both Defendants are at fault.

The grant of a new trial in this case based upon Howard v. Roberson is unconstitutional because it removes the burden of proof from the Plaintiff and places it on the Defendants. It brings the doctrine of res ipsa/alternative liability into this state in contradiction of South Carolina law. Watson v. Ford Motor Company, 389 SC 434, 699 SE2d (2010); Snow v. City of Columbia, *supra.*

That Edgar Rivera drove his car under a logging trailer does not, in and of itself, make him liable for anything. That the Newtons backing maneuver blocked another lane for a few seconds does not, in and of itself, make them liable for anything. The Respondent/Plaintiff does not seem to understand that it was her burden to prove that each of these acts were negligent and

that each of these acts proximately caused her injuries and that the jury verdict indicates that she did not meet her burden of proof. The alternative liability/*res ipsa*/ burden shifting holding of Howard v. Roberson, if left in place, would do what the Respondent apparently feels has already been done -- change South Carolina law so that in passenger cases against multiple drivers, the fact of the accident does, indeed, speak for itself.

Petitioners Newton believe that the burden shifting holding in this case violates long-standing South Carolina law and their Constitutional rights.

IV. *The Respondent Incorrectly States the Applicable Legal Standard:*

The Respondent incorrectly states the "abuse of discretion" standard as the one applicable to this trial court's grant of a new trial. (R.p.6) Here, the trial court granted a new trial because it had second thoughts about its failure to direct a verdict as to liability, as Judge Konduras' dissent points out. (Appx. p.12)

A directed verdict motion goes to the whole case and 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). If the evidence, viewed in the light most favorable to the nonmoving party, is susceptible of more than one reasonable inference, the case should be submitted to the jury. ; ; A Trial Court may only consider the existence or non-existence of evidence at the directed verdict stage and a reviewing appellate court should determine whether a jury could reasonably return a verdict for the opposing party under those facts. Jones v. General Electric, 331 SC 351, 503 SE2d 173 (Ct.App. 1998)

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). The grant of a new trial on the facts is not equivalent to the grant of a directed verdict motion. *Id.* And in all cases, 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." Joiner v. BeVier, 155 SC 340, 152 SE 652, 656 (1930).

In the present case, the contested facts and issues of credibility were such that granting a directed verdict would have been an error of law. Petitioners incorporate by reference their brief, which contains a detailed description of these contested facts and credibility issues. Judge Konduras points out a few of them and concludes that the grant of a new trial should be reversed and the jury's verdict reinstated:

> On that point, I believe the trial court correctly denied Jeisel's motion, because the jury could have found she failed to meet her burden of proof as to the negligence of both defendants. Jeisel testified she did not believe Edgar could have done anything to avoid the accident, and the parties presented conflicting testimony regarding the direction the tractor-trailer's headlights were shining and how well the truck and area were lit the night of the accident. *See Moore v. Levitre,* 294 S.C. 453,453-54,365 S.E.2d 730, 730 (1988) (stating in deciding a directed verdict motion, the trial court must view the evidence and its inferences in the light most favorable to the opposing party and should deny the motion if the evidence yields more than one inference or if its inferences are in doubt).
>
> Because I believe the trial court's grant of a new trial was based on an erroneous change of heart with respect to the directed verdict motion, I would reverse the trial court's grant of a new trial and reinstate the jury's verdict.
> **(Appx. p. 12)**

This is not a case governed by an "abuse of discretion" standard as Respondent contends. Allowing a Trial Court discretion to grant a Thirteenth Juror new trial based on a change of heart over a directed verdict ruling means that a Trial Court could do under the Thirteenth Juror doctrine what it could not do when ruling on either a directed verdict or a JNOV. Most

importantly, this is a case that was tried to a jury verdict and that verdict should be upheld and the jury's intention should be carried into effect.

IV. *The South Carolina Constitution Does Not Guarantee The Right To A Recovery*

The Respondent erroneously claims that the South Carolina Constitution guarantees every person a remedy "for wrongs sustained." In fact, the applicable constitution provision states as follows: "§9. Courts; speedy remedy. All courts shall be public, and every person shall have speedy remedy therein for wrongs sustained." *South Carolina Constitution,* Article I §9.

The speedy remedy granted by this provision is the right to seek redress in South Carolina courts for wrongs sustained. Whether the person seeking redress, the Plaintiff, makes a recovery may depend upon many factors. Some of these are whether the Plaintiff sought redress timely, whether the wrong sustained is one for which the law can provide a remedy (for example, a person who pays money for illegal narcotics they do not receive has no right in the courts to recover the money), whether under the facts and the law the person is entitled to the remedy -- and, whether the person seeking redress proves her case.

Petitioners Newton also have rights within the protection of the South Carolina constitution, including the right to due process. The courts exist to serve the interests of justice for all parties. It is one of the important functions of the judicial system to balance the rights of the parties so that all are respected, insofar as possible, but that none is paramount. The ultimate expression of the balancing of remedies and rights in a particular case, under a specific set of facts, lies in the hands of the impartial jurors who hear all the admitted evidence, are instructed in the law by the court, and render a verdict.

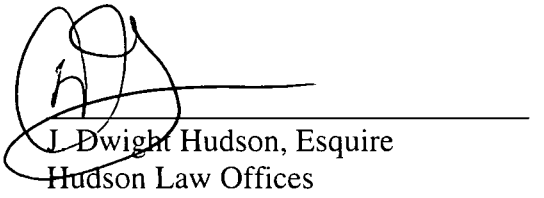
The Respondent sought redress in the Court and received it, to the fullest extent of the legal system when the jury in this case returned a verdict. The South Carolina Constitution does not guarantee that all jury verdicts will favor Plaintiffs.

CONCLUSION

The Court of Appeals erred in upholding the trial court's grant of a new trial and it erred in upholding the trial court's reliance on Howard v. Roberson as a basis for the grant of a new trial. The Howard v. Roberson decision is based on the burden shifting doctrine of alternative liability which is founded in principals of *res ipsa loquitur,* a doctrine that has been properly rejected by this court. South Carolina law requires all Plaintiffs to prove their case, both in the sense of meeting the legal burdens, like establishing all elements of negligence, and in the sense of persuading the jury. This Court should continue to adhere to those principals.

For all of the reasons expressed herein and those expressed in Petitioners Newton's principal brief, Petitioners ask that this Court overrule the Court of Appeals and the Trial Court and reinstate the jury verdict.

Respectfully submitted,



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Dated: December 17, 2014

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Hazel Jeisel Rivera,

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v.

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Petitioners.

PROOF OF SERVICE

I certify that I have served one bound copy of the **Reply 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 December 17, 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 original copies of the said brief, and one unbound original of the brief with service upon the parties made to the following addresses: by US Mail:

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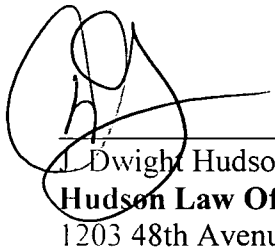

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December 17, 2014

The Hon. Daniel E. Shearouse
Clerk of the SC Supreme Court
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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:

- Fifteen (15) Bound and one unbound **Reply Brief of Petitioners Newton**, all containing original signatures;
- An original and a copy of a Proof of Service regarding the same.

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 Reply Brief of Petitioners Newton upon all counsel.

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

J. Dwight Hudson, Esq.
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JDH: mag
Enclosure(s): as stated
cc: L. Sidney Connor, IV, Esq.
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