

The State of South Carolina
In the Court of Appeals

Appeal from Aiken County Court of Common Pleas
The Honorable Doyet A. Early, III Circuit Court Judge
The Honorable Clifton Newman, Circuit Court Judge

Civil Action No.: 2011-CP-02-00868

Paige Weeks Johnson, as Personal Representative of the Estate of Christie Lane Valenzuela,
Respondent,
versus
Sam English Grading, Inc.,
Appellant.

Petition for Rehearing

The Appellant petitions this Court to rehear and/or reconsider, reverse or modify its decision in the appeal of this case. The reasons the Appellant believes this Opinion is in error is because the Court of Appeals has misapprehended, overlooked, or failed to correctly rule on the following:

Proximate Cause

This issue was the very first question presented and was argued under three different subheadings.

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It was stated in the Table of Contents of the Brief of the Appellant on the first visible page of the Appellants Brief in bold.

I. The negligence that caused this single vehicle accident was the negligence of its driver in:

a. Deciding not to stop but instead to use his rear brake to skid his rear tire to draw attention to himself, instead of using both brakes to stop.

b. Having committed to his decision not to try to stop, but to skid his rear tire, he made his second negligent decision when he decided to throw down the motorcycle. While he was skidding the pan drier was stopping and did not enter the road. It was not necessary to throw down the motorcycle.

c. There is no evidence of any negligent act or breach of duty by Sam English grading that caused the driver of the motorcycle to decide not to stop his motorcycle or decide to throw down the motorcycle.

It was stated again in the Questions Presented on the first numerical Page 1 of the Brief of the Appellant.

The crucial proximate cause undisputed testimony of the motorcycle driver, Michael Valenzuela, was not just cited but was quoted in the Statement of Facts on page 9 of the Appellant's Brief. That conduct and how it describes the proximate cause of the accident is further explained on pages 10 and 11 of the Brief of the Appellant.

The proximate cause issue is again stated at the very beginning of the Argument section of the Brief of the Appellant on page 19 and continues through page 23 of the Appellant's Brief.

The crucial outcome determinative evidence of the proximate cause of this accident comes from the deceased's own husband, the operator of the motorcycle and it is not disputed by anyone when, prompted by questions from his own lawyer, he stated :

Q. Tell us about what happened.

A. All right. So I'm coming up down Redd's Branch Road and my wife Christie taps me on the side; so I know I sense something is wrong. So I look. I look in my rear view mirror. I look up ahead. I look everywhere. I let off my throttle. I'm looking. I am trying to figure out is it a deer, is it a dog?

Something is going on. [R. p. 467].

Q. Describe for the jury the type braking you did when you saw that that pan was coming out in front of you.

A. I just stayed on the back brake because what I was hoping he was going to do is when we started to hit brakes maybe he could get stopped that I could continue my path is what I was hoping. I wasn't going to lay the bike down. That was not my intention until I realized he is not going to stop. That's when I had no other choice but to just completely slide her out, to throw it straight at him -- come off the bike, let the bike go and hopefully we would be just fine. [R. p. 470].

I was like I got to lay this bike down and that's what I did. I skidded as long as I could to see if he would see me, you know. I stayed upright, but right there at the last I don't know how many feet it was he never would acknowledge me; so I just threw the motorcycle at him, laid it down hoping that we would stay behind it and we would survive it. He would get caught up in the motorcycle himself. That was my plan. [R. p. 469].

Finally, the proximate cause analysis was stated as the first basis for a reversal in the Conclusion on page 47 of the Appellant's Brief.

The Court of Appeals erred in deeming the central issue in this case to be abandoned. The analysis of the proximate cause of this accident was vigorously argued extensively in the Appellants brief and at oral argument. This was no conclusory assertion of a principle of law with no support. This is a detailed analysis of the facts of this case which reveal without dispute

what the proximate cause of this accident was – either or both of the two actions taken by the driver of the motorcycle as placed in evidence by his own testimony.

The negligence that proximately caused this motorcycle accident was as a matter of law the negligence of its driver in either or both of two independently sufficient negligent proximate causes of the accident:

in skidding his rear tire to draw attention instead of using his brakes to stop;

in throwing down the motorcycle on the road.

The Court of Appeals omitted from the facts the undisputed and crucial to proximate cause the facts from the testimony of Michael Valenzuela.

The undisputed evidence from Michael Valenzuela shows as a matter of law that his actions were the proximate cause of the accident by deciding not to stop.

The undisputed evidence from Michael Valenzuela shows as a matter of law that his actions were the proximate cause of the accident by deciding to throw down the motorcycle.

If it is necessary to cite a case for the application of the doctrine of proximate cause to this tort case, then your Appellant apologizes and respectfully requests that this Court take Appellate Judicial Notice that the courts of South Carolina have long adopted proximate cause as set down by Chief Justice Benjamin Cardozo in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928). In *Doe V. Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001) the South Carolina Supreme Court of Appeals relied upon Chief Justice Cardozo who quotes Sir Frederick Pollock in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 341, 162 N.E. 99, 99 (1928) (quoting Sir Frederick Pollock).

The South Carolina Supreme Court has cited *Palsgraf* in *Doe v Batson*, 345 S.C. 316, 548 S.E.2d 854 (2001) and the South Carolina Court of Appeals also cites this famous proximate

cause case. *Sharpe V. South Carolina Department of Mental Health*, 292 S.C. 11, 354 S.E.2d 778 (1987). Proximate Cause has been the universally known and accepted doctrine in South

Carolina Law for many decades and is similarly prevalent in jurisdictions and law schools throughout the nation.

The undisputed evidence that no act of this defendant was the proximate cause of the plaintiff's injuries is the testimony of Michael Valenzuela of his plan not to stop, but to skid to draw attention, and following that, his throwing the motorcycle down.

Because there is only evidence that these acts of Michael Valenzuela are the proximate cause of this accident, Judgment should be entered for this defendant.

Contracts that should not have been admitted into evidence

In the Facts/Procedural History the Court of Appeals was correct to find that the pan was being driven on a private driveway owned by Corning. However, the Court of Appeals erred in affirming the admission a series of evidentiary rulings from private contracts that were inadmissible for the following reasons including:

They were private contracts between Owens Corning and Sam English Grading about the grading work at the Owens Corning land fill and an encroachment permit issued by the SC DOT to Owens Corning which expired in 1984.

The contracts' references to Construction Zone Warning signs, flagmen, and private driveway stop signs are not public rules of the road and do create rights or duties between Sam English Grading and the public.

The private driveway was not the property of Sam English Grading.

The terms of the contract documents between Sam English Grading and Corning do not create duties to the motoring public on the public roads, do not constitute statutory or common law standards of care and should not have been admitted as evidence.

The issue in this case is about the operation of two vehicles that were approaching the end of the Corning driveway. It is not about preparing the road for an encroachment. It is the failure of the motorcycle driver to exercise of due care by not trying to stop that controls how this accident happened.

Testimony of prior unrelated events that should not have been admitted

The Court of Appeals erred in affirming the admission of testimony from three neighbor and friend witnesses about times they thought vehicles coming from the Owens Corning driveway were dangerous.

Evidence of prior conduct is well known to be prejudicial. It is a classic evidence problem and the prejudicial effect of bringing conduct that is from some other day and time is known as strongly influential to a lay jury and equally improper and inadmissible. "You committed some other crime so you must have committed this one. You were negligent on that day so you must have been negligent on this day." It is time proven to be error and for good reasons. It is only admitted in limited circumstances in which a pattern is an element of a case. In this case the evidence was not only not of similar accidents but was not even about prior accidents but only about speculations of risk that neighbors or passersby testified about. Neither Ann Johnson, nor Laura Boozer, nor Virginia Gunter gave competent admissible testimony relevant to proving negligence in this case.

This evidence was not admissible in the case in liability phase of the case and yet it was the very first testimony the jury was exposed to and were under the influence of during the entire trial.

To conclude that even if this was not admissible to prove negligence it comes in for punitive damages is error. This trial was bifurcated and the evidence was admitted in the liability phase of the case, not the punitive damages phase. Further, the jury awarded no punitive damages so the only possible impact was on the issue of negligence.

The evidence was also not admissible for purposes of punitive damages. There is no testimony any of this information was ever brought to the attention of Sam English Grading. It didn't support punitive damages because there were none.

Coercive Jury Charge

After the jury reported it could not reach a unanimous verdict, the Trial Court gave a coercive improper variant of an Allen charge that should require a new trial for the following reasons:

The coercive charge was not just an Allen Charge but was combined with additional coercive language that constitutes reversible error.

The purported "Allen Charge" created an improper pressure on a divided jury to compromise into a verdict.

The purported "Allen Charge" placed an improper burden on the jurors' service and constitutes reversible error.

The Court announced to the parties that the Court was going to get it done. The Court told the jurors to reach a verdict. There was no time or outcome alternative given to the jury. "If we can't agree, we can come back tomorrow, Saturday. If you don't want to come back tomorrow, we'll come back Tuesday morning.....let's reach a verdict in this case."

The time for an evening break before having to return on Saturday or Tuesday was 9:00 pm. The jury skipped the offered meal and the jury returned its verdict only moments before they triggered being brought back.

Absence of evidence of negligence if the contracts and testimony of prior events is not competent evidence

The Court of Appeals erred in failing to enter judgment for the defendant because if the erroneously admitted prejudicial evidence is removed this defendant then is entitled to Judgment as a matter of law.

Mutually exclusive inconsistent findings of fact

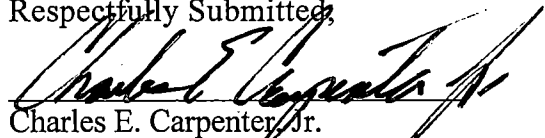
In the Facts/Procedural History the Court of Appeals made incorrect findings of fact on the issues of time, speed, and distance. In the Facts/Procedural History the Court of Appeals incorrectly described the braking action of the pan.

Conclusion

1. This Court should rehear, reconsider and reverse its initial opinion, vacate the judgment, enter judgment for the defendant.
2. If this Court determines not to enter judgment for the defendant then the Court should rehear, reconsider, reverse and grant a new trial to proceed without the inadmissible evidence from the contracts that was allowed in the first trial.
3. If this Court determines not to enter judgment for the defendant then the Court should rehear, reconsider, reverse and grant a new trial to proceed without the inadmissible testimony about prior events that was allowed in the first trial.
4. If this Court determines not to enter judgment for the defendant then the Court should rehear, reconsider, reverse and grant a new trial to proceed without the coercive jury charge that was allowed in the first trial.

This the 19th day of May, 2015

Respectfully Submitted,



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Certificate Of Service

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Appellant, Sam English Grading, Inc., do hereby certify that I have this date served the foregoing , Petition for Re-hearing , by personally depositing a copy of the same in a United States Postal Service mailbox, postage prepaid, addressed to the parties indicated below:

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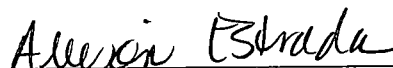
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Allison Estrada, Paralegal to Charles E. Carpenter Jr.

Dated: May 20, 2015.