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SC Court of Appeals

The State of South Carolina
In the SUPREME COURT

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

Opinion No. 5315 (S.C. Ct App filed May 6, 2015)
Appellate Case No. 2015-001531

Paige Weeks Johnson, as Personal Representative of the Estate of Christie Lane Valenzuela,

Respondent,

versus

Sam English Grading, Inc.,

Petitioner.

Appellant's Reply to Return to Petition of Writ of Certiorari

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Argument

I. Proximate Cause and *Ipsi Dixit* (on one's own say so)

The Respondent begins his Argument on p. 5 with the charge "Sam English's petition is largely ipsi dixit." This is a common false charge from a weak position. It was used by Steven Douglas against Abraham Lincoln in 1858. Lincoln responded:

> "I pass one or two points I have because my time will very soon expire, but I must be allowed to say that Judge Douglas recurs again, as he did upon one or two other occasions, ... upon his *ipse dixit* charging a conspiracy upon a large number of members of Congress, the Supreme Court, and two Presidents, to nationalize slavery. I want to say that, in the first place, I have made no charge of any sort upon my *ipse dixit*. I have only arrayed the evidence tending to prove it, and presented it to the understanding of others, saying what I think it proves, but giving you the means of judging whether it proves it or not. This is precisely what I have done. I have not placed it upon my *ipse dixit* at all." The Complete Works of Abraham Lincoln, Vol. III, pp. 290-291.

Your Petitioner offers the same response as Lincoln to the false charge of ipse dixit. We make no charge of any sort relying on our own say so. We have only arrayed the testimony of Valenzuela himself and the other evidence which proves proximate cause, and we present it to the understanding of this Court, saying what we think it proves, but giving this

Court the means of judging whether it proves it or not. This is precisely what we have done. We have not placed it upon our *ipse dixit* at all.

Valenzuela's Own Testimony of His Negligence that was the Proximate Cause

The Respondent avoids dealing with the testimony of Valenzuela which shows his negligent acts were the proximate cause of the accident. He attempts to obscure his own proximate cause problem by focusing only on Sam English Grading. That is nothing but a distraction from Valenzuela's own testimony.

Here is the proximate cause of this accident: [Valenzuela Testimony, R. p. 468].

Valenzuela saw the pan and thought it was not going to stop. Whether his thought was correct or not, he should have stopped if that is what he thought. If he stopped he would be safe and if the pan also stopped before entering the road he would have been doubly safe. But he did not. Instead he "laid in my back brake. I started skidding. ... I skidded as long as I could to see if he would see me, you know."

That decision to skid his rear brake to draw attention instead of using his brakes to stop was negligent and it led to his next negligent decision. He decided during his attention drawing skid that it had become too late to stop, and that it was too late to continue to drive through, so he decided to throw the motorcycle down on the road.

"Just hit the brakes please and I'll hold upright, you know, but I couldn't. He kept coming; never did see me. I threw the bike down. I slid it out hoping we could stay behind it. The bike could crash into him. We could

survive it -- because there was no way in the world we was going to miss him." .....[R. p. 468].

....

He never would look up the road. I was like I got to lay this bike down and that's what I did. 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].

A motorcycle driver must apply both front and rear brakes to stop. South Carolina Driver's Manual p. 133. R.p. 896, 898.

Valenzuela's act was more than just a negligent use of brakes to stop – it was deciding to not even try to stop - but to avoid the inconvenience of stopping by skidding to alert the pan driver so Valenzuela would never have to stop.

A compounding causal negligent act was not just wrongly failing to stop and not just wrongly estimating the pan would come out into the road, but also, in deciding to throw down the motorcycle which should not be done in any circumstance. R.p. 899- 901.

Proximate Cause was Raised and Argued.

The Court of Appeals did not analyze proximate cause and did not deal with Valenzuela's testimony in its recitation of the facts or analysis. The Court of Appeals erroneously dismissed the issue as not preserved. The proximate cause issue was the first question presented in the brief below; it was stated in the Table of Contents on the first page; in the Questions

Presented and it was extensively argued as the key issue in the case. The analysis of the issue of proximate cause was raised and argued repeatedly in your petitioner's brief and oral argument to the Court of Appeals.

This was no conclusory assertion of a principle of law with any support. This is a detailed analysis of the facts of this case showing the negligence that proximately caused this motorcycle accident was, as a matter of law, the negligence of Valenzuela, its driver, in either or both of two independently sufficient negligent proximate causes of the accident.

South Carolina Adheres to the Doctrine of Proximate Cause

South Carolina tort law requires a plaintiff to prove there is duty, a breach of duty and that the breach of duty is the proximate cause of an injury.

In response to the requirement of proximate cause the Respondent says that the opinion in *Palsgraf v. Long Island Railroad Co.,* 248 N.Y. 339, 346, 162 N.E. 99, 101 (1928), and the line of South Carolina cases which follow Palsgraf such of *Doe v Batson,* 345 S.C. 316, 548 S.E.2d 854 (2001) and *Sharpe v. South Carolina Department of Mental Health,* 292 S.C. 11, 354 S.E.2d 778 (1987). are about duty of care. Of course those cases talk about the other essential element of duty of care but that doesn't mean South Carolina doesn't require proof of proximate cause as well as a duty of care.

The Difference between Negligence and Proximate Cause.

The Respondent asserts that the jury could find Sam English proximately caused Valenzuela's death because: the pan driver would have run the stop sign if the spotter had not signaled him, there was no flagman, the pan driver failed to maintain a proper lookout.

This assertion about proximate cause is absolutely wrong on its face. That evidence is all directed toward whether Sam English Grading was negligent. It in no way addresses the issue of proximate cause.

In tort cases it is not unusual to see a focus on negligence with no evidence of proximate cause. Rarely is anyone's conduct perfect and it is often possible to find some kind of mistake. An example can be found in medical malpractice cases. There may be evidence of a mistake. The mere presence of a mistake is in no way an answer to whether the mistake was the cause of the patient's injury. Proof of causation is essential before the law will impose liability on one person for another person's injury.

In this case, putting a label on Sam English's conduct is not to answer the question of proximate cause. The answer to proximate cause is a separate analysis.

The undisputed evidence that no act of this defendant was the proximate cause is the testimony of Valenzuela of his plan not to stop, but to skid to draw attention, and following that, to throw 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.

II. New Trial because of erroneous evidentiary rulings

The Court of Appeals and the Respondent dismiss the evidentiary ruling with the conclusion that evidentiary rulings are largely within the discretion of the trial court. While that cliché is correct it does not mean there are no rules of evidence the trial court must follow. Nor does quoting the cliché substitute for a proper analysis.

Inadmissible Witnesses to Prior Events

This is a classic prejudicial type of evidence and is forbidden unless there is a strong reason to allow it. The prejudicial effect was not lost on plaintiff's counsel because he opened his case with three who did not witness any facts in dispute. They were neighbors who described their own unrelated prior experiences in which they complained of vehicles entering the highway from the Owens Corning landfill.

The Court of Appeals even acknowledged that it should not have been admitted in the liability phase of the case.

Third Party Contracts That Should Not Have Been Admitted Into Evidence

The Court of Appeals found the pan was being driven on a private driveway owned by Owens Coming. There were private contracts between Sam English Grading and Owens Corning that do not create independent duties to the public. Yet they were treated as if they established legal duties of Sam English Grading to the plaintiff. They should not have been allowed in evidence.

III. New Trial Coercive Verdict

Coercive Jury Charge

The Respondent charges that your Petitioner argues out of context. Rather than trade barbs it is more helpful to look at what the judge actually said and in what context.

When the trial judge first learned of the jury deadlock he said on the record to the lawyers:

"I am going to tell them I'll let them continue on. I'll buy them supper. If we can't reach a verdict by nine, we'll come back tomorrow. We're going to push it until we get it concluded."

That sounds like an unconditional statement that the trial court is going to get verdict.

The Respondent also quotes one sentence that seen in context is not as benign as when it stands alone. "I urge you, please, consider each other's opinion and in the spirit of compromise or whatever let's reach a verdict in this case." This also sounds unconditional and the sound is much louder when heard in context. It is not the Allen charge per se that is unlawfully coercive. It is the combined language of the extra-Allen context:

> **"So, here is where we are. It is a quarter 'til six. I'll be glad to order you supper. We can stay here until nine, ten, eight, whatever you want to stay to. 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, but these lawyers have -- this case was filed over a year ago. They have put untold hours into it. The facts aren't going to change.**
>
> **Y'all are twelve -- y'all have paid super attention. You have done a super good job and I ask that you go back and let's give it a good faith stab. If you can't get it done tonight, we'll come back in the morning or if you don't want to come back on Saturday we can come back Tuesday and I'll be glad -- you're probably tired of pizza. I am. It's the third time I've had it this week. My wife is out of town. I'm sick of it; so we'll get something different or if you want to -- if you want to go home about 8 o'clock or 9 o'clock and come back fresh in the morning if we can't reach -- but we're going to give it a shot."**

The facts that it was late Friday on Labor Day weekend, that the judge's wife was out of town, that if they did not reach a verdict by nine meant coming back on Saturday or Monday of the Labor Day weekend to further deliberate to reach a verdict, were not lost on the jury.

After that charge, the jury did not ask for a meal, kept on going and reported at 8:47 Friday night that they had reached a verdict.

They got the point. They had better come back with a verdict that night by nine o'clock or keep coming back over the Labor Day holiday. The came back with a verdict only 13 minutes before the deadline with a verdict that was coerced and should not be allowed to stand.

IV. Conclusion

The Court avoided Valenzuela's own testimony that shows his actions were the proximate cause by saying the argument was not preserved. The Court avoided analyzing the impact of inadmissible evidence, even evidence it tacitly acknowledge was erroneously admitted by simply stating the cliché that evidentiary rulings are largely discretionary with the trial court. The Court avoided analyzing the blatantly coercive "Allen plus" charge by the conclusory remark that it didn't coerce.

Each of these is in error.

This Court should issue a Writ of Certiorari and upon review reverse and enter judgment for the defendant, or, in the alternative, grant a new trial.

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August 13, 2015.

CERTIFICATE OF SERVICE

I, the undersigned, an employee of Carpenter Appeals and Trial Support, LLC, attorneys for Petitioner, Sam English Grading, Inc., do hereby certify that I have this date served the foregoing , **Appellant's Reply to Return to Petition for Writ of Certiorari**, 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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