

3

THE STATE OF SOUTH CAROLINA

In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
COURT OF COMMON PLEAS

The Honorable Alison Renee Lee

RECEIVED

AUG 12 2015

SC Court of Appeals

Appellate Case No. 2014-002105

The City of Greer,

Respondent,

v.

Michael Edward Schulz,

Appellant.

REPLY TO RESPONDENT'S MOTION TO STRIKE
APPELLANT'S DESIGNATION OF MATTER

Daniel J. Farnsworth, Jr.
Farnsworth Law Offices, LLC
Post Office Box 8719
Greenville, South Carolina 29604
(864) 250-9119
Attorney for Appellant

Daniel R. Hughes
Duggan & Hughes, LLC
457-B Pennsylvania Avenue
Greer, South Carolina 29650
(864) 879-0144
Attorney for Respondent

**REPLY TO RESPONDENT'S
MOTION TO STRIKE APPELLANT'S
DESIGNATION OF MATTER TO BE INCLUDED IN THE RECORD ON
APPEAL**

STATEMENT OF ISSUE

Respondent has moved to Strike from Appellant's Designation of Matter for the Record on Appeal, Item No.4, entitled "NHTSA Study titled "Blue Print for Ending Distracted Driving". This item contained findings of National Highway Traffic Safety Administration studies concerning the impact on driving while texting or emailing. The study contained data, graphs and specific findings that would educate the reader as to just how serious of an impact such distracted driving has on driver error.

The arresting officer on direct examination had asserted that only alcohol could cause the Appellant's poor driving (Tr. p 32). Counsel for Appellant was then prohibited from questioning the arresting officer using the NHTSA study, produced by the very same government agency that produced materials used to train the officer on DUI detection. Appellant believed the study would challenge the officer's assertions by illustrating the full capacity for driving error caused by such distracted driving. Appellant further sought to challenge the officer's conclusions concerning the appellant's driving by illustrating the lack of awareness the officer had concerning the effect of such distracted driving.

Although the arresting officer admitted during his testimony that texting and driving was unsafe, he downplayed and minimized the impact of such distracted driving. The officer distinguished the appellant's driving from that of texting and driving (Tr. p. 29, 51- 56), and attributed only one type of driving error to texting and driving (Tr. p.29).

The findings contained in the NHTSA study directly contradicted the arresting officer's testimony.

ARGUMENT

Counsel for Respondent argues that 1) Appellant failed to disclose this item prior to trial, and 2) that Appellant failed to mark the item as a trial exhibit and therefore cannot be addressed in this appeal.

Disclosure of Evidence by Appellant

Appellant was cross-examining the arresting officer when he was prohibited from using the content of the NHTSA distracted driving study. Both the Respondent's Request for Disclosure and the Rules of Criminal Procedure (Rule 5(b)) require disclosure of documents which the defendant intends to introduce as *evidence in chief* at the trial.

This NHTSA study was being used exclusively for purposes of impeachment during cross-examination and not offered during the Appellant's case. The publication of information and findings from the study were specifically intended to impeach the arresting officer's assertions regarding what he found to be the impact of texting on driving behavior, and his efforts to minimize the possibility that Appellant's poor driving could have been attributed to texting rather than impairment by alcohol.

Appellant was not required to provide, prior to trial, those items of evidence it planned to use when impeaching the Respondent's witnesses.

Failure to Mark Proffered Evidence as Exhibit

Counsel for Appellant carefully described the title, source and content of the NHTSA study through testimony of the arresting officer during his proffer. (Tr. p. 119 -

120) Further, Appellant had the arresting officer recite several of the specific statements and findings that Appellant sought to introduce from the pages of the study, including

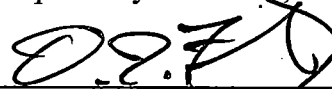
- a) that “*texting simultaneously involves manual, physical and mental distraction and is among the worst of all driving distractions*”. (Id.)
- b) that “sending or receiving a text takes a driver’s eyes from the road for an average of 4.6 seconds, *the equivalent- at 55 miles per hour- of driving the length of an entire football field, blind*”. (Id.)
- c) the titles of Graphs contained in the study,
 - i. *Crash or Near-Crash Involvement of the Driver* in the Past Year, by Sex and Age
 - ii. Sending Text or Emails while Driving, by Sex and Age (Id.)

Appellant adequately identified and described, through proffer, the NHTSA study with which he was attempting to impeach the arresting officer.

Conclusion

Appellant would therefore ask the Court to deny Respondent’s motion to strike the National Highway Traffic Safety Administration study, “Blue Print for Ending Distracted Driving” (Item No. 4) from Appellant’s Designation of Matter to be Included in Record on Appeal.

Respectfully submitted,



Daniel J. Farnsworth, Jr.
SC Bar No. 6922
Farnsworth Law Offices, LLC
2 Williams Street
Post Office Box 8719
Greenville, South Carolina 29604
864-250-9119 Telephone
864-250-9120 Facsimile
Dan@FarnsworthLawOffices.com
ATTORNEY FOR APPELLANT

August 10, 2015

STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

The Honorable Alison Renee Lee, Circuit Court Judge

RECEIVED

AUG 12 2015

SC Court of Appeals

Appellate Case No. 2014-002105

Michael Schulz,

Appellant,

v.

The City of Greer,

Respondent.

PROOF OF SERVICE

I, Brad Tollison, certify that I have served the within Reply to Respondent's Motion to Strike Appellant's Designation of Matter by depositing a copy of same in the United States mail, postage prepaid, addressed to:

Daniel R. Hughes, Esquire
Duggan & Hughes, LLC
457-B Pennsylvania Avenue
Greer, South Carolina 29650

I further certify that all parties required by Rule to be served have been served.
This 10th day of August, 2015.

Brad Tollison

Brad Tollison, Paralegal
Daniel J. Farnsworth, Jr.
Farnsworth Law Offices, LLC
Post Office Box 8719
Greenville, South Carolina 29604
864-250-9119 Telephone
Dan@FarnsworthLawOffices.com
Attorney for Appellant

August 10, 2015

FARNSWORTH LAW OFFICES, LLC

ATTORNEYS AND COUNSELORS AT LAW

2 WILLIAMS STREET
POST OFFICE BOX 8719
GREENVILLE, SOUTH CAROLINA 29604

DANIEL J. FARNSWORTH, JR.*

* ALSO ADMITTED TO PRACTICE IN VIRGINIA

TELEPHONE: 864.250.9119
FACSIMILE: 864.250.9120

August 10, 2015

RECEIVED

AUG 12 2015

SC Court of Appeals

South Carolina Court of Appeals
V. Claire Allen, Deputy Clerk
Post Office Box 11629
Columbia, South Carolina 29211

Re: The City of Greer v Michael Edward Schulz
Appellate Case Number: 2014-002105

Dear Ms. V. Claire Allen, Deputy Clerk:

Please find enclosed our original and two (2) copies of our Reply to Respondent's Motion to Strike Appellant's Designation of Matter, and Proof of Service.

Please return to us the two (2) copies stamped and clocked in the provided self addressed stamped envelope.

Thank you for your assistance.

With kind regards, I remain,

Yours truly,



Brad Tollison
Paralegal to Daniel J. Farnsworth, Jr.

Enclosures