THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HAMPTON COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Op. No. 27587
(S.C. S.Ct. filed November 4, 2015)

Willie Homer Stephens, Guardian ad Litem for
Lillian C., a minor, ... Petitioner,

v.

CSX Transportation, Inc. and South Carolina
Department of Transportation, ... Respondents.

MEMORANDUM IN SUPPORT OF PETITION FOR REHEARING

The Respondent South Carolina Department of Transportation (SCDOT) has petitioned the South Carolina Supreme Court for a rehearing of the Court's recent decision in *Stephens v. CSX Transportation, Inc.*, Op. No. 27587 (S.C. S.Ct. filed

November 4, 2015). The Respondent SCDOT respectfully submits that the following points were overlooked or misapprehended by this Court:

I.

In its 3-2 opinion, the majority of this Court concluded that a portion of the trial judge's charge was erroneous and then speculated that such errors in the charge "***may*** have tainted the jury's consideration of the initial question on the special verdict form regarding negligence, particularly where CSX admitted that the train engineer failed to timely sound the train's horn in accordance with section 58-15-910 of the South Carolina Code." (Slip. Op. at 14). (Emphasis added). The majority further speculated that "the jury ***may*** have concluded that Colvin's negligence superseded any admitted or proven negligence of CSX or SCDOT." (Slip. Op. at 15). (Emphasis added). The dissent correctly observed that the majority's rulings in this regard are "speculation" on the majority's part, and that the Court should be guided instead by "compelling policy reasons to resist such speculation and for honoring the agreed-upon verdict form." (Slip. Op. at 19).

The Court is respectfully urged to reconsider its decision in this regard in part because of the precedent that this case presents for future cases. Counsel has been unable to locate any prior case in South Carolina where an appellate court has reversed a jury verdict where the jury provided the specific bases of its decision in response to special interrogatories presented by the trial judge and to which the

parties agreed. Historically, even in cases where a jury returns a general verdict, this Court and the Court of Appeals have correctly abstained from speculating about the jury's verdict. By way of example, in *Cole v. Raut*, 378 S.C. 398, 663 S.E.2d 30 (2008), this Court found that "[i]t would be far too speculative on the part of this Court to find prejudicial error" based on an erroneous assumption of the risk charge. 663 S.E.2d at 34. Likewise, in *Moore v. Moore*, 360 S.C. 241, 599 S.E.2d 467 (Ct. App. 2004), the Court of Appeals explained: "Without a special verdict form, we cannot speculate as to what portion of the award the jury attributed to lost profits as opposed to other tort damages." 599 S.E.2d at 475. In *State v. Lemire*, 406 S.C. 558, 753 S.E.2d 247 (Ct. App. 2013), the Court of Appeals reaffirmed the "general rule against review of internal jury deliberations" and "decline[d] to speculate about what occurred within the jury room." 753 S.E.2d at 253. In addition, in *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005), the Court of Appeals declined to "speculate as to how the jury allocated damages" and further explained that "[t]he appellate courts of this State exercise every reasonable presumption in favor of the validity of a general verdict." 621 S.E.2d at 379.

This last point warrants further analysis. If the appellate courts exercise every reasonable presumption in favor of the validity of a general verdict, that should certainly be true – if not more so – for a special verdict where the parties

agreed on the special interrogatories to be answered by the jury. Those special interrogatories should not be disregarded; they explain the jury's reasoning. They remove the speculation. In the present case, in very clear and succinct language, the jury found that SCDOT was *not negligent*. (R. 10).

Yet, the majority questions whether the jury meant just that. The majority questions whether the jury actually concluded that SCDOT was negligent but chose just to disregard SCDOT's negligence or otherwise chose not to correctly report that negligence on the verdict form. With all due respect, that level of speculation by the Court – *particularly in interpreting a special verdict form* – is unprecedented and will serve only to encourage trial courts, appellate courts, and litigants to apply similar speculation to assail future verdicts. The "may have tainted" standard that the majority employs here is not a high threshold and will undoubtedly invite a myriad of challenges to future verdicts not only in the context of challenges to jury instructions, as in this case, but also in the context of juror misconduct allegations.

Moreover, there is simply no evidence of any jury confusion as to what the jury was required to decide and did decide as to SCDOT. The jury found that SCDOT was not negligent, and neither the Court nor the Petitioner has shown that the jury was required under the evidence presented to find SCDOT negligent. In other words, the jury's decision is supported by substantial evidence in the record.

SCDOT recognizes that the majority's ruling is motivated to a great extent by the apparent admission by CSX's counsel in opening statements that the train engineer did not timely sound the train's horn. *See*, Slip Op. at 14 ("... ***particularly where*** CSX admitted that the train engineer failed to timely sound the train's horn in accordance with section 58-15-910 of the South Carolina Code") (Emphasis added). The majority describes CSX's denial of liability in light of that admission as "disingenuous" and even uses the term "admitted negligence." (Slip. Op. 14, 15). However, it is important to recognize that the majority similarly has not pointed to any "admitted" evidence of SCDOT's negligence nor described any liability arguments by SCDOT as "disingenuous." There is quite frankly no basis for questioning and thereby rejecting the jury's clear finding that SCDOT was not negligent. Further, it is inherently unfair for the majority to impute to SCDOT its belief that CSX was admittedly negligent contrary to the jury's determination and to thereby conclude that the jury must have been mistaken as well in its conclusion that SCDOT was not negligent. The allegations of negligence asserted against SCDOT and CSX are distinctly different.

In sum, the majority is respectfully requested to reconsider its decision to override the jury's special verdict under these circumstances particularly in light of the new and troubling precedent that it is setting with this 3-2 decision. This is particularly true given the fact that what is being reversed is the jury's special

verdict – a verdict form agreed to by the parties after much discussion and a verdict form which no party contends was confusing or difficult for the jury to understand. This is also particularly true – certainly as to SCDOT – where there is no indication that the jury did conclude or should have concluded that SCDOT was negligent. The Court is urged to allow the verdict as a whole to stand or – at the very least – to allow the verdict to stand as to SCDOT.

II.

With respect to the jury charges themselves, the majority indicated that it was "most troubled" with the trial judge's decision not to charge the presumptions of impairment set forth in Section 56-5-2950(b).[1] (Slip Op. at 19). The majority found "Petitioner was entitled to have the jury instructed on the statutory presumption provided in section 56-5-2950(b)(1)," and without that instruction, "it is arguable the jury found Colvin was impaired while driving and that this criminal act negated any negligence on the part of CSX and SCDOT." (Slip Op. at 19).

In making that ruling, the majority failed to consider the reasoning of the trial judge and to actually assess whether she abused her discretion. Judge Mullen explained her reasoning as follows in her order denying post-trial motions:

> Plaintiff contends I should have charged Section 56-5-2950. This statute was discussed at length at trial. By its

[1] Effective February 10, 2009, Section 56-5-2950(b) has been re-codified as Section 56-5-2950(G).

> very wording, the statute applies only in criminal prosecutions. Thus, to use it in a civil proceeding, where the burden of proof is the preponderance of the evidence and not beyond a reasonable doubt, would have been inappropriate. Further, the statute refers to presumptions regarding blood alcohol level, whereas evidence in this case showed Ms. Colvin had combined the use of both alcohol and prescription drugs. Additionally, Plaintiff can show no prejudice given that I did charge, at Plaintiff's request, that it is not unlawful in this State to drink and drive, it is only unlawful to drive while impaired or under the influence. Thus, I correctly refused the requested charge.

(R. 7). As Judge Mullen concluded, the charge would have been confusing to a jury given that the evidence did not concern only alcohol consumption. Instead, it is undisputed that Colvin ingested a combination of alcohol and prescription drugs. As the majority points out, Colvin took prescription drugs that morning and the blood test revealed the presence of opiates. (Slip Op. at 19). The presumptions set forth in Section 56-5-2950(b) *pertain to alcohol use only*. Thus, the presumptions have no applicability or relevance given that Colvin's impairment was not based solely on the use of alcohol alone. Thus, if the trial court had charged the jury on Section 56-5-2950(b), that would have likely resulted in jury confusion. Judge Mullen avoided that confusion by correctly refusing to charge Section 56-5-2950(b), while at the same time making certain that the jury understood that it is not unlawful to drink alcohol and then drive, only that it is unlawful to drive while impaired.

In short, Judge Mullen exercised her discretion in making a determination that the presumption under Section 56-5-2950(b) was not applicable or would be confusing given the admitted combination of alcohol and drug use. The majority has not even addressed whether Judge Mullen's decision-making on this issue rises to the level of an abuse of discretion, which is indisputably the appropriate standard of review. Judge Mullen's reasoning in declining to charge the presumption under Section 56-5-2950(b) was well within her discretion and should not have resulted in a reversal of the jury verdict for SCDOT. That is also true because, as previously argued, the charge does not implicate the threshold question of whether SCDOT or CSX was negligent.[2]

[2] In accordance with Rule 208(b)(6), SCACR, the Respondent SCDOT adopts and incorporates herein the arguments made by the Respondent CSX to the extent not inconsistent herewith with respect to each of the other jury charge issues on which the majority bases its reversal.

CONCLUSION

Based on the foregoing discussion, the Respondent SCDOT respectfully requests that the Court rehear its decision and affirm the decision of the South Carolina Court of Appeals which in turn affirmed the order of Judge Carmen Tevis Mullen denying post-trial motions and upholding the jury's verdict and the judgment in favor of the Respondent SCDOT.

Respectfully submitted,

DAVIDSON & LINDEMANN, P.A.

BY: _____

ANDREW F. LINDEMANN
1611 Devonshire Drive
Post Office Box 8568
Columbia, South Carolina 29202
(803) 806-8222

PEDEN B. McLEOD
McLeod, Fraser & Cone
111 East Washington Street
Post Office Drawer 230
Walterboro, South Carolina 29488
(843) 549-2516

Counsel for Respondent South Carolina Department of Transportation

Columbia, South Carolina

November 19, 2015

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM HAMPTON COUNTY
Carmen Tevis Mullen, Circuit Court Judge

Op. No. 27587
(S.C. S.Ct. filed November 4, 2015)

Willie Homer Stephens, Guardian ad Litem for
Lillian C., a minor, ... Petitioner,

v.

CSX Transportation, Inc. and South Carolina
Department of Transportation, ... Respondents.

CERTIFICATE OF SERVICE

The undersigned employee of Davidson & Lindemann, P.A., attorneys for the Respondent South Carolina Department of Transportation, does hereby certify that service of the **Petition for Rehearing** and **Memorandum in Support of Petition for Rehearing** was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 19th day of November 2015:

John E. Parker, Esquire
J. Paul Detrick, Esquire
Grahame E. Holmes, Esquire
Matthew V. Creech, Esquire
Peters Murdaugh Parker Eltzroth & Detrick, P.A.
Post Office Box 457
Hampton, South Carolina 29924-0457

Carl H. Jacobson, Esquire
Uricchio, Howe, Krell, Jacobson,
Toporek, Theos & Keith, P.A.
Post Office Box 399
Charleston, South Carolina 29401

Peden B. McLeod, Esquire
McLeod, Fraser & Cone
Post Office Drawer 230
Walterboro, South Carolina 29488-0003

Ronald K. Wray, II, Esquire
Thomas E. Vanderbloemen, Esquire
John R. Bell, Jr., Esquire
Gallivan White & Boyd, P.A.
Post Office Box 10589
Greenville, South Carolina 29603

J. Arthur Davison, Esquire
James Purcell, Esquire
Fulcher Hagler, LLP
Post Office Box 1477
Augusta, Georgia 30903

Jonathan P. Harmon, Esquire
McGuire Woods, LLP
One James Center
901 East Cary Street
Richmond, Virginia 23219-4030