ORIGINAL

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BAMBERG COUNTY
Court of Common Pleas
Doyet A. Early, III, Circuit Court Judge

Case No.: 2006-CP-05-00034

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, ... Appellant,

-v-

CSX Transportation, Inc., ... Respondent.

Case No.: 2006-CP-05-00107

Connie Carson as Personal Representative
of the Estate of Beryl Harvey, ... Appellant,

-v-

CSX Transportation, Inc., ... Respondent.

REPLY BRIEF OF APPELLANT

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I. THE DATA SCDOT RELIED UPON IN MAKING ITS APRIL 26, 2004 RECOMMENDATION WAS NOT PROTECTED BY 23 U.S.C. § 409 BECAUSE IT WAS ADMITTED INTO EVIDENCE WITHOUT OBJECTION.

Appellant contends the data relied upon by SCDOT in making the April 26, 2004 recommendation is admissible as it was admitted into evidence at trial without objection. It is true 23 U.S.C. § 409 precludes the admissibility of certain documents and data when a party properly objects and it is proven the documents or data were compiled or collected for § 130 purposes. In this case, however, Respondent did not object when the evidence was admitted through Dr. Heathington, nor did Respondent offer any evidence to satisfy its burden that the elements of 23 U.S.C. § 409 were met.

SCDOT employs a priority list to determine which crossings need gates and flashing lights. The priority list is compiled based on data which includes: the accident history at each crossing, (Munn Depo. R. p. 1338, lines 9-13), the volume of rail and vehicular traffic at each crossing (Munn Depo. R. p. 1337, lines 4-23), train speed at each crossing, (Munn Depo. R. p. 1338, lines 2-8), in addition to the available sight distance (Munn Depo. R. p. 1338, lines 14-16). In his proffered deposition testimony, Mr. Munn confirms the observations and data which led to the April 26, 2004 recommendation:

> Q. Do you recall what observations you made that led you to the conclusions to recommend gates and lights for this crossing?
> A. Well, first of all, we have the ranking that I mentioned and that determines a lot of what we do, where a crossing, you know, ranks relative to the other crossings in the state. You've got a high speed line, you had a fair amount of ADT, I think you said at that time, was 300.
> Q. 320, I believe.
> A. Let's see. This is from 3/15/04, we're showing 320. So 320 is not high, but it's not very low. And we had a

> substantial amount of trains, I would say. So those, added together with the fact that on the approaches themselves you had limited sight distance, so my recommendation was to add gates.

(Munn Depo. R. p. 1341, lines 6-22).

The data underlying the SCDOT recommendation cannot be precluded by 23 U.S.C. § 409 because Dr. Heathington testified earlier in the trial regarding the number of daily trains (R. p. 518, line 25 – p. 519, line 3), volume of daily vehicular traffic (R. p. 518, lines 10-24), train speed for the track at Honeyford Road (R. p. 518, lines 5-9), in addition to the AASHTO sight distance chart and the available sight distance. (R. p. 522, line 13 – p. 524, line 20).

Respondent did not object to the same data underlying the SCDOT recommendation when testified to by Dr. Heathington. Because the same data was already in evidence, Respondent should not be allowed to raise a § 409 objection since the same data was used as the basis for SCDOT's recommendation to install gates and flashing lights at the Honeyford Road crossing. More importantly, Darrell Munn's testimony independently corroborates Dr. Heathington's expert testimony regarding the need for additional measures at Honeyford Road. The trial court's exclusion of the April 26, 2004 recommendation unfairly prejudiced Appellant and a new trial is warranted.

II. FRANCES HARVEY'S NEGLIGENCE IS NOT IMPUTABLE TO ONE-HALF (1/2) OF THE SURVIVAL ACTION BECAUSE IT PASSED TO THE BLAMELESS HEIRS OF THE BENEFICIARIES OF THE ESTATE OF CHARLES HARVEY, THE DECEDENT'S FATHER.

Respondent argues that Frances Harvey was in fact the sole survival claimant, making her contributory negligence a complete defense to both the wrongful death and survival actions. In essence, Respondent argues that Beryl's father's interest in the survival action passed to Frances Harvey on his death, rather than the father's heirs at

law, Beryl Harvey's siblings and half-siblings. There is no support in South Carolina statutory or case law for Respondent's contention. While Respondent argues that the equities require a finding otherwise, valid policy considerations, as well as statutory construction, compel a finding that Charles Harvey's interest in the survival action of Beryl Harvey in fact passed to Charles' heirs upon his death.

First, as Respondent correctly notes, damages in a wrongful death case are awarded to for the benefit of the decedent's estate. Wrongful death damages are to compensate proper beneficiaries of the estate for their own loss of services, economic losses, wounded feelings and grief and sorrow caused by the decedent's death. [1] In other words, such "loss" is personal to the beneficiary and to the extent a property interest or right exists to the proceeds of a wrongful death settlement, such interest or right is the beneficiary's own. Accordingly, if such a beneficiary dies prior to any recovery by way of settlement or verdict, no actual property interest or right has vested at the time of their own death that could pass into that beneficiary's estate. Thus, South Carolina courts have held that upon the death of a wrongful death beneficiary before settlement or verdict, the action abates. See, Rushton v. Smith, 233 S.C. 292, 104 S.E.2d 376 (1958).

In contrast, the survival statute, S.C. Code Ann. §15-5-90, provides in relevant part as follows:

> Causes of action for and in respect to... any and all injuries to the person or to personal property shall survive both to and against the personal or real representative, as the case

[1] Damages recoverable in a wrongful death action include: "(1) Pecuniary loss, (2) mental shock and suffering, (3) wounded feelings, (4) grief and sorrow, (5) loss of companionship, and (6) deprivation of the use and comfort of the intestate's society, the loss of his experience, knowledge, and judgment in managing the affairs of himself and of his beneficiaries...." Scott v. Porter, 340 S.C. 158, 168, 530 S.E.2d 389, 394 (Ct. App. 2000) (citing, F.P. Hubbard & R.L. Felix, THE SOUTH CAROLINA LAW OF TORTS, 610 (2d ed.1997) (citing Mishoe v. Atlantic Coast Line R.R., 186 S.C. 402, 197 S.E. 97 (1938)).

> may be, of a deceased person... any law or rule to the contrary notwithstanding.

Id. Therefore, under the plain language of the survival statute, it is the cause of action itself which survives the death of the injured party. The cause of action is a right or property interest of the decedent himself. As with any other property or ownership interest, that cause of action would pass through to the appropriate beneficiaries of the decedent and follow the law of intestate succession.

In other words, at the time of his death, the causes of action for and by Beryl Harvey "survive" by statute. These causes of action, statutorily granted, would pass by intestate succession to his mother and father, each with a one-half (1/2) interest. Upon the death of his father Charles, who was divorced from Frances Harvey, his one-half interest would pass through to his beneficiaries, his children. These beneficiaries are entirely blameless for the accident at hand. Therefore, one-half of any award for a survival cause of action would be unaffected by any imputation of negligence on the part of Frances Harvey. For the reasons addressed more fully in the final Brief of Appellant, the Court erred in instructing the jury to the contrary.[2]

This analysis comports with the analysis undertaken by our Supreme Court in Estate of Covington by Montgomery v. AT & T Nassau Metals Corp., 304 S.C. 436, 405 S.E.2d 393 (1991). There, the Court found that the claim of the personal representative and sole

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[2] To the extent CSXT argues that Appellant has not preserved the issue or waived objection to the Court's charge, this argument is without merit. "Where a party requests a jury charge and after an opportunity for discussion, the trial judge declines the charge, it is unnecessary, to preserve the point on appeal, to renew the request or to object to the failure to give the charge, at the conclusion of the jury instructions. Keaton v. Greenville Hosp. Sys., 334 S.C. 488, 514 S.E.2d 570 (1999); State v. Johnson, 333 S.C. 62, 508 S.E.2d 29 (1998), clarifying State v. Whipple, 324 S.C. 43, 476 S.E.2d 683, cert. denied 519 U.S. 1045, 117 S.Ct. 618, 136 L.Ed.2d 541 (1996); State v. Grant, 275 S.C. 404, 272 S.E.2d 169 (1980); Rogers v. Florence Printing Co., 233 S.C. 567, 106 S.E.2d 258 (1958); Dixon v. Ford, 362 S.C. 614, 608 S.E.2d 879 (Ct. App. 2005); Nedrow v. Pruitt, 336 S.C. 668, 521 S.E.2d 755 (Ct. App. 1999).

heir at law of a deceased employee had abated where the employee, who had injured her back while working and filed a Workers' Compensation claim, was killed in a nonwork-related auto accident prior to its adjudication. At the time of her death the employee's heir, who was substituted as the claimant in the proceeding, was not dependent on the employee for support, as required by the Worker's Compensation Code. Nevertheless, the employee's heir contended that the workers compensation action should survive the worker's death under the survival statute of S.C. Code Ann. §15-5-90. The Court disagreed, noting that § 42-1-540 of the Workers' Compensation Code excludes "all other rights and remedies of such employee, his personal representative, parents, dependents or next of kin . . . at common law or otherwise . . . ." S.C. Code Ann. § 42-1-540. Thus, the exclusivity provision of the Workers Compensation Code precluded application of the general survival statute. Thus, implicitly, the Court has recognized that an action brought under the general survival statute does not abate upon the death of an heir, but rather passes through to the next class of beneficiaries of the heir.

III. APPELLANT DID NOT WAIVE HER RIGHT TO OBJECT TO THE TRIAL COURT'S PROPOSED RESPONSE TO THE JURY'S QUESTION, BECAUSE THE TRIAL COURT NOTED APPELLANT'S OBJECTION, AND ADVISED THE PARTIES THE COURT WOULD DEAL WITH A VERDICT OF ZERO DAMAGES ON POST-TRIAL MOTIONS.

Respondent incorrectly argues that the Appellant waived the right to contest the inconsistent verdict which was rendered because the Appellant did not object before the discharge of the jury. All of the cases cited by Respondent in support of its position are distinguishable because there, no objection had been made. Here, after allocating the percentages of negligence to both CSX and the Plaintiff, the jury submitted a question to

the court and asked if it had to award damages on the survival action claim if it concluded that CSX's negligence caused the collision:

> The question was: If we answer yes to number six, do we have to have to award any amount of number eight? Number eight being, of course, conscious pain – survival action.

(R. p. 1318, lines 8-11). The trial court answered the jury as follows:

> The answer is yes, if you find Beryl Harvey suffered conscious pain and suffering; no, if you find that Beryl Harvey did not suffer any conscious pain and suffering.

(R. p. 1318, lines11-14). Counsel for the Appellant made a contemporaneous objection to the Court's response to the jury, noting that the bills for the funeral, monument, and EMS bills would be survival damages. (R. p. 1318, lines 15-18). The court noted the objection and instructed that "if they come back with a zero amount, I will consider post-trial amendment if that be the case." (R. p. 1318, lines 21-23).

Thus, the objection was raised and noted by the trial court. The trial court acknowledged that in the event of an inconsistent verdict, the court would address the matter from a post trial standpoint. The essential question, under Stevens v. Allen, 342 S.C. 47, 50, 536 S.E.2d 663, 664 (2000) and its progeny cited by Respondent is whether the issue was raised. Here, the objection certainly was and the issue is therefore preserved. There is no concern that the Appellant has sat "idly by while a verdict erroneous in form is being returned... without objection" and later, after the jury has been discharged, that Appellant has claimed advantage of the error, thus invited by acquiescence. See, Deese v. Williams, 237 S.C. 560, 118 S.E.2d 330 (1961). At all times the Appellant asserted its objections and position on the issue and the inconsistent verdict has been appropriately challenged.

Respectfully Submitted,

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CERTIFICATE OF COUNSEL

The undersigned certified that this final Reply Brief of Appellant complies with Rule 211(b) of the SCACR.

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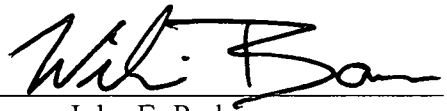
BY: 

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PROOF OF SERVICE

This is to certify that I, *Donna L. Mann*, legal secretary with the Law Firm of Peters, Murdaugh, Parker, Eltzroth & Detrick, P.A., Attorneys for the Appellant, have this date mailed via the U.S. Postal Service with first class postage prepaid, a true and correct copy of the within **REPLY BRIEF OF APPELLANT** to:

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