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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

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APPEAL FROM RICHLAND COUNTY
The Court of Common Pleas
The Honorable Tanya A. Gee, Circuit Court Judge

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Case No. 2010-CP-40-7404

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Reginald Todd Young,..... Appellant,

v.

Eric D. Powell and United Parcel Service, Inc..... Respondents.

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# INITIAL BRIEF OF APPELLANT

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## STATEMENT OF THE CASE

1. In 2009, Appellant was traveling in his vehicle North on Congaree Road, a two lane road in Richland County, South Carolina. Respondent Powell was operating Respondent UPS's vehicle South on Congaree Road, in Richland County, South Carolina. (Third Party Compl., December 29, 2010). The speed limit at the collision site is 35 miles per hour. Tr, 228:4-8. The vehicles collided head on at some point in or around the center of the road. Pl. Ex. 36. The road did not have any yellow lines or markings dividing the two lanes at the accident situs. Pl. Ex. 16, 36. Tr. 87:5-17.

2. As a result of the collision Appellant suffered extensive injuries including a broken leg, broken wrist, and a brain injury. He spent 28 days in the hospital. As of 2016, Appellant was still suffering with headaches resulting from the accident and was still under the care of 3 physicians. Tr. 117-121.

3. On October 21, 2010, Respondent Powell filed a Summons and Complaint against Appellant seeking damages stemming from Appellant's alleged negligence.

4. On December 29, 2010, the Appellant filed an Answer and Counterclaim and Third Party Summons and Complaint alleging negligence and seeking damages against Respondents. The Appellant alleged, among other allegations, Respondent driver was operating his vehicle at an excessive rate of speed, was driving too fast for conditions, and drove his vehicle left of center and caused the collision. (Third Party Compl. ¶ 24 and 26, December 29, 2010). Additionally in answering the Summons and Complaint of Respondent Powell, Appellant raised the defense of comparative negligence. (Third Party Compl. ¶ 9-14, December 29, 2010).

5. On January 7, 2011, the Respondents filed a Reply to Counterclaim and Answer to Third-Party Complaint raising several defenses including the affirmative defense of comparative negligence. Respondent driver's claim against Appellant was settled prior to trial.

6. The case was tried before a jury in April of 2015, which resulted in a hung jury mistrial on April 17, 2015.

7. Subsequent to the mistrial, Appellant filed an amended third party complaint reasserting his original allegations and adding new causes of action of negligent hiring and negligent entrustment against Respondent UPS. Respondents filed an amended answer denying the allegations and again asserting the affirmative defense of Comparative Negligence.

8. Prior to trial, Respondents' made a motion in limine requesting that all evidence of Respondent Powell's speed be excluded. The Court denied the motion stating that "Evidence of speed may be necessary to prove why the truck crossed the center line. Its relevant and probative...". Tr. 21:12-25.

9. Respondents made a Motion in Limine seeking to exclude evidence of Respondent Powell's driving history. The trial court allowed Appellant to go forward with his negligent hiring and negligent entrustment causes of action but excluded the introduction of the driving record, did not allow Appellant to question Respondent driver about his driving record, and did not allow Appellant to question Respondent Powell about his responses to Appellant's Requests For Admissions Pursuant to Rule 36 SCRCP. Tr. 30:25-31:22. The Appellant proffered the driving record and Respondents' responses to Appellant's Requests for Admissions and had them marked by the court reporter. Tr.

36:23-37:7. The sole basis for the trial court's decision was S.C. Code Ann. 56-5-6160. Tr. 64:8-65:16.

10. The Appellant's theory of the accident was Respondent driver's speeding was the proximate cause of the accident: Respondent driver was speeding around a curve on Congaree Road, which caused his two passenger side tires to leave the roadway, which then caused the Respondent to "overcorrect" his vehicle left of center, thus colliding with Appellant's vehicle.

11. The Respondents' theory of the accident was Appellant negligently drove his vehicle left of center into Respondents' lane, Respondent driver attempted to make evasive maneuvers to avoid the accident; however, he could not avoid the accident.

12. At trial Appellant testified that Respondent was speeding, that Respondent's passenger side tires went off the roadway, and that the Respondent overcorrected his vehicle into Appellant's lane, thus causing the collision. Tr. 114:7 – 116:14. Tr. 123:9 – 124:18. Tr. 126:1-14. Tr. 135:16 – 136:11.

13. An eyewitness who was traveling in his vehicle immediately behind Appellant testified that Respondent was speeding, that Respondent's passenger side tires went off the roadway, and that the Respondent overcorrected his vehicle into Appellants lane, thus causing the collision. Tr. 85:21-88:14. Tr. 95:23 – 96:5. Tr. 100:8-16.

14. The Respondent driver testified he was speeding. He testified that he was traveling 45 miles per hour in the 35 miles per hour zone. Tr. 237:11-21. Tr. 239:18-240:6.

15. Photographs of the accident scene were entered into evidence that showed Respondents' vehicles' tire marks off the roadway. (Pl. Ex. 10, 14).

16. The M.A.I.T. accident reconstructionist testified and concluded Appellant was at fault but when asked to mark on a diagram where he believed the collision occurred he circled an area in the middle of the roadway. (See Ex. referenced in Tr. 189, 190, 253). Additionally the expert admitted that the eyewitness to the accident was not interviewed even though his name and contact information were known at the time of the investigation. Tr. 181:8-182:24. Included in The M.A.I.T. report was the Respondent driver's driving record and a photograph showing the speedometer of the Respondent UPS's vehicle frozen on 55 M.P.H. Tr. 209:10-25.[1]

17. Prior to closing arguments, the counsel for Appellant and Respondent handed up to the trial judge their proposed charges. On motion of Respondents, the trial judge agreed to exclude charging the law of comparative negligence. The trial judge refused to charge comparative negligence on 2 grounds: 1. Because the Respondent had the final say on whether it was charged because it was his pled defense, and 2. Because she did not believe it was appropriate considering the facts presented, implying that either Respondent crossed into Appellant's lane or Appellant crossed into Respondent's lane. Tr. 257:11-19. Tr. 255:15-21.

18. There were no precharge arguments, objections, or discussions regarding Appellant's request to charge the speed statute: S.C. Code Ann. Section 56-5-1520 (1976).

19. The trial judge did not charge the jury the law on excessive speed.

20. The Appellant, after the jury was charged but prior to deliberations, objected to the trial judge's failure to charge the speeding statute. Tr. 321:20 – 322:22. The trial judge

[1] The trial court allowed the photograph of the speedometer into evidence for the limited purpose of showing damage to the Respondent vehicle. The trial court did not allow Appellant to argue the photograph was evidence of speeding.

overruled the objection stating that charging speed would confuse the jury and the only issue was who crossed over the center line. Tr. 322:9-15.

21. The jury returned a verdict for Respondent. Appellant then made his post trial motion renewing his objections as to the trial judge's refusal to charge the speed statute, the law of comparative negligence, and the exclusion of evidence of the Respondent driver's past driving record. Tr. 325:16-327:7. The motions were denied. Tr. 330:10-12.

22. Appellant filed a Notice of Appeal asking this Court vacate the jury verdict and remand the matter for a new trial.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY ON THE LAW OF EXCESSIVE SPEED.

"A trial judge has a duty to give a requested instruction that correctly states the law applicable to issues and evidence." Wall v. Suits, 318 S.C. 377 (Ct. App. 1995); Brown v. Smalls, 325 S.C. 547 (Ct. App. 1997). "It is error for the trial judge to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." Sanders v. Western Auto Supply, Co., 256 SC 490 (1971). "Where a request to charge is timely made and involves a controlling legal principle, a refusal by the trial judge to charge the request constitutes reversible error." Baker v. Weaver, 279 S.C. 479 (Ct. App.1983). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." Cole v. Raut, 378 S.C. 398, 404 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Id.

The Appellant's theory of the case was that the Respondent Powell's speed was the proximate cause of the accident. Ample evidence was presented at trial that Respondent Powell was speeding and that his speeding resulted in his passenger side tires leaving the road, which then caused him to overcorrect his vehicle into the Appellant's lane of travel. The Appellant testified that Respondent was speeding, then left the roadway, then overcorrected into the lane of the Appellant. Tr. 114:7 – 116:14. Tr. 123:9 – 124:18. Tr. 126:1-14. Tr. 135:16 – 136:11. An eyewitness testified that Respondent was speeding, then left the roadway, then overcorrected into the lane of the Appellant. Tr. 85:21-88:14. Tr. 95:23 – 96:5. Tr. 100:8-16. The Respondent driver admitted he was speeding. Tr. 237:11-21. Tr. 239:18-240:6. A photograph taken from the M.A.I.T. investigation showed the speedometer of the Respondent's truck frozen at 55 m.p.h. Tr. 209:10-25.

Prior to trial, Respondents' made a motion in limine requesting that all evidence of Respondent Powell's speed be excluded. The Court denied the motion stating that "Evidence of speed may be necessary to prove why the truck crossed the center line. Its relevant and probative..." Tr. 21:12-25. At the close of the Appellant's case in chief, the Respondents made a directed verdict motion to strike any allegations that speed was the proximate cause of the accident. Tr. 142:4 – 25. The trial court again denied the motion. Tr. 142:4-25. However, at the close of evidence the trial judge inexplicably refused Appellant's request to charge the speed statute S.C. Code Ann. 56-5-1520. Tr. 321:18-322:21.

In denying Appellant's request to charge the speed statute, the trial judge stated that the only proximate cause issue was which driver crossed the center lane. Tr. 322:9-

15. By failing to charge excessive speed the judge has essentially decided the issue presented by the Appellant to the jury: Whether the Respondent's speed was the legal and proximate cause of the accident. This is prejudicial error and warrants reversal.

The South Carolina Supreme Court has said that in almost all automobile accidents a vehicle's speed creates imponderable issues of time and distance which must be resolved by a jury. Tubbs v. Bowie, 308 S.C. 155, 158 (1992). Only in very rare cases is speed not a causative factor to be considered by the jury. Id. Horton v. Greyhound, 241 S.C. 430 (1962) presented an instance where the Court determined as a matter of law an automobile accident was inevitable and therefore speed could not be considered by the jury as a causative factor. In Horton, the facts were uncontroverted that a truck crossed the center line and came into the lane of a bus causing a head on collision. The truck driver asserted that but for the speeding of the bus driver, the accident would not have occurred. The Court held that the fact that the bus was speeding was without legal significance because the bus driver had the legal right to occupy his lane and the accident was inevitable. This case is distinguishable from Horton. Both drivers claim the other drove their vehicle left of center. There is evidence in the record as stated above that could allow a jury to conclude that the Respondent driver's speeding is what caused him to come into Appellant's lane of travel.

In Clark v. Cantrell, 339 S.C. 369 (2000), the Supreme Court was presented with the issue of whether the trial judge erred in refusing to charge a Horton charge; essentially instructing the jury to exclude a vehicle's speed as a causative factor in an automobile accident. Id. at 388. In upholding the decision to refuse to charge Horton the Court noted that the appellant was essentially asking the judge to tell the jury that as a

matter of law it did not matter whether she was speeding because her speed could not have caused the accident. Id. at 390, 391. Essentially the judge would be deciding the very issue to be presented to the jury, whether speed was the proximate cause of the accident. Id. at 390, 391. The Court opined, "...we doubt [sic] the proposed instruction could ever be presented as a sound principle of law to a jury in any collision case." Id. at 390. Appellant submits that if a Horton charge should very rarely, if ever, be given, then it is also true that any time a party requests an excessive speed charge in an automobile collision case, especially one where there is uncontroverted evidence of speeding by Respondent, the trial judge must charge it and let the jury decide whether speed was the legal proximate cause of the accident. For the foregoing reasons this matter should be remanded for a new trial.

## II. THE TRIAL COURT ERRED IN REFUSING TO CHARGE THE JURY ON THE LAW OF COMPARATIVE NEGLIGENCE.

Under South Carolina's version of Comparative Negligence, "[t]he determination of respective degrees of negligence attributable to the plaintiff and the defendant presents a question of fact for the jury, at least where conflicting inferences may be drawn." Hurd v. Williamsburg County, 363 S.C. 421, 429 (2005). "A trial judge has a duty to give a requested instruction that correctly states the law applicable to issues and evidence." Wall v. Suits, 318 S.C. 377 (Ct. App. 1995); Brown v. Smalls, 325 S.C. 547 (Ct. App. 1997). "It is error for the trial judge to refuse to give a requested instruction which states a sound principle of law when that principle applies to the case at hand, and the principle is not otherwise included in the charge." Sanders v. Western Auto Supply, Co., 256 SC 490 (1971). "Where a request to charge is timely made and involves a controlling legal

principle, a refusal by the trial judge to charge the request constitutes reversible error." Baker v. Weaver, 279 S.C. 479 (Ct. App.1983). "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." Cole v. Raut, 378 S.C. 398, 404 (2008). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Id.

Respondents raised the affirmative defense of comparative negligence in its pleadings. At the close of the evidence Appellant requested the trial judge charge the jury on the law of comparative negligence. The rationale for such a charge was that there was evidence that both parties were negligent. Appellant and eyewitness testified that Respondent was speeding going into a curve, respondent left the roadway, then over corrected into Appellant's lane of travel. Respondent testified Appellant slowly veered into Respondent's lane, causing Respondent to take evasive action which resulted in the accident. The SLED accident reconstruction expert testified that the accident likely occurred in the Respondent's lane. However, when asked where he believes believed the impact occurred, he circled the middle of the road on an exhibit. Tr. 189, 190, 253). [2] The trial judge refused to charge comparative negligence on two grounds: 1. The Respondent had the final say on whether it was charged because it was his pled defense; and, 2. The trial judge did not believe the charge was appropriate considering the facts presented. Tr. 257:11-19. Tr. 255:15-21.

Appellant submits that even though the two versions of events as presented by the the parties factually do not have much in common, this case does not present an

[2] It is important to note that the stretch of road where the accident occurred did not have a dividing line. Tr. 87:5-17. (Pl. Ex. 36, 16). So even the issue of where one lane ends and the other lane begins is a question of fact.

"either/or" situation for the jury. It would have been very plausible for a jury to conclude that BOTH drivers were negligent and that both drove their vehicles left of center, colliding in the center of the road. The determination of the respective degrees of negligence attributable to the plaintiff and the defendant is a question of fact for the jury, where conflicting inferences may arise. Brown v. Smalls, 325 S.C. 547, 481 S.E.2d 444 (Ct. App.1997). It was error for the trial judge to rule as a matter of law that comparative negligence was inapplicable with this record ripe with evidence of negligence by both drivers.

The trial judge stated that she was not charging comparative negligence because the Respondents did not want it charged. She concluded that because the Respondents pled comparative negligence as an affirmative defense, Respondents had the final say on whether it was charged to the jury. Tr. 255, 256. This is error. Appellant knows of no precedent that gives one party the final say on what is charged to the jury. The trial judge has a duty to give a requested instruction that correctly states the law applicable to issues and evidence regardless of which side asks for it. In Nelson v. Concrete Supply Company, 303 S.C. 243 (1991), the case adopting South Carolina's version of Comparative Negligence, at the trial level it was the Plaintiff attorney who requested that the law of comparative negligence be charged. Additionally it is disingenuous of Respondents to assert an affirmative defense in its pleadings, assert that defense throughout trial, and then at the close of evidence abandon the defense with the sole objective of keeping the jury from hearing a comparative negligence charge. Moreover, Appellant raised comparative negligence in his Answer to Respondent driver's Complaint. (Third Party Compl. ¶ 9-14, December 29, 2010).

For the foregoing reasons, the trial judge abused her discretion by refusing to charge the jury the law of Comparative Negligence. Failing to charge this controlling principle of law when there is evidence in the record that both parties were negligent constitutes reversible error and the matter should be remanded for a new trial.

## III. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF RESPONDENT DRIVER'S EXTENSIVE HISTORY OF SPEEDING AND RECKLESS DRIVING.

On July 2015 Appellant filed an Amended Complaint alleging negligent hiring and negligent entrustment causes of action against Appellant UPS.

Respondents filed a Motion in Limine seeking to exclude evidence of Respondent Powell's driving history.[3] The trial court allowed Appellant to go forward with his negligent hiring and negligent entrustment causes of action but excluded the introduction of the driving record and did not allow Appellant to question Respondent driver about his driving record, and did not allow Appellant to question Respondent Powell about his responses to Appellant's Requests For Admissions Pursuant to Rule 36 SCRCP. Tr. 30:25-31:22. The Appellant proffered the driving record and Respondents' responses to Appellant's Requests for Admissions and had them marked by the court reporter. Tr. 36:23-37:7. The sole basis for the trial court's decision was S.C. Code Ann. 56-5-6160, which states "no evidence of conviction of any person or any violations of the uniform act, regulations, traffic on highway shall be admissible on any Court in any civil action." Tr. 64:8-65:16.

[3] Since being employed with Respondent UPS, Respondent Powell was convicted for speeding seven times and reckless driving once. (See Respondent Powell's driving record) His license had been suspended for too many points prior to being hired by UPS. Tr. 30:5-24.

South Carolina recognizes both negligent hiring and negligent entrustment as independent causes of action against an employer irrespective of whether the employer has admitted vicarious liability. Doe v. Atc, Inc., 367 S.C. 199 (2005). James v. Kelly Trucking Co., 377 S.C. 628 (2008). To prove these causes of action a Plaintiff must present evidence such as an employee's prior driving record, arrest record, and specific acts of misconduct while on the job. In Kelly Trucking, the Supreme Court was presented with the issue of whether to allow a Plaintiff to pursue these causes of action when an employer had already admitted vicarious liability. The argument against allowing these causes of actions was that it would allow a Plaintiff to present otherwise inadmissible prejudicial evidence such as an employee's past driving record and criminal record. The Court dismissed this argument saying, "[i]n our view, the argument that the court must entirely preclude a cause of action to protect the jury from considering prejudicial evidence gives impermissibly short-shrift to the trial court's ability to judge the admission of evidence and to protect the integrity of trial, and to the jury's ability to follow the trial court's instructions." Id. The court went on to say that a trial judge should have discretion to effectively give instruction to a jury on what they may or may not infer from a piece of evidence. Id.

In this case the judge read S.C. Code Ann. 56-5-6160 as a complete bar to the introduction of Respondent Powell's driving record. This was error. There are instances where South Carolina's appellate courts have allowed the introduction of like evidence notwithstanding S.C. Code Ann. 56-5-6160.[4] While it is true that prior convictions cannot be offered as evidence of liability, a driving record as a whole can be offered to

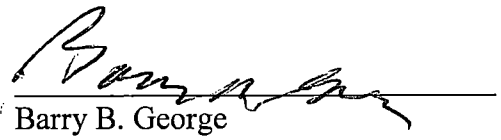
[4] Addyman v. Specialties of Greenville, Inc., 273 S.C. 342 (1979) (§ 56-5-6160 does not bar the use of this evidence to impeach the credibility of a witness, whether or not such witness is a party to the action.) Samuel v. Mouzon, 282 S.C. 616 (Ct. App. 1984) (See Addendum).

prove the independent causes of actions of negligent hiring, supervision, and retention against an employer. Here the Appellant was not only excluded from introducing the driving record as substantive evidence, but was also not allowed to question the Respondent driver about his past driving history or about his admissions he made pursuant to Rule 36 SCRCP. The trial judge, while allowing Appellant to proceed with his negligent hiring and retention causes of action, did not allow him to introduce in any form the exact evidence necessary to prove such a cause of action. Respondents' argument that Appellant could have introduced past instances of bad driving through fact witnesses to those instances is misplaced. Tr. 62:12 – 63:18. Appellant was not introducing the evidence to prove that Respondent driver in fact was speeding or driving recklessly on those multiple past occasions, but was introducing the evidence to show that Respondent driver had an extensive documented record of driving convictions that the employer knew or should have known. The evidence should have been admitted and the trial judge should have instructed the jury on what they are allowed and not allowed to infer from such evidence. This is the procedure called for by the Supreme Court in Kelly Trucking. By not allowing the Appellant to introduce evidence of negligent hiring and retention, the trial judge in essence directed a verdict in favor of Respondent on those causes of action. This amounts to an abuse of discretion and the case should be remanded for a new trial.

## CONCLUSION

For the reasons stated this Court should vacate he jury verdict and remand the case for a new trial.

Respectfully Submitted,



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**PROOF OF SERVICE**

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I certify that I have served the Appellant's Initial Brief and Designation of Matter by depositing a copy of it in the United States Mail, postage prepaid, on July 15, 2016, addressed to their attorney of record, Wilson S. Sheldon, Esquire, Wilson, Jones, Carter, & Baxley, P.A., 872 S. Pleasantburg Drive, Greenville, South Carolina 29607.

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