

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

Case No. 2010-CP-40-7404
Appellate Case No. 2016-000210

RECEIVED
SEP 15 2016
SC Court of Appeals

Reginald Todd Young.....Appellant,

v.

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

INITIAL BRIEF OF RESPONDENTS

Wilson S. Sheldon (SC Bar No. 15225)
Katie M. Brown (SC Bar No. 101134)
Willson Jones Carter & Baxley
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
Telephone: (864) 527-3280
Fax: (864) 235-6015
**Attorneys for Respondents Eric D. Powell and
United Parcel Service**

September 13, 2016

TABLE OF CONTENTS

Table of Authorities ii

Statement of Issues of Appeal 1

Statement of the Case 2

Statement of the Facts 3

Arguments

I. THE TRIAL COURT PROPERLY DECLINED TO CHARGE
THE JURY ON THE LAW OF EXCESSIVE SPEED 6

II. THE TRIAL COURT PROPERLY DECLINED TO CHARGE
THE JURY ON THE LAW OF COMPARATIVE NEGLIGENCE..... 12

III. THE TRIAL COURT PROPERLY EXCLUDED RESPONDENT
POWELL’S PRIOR TRAFFIC CONVICTIONS 14

Conclusion 17

TABLE OF AUTHORITIES

SOUTH CAROLINA CASES

<i>Bishop v. S.C. Dep't of Mental Health</i> , 331 S.C. 79, 502 S.E.2d 78, (1998)	7
<i>Blanding v. Hammell</i> , 267 S.C. 352, 228 S.E.2d 271 (1976)	10
<i>Clark v. Cantrell</i> , 339 S.C. 369, 529 S.E.2d 528 (2000)	7, 12
<i>Clarke v. Swearingen</i> , 6 S.C. 291 (1875)	8, 13
<i>Cole v. Raut</i> , 378 S.C. 398, 663 S.E.2d 30 (2008)	11
<i>Dalon v. Golden Lanes, Inc.</i> , 320 S.C. 534, 466 S.E.2d 368 (Ct. App. 1996)	7, 12
<i>Fields v. Reg'l Med. Ctr.</i> , 363 S.C. 19, 609 S.E.2d 406 (2005)	16, 17
<i>Fontaine v. Peitz</i> , 291 S.C. 536, 354 S.E.2d 565 (1987)	7, 12
<i>Greenville Housing Authority of City of Greenville by Carlton v. Massey</i> , 281 S.C. 618, 316 S.E.2d 722 (Ct. App. 1984)	7, 13
<i>Guffey v. Columbia/Colleton Reg'l Hosp., Inc.</i> , 364 S.C. 158, 612 S.E.2d 695 (2005)	13
<i>Guyton v. Guyton</i> , 244 S.C. 357, 137 S.E.2d 273 (1964)	10
<i>Horton v. Greyhound Corp.</i> , 241 S.C. 430, 128 S.E.2d 776 (1962)	9, 10, 11
<i>Kennedy v. Carter</i> , 249 S.C. 168, 153 S.E.2d 312 (1967)	10
<i>Lever v. Wilder Mobile Homes, Inc.</i> , 283 S.C. 452, 322 S.E.2d 692 (Ct. App. 1984)	8, 13, 14
<i>McNair v. Rainsford</i> , 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998)	6
<i>Mellen v. Lane</i> , 377 S.C. 261, 659 S.E.2d 236 (Ct. App. 2008)	6, 7
<i>Miller v. City of West Columbia</i> , 322 S.C. 224, 471 S.E.2d 683 (1996)	8, 11, 13, 14
<i>Odom v. Steigerwald</i> , 260 S.C. 422, 196 S.E.2d 635 (1973)	10
<i>Ross v. Paddy</i> , 340 S.C. 428, 532 S.E.2d 612 (Ct. App. 2000)	13
<i>S.C. Ins. Co. v. James C. Greene and Co.</i> , 290 S.C. 171, 348 S.E.2d 617 (1986)	7
<i>Sanders v. Western Auto Supply Co.</i> , 256 S.C. 490, 183 S.E.2d 321 (1971)	7, 12
<i>Smith v. Ridgeway Chemicals, Inc.</i> , 302 S.C. 303, 395 S.E.2d 742 (Ct. App. 1990)	7, 12
<i>Tucker v. Reynolds</i> , 268 S.C. 330, 233 S.E.2d 402 (1977)	7, 8, 12, 13
<i>Wells v. Halyard</i> , 341 S.C. 234, 533 S.E.2d 341 (Ct. App. 2000)	12
<i>Youmans v. S.C. D.O.T.</i> , 380 S.C. 263, 670 S.E.2d 1 (Ct. App. 2008)	13

STATUTES

Rule 8, SCRCP13, 14
S.C. Code Ann. § 56-5-61603, 15

STATEMENT OF ISSUES ON APPEAL

- I. DID THE TRIAL COURT ERR IN REFUSING TO CHARGE THE JURY ON THE LAW OF EXCESSIVE SPEED?
- II. DID THE TRIAL COURT ERR IN REFUSING TO CHARGE THE JURY ON THE LAW OF COMPARATIVE NEGLIGENCE?
- III. DID THE TRIAL COURT ERR IN EXCLUDING EVIDENCE OF RESPONDENT DRIVER'S EXTENSIVE HISTORY OF SPEEDING AND RECKLESS DRIVING?

STATEMENT OF THE CASE

On October 21, 2010, Respondent Eric D. Powell filed a Summons and Complaint against Appellant, Reginald Todd Young, seeking damages arising out of a motor vehicle accident that occurred on August 3, 2009. On December 29, 2010, Appellant filed an Answer and Counterclaim and Third-Party Summons and Complaint alleging negligence, gross negligence, and damages against Respondent Eric D. Powell and Respondent United Parcel Service (hereinafter "UPS"). Appellant alleged that "as a result of said collision, Young suffered great bodily injury, which caused Young, and will cause Young in the future, to incur medical expenses, to suffer tremendous pain and suffering, permanent injury and to lose time from work and lost wages, in addition to property damage." Third-Party Complaint, ¶ 25. On January 7, 2011, Respondents filed a Reply to Counterclaim and Answer to the Third-Party Complaint. Respondent Powell's claims against Appellant were resolved prior to trial, and the parties were realigned with Appellant Young as the Plaintiff and Respondents Powell and UPS as the Defendants.

The case was tried before a jury in Richland County in April 2015 and resulted in a mistrial due to a hung jury. Following the mistrial, Appellant filed an Amended Third-Party Complaint, reasserting his original allegations and adding new causes of action for negligent hiring and negligent entrustment against Respondent UPS. Respondents filed an Answer to the Amended Third-Party Complaint, denying the allegations set forth in the Amended Complaint and asserting defenses.

The case was tried a second time in January 2016 before the Honorable Tanya A. Gee. The jury returned a verdict for Respondents Powell and UPS on January 13, 2016. Transcript p. 324. Appellant filed a Notice of Appeal on February 5, 2016.

STATEMENT OF THE FACTS

On August 3, 2009, Respondent Eric Powell was operating a UPS package vehicle, traveling south on Congaree Road in Richland County, on his regular delivery route. Transcript p. 225. Reginald Todd Young (“Appellant”) was traveling the opposite direction on Congaree Road in a white BMW. The vehicles collided when Appellant Young drifted and crossed over the center line into Respondent Powell’s lane of travel. Transcript pp. 228:16–229:1. As a result of the collision, both parties suffered physical injuries.

Prior to the trial in January 2016, Respondents filed Motions in Limine to exclude the following evidence: 1) testimony or other evidence regarding Respondent Powell’s prior convictions and/or citations for traffic offenses; 2) photographs of the damaged speedometer from the UPS truck; 3) the accident report; and 4) any testimony or evidence regarding the speed of the UPS vehicle.

The trial judge granted the Motion in Limine with regard to Respondent Powell’s prior convictions for traffic offenses pursuant to S.C. Code Ann. § 56-5-6160. Transcript pp. 30:25–31:6. The trial judge allowed the photograph of the broken speedometer to be admitted for the limited purpose of showing the interior condition of the UPS package vehicle after the accident. Transcript p. 25:9–12. The trial judge also excluded the accident report pursuant to S.C. Code Ann. §§ 56-5-1270 and 56-5-1290. Transcript p. 16:14–16. Finally, the trial judge denied Respondents’ Motion in Limine to exclude evidence of speed and ruled that evidence of speed could be necessary to prove why the UPS vehicle crossed the center line. Transcript p. 21:20–25.

In his opening statement, Appellant’s counsel provided the following summary of the issue to be addressed by the jury: “And the question that you are going to have to – this is what you are

going to determine, where did the accident happen. Did it happen in this lane or did it happen in that lane.” Transcript p. 73:15–18. Appellant’s counsel also explained:

Now, so Mr. Young is going to testify and Mr. Brown is going to testify and they are going to testify the UPS truck crossed the center line came over in his lane. This gentleman I’m sure he is going to testify opposite. He is going to say that Mr. Young came over in his lane.

Transcript p. 75:3–8. Respondents’ counsel re-emphasized the issue for the jury in his opening statement:

Mr. George mentioned to you exactly the issue in this case. He told you and I wrote it down and I want to re-emphasis [sic] it to you. The decision that you will make in this case before you ever determine if there is injury that has to be paid by a defendant in this case is where did the accident occur. That’s the issue. It doesn’t have anything to do with how fast these vehicles were going or not going. It is where the accident occurred. Because you will hear that both drivers in this case claim that the other vehicle crossed the center line.

Transcript p. 77: 5–15.

Marshall Brown, Appellant’s nephew, was traveling in his vehicle some distance behind Appellant’s vehicle when the accident occurred. Transcript p. 84:11–16. On direct examination, Mr. Brown testified that the UPS vehicle was speeding and that he saw the UPS vehicle’s tires leave the roadway. Transcript p. 86. On direct examination, Mr. Brown also testified that he saw the collision occur. Transcript p. 88. However, when questioned by Respondents’ counsel on cross-examination, Mr. Brown admitted that he did not see the accident occur. Transcript p. 91:13–23.

On direct examination by his attorney, Appellant Young testified that Respondent Powell was speeding, that Respondent Powell’s passenger side tires went off the roadway, and that Respondent overcorrected his vehicle into Appellant’s lane, causing the collision. Transcript pp. 114:7–116:14; 123:9–124:18; 126:1–14; 135:16–136:11.

At the close of Appellant’s case-in-chief, Respondents moved to strike or for a directed verdict on Appellant’s causes of action for negligent hiring and negligent entrustment on the basis

that no evidence was presented to support those causes of action. Transcript pp. 139:9–141:7. The trial judge granted Respondents’ motion. Transcript p. 141:10–15.

Respondents first called Charles Monroe Coats, formerly of the Multi-disciplinary Accident Investigative Team (“MAIT”), who was part of the team investigating and reconstructing the collision at issue in this case, as an expert witness. Mr. Coats testified that Appellant’s white BMW crossed into the oncoming lane of the UPS vehicle. Transcript p. 174:19–24. He also reviewed photos of the accident scene and identified skid marks and gouge marks from the UPS vehicle in the UPS lane of travel. Transcript pp. 166:15–169:11; Defendants’ Trial Exh. 5.

Respondent Powell was also called as a witness and testified as to his recollection of the accident. Powell testified that Appellant’s vehicle drifted into his lane, and he initially thought Appellant would pull his vehicle back into his own lane. Transcript p. 228:13–23. Respondent Powell testified that when he realized that Appellant was not going to correct and return to his lane of travel, he slammed on his brakes and went off to the side in an attempt to miss Appellant’s vehicle. Transcript pp. 228:23–25. Respondent Powell testified that Appellant’s vehicle hit the UPS vehicle in the front center. Transcript pp. 228:13–229:1. Respondent Powell also reviewed photos from the accident scene and identified the pre-impact skid marks from the UPS vehicle, in the UPS lane of travel. Transcript pp. 231:18–235:4; Defendants’ Trial Exhs. 1, 2, 3, 4, 5.

Photographs of the accident scene were entered into evidence that showed gouge marks from the UPS vehicle’s rear tires and the final resting position of both the BMW and the UPS package vehicle. Defendants’ Trial Exhs. 1, 5, 7, 19, 20, 38.

Prior to jury instructions, Appellant argued for a comparative negligence charge. Transcript pp. 253–257. Respondents argued that the proximate cause of the accident and the issue to be

decided by the jury was which vehicle crossed over the center line. Transcript p. 254:11–23. The trial judge ruled that she would not charge comparative negligence and explained:

I am not going to charge comparative negligence. I find if the defendant chooses not to assert an affirmative defense and here that is exactly what is happening it's not appropriate for me to charge that affirmative defense to the jury. Further, I find that based on the facts of this case it would be an inappropriate charge in any event.

Transcript p. 257:13–19.

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

I believe that charging the jury on speeding was not necessary in light of the proximate cause issue with regard to the – who crossed the center line. I allowed evidence of speed to come in, however, I think charging the speeding would have confused the jurors and so your objection is noted for the record.

Transcript p. 322:9–15.

The jury returned a verdict for Respondents Powell and UPS. Transcript p. 324. Appellant made post-trial motions renewing his objections as to the trial judge's refusal to charge the speed statute and the law of comparative negligence and the exclusion of Respondent Powell's prior traffic convictions. Transcript pp. 325:16–327:7. The motions were denied. Transcript p. 330:10–12. Appellant filed a Notice of Appeal on February 5, 2016.

ARGUMENT

I. THE TRIAL COURT PROPERLY DECLINED TO CHARGE THE JURY ON THE LAW OF EXCESSIVE SPEED

The trial court did not abuse its discretion in declining to charge the jury on the law of excessive speed. “Proximate cause is the efficient or direct cause of an injury.” *McNair v. Rainsford*, 330 S.C. 332, 349, 499 S.E.2d 488, 497 (Ct. App. 1998). “An act is the proximate cause if it is ‘an efficient cause without which the injury would not have resulted to as great an extent and that any other efficient cause is not attributable to the person injured.’” *Mellen v. Lane*, 377

S.C. 261, 278, 659 S.E.2d 236, 245 (Ct. App. 2008) (quoting *S.C. Ins. Co. v. James C. Greene and Co.*, 290 S.C. 171, 176, 348 S.E.2d 617, 620 (1986)). “Proximate cause requires proof of both causation in fact and legal cause.” *Bishop v. S.C. Dep’t of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 83 (1998). “Causation in fact is proved by establishing the plaintiff’s injury would not have occurred ‘but for’ the defendant’s action.” *Mellen*, 377 S.C. at 278, 659 S.E.2d at 245 (quoting *Bishop v. S.C. Dep’t of Mental Health*, 331 S.C. 79, 88, 502 S.E.2d 78, 83 (1998)). “Legal cause is proved by establishing foreseeability.” *Bishop*, 331 S.C. at 88, 502 S.E.2d at 83.

“An appellate court will not reverse the trial court’s decision regarding jury instructions unless the trial court abused its discretion.” *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citing *Dalon v. Golden Lanes, Inc.*, 320 S.C. 534, 541, 466 S.E.2d 368, 372 (Ct. App. 1996); *Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 307, 395 S.E.2d 742, 744 (Ct. App. 1990)). “An abuse of discretion occurs when the judge’s ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support.” *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

“When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues.” *Clark*, 339 S.C. at 390, 529 S.E.2d at 539 (citing *Tucker v. Reynolds*, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977)). It is error for the trial court 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 S.C. 490, 497, 183 S.E.2d 321, 325 (1971). However, the trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved. *Greenville Housing Authority of City of Greenville by Carlton v. Massey*, 281 S.C. 618, 622, 316 S.E.2d 722, 724 (Ct. App. 1984) (citing

Clarke v. Swearingen, 6 S.C. 291 (1875)). “[T]he court acts correctly when it charges the jury on the law framed by the issues as made by the pleadings and the facts developed by the evidence in support of those issues.” *Tucker v. Reynolds*, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977).

Even if the trial court erred in failing to give a requested instruction, the requesting party must show that the error was prejudicial to warrant reversal on appeal. *Miller v. City of West Columbia*, 322 S.C. 224, 230, 471 S.E.2d 683, 686 (1996). Failure to give requested jury instructions is not prejudicial error when the instructions given afford the proper test for determining the issues. *Lever v. Wilder Mobile Homes, Inc.*, 283 S.C. 452, 454, 322 S.E.2d 692, 694 (Ct. App. 1984).

In Appellant’s first claim of error, he attempts to present a new theory of the case, one not presented to the jury or supported by the evidence presented at trial. Contrary to Appellant’s contention in his brief, Appellant’s theory of the case was not “that the Respondent Powell’s speed was the proximate cause of the accident.” App. Brief p. 7. In fact, in his opening statement at trial, Appellant’s counsel specifically explained to the jury: “And the question that you are going to have to – this is what you are going to determine, where did the accident happen. Did it happen in this lane or did it happen in that lane.” Transcript p. 73:15–18. He also argued, “Now, so Mr. Young is going to testify and Mr. Brown is going to testify and they are going to testify the UPS truck crossed the center line came over in this lane. This gentleman I’m sure he is going to testify opposite. He is going to say that Mr. Young came over in his lane.” Transcript p. 75:3–8.

On the basis of the evidence presented, the trial judge concluded that speed was not an appropriate charge. Transcript p. 322. When Appellant’s counsel objected to the judge’s failure to charge the jury on the law of excessive speed, the trial judge ruled as follows:

I believe that charging the jury on speeding was not necessary in light of the proximate cause issue with regard to the – who crossed the center lane. I allowed evidence of speed

to come in, however, I think charging the speeding would have confused the jurors and so your objection is noted for the record.

Transcript p. 322. Although the trial judge presented both attorneys with copies of the jury instructions prior to charging the jury, Appellant failed to object to the instructions until after the judge completed the charges and the jury had left the room.

The facts involved in the present case are similar to those presented to the South Carolina Supreme Court in *Horton v. Greyhound Corp.*, 241 S.C. 430, 128 S.E.2d 776 (1962). In *Horton*, a collision occurred when a pickup truck crossed the center line of the highway and collided with a Greyhound bus. *See id.* There were no marks on the highway indicating that the brakes of the truck had been applied; however, the Greyhound bus left over 98 feet of skidmarks to the point of impact. *Horton*, 241 S.C. at 434, 128 S.E.2d at 779. Witnesses at trial testified that they saw the bus traveling between 70-80 miles per hour prior to the collision. *Id.*

Upholding the trial judge's grant of a directed verdict to the Plaintiff, the South Carolina Supreme Court in *Horton* stated that it was "abundantly clear that the primary efficient cause of the collision was the unlawful act of the truck driver in turning his north bound vehicle into the south bound lane of travel, which was occupied by the approaching bus." *Horton*, 241 S.C. at 438, 128 S.E.2d at 781. Further, the Court noted that it was "equally clear that the only evidence of a negligent or unlawful act by the bus driver relates to excessive speed, which could not have resulted in harm to [the Plaintiff] if the truck had remained in its proper lane of travel." *Horton*, 241 S.C. at 438-39, 128 S.E.2d at 781. Further, the "concurrence of excessive speed with this primary, efficient cause of the collision does not impose liability on the defendants unless, without it, the collision would not have occurred." *Horton*, 241 S.C. at 439, 128 S.E.2d at 781 (citations omitted). "That speed was a contributing factor in placing the bus at a particular location on the highway when the emergency arose is without legal significance, because the defendants had the

legal right to occupy that portion of the highway.” *Id.*

The court in *Horton* continued by stating that “[t]he bus driver was required to operate the bus at a speed that was reasonable and prudent under the conditions and to drive at such a speed as to avoid colliding with any vehicle on the highway in compliance with legal requirements and the duty of all persons to use due care.” *Id.* “However, he was not required to anticipate that the truck would suddenly turn into his lane of travel and to drive at such a speed as to avoid collision with it in this event.” *Horton*, 241 S.C. at 439–40, 128 S.E.2d at 781–82. “Therefore, the length of the skid marks made by the bus cannot, alone, constitute evidence of causal connection between excessive speed and the collision.” *Horton*, 241 S.C. at 440, 128 S.E.2d at 782. “Some evidence that if the bus had been operated at a reasonable speed it could have been stopped at *some distance* short of the collision point is required to support such an inference.” *Id.* (emphasis in original).

Indeed, numerous cases since *Horton* have held that speed alone cannot be a proximate cause of a collision in circumstances such as those involved in the present case. *See Blanding v. Hammell*, 267 S.C. 352, 356–57, 228 S.E.2d 271, 272–73 (1976) (citing *Horton* in affirming directed verdict where all testimony showed plaintiff pulled directly in front defendant; defendant's slight speeding could not, as a matter of law, have caused the accident); *Odom v. Steigerwald*, 260 S.C. 422, 426–27, 196 S.E.2d 635, 637 (1973) (citing *Horton* in reversing denial of plaintiff's directed verdict motion on liability because, as a matter of law, any speeding by plaintiff could not have caused accident where evidence showed defendant's vehicle pulled directly into plaintiff's path); *Kennedy v. Carter*, 249 S.C. 168, 178, 153 S.E.2d 312, 317 (1967) (citing *Horton* in reversing denial of directed verdict for defendant who swerved off road to avoid oncoming drunken driver; defendant's speeding could not, as a matter of law, have caused the accident); *Guyton v. Guyton*, 244 S.C. 357, 361–62, 137 S.E.2d 273, 275 (1964) (citing *Horton* in affirming directed

verdict for defendant whose vehicle collided with a dark-colored mule that darted onto road at night; defendant's speeding could not, as a matter of law, have caused the accident).

Although Appellant presented some testimony that Respondent was traveling slightly above the posted speed limit, and argued that speed could have been the reason Respondent Powell allegedly crossed the center line, Appellant failed to produce or present any evidence that speed was the proximate cause of the accident—that but for Respondent Powell's excessive speed, the accident would not have occurred. Furthermore, Appellant failed to introduce any evidence to support that the accident could have been avoided if Respondent Powell was traveling at the speed limit or below.¹ See *Horton*, 241 S.C. at 440, 128 S.E.2d at 782. All evidence presented by parties on both sides indicates that this case clearly involved the issue of which driver crossed over the center line to cause the motor vehicle accident. Moreover, all physical evidence and photographs of the accident scene clearly indicate the accident occurred in the UPS vehicle's lane of travel. Defendants' Trial Exhs. 1, 4, 6, 28.

Even if the trial court erred in declining to charge the jury on the law of excessive speed, the error was not prejudicial and does not warrant reversal on appeal. *Miller v. City of West Columbia*, 322 S.C. 224, 471 S.E.2d 683 (1996). To warrant reversal, the party seeking the requested jury charge must demonstrate error and prejudice. *Cole v. Raut*, 378 S.C. 398, 405, 663 S.E.2d 30, 33 (2008) ("An erroneous jury instruction, however, is not grounds for reversal unless the appellant can show prejudice from the erroneous instruction."). "An alleged error is harmless

¹ We note that in support of his argument that the trial court erred in refusing to charge the jury on the law of excessive speed, Appellant references a photograph from the MAIT investigation that shows the broken speedometer of the UPS vehicle frozen at 55 mph. The trial court allowed the photograph of the broken speedometer into evidence solely for the limited purpose of showing the damaged condition of the interior of the vehicle after the collision. Transcript pp. 206:17–209:25.

if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict." *Wells v. Halyard*, 341 S.C. 234, 237, 533 S.E.2d 341, 343 (Ct. App. 2000).

The jury returned a defense verdict. The jury's verdict resolved the parties' dispute, and based on the sole question as to proximate cause presented by both the Appellant and Respondent as to which driver crossed over the center line, concluded that Respondent Powell did not cross the center line, and that the accident occurred in the Respondents' lane of travel. Because the jury concluded that the accident occurred in Respondents' lane of travel, issues of speed are irrelevant, and the trial court's failure to charge the law of excessive speed was not prejudicial to Appellant.

II. THE TRIAL COURT PROPERLY DECLINED TO CHARGE THE JURY ON THE LAW OF COMPARATIVE NEGLIGENCE

The trial court did not abuse its discretion by declining to charge the jury on the law of comparative negligence. "An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court abused its discretion." *Clark v. Cantrell*, 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000) (citing *Dalon v. Golden Lanes, Inc.*, 320 S.C. 534, 541, 466 S.E.2d 368, 372 (Ct. App. 1996); *Smith v. Ridgeway Chemicals, Inc.*, 302 S.C. 303, 307, 395 S.E.2d 742, 744 (Ct. App. 1990)). "An abuse of discretion occurs when the judge's ruling is based upon an error of law or, when based upon factual conclusions, is without evidentiary support." *Fontaine v. Peitz*, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

"When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues." *Clark*, 339 S.C. at 390, 529 S.E.2d at 539 (citing *Tucker v. Reynolds*, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977)). It is error for the trial court 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 S.C.

490, 497, 183 S.E.2d 321, 325 (1971). However, the trial court is not required to instruct the jury on a principle of law that is irrelevant to the case as proved. *Greenville Housing Authority of City of Greenville by Carlton v. Massey*, 281 S.C. 618, 622, 316 S.E.2d 722, 724 (Ct. App. 1984) (citing *Clarke v. Swearingen*, 6 S.C. 291 (1875)). “[T]he court acts correctly when it charges the jury on the law framed by the issues as made by the pleadings and the facts developed by the evidence in support of those issues.” *Tucker v. Reynolds*, 268 S.C. 330, 335, 233 S.E.2d 402, 404 (1977).

Moreover, even if the trial court erred in failing to give a requested instruction, the requesting party must show that the error was prejudicial to warrant reversal on appeal. *Miller v. City of West Columbia*, 322 S.C. 224, 230, 471 S.E.2d 683, 686 (1996). Failure to give requested jury instructions is not prejudicial error when the instructions given afford the proper test for determining the issues. *Lever v. Wilder Mobile Homes, Inc.*, 283 S.C. 452, 454, 322 S.E.2d 692, 694 (Ct. App. 1984).

Rule 8(c), SCRCP requires a party to set forth any affirmative defenses in the pleadings, and comparative negligence is recognized as an affirmative defense in South Carolina. *Ross v. Paddy*, 340 S.C. 428, 436, 532 S.E.2d 612, 616 (Ct. App. 2000); *Youmans v. S.C. D.O.T.*, 380 S.C. 263, 281, 670 S.E.2d 1, 10 (Ct. App. 2008); *see also Guffey v. Columbia/Colleton Reg'l Hosp., Inc.*, 364 S.C. 158, 164, 612 S.E.2d 695, 697 (2005) (“Hospital moved to strike the “Aftercare Instructions,” after withdrawing comparative negligence as a defense.”). Moreover, if a defendant chooses to assert the affirmative defense of comparative negligence, the defendant bears the burden of proving the plaintiff’s negligence.

At the conclusion of their case and prior to jury instructions, Respondents withdrew their comparative negligence defense. Appellant objected, and the trial judge ruled that she would not charge comparative negligence. Transcript pp. 253-258. The trial judge explained:

I am not going to charge comparative negligence. I find if the defendant chooses not to assert an affirmative defense and here that is exactly what is happening it's not appropriate for me to charge that affirmative defense to the jury. Further, I find that based on the facts of this case it would be an inappropriate charge in any event.

Transcript p. 257.

Appellant asserts in his brief that he raised comparative negligence in his Answer to Respondent Driver's Complaint; however, this fact is irrelevant to the issue presented in this appeal. Appellant raised comparative negligence as a defense to Respondent Powell's Complaint. That claim was resolved and settled prior to the first trial. Pursuant to Rule 8(c), SCRPC, Appellant had the right to file a reply to any of the affirmative defenses asserted by Respondents in their pleadings. Comparative negligence is recognized as an affirmative defense in South Carolina, and because Respondents asserted comparative negligence in their pleadings, as a defense to Appellant's claims, Respondents were within their rights to withdraw the defense at trial.

Additionally, Appellant has failed to show how the trial court's failure to charge comparative negligence was prejudicial to warrant reversal on appeal. *Miller*, 322 S.C. at 230, 471 S.E.2d at 686. Failure to give requested jury instructions is not prejudicial error when the instructions given afford the proper test for determining the issues. *Lever*, 283 S.C. at 454, 322 S.E.2d at 694. Accordingly, the trial judge correctly declined to charge the jury on the law of comparative negligence, as the defense was withdrawn by Respondents.

III. THE TRIAL COURT PROPERLY EXCLUDED RESPONDENT POWELL'S PRIOR TRAFFIC CONVICTIONS

The circuit court did not abuse its discretion by excluding Respondent Powell's prior traffic convictions. In July 2015, Appellant amended his Complaint to allege causes of action for negligent hiring and negligent entrustment against Respondent UPS. Prior to the second trial, in January 2016, Respondents filed a Motion in Limine seeking to exclude evidence of Respondent Powell's driving history. The trial judge granted the Motion in Limine pursuant to S.C. Code Ann.

§ 56-5-6160, which provides: “No evidence of conviction of any person for any violation of [the Uniform Act Regulating Traffic on Highways] shall be admissible in any court in any civil action.”

Transcript pp. 30:25–31:6. Specifically, the trial judge ruled that the convictions for speeding were not admissible based on the language of the statute. Transcript p. 64. The trial judge also explained:

. . . . But I do want to also clarify my ruling. It does not preclude the plaintiff from pursuing it’s [sic] negligent hiring and entrustment cause of action, just that the convictions for speeding are not admissible and that is simply based on the language of the statute. Whether the employer had knowledge of previous accidents or otherwise had information about the defendant’s poor driving skills, my ruling does not preclude that type of evidence just the convictions. . . .

Transcript p. 64:8–17.

Contrary to Appellant’s argument in his initial brief, the trial judge did not read S.C. Code Ann. § 56-5-6160 as “a complete bar to the introduction of Respondent Powell’s driving record.” App. Brief at 13. In fact, the trial judge specifically explained she was only precluding admission of the convictions. The trial judge also explained: “Isn’t there other ways to show, poor driving skills other than [sic] convictions for uniform traffic offenses? Couldn’t there be knowledge of accidents or something other than [sic] convictions?” Transcript p. 61:1-4.

Even though the trial judge’s ruling was limited to excluding the admission of prior convictions for traffic offenses, Appellant failed to offer, produce, or present any evidence that anyone from UPS had any knowledge of Respondent Powell’s driving record to support Appellant’s causes of action for negligent hiring and negligent entrustment. Moreover, Appellant failed to cross-examine Respondent Powell about his alleged history of speeding. Transcript pp. 239–247. Appellant elicited no testimony from Respondent Powell regarding his alleged history of speeding, and he called no witnesses from UPS to testify regarding UPS’s alleged knowledge of Respondent Powell’s driving history. In his initial brief, Appellant attempts to remedy his failure

to introduce any evidence of Respondent Powell's driving history at trial by misconstruing the scope of the trial court's ruling on the admissibility of prior traffic convictions.

Even if the trial court did erroneously exclude evidence of Respondent Powell's prior traffic convictions, Appellant has failed to show how this exclusion was prejudicial. "To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof." *Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 26, 609 S.E.2d 406, 509 (2005).

When evidence is erroneously excluded by the trial court, the appellate court usually engages in the following analysis to determine whether prejudice has occurred. First, the court considers, inter alia, whether the error may be deemed harmless because equivalent or cumulative evidence or testimony was offered; the aggrieved party still managed to accomplish his primary objective, such as eliciting testimony about an issue or effectively cross-examining a witness; the jury's verdict or a proper court ruling rendered the wrongly excluded evidence moot because it was relevant to an issue that did not have to be reached; the aggrieved party failed to establish a claim or defense even when both the admitted and excluded evidence are considered; or the wrongly excluded evidence involved a generally known fact.

Second, the appellate court considers whether, viewing a case as a whole, the wrongly excluded evidence or testimony was so crucial and important in proving the aggrieved party's claim or defense that its exclusion constitutes prejudicial error, i.e., the aggrieved party demonstrates there is a reasonable probability the jury's verdict was influenced by the lack of the challenged evidence.

Fields, 363 S.C. at 31–33, 609 S.E.2d at 512–13.

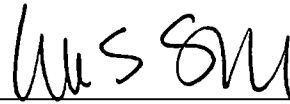
The trial court only excluded Respondent Powell's prior traffic convictions, and yet, Appellant failed to offer any other evidence to support his claims for negligent hiring and negligent entrustment against Respondent UPS. Accordingly, the trial court granted Respondents' motion for directed verdict as to Appellant's causes of action for negligent hiring and negligent entrustment because Appellant failed to present any evidence to support those allegations. Transcript p. 141. As the trial court's ruling on Respondents' motion for directed verdict ended

the causes of action for negligent hiring and negligent entrustment, any evidence of Respondent Powell's prior traffic convictions was rendered moot, because the jury did not have to address those causes of action. *Fields*, 363 S.C. at 31–33, 609 S.E.2d at 512–13.

CONCLUSION

For the reasons stated above, this Court should affirm the jury verdict. The trial court did not abuse its discretion in declining to charge the jury on the law of excessive speed and comparative negligence, nor did the trial court abuse its discretion in excluding Respondent Powell's prior traffic convictions. Accordingly, this Court should affirm the judgment of the circuit court.

Respectfully submitted,



Wilson S. Sheldon (SC Bar No. 15225)

Katie M. Brown (SC Bar No. 101134)

Willson Jones Carter & Baxley, P.A.

872 S. Pleasantburg Drive

Greenville, South Carolina 29607

Telephone: (864) 527-3280

Fax: (864) 235-6015

**Attorneys for Respondents Eric D. Powell
and United Parcel Service**

September 13, 2016

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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

RECEIVED

SEP 15 2016

SC Court of Appeals

Case No. 2010-CP-40-7404
Appellate Case No. 2016-000210

Reginald Todd Young.....Appellant,

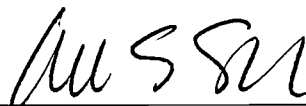
v.

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

PROOF OF SERVICE

I certify that I have served the Respondents' Initial Brief by depositing a copy of it in the United States Mail, First Class postage prepaid, on September 13, 2016, addressed to attorneys of record, Barry B. George and Paige B. George, 1419 Bull Street, Columbia, South Carolina, 29201.

Respectfully submitted,



Wilson S. Sheldon (SC Bar No. 15225)
Katie M. Brown (SC Bar No. 101134)
Willson Jones Carter & Baxley, PA
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
Telephone (864) 527-3280
Fax: (864) 235-6015

**Attorneys for Respondents Eric D. Powell and
United Parcel Service**

September 13, 2016

WILLSON JONES CARTER & BAXLEY, P.A.

ATTORNEYS AT LAW

GREENVILLE CHARLESTON COLUMBIA CHARLOTTE RALEIGH ATLANTA

Wilson S. Sheldon
Direct (864) 672-3712
Fax (864) 373-7055
wssheldon@wjlaw.net

872 S. Pleasantburg Drive
Greenville, SC 29607
www.wjcbllaw.net

September 13, 2016

Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

RECEIVED
SEP 15 2016
SC Court of Appeals

Re: Reginald Todd Young vs. Eric D. Powell United Parcel Service, Inc.
Court of Appeals Case No. 2016-000210
Circuit Court Case No. 2010-CP-40-07404
WJC&B File No. 0157.00004

Dear Ms. Kitchings:

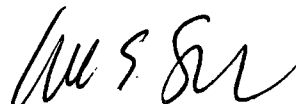
Enclosed please find for filing with your office an original and one copy of Respondents' Initial Brief and Respondents' Designation of Matter. Please file the original and return a clocked copy to us in the self-addressed, enclosed envelope.

By copy of this correspondence, we are serving counsel for the Appellant with a copy of Respondents' Initial Brief and Designation of Matter.

Thank you and with kind regards, we remain,

Very truly yours,

WILLSON JONES CARTER & BAXLEY, P.A.


Wilson S. Sheldon

WSS:meg
Enclosures

cc: Barry B. George, Esq. (w/encls.)
Paige B. George, Esq. (w/encls.)

NEOPOST FIRST-CLASS MAIL

09/13/2016

US POSTAGE \$003.46⁰



ZIP 29607
041L10252168



WILSON S. SHELDON
WILLSON JONES CARTER & BAXLEY, P.A.
ATTORNEYS AT LAW
872 S. PLEASANTBURG DRIVE
GREENVILLE, SC 29607

RECEIVED

SFP 15 2016

SC Court of Appeals

HON. JENNY ABBOTT KITCHINGS
SOUTH CAROLINA COURT OF APPEALS
P.O. Box 11629
COLUMBIA, SC 29211