IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appeal Case No. 2016-000259

Jerry Hogan ..... Respondent.

v.

Corder & Sons, Inc. ..... Appellant

BRIEF OF APPELLANT

Jonathan R. Hendrix, Sr., S.C. Bar #3035

HENDRIX & STEIGNER
1622 Sunset Boulevard
West Columbia, South Carolina 29169
(803) 200-2970

Attorney for Appellant
Corder & Sons, Inc.

Other Counsel of Record:

Bradd W. Bunce
Law Offices of William A. Green
Post Office Box 1698
Columbia, South Carolina 29202
(803) 771-2455

IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appeal Case No. 2016-000259

Jerry Hogan ..... Respondent.

v.

Corder & Sons, Inc. ..... Appellant

BRIEF OF APPELLANT

Jonathan R. Hendrix, Sr., S.C. Bar #3035

HENDRIX & STEIGNER
1622 Sunset Boulevard
West Columbia, South Carolina 29169
(803) 200-2970

Attorney for Appellant
Corder & Sons, Inc.

Other Counsel of Record:

Bradd W. Bunce
Law Offices of William A. Green
Post Office Box 1698
Columbia, South Carolina 29202
(803) 771-2455

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

QUESTIONS PRESENTED

1. Was there presented evidence, other than conjecture and/or speculation, as to why the sports utility vehicle being held up by the front-end loader "suddenly fell" which was sufficient to justify denying Appellant's motions for directed verdict and for judgment notwithstanding and verdict?

2. Was there presented any evidence which rose above conjecture and/or speculation that there was any failure on the part of the front-end loader holding up the sports utility vehicle while Respondent worked under it?

3. Was there presented any evidence as to why the sports utility vehicle "suddenly fell" and, consequently, resulted in injuries to the Respondent for which Appellant was responsible?

4. Did the jury improperly rely upon conjecture, speculation and the doctrine of *res ipsa loquitur* in finding that the Appellant was liable for Respondent's injuries?

STATEMENT OF ISSUE ON APPEAL
(Encompassing All Questions Presented)

The sole issue on appeal is whether the trial court erred in denying Appellant, Corder & Sons, Inc.'s ("Corder"), motions for directed verdict and for judgment notwithstanding the verdict at the appropriate stages of the proceedings. The Respondent failed to put forth any evidence which rose above conjecture and speculation as to why the sports utility vehicle being held by a front-end loader, capable of holding three times the weight of the sports utility vehicle, "suddenly fell." Therefore, there was insufficient proof that any negligence on Defendant's part caused Respondent's injuries.

STATEMENT OF THE CASE

This suit arose out of Respondent Hogan's allegations that he was injured on or about February 18, 2011, while working at Appellant's salvage yard near the Town of Leesville in Lexington County, South Carolina. In Respondent's Complaint, Respondent alleged that "suddenly and without" warning the sports utility vehicle fell directly on the Plaintiff [Respondent] from above, resulting in significant physical injury to the Plaintiff. (Complaint, paragraph 11). The Complaint, in paragraph 15, made some allegations of negligence of the Appellant. The Complaint, however, did not make any specific allegations of negligence attributable to Appellant concerning what caused or started the chain of events resulting in the injury to the Respondent. Respondent did not offer any proof at trial as to what caused the loader to fail to "hold" the load in the air and off of Respondent. Rather, Respondent claimed that a secondary safety device or "system" (a mobile home axle placed under one of the loader's forks) was inadequate and that Appellant should be held liable because of this alleged inadequacy even though Respondent failed to prove why the loader failed to safely hold the sports utility vehicle in the first place. The Appellant, in its Answer, denied negligence. Appellant timely moved for a directed verdict in its favor at the end of the Respondent's case and, again, at the end of Appellant's case. The case was submitted to a jury and the jury returned a verdict in favor of Respondent in the amount of $864,341.80.

Following the discharge of the jury, the Appellant requested ten (10) days to file post-trial motions and this was granted. Appellant timely filed its motions and these were denied by the Trial Judge who signed an order on January 19, 2016, which was filed with the court on January 22, 2016. The Appellant timely filed this appeal on or about February 10, 2016.

STATEMENT OF FACTS

The Respondent, Jerry Hogan, had been employed at Appellant's salvage yard for several months prior to the accident which occurred on or about February 18, 2011. He had worked for the Appellant at yet another time in the past when the salvage yard was run by Robert James "Bubba" Corder, the son of James Corder. (R p. 64 L. 7 - 18, p. 220 L. 10 - 12). At some time in the past, "Bubba" Corder had seen, at other salvage yards, workers using a steel pipe or "pole" under the fork of a front-end loader as a secondary, backup safety device to help ensure that no load being held up by the front-end loader would fall if the loader failed. (R p. 221 L. 25 to p. 222 L. 12). The uncontradicted evidence at trial was that there were no problems with the front-end loader giving way or failing at any time before Mr. Hogan's injury occurred or at any time afterwards. (R p. 56 L. 13 - 18, p. 223 L. 16 to p. 224 L. 5). Likewise, the secondary safety device (the axle) had never failed at any time. (R p. 222 L. 14 - 19).

Mr. James Corder testified that, on the day of the accident, Mr. Hogan was not supposed to be there when the accident occurred (R p. 28 L. 12 - 15, p. 39 L. 14 to p. 40 L. 9) and that Mr. Hogan knew how to run the equipment himself. (R p. 27) L. 6 - 10). Mr. Corder testified that he did not bring any vehicle down to the shop himself. He paid Mr. Hogan at noon at Mr. Hogan's specific request. (R p. 48 L. 1 - 6). The only persons present at the salvage yard that day at the time of the accident were Mr. Corder, two ladies sitting with him in the "office" and Mr. Hogan. Mr. Corder was inside with the ladies and thought Mr. Hogan had left. The "setting" of the pole under the forks of the front-end loader was usually done by two persons (R p. 58 L. 9 - 22). Mr. Hogan, apparently, attempted to do that job himself without Mr. Corder's knowledge or consent. (R p. 58 L. 24 - 25).

The Respondent's expert admitted that he was not an expert with respect to front-end loaders. (R p. 58 L. 25 to p. 59 L. 3). Appellant's expert, who was stipulated by Respondent to be an expert as to the front-end loader (R p. 197 L. 9 - 14) testified that the front-end loader was capable of lifting and holding in the air, indefinitely, three times the weight of the sports utility vehicle. (R p. 200 L. 5 to p. 202 L. 13). Respondent Hogan testified that he saw no evidence that the sports utility vehicle was not properly mounted on the loader and doesn't know what caused it to fall; that no hydraulic lines had been broken; no metal on the forks had broken or given way. He saw no evidence that anything broke except that he says "it came down". (R p. 88 L. 2 to p. 89 L. 11).

Natasha Smith was called as a witness by Mr. Hogan and testified that she heard machinery "moving around in the salvage yard" while she and her mother were inside the shop talking to Mr. Corder. Whoever was moving the equipment just before the accident could not have been Mr. Corder. (R p. 100 L. 1 to p. 102 L. 8) Ms. Smith estimated that she heard the machine running approximately 20 minutes before Mr. Hogan called out for help. (R p. 101 L. 21 to p. 102 L. 3).

Mr. Hogan's expert, Stephen Fournier, testified that he did not know what caused the front-end loader to let the sports utility vehicle tilt and slide down. (R p. 149 L. 6 -12). Mr. Fournier had no criticism of the front-end loader being used for the purpose of lifting the sports utility vehicle load off the ground and stated that it should be capable of lifting and holding the load if it is in good working order. (R p. 153 L. 6 - 14). Mr. Fournier also admitted that the loader was one system to make sure the load didn't fall. R p. 153 L. 15 - 22). He also testified that, based upon the information available to him, "most likely" Mr. Hogan was the operator who

set the machine up. (R p. 157 L. 7 - 12). Mr. Fournier further testified that before the "secondary" safety measure of the mobile home axle would come into play, there would first have to be something or someone to cause the weight of the sports utility vehicle (perhaps even the force of the machine) to be applied to the axle. Mr. Fournier did not know what, if anything, happened to cause that to occur. (R p. 158 L. 13 - 14).

Respondent's expert also admitted that the secondary safety devise (the axle) would not come into use unless and until the first one (i.e., the front-end loader) failed. (R p. 158 L. 15 - 24). Respondent's expert went on to say: "if the machine had held, I guess it [the accident] would not have happened...." (R p. 159 L. 4 - 17) (bracketed language supplied).

Corder's expert, Chad Reeves, was stipulated to be an expert on the Caterpillar front-end loader by the Respondent. (R p. 197 L. 9 - 13). Mr. Reeves' testified that the only way the front-end loader would "fail" and suddenly let the load down would either be because of a catastrophic failure of a hydraulic cylinder or hose or through human error. (R p. 199 L. 24 to p. 200 L. 6). If the cylinder or hose had failed, there would have been "oil," or hydraulic fluid, everywhere at the scene. Approximately five to ten gallons of oil or hydraulic fluid would have spewed on the loader and the ground. (R p. 200 L. 15 to p. 201 L. 9). No one testified that this type of leakage occurred.

Mr. Reeves also testified that, without evidence of five to ten gallons of hydraulic fluid or "oil" on the ground and on the machine, there was no evidence of any problem with the machine which would have caused a sudden release of the load (the sports utility vehicle) from the lifting capability of the front-end loader. (R p. 200 L. 15 to p. 201 L. 9). The only other way for the front-end loader to have let the weight down would have been for someone to manually move the

controls for the lifting arms and the forks. (R p. 201 L. 10 - 13). The loader was strong enough to lift and support 15,000 pounds which is approximately three times the weight of the sports utility vehicle it was holding at the time of Mr. Hogan's injury. (R p. 201 L. 24, p. 202 L. 8). The machine was strong enough to press down with that same amount of force and, by using the "tilt" control, cause the post or axle to fail. (R p. 201 L. 24 to p. 202 L. 8). The loader was also strong enough to cause the failure of two such pipes, one under each of the forks. (R p. 203 L. 11 - 16). The loader was also strong enough to press the axle into the ground. (R p. 211 L. 2 - 5).

Appellant's expert also testified that, if there had been a mechanical failure of this machine, the entire lifting system would have failed. (R p. 203 L. 10 - 13). If the tilt, lift/lower controls had been manipulated and had caused a failure of the pipe or axle, the failure would have been instant and the SUV would not have sat there suspended for anytime after it was set up. (R p. 205 L. 20 to p. 206 L. 5). Without a mechanical failure of the machine itself, the front-end loader would have stayed there until someone moved it. (R p. 206 L. 14 - 20). The loader would have held up the sports utility vehicle after the controls were used to set it on the pole and would stay there after the controls were no longer being used and would continue to do so even if the machine itself were completely "cut-off." (R p. 214 L. 2 - 3). In other words, the front-end loader, by itself, would prevent this accident from happening.

Mr. Hogan offered no evidence as to what caused any alleged "failure" of the front-end loader to hold the sports utility vehicle other than conjecture or speculation. Essentially, the true cause of this accident is unknown as there is no dispute that this equipment was more than capable of handling the job which Mr. Hogan intended to do. Appellant cannot be held accountable or deemed to have been negligent in this case. Appellant cannot take steps to protect

itself against something that was clearly not foreseeable and which has not been explained. Appellant did take steps to protect the operators of the equipment from what was reasonably foreseeable. The secondary system in place was designed to protect against accidents caused by loader failure. No qualified witness has said Appellant had a duty to guarantee that no mishap could occur from any and all loader misuse in addition to protecting against possible loader failure.

The evidence in this record is that the loader did not fail. There is no evidence that the cause of the loader not safely holding the sports utility vehicle due to any negligence on the part of Appellant. The system in place was reasonably designed to protect against foreseeable accidents. The only person in the vicinity of this machine when the accident occurred was Mr. Hogan. The evidence makes it clear that only Respondent was in a position to have caused a "human error" failure.

While is it unfortunate that Mr. Hogan suffered serious injuries, the only reasonable conclusion is that he operated the machine inappropriately in some fashion. It is clear from the testimony of the witnesses that the machine did not fail. Mr. Hogan's expert had no explanation as to why this accident occurred in the first place. He found no fault in the safety measures in place on the front-end loader. Mr. Fournier had no criticism of the loader being used for the purpose it was being used at the time of Mr. Hogan's injury. The fact that Mr. Hogan was injured did not mean that, without more, there was negligence on the part of Corder. There is no evidence that the first safety system in place failed and, although the Respondent's expert was critical of the secondary safety system in place, the secondary safety measure did not by itself cause the accident. It is axiomatic that the secondary safety measure could not come into "play"

unless the first failed and it did not fail.

What happened here and what caused the Respondent to be seriously injured was never established by the evidence presented. There is also no proof it was caused by the negligence of the Appellant.

ARGUMENT

Because Mr. Hogan failed to put forth any direct or circumstantial evidence to prove why the front-end loader failed to hold the sports utility vehicle and to prove that such failure was foreseeable and the result of Appellant's negligence, the Court erred in denying Corder's motions for directed verdict and judgment notwithstanding the verdict.

I. Standard of Review

On a motion for directed verdict by the defendant, the testimony must be viewed in a light most favorable to the plaintiff. However, if the only reasonable inference to be drawn from all the testimony is that the plaintiff has failed to make out his case against the defendant, then it is the duty of the trial judge to direct a verdict against the plaintiff. Owens v. South Carolina State Highway Dept., 239 S.C. 44, 56-57, 121 S.E.2d 240, 247 (1961).

South Carolina has always refused to adopt the doctrine of *res ipsa loquitur*:

> "In this State it is well settled that the burden rests upon the party to prove negligence. This burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence, Gilland v. Peter's Dry Cleaning, Co., 195 S.C. 417, 11 S.E.2d 857; Perry v. Carolina Theater, 180 S.C. 130, 185 S.E. 184. In order, therefore, for a plaintiff to recover damages, she must prove by the greater weight or preponderance of the evidence

not only the injury but also that it was caused by the actionable negligence of the defendant." King v. J.C. Penney Co., 238 S.C. 336, 339-40, 120 S.E.2d 229, 229, 230 (1961).

"Neither the existence, causation nor amount of damages can be left to conjecture, guess or speculation." Baughman v. AT&T Co., 306 S.C. 101, 116, 410 S.E.2d 537, 546 (1991) [emphasis supplied]. Our courts are simply not permitted to leave the question or whether misfortune was a result of negligence to mere conjecture or speculation. Fletcher v. Medical University, 390 S.C. 458, 702 S.E.2d 372 (Ct. App. 2010).

Our Supreme Court in Marchant v. Mitchell Distributing Co., 270 S.C. 29, 240 S.E.2d 511 (1977) recognized: "Most any product can be made more safe. Automobiles would be more safe with disc brakes and steel-belted tires than with ordinary brakes and ordinary tires, but this does not mean than an automobile dealer would be held to have sold a defective product merely because the most safe equipment is not installed." Bragg v. High Ranger, Inc., 319 S.C. 531, 462 S.E.2d 321 (1995); Marchant v. Mitchell Distributing Co., 270 S.C. 29, 240 S.E.2d 511 (1977).

Those cases were products liability cases but the same theory should apply here. Appellant provided a secondary, additional safety device or "system" in the form of the steel axle. Respondent's expert criticized it for not being good enough, saying that it could have been better. A critical question not answered by the evidence is "How good should it have been;" or, put another way, "Exactly what was the risk which Appellant should have foreseen and prevented?" Respondent has taken the position that Appellant should have devised a secondary system which would have guaranteed Respondent's safety. Appellant submits that it cannot be held liable unless the safety system in place is proven to be unreasonable under the

circumstances. The Court system should not impose upon Appellant the unreasonable burden of guaranteeing a worker's safety regardless of whatever unexplained occurrence caused the machine to partially tilt and the sports utility vehicle to slide down the forks. While it might be reasonable to say Appellant should have foreseen a "loader failure" and guarded against that, it is an entirely different matter to say Appellant must have taken steps to protect against an unanticipated misuse of the loader or other unknown, unanticipated cause. The loader's 15,000 pound downward thrust capability and the forks' simultaneous tilt capability are not hazards one should reasonably expect in this situation. Appellant submits that is not a hazard one should have to design a secondary safety system which could guarantee that no harm could result from such misuse.

"A negligent act or omission is a proximate cause of injury if, in a natural and continuing sequence of events, it produces the injury, and without it, the injury would not have occurred." Shepard v. South Carolina Department of Corrections, 299 S.C. 370, 385 S.E.2d 35 (Ct. App. 1989). Where the injury complained of is not reasonably foreseeable, there is no liability. Woody v. South Carolina Power Co., 202 S.C. 73, 24 S.E.2d 121 (1943). One is not charged with foreseeing that which is unpredictable or which would not be expected to happen as a natural and probable consequence of the Defendant's negligent act, id. "Foreseeability is to be judged from the perspective of the Defendant at the time of the negligent act, not after the injury has occurred. Shepard v. South Carolina Department of Corrections, supra." Crolley v. Hutchins, 300 S.C. 355, 387 S.E.2d 716 (1989).

Under the law, the Respondent, Jerry Hogan, had the burden of presenting sufficient evidence from which a jury could reasonably infer (without resorting to conjecture or

speculation) that his injuries were caused by a specific act or omission of the Appellant. Respondent must prove Appellant had either created a dangerous condition or that Appellant had knowledge of a dangerous condition and failed to correct it. As applied to the specific facts of this case, Mr. Hogan had the burden of establishing evidence that some negligence of the Appellant caused his injuries, without which the injuries would not have occurred.

At trial, Mr. Hogan relied purely upon conjecture and speculation and failed to put forth any evidence from which a jury could determine or infer what, besides some action of his own, caused the front-end loader to "release" its holding of the load of the sports utility vehicle up in the air which ultimately resulted in an injury to Mr. Hogan.

The evidence in the record makes it clear that there were two distinct "safety systems" utilized at Appellant's salvage yard to ensure safety of anyone who was working under a load. The first was the loader itself. The evidence is clear that the loader was more than capable of holding up the weight of the sports utility vehicle. In fact, it could hold the weight of approximately three sports utility vehicles in the air indefinitely. There is no contest about this.

Mr. Hogan has offered no explanation as to why the load was released by the sports utility vehicle. The uncontradicted evidence in the record is that there was no "failure" of the front-end loader which caused the load to be released. (R p. 201 L. 6 - 7, p. 205 L. 3 - 4). As Defendant's expert, Chad Reeves, testified, the only other option was that someone would have had to have worked the tilt handles on the front-end loader and that any "failure" there would have happened instantly. (R p. 201 L. 10 - 13).

Since there was absolutely no failure proven on the part of the front-end loader, there is no proof that any "hazard" actually happened in this case and which could have reasonably been

guarded against or which should have been foreseen by the Appellant. No one who testified had any idea why the forks of the front-end loader failed to hold the load.

"Proximate cause requires proof of causation in fact and legal cause." Rife v. Hitachi Const. Mach. Co., Ltd., 363 S.C. 209, 215, 609 S.E.2d 565, 569 (Ct. App. 2005) "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence." Rife v. Hitachi Const. Mach. Co., Ltd., 363 S.C. 209, 609 S.E.2d 565 (Ct. App. 2005). "Legal cause is proved by establishing foreseeability."

The primary safety mechanism is the loader's unquestioned ability to adequately and safely hold the load of the sports utility vehicle. It did not fail. There is no explanation in the evidence for how this accident occurred. There is only conjecture and speculation and that is not enough to support a finding against the Appellant herein of negligence. Mr. Hogan must prove something that the Appellant failed to do that he should have done or something that he did and should not have done which caused Respondent's injuries. Otherwise, Appellant should not be held at fault.

Respondent's theory seems to be the very definition of *res ipsa loquitur*. "Something happened (we don't know what), therefore the secondary system failed, therefore the Defendant must be liable." This type of evidence is not enough to establish liability in the State of South Carolina. There was no contention at trial that the front-end loader had ever failed before the accident or after the accident. There was no physical evidence that it failed at the time of this accident. According to Chad Reeves, the only expert regarding the front end loader who testified at trial, there would necessarily have been evidence of such a failure. (R p. 201 L. 6 - 13).

Natasha Smith, an independent witness, testified that she heard some machinery moving

around in the salvage yard while Mr. Hogan was in the salvage yard. Mr. James Corder, the only other employee of Appellant who was at the salvage yard, was in the shop talking with Natasha and her mother. Even Plaintiff's own expert witness agreed that, based upon the evidence available to him, it was most likely that Mr. Hogan was the one who set the sports utility vehicle up to be worked on. (R p. 157 L. 7 - 12).

Some times accidents occur for which no one can or should be blamed. The fact of injury, in and of itself, even absent explanation, does not necessarily mean that a party had been guilty of negligence. Kapuschinsky v. United States of America, 248 F.Supp. 732 (D.S.C. 1966) (quoting State of Louisiana Ex Rel. Francis v. Resweber, 329 U.S. 459, 462, 67 S.CT. 374, 375, 91 L.Ed. 422) (internal citations omitted).

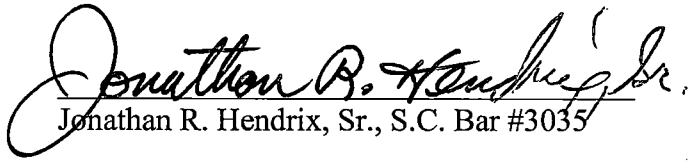
The Plaintiff's damages were substantial. Perhaps for that reason, the jury in this case overlooked the glaring lack of evidence as to what started the chain of events resulting in Mr. Hogan's injuries and decided that Appellant should be blamed.

Appellant submits that such is not a proper basis for imposing liability under the laws of the State of South Carolina. Appellant submits that, from the point of view of the Appellant, there can be no foreseeability or liability for an injury resulting from a completely unexplained "failure" of a properly working front-end loader to safely hold up the sports utility vehicle, allegedly causing the secondary safety system to come into play and fail. What, exactly, was the particular risk Appellant should have guarded against? Since this unexplained event could not be foreseeable on the part of the Appellant at the time that the Appellant acted in putting this system into effect, there can be no liability under the laws of this State.

CONCLUSION

For the reasons sited herein above, the Appellant respectfully requests that the court reverse and set aside the verdict and judgment appealed from and to remand the case to the trial court with the instructions to enter judgment in favor of the Appellant, Corder & Sons, Inc.

Respectfully submitted,



Jonathan R. Hendrix, Sr., S.C. Bar #3035

HENDRIX & STEIGNER
1622 Sunset Boulevard
West Columbia, South Carolina 29169
(803) 200-2970

Attorneys for Appellant
Corder & Sons, Inc.

Lexington, South Carolina
August 23, 2016.