THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Appellate Case No. 2016-000713

Do Yeon Kim, v. Appellant,

County of Richland, Richland County Sheriff's Department and Leon Lott in his Official Capacity as Richland County Sheriff, Respondents,

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FINAL BRIEF OF APPELLANT

January 16, 2017

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STATEMENT OF CASE

Do Kim was injured and his pick-up truck was damaged when a Richland County Sheriff's Deputy ran a red traffic light and slammed into him. ROA, pp. 9-12; ROA pp. 132-

152. At trial, the deputy admitted he had a red traffic light and Mr. Kim had a green traffic light. ROA, pp. 295-296. His primary defense to liability for the wreck was in the application of S.C. Code Ann. § 56-5-760(A), which allows emergency vehicles to run red traffic lights in limited circumstances. For S.C. Code Ann. § 56-5-760(A) to apply the emergency vehicle must be using its lights and sirens and must be responding to an emergency.

The evidence and testimony at trial was contradictory as to whether Deputy Proffitt had his lights and siren on when he ran the red light and collided with Mr. Kim. Mr. Kim testified the deputy did not have his lights and sirens on. ROA, pp. 132-133. Additionally, he offered evidence and testimony that showed that anytime the deputy turns on his lights and siren, it automatically turns on a dash cam video/audio recording in the deputy's patrol car. ROA, pp. 294-296. The dash cam video would have shown the wreck in this case. ROA, pp. 294-296. However, Respondent's did not produce this video because they claimed the dash cam was not working at the time of the wreck even though it was working at the beginning Deputy Proffitt's shift, a few hours before the wreck. ROA, pp. 294-296.

Deputy Proffitt testified he had his lights and siren on. ROA, pp. 265-266. Another deputy testified to this as well. ROA, pp. 350-353. This testimony was to be contradicted by an independent witness, Sunny Fain, who was following Mr. Kim's pick-up truck at the time of the wreck. ROA, pp. 95-105. Ms. Fain's identity was not learned until Mr. Kim's deposition that was taken twenty-one (21) days prior to trial. ROA, pp. 95-105. Within a week of Mr. Kim's deposition and a full fourteen (14) days before trial, Appellant's Counsel supplemented discovery responses and provided Respondent's Counsel with Ms. Fain's contact information and telephone number. ROA, pp. 504-511; 95-105.

Prior to trial, Respondent's Counsel called Ms. Fain and interviewed her by telephone about what happened in the wreck. ROA, pp. 95-105. At no time prior to trial did Respondent's Counsel seek to depose Ms. Fain. ROA, pp. 95-105. Nor did Respondent's Counsel ask that the case be continued so he could depose Ms. Fain. ROA, pp. 95-105. At trial, Respondent moved to exclude Ms. Fain's testimony altogether. ROA, pp. 95-105. Without reciting or considering the relevant factors for exclusion articulated in Jumper v. Hawkins, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001), the trial court excluded Ms. Fain's testimony stating:

> THE COURT: All right. My ruling is this. I'm going to disallow the two that came in late, the two that you just go, Mr. Garfield.
> And, obviously, this case is two years old at least. Filed in October of 2014, so it's a year and – year and four or five months old – year and three months old.
> All right. I think you have to comply with, supplement your answers to interrogatories, and I'm going to disallow Ms. Fain to testify – the lateness of the hour, particularly with the language situation, and I'm going to exclude that witness.

ROA, p. 105.

The trial court's ruling also applied to evidence of additional medical bills and expenses the Appellant incurred between the time he originally answered Respondent's interrogatories and the time of trial. He supplemented his discovery the day after his deposition (twenty (20) days before trial) and again on January 6, 2016, fourteen (14) days before trial. ROA, pp. 476-482; 483-486; 504-511; 512-514; 95-105.

The trial court did not apply the same standard to a witness Respondent called but who Respondent never identified until the middle of trial. Specifically, on the second day of trial, Respondent called Leon Lott to testify. ROA, pp. 334-335 & 370. Lott had never been disclosed, despite interrogatories requesting the identity and expected testimony of all witnesses. ROA, pp. 334-335; 492-499; 500-503. Nevertheless, the trial court allowed him to testify even

though his appearance at the second day of trial was a complete surprise to Appellant and his attorneys. ROA, pp. 334-335.

After the trial court excluded Sunny Fain from testifying, Appellant sought to elicit other testimony and evidence that showed two things. First, that Respondent's deputy was at fault at for the wreck and not Mr. Kim. Second, that S.C. Code Ann. § 56-5-760(A) did not apply because Deputy Proffitt was not responding to an emergency which is a prerequisite for application of S.C. Code Ann. § 56-5-760(A).

As to fault for the wreck, the South Carolina Highway Patrol performed an investigation. ROA, pp. 278-293. This investigation is a statutory mandate in South Carolina per S.C. Code Ann. §56-5-765 whenever a law enforcement agency is involved in a wreck. As part of the statutory mandate to conduct an investigation, S.C. Code Ann. §56-5-765 also mandates that a written report be generated. The report stated Respondent contributed to the wreck and Appellant did not contribute to the wreck. ROA, pp. 278-293. At trial, Appellant sought to elicit testimony regarding the contents of this report but the trial court disallowed this evidence. ROA, pp. 278-293.

As to the second point, application (or lack thereof) of S.C. Code Ann. § 56-5-760(A) the undisputed testimony at trial was that Deputy Proffitt was responding to a request for backup assistance from another deputy when he ran the red light and injured the Plaintiff. ROA, pp. 201-209. The deputy who called for backup, Kristin Boyles, testified that she requested additional officers to respond to a suspicious vehicle stop. ROA, pp. 201-209. At no time did she ever indicate that she was threatened in any way or that an emergency existed. ROA, pp. 201-209. Rather, she simply wanted another officer to assist her since there were two occupants in the vehicle she pulled over and both were physically bigger than she was. ROA, pp. 201-209.

Three officers responded to Deputy Boyles request for backup, Weaver, Proffitt and Taylor. ROA, pp. 210-238, 256-306, 336-369. Each of the three deputies who responded testified that the Sheriff's Department uses a three tiered system in responding to calls and requests. ROA, pp. 210-238, 256-306, 336-369. Code 1 is merely a request that is not urgent or emergent. ROA, pp. 210-238, 256-306, 336-369. Code 1 does not require an officer to use any kind of lights or siren because it is not urgent or emergent. ROA, pp. 210-238, 256-306, 336-369. Code 2 is urgent but not emergent. ROA p. 222 & 345. It allows officers to use emergency flashers but not audible sirens or the blue lights on the top of their cars. Trial Transcript, 283-285. Code 3 is emergent. ROA, p. 222. In responding to Code 3 situations, officers use their lights and sirens. ROA, p. 222. While the officers who testified were somewhat contradictory in whether an initial request for backup at a traffic stop was a Code 2 or a Code 3, the bulk of their testimony suggested it was a Code 3 even if there was no actual emergency in the initial call or request for backup. ROA, pp. 210-238, 256-306, 336-369.

Of the three officers who responded to Deputy Boyles request for backup at a suspicious traffic stop, Deputy Weaver was closest and was the first officer to arrive. ROA, pp. 210-238. Once Deputy Boyles heard Deputy Weaver's lights and sirens, she testified she called off the request for additional backup by calling a "signal 18." ROA, p. 204. "And signal 18 is actually basically saying that I am okay." ROA, p. 204. In response to this "signal 18" and "basically saying that I am okay" Deputy Weaver turned off his lights and sirens because the situation was now downgraded from an alleged emergency Code 3 to a non-emergent Code 2. ROA, p. 219. He passed through intersection on a green light and without incident. ROA, p. 219.

Another officer who responded, Deputy Taylor, testified that he was running a Code 2 the entire time. ROA, p. 361. He described a Code 3 as applying to "officer in trouble,

burglaries, home invasions, active assaults, fights in progress. Those are our code three calls – blue lights and sirens." ROA, p. 348. He did not list backup for suspicious traffic stops as a Code 3 and in fact he was not running a Code 3 in responding to Deputy Boyles request for backup. ROA p. 348 & 361. He also testified that once a Signal 18 is made, officers are trained to "kinda of slow it down" and "downgrade our response to a lesser grade response." ROA, pp. 341-342.

Deputy Proffitt did not "kinda of slow it down" or "downgrade [his] response to a lesser grade response" once Deputy Boyles radioed "Signal 18 basically okay for now." ROA, p. 204; 132-138; 261-277; and 347-342. Instead, he ran through the red traffic light because he claimed he did not hear Deputy Boyles' Signal 18. ROA, p. 277.

Following the close of Respondent's case, Appellant moved for a directed verdict on liability. ROA, pp. 386-388. Since the un-contradicted testimony at trial was that Deputy Proffitt was not responding to an emergency when he ran the red traffic light, S.C. Code Ann. § 56-5-760(A) did not apply. ROA, pp. 386-388. Moreover, Respondent's deputy was negligent *per se* in running the traffic light and liability was clear based on S.C. Code Ann. §56-5-970 and Miller v. Ferrellgas, 392 S.C. 295, 709 S.E.2d 616 (2011). ROA, pp. 386-388. The trial court denied this motion and charged the jury on application of S.C. Code Ann. § 56-5-760(A). ROA, p. 388.

After several hours of deliberation, the jury returned a verdict in favor of the Appellant and awarded the Appellant $1,500 in damages. ROA, pp. 456-457; 515. The jury awarded Respondents no money. ROA, pp. 456-457; 515. The jury apportioned liability at 50/50. ROA, pp. 456-457. At post trial motions, the trial court granted both parties additur motions. ROA, pp. 470-474; 5; 7. The trial court awarded Appellant the cost of repair but no money for personal

injuries and awarded Respondent its property damage claimed at trial. ROA, pp. 470-474; 5; 7. This appeal followed.

ARGUMENT

I. THE TRIAL COURT ERRED IN EXCLUDING A WITNESS FROM TESTIFYING WHO SAW THE WRECK HAPPEN BECAUSE SHE WAS DISCLOSED FOURTEEN (14) DAYS PRIOR TO TRIAL.

The trial court excluded Sunny Fain from testifying because she was disclosed fourteen (14) days prior to trial. ROA, pp.95-105. In making this ruling, the trial court focused only on the fact that Ms. Fain was identified as a witness fourteen (14) prior to trial and did not consider the other relevant factors articulated by this Court in Jumper v. Hawkins, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001). Additionally, the trial court excluded the only independent witness to the wreck who was not a party or employee of one of the parties which deprived the jury of critical information on fault and liability. This was reservable error that should be corrected by this Court.

A. The trial court was without discretion to exclude Ms. Fain as a witness because she was timely and properly disclosed in discovery once her name and contact information were known.

Ordinarily, the decision about whether to allow a witness to testify who was not timely disclosed in discovery rests in the discretion of the trial court. However, a trial court is only vested with that discretionary authority when a witness is not timely and properly disclosed. *See generally* Arthur v. Sexton Dental Clinic, 368 S.C. 326, 628 S.E.2d 894 (Ct. App. 2006) and In the Matter of Estate of Hendricks, Opinion No. 2008-UP-320 (Ct. App. 2008). As repeatedly noted by this Court, before a witness can be excluded from testifying because they were not

timely and properly disclosed, "a threshold matter" is that they were not, in fact, timely and properly disclosed. Arthur *supra* and In the Matter of Estate of Hendricks *supra*. In other words, before invoking witness exclusion as a sanction for discovery abuse, discovery abuse must have occurred. Such was not the case here because Sunny Fain was disclosed to Respondent as soon as she was identified as a witness and her contact information was known to Appellant's Counsel. ROA, pp.95-105.

Admittedly, it is not ideal that a fact witness is identified fourteen (14) days prior to trial. However, of more significance is the fact that Respondent never sought to depose Ms. Fain prior to trial. ROA, pp.95-105. That is probably because Respondent's counsel personally spoke with Ms. Fain and interviewed her about what she witnessed days before trial. ROA, pp.95-105. Moreover, Respondent's counsel never sought to continue the case in order to depose Ms. Fain or garner additional information prior to trial. ROA, pp.95-105.

Ironically, it was the trial judge himself who fashioned an appropriate remedy by suggesting that a short recess be taken so that Respondent's counsel could depose Ms. Fain. ROA, p. 103. Respondent's counsel seemed amenable to this solution and there was no objection by Appellant's counsel. ROA, p. 103. Nonetheless and without a "threshold" finding of any discovery abuse, the trial court simply excluded Ms. Fain's testimony altogether. This ruling should now be reserved by this Court.

B. Even if the trial court was vested with the discretion to exclude Ms. Fain the trial court abused its discretion by failing to appropriately consider the five (5) factors outlined by this Court in Jumper v. Hawkins, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001).

Even if the trial court were vested with the authority to exclude Ms. Fain as a sanction for discovery abuse, the trial court abused its discretion by failing to properly and adequately consider the five (5) factors articulated by this Court in Jumper v. Hawkins, 348 S.C. 142, 558 S.E.2d 911 (Ct. App. 2001). As this Court has noted before: "In deciding what sanction to impose, the circuit court should weigh the nature of the interrogatories, the discovery posture of the case, willfulness and the degree of prejudice." Fields v. Regional Med. Center Orangeburg, 354 S.C. 445, 581 S.E.2d 489 (Ct. App. 2003)(*citations omitted*). "A circuit court's failure to exercise discretion is itself an abuse of discretion." *Id.* Articulated another way by the Supreme Court: "When the trial judge is vested with discretion, but his ruling reveals no discretion was, in fact, exercised, an error of law has occurred." Callen v. Callen, 365 S.C. 618, 620 S.E.2d 59 (2005)(*quoting* Fontaine v. Peitz, 291 S.C. 536, 538, 354 S.E.2d 565, 566 (1987).

The Supreme Court has held that "the sanction of exclusion of a witness should never be lightly invoked." Barnette v. Adams Bros. Logging, Inc., 355 S.C. 588, 592, 586 S.E.2d 572 (2003)(*quoting* Jackson v. H&S Oil Co., Inc., 263 S.C. 407, 411, 211 S.E.2d 223, 225 (1975). Put another way: "The exclusion of a witness is a sanction under Rule 37, SCRCP, which should never be lightly invoked." Orlando v. Boyd, 320 S.C. 509, 511, 466 S.E.2d 353, 355 (1995). To assist lower courts in not "lightly invoking" the witness exclusion rule, this Court articulate five factors that the trial court should consider before excluding a witness:

(1) the type of witness involved;

(2) the content of the evidence emanating from the proffered witness;

(3) the nature of the failure or neglect or refusal to furnish the witness' name;

(4) the degree of surprise to the other party, including prior knowledge of the name of the witness; and

(5) the prejudice to the opposing party.

Jumper v. Hawkins, 348 S.C. 142, 152, 558 S.E.2d 911 (Ct. App. 2001). Since Jumper was published, the Supreme Court has explicitly recognized these five (5) factors as a correct statement of the law in South Carolina. *See* Barnette *supra*. As noted by this Court recently: "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion." Teseniar v. Prof. Plastering & Stucco, Inc., 407 S.C. 83, 754 S.E.2d 267, 273 (Ct. App. 2014)(*citations omitted*). While the trial court is not required to specifically mention the Jumper factors to consider them, a review of the record on appeal compared with applicable case law shows how the trial court failed to consider and/or misapplied the Jumper factors.

These first two factors were ascertained by the trial court but in ruling the trial court simply ignored the importance of Ms. Fain's testimony. Ms. Fain witnessed the wreck at issue. ROA, pp.95-105. She was driving behind Appellant's vehicle at the time of the wreck and she was expected to testify that Deputy Proffitt did not have his lights and siren on at the time he ran a red traffic light and collided with Mr. Kim's pick-up truck. ROA, pp.95-105. Her eye-witness testimony was crucial to the jury's understanding because one of the disputed factual issues at trial was whether Deputy Proffitt had his lights and siren on, a prerequisite for application of S.C. Code Ann. § 56-5-760(A). Mr. Kim testified Proffitt did not have his lights and siren on. ROA, p. 135. Deputy Proffitt testified he did have his lights and sirens on. ROA, pp. 263-264. At the time of the wreck, Ms. Fain was following the Appellant and she was expected to testify that Proffitt did not have his lights and siren on. ROA, pp.95-105. As a witness who was not a party to the lawsuit and who was not employed by a party to the lawsuit, Ms. Fain's testimony

was important for the jury to consider. However, nothing in the record indicates the trial court ever considered the importance of Ms. Fain's testimony. ROA, pp.95-105.

Instead, the trial court focused on the third Jumper factor – "the nature of the failure or neglect or refusal to furnish the witness's name." In so doing, however, the trial court misapplied the law in considering this factor. In this case, the trial court suggested Appellant's counsel should have known of Ms. Fain sooner than he did. ROA, p. 105. Based on what the trial court concluded should have been known, the trial court excluded Ms. Fain's testimony altogether. ROA, p. 105.

> THE COURT: All right. My ruling is this. I'm going to disallow the two that came in late, the two that you just go, Mr. Garfield.
> And, obviously, this case is two years old at least. Filed in October of 2014, so it's a year and – year and four or five months old – year and three months old.
> All right. I think you have to comply with, supplement your answers to interrogatories, and I'm going to disallow Ms. Fain to testify – the lateness of the hour, particularly with the language situation, and I'm going to exclude that witness.

ROA, p. 105. Appellate case law, however, does not support the trial court's decision in this case. Specifically in Fields *supra* this Court held: "Failure to disclose a witness in answer to an interrogatory when only discovered several days before trial does not show willfulness." *See also* Laney v. Hefley, 262 S.C. 54, 202 S.E.2d 12 (1974)(suggesting witness should not be excluded when their name was only learned days before trial) and Orlando v. Boyd, 320 S.C. 509, 466 S.E.2d 353 (1995)(reversing trial court for excluding a witness' testimony when the identity of the witness was not known to counsel even though the trial court accused the attorney "lax efforts" in discovering the witness' identity).

The trial transcript also does not demonstrate that the trial court properly considered the fourth and fifth factors as articulated by this Court in Jumper: The degree of surprise to the party and the prejudice to the other party. ROA, pp.95-105. Had the trial court properly considered

and weighed these factors, it could not have properly excluded Ms. Fain from testifying. That is because there was no unfair surprise to Respondent because Respondent learned Ms. Fain witnessed the wreck at the same time Appellant's counsel learned that Ms. Fain witnessed the wreck - at Appellant's deposition that was held on December 30, 2015, twenty-one (21) days before trial started. ROA, pp.95-105. After learning Ms. Fain witnessed the wreck, Appellant's Counsel tracked down her cell phone number and supplemented discovery responses. ROA, pp.95-105; 512-514. Nothing in the trial court's ruling indicates the trial court weighed this factor. However, in Laney *supra* the Supreme Court held that this should be a "major consideration" for the trial court. In affirming the trial court's ruling that allowed a previously undisclosed witness from testifying the Supreme Court wrote: "The fact that the opposing party has independent knowledge of the existence of such a witness prior to trial is a major consideration..." Laney *supra*. Nothing in the trial transcript indicates the trial judge even considered this factor much less gave it "major consideration" according to the Supreme Court's teachings in Laney *supra*.

The trial court also failed to consider the fact that Respondent demonstrated no prejudice by the fact that Ms. Fain was disclosed two (2) weeks prior to trial. Respondent's Counsel spoke with Ms. Fain by telephone prior to trial. ROA, p. 102. He never noticed her deposition or sought to have the case continued so he could be depose her. ROA, pp.95-105. The first time her deposition was suggested was by the trial court when the trial judge initially suggested she be deposed before she testified at trial. ROA, p. 103. But, the record is simply devoid of any finding of unfair prejudice. This, in and of itself, is reversible error. As specifically stated by the Supreme Court:

> [T]he trial court made no specific finding of prejudice to the respondents, other than finding the late disclosure would necessitate further discovery. Moreover, the trial court advised the parties that there had been no disobedience of any order of the court and that it had not imposed any sanctions. Under the facts presented, we find the exclusion of plaintiffs' experts was not warranted. Accordingly, the trial court's exclusion of plaintiffs' experts is reversed.

Barnette *supra*. The same is true in this case: "The trial court made no specific finding of prejudice" and "there had been no disobedience of any order of the court." Just as the Supreme Court reversed the trial court's exclusion in Barnette, this Court should reverse the trial court's exclusion of Ms. Fain and remand this case for a new trial.

II. THE TRIAL COURT ERRED IN ALLOWING RESPONDENT TO CALL LEON LOTT AS A WITNESS BECAUSE LOTT WAS NEVER DISCLOSED AS A WITNESS PRIOR TO TRIAL AND THE TRIAL COURT FAILED TO MAKE A RULING BASED ON THE JUMPER FACTORS.

While the trial court disqualified Sunny Fain from testifying because she was not listed as a witness until fourteen (14) days before trial, the trial court allowed Respondent to call Leon Lott as a witness even though Lott had never been disclosed as a witness despite specific interrogatories. ROA, p. 333-334. In so doing, the trial court committed reversible error because the trial court did not exercise any discretion and determine if Lott's testimony should be allowed using the five (5) factors articulated by this Court in Jumper *supra*.

As previously held by this Court: "A failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion." Teseniar *supra*. Even a cursory review of the trial transcript demonstrates that the trial court failed to analyze the issue by considering the Jumper factors. Instead, the trial court ruled that even though Lott had not been disclosed in response to specific interrogatories: "I don't think he has to be named. He's a

party. He certainly can testify in his own defense." ROA, p. 334. The trial court's conclusion is erroneous, wrong and amounts to reversible error for multiple reasons.

First, there is no rule of procedure, case law or legal authority supporting the trial court's conclusion that a named party does not have to be listed in response to specific interrogatories asking for witness names and a summation of their expected testimony. This case demonstrates why such a rule of procedure and legal authority does not exist. Prior to being called as a witness, Lott was a figurehead and legal name to the Sheriff's Department. The Sheriff's Department was originally named as a Defendant but Respondent sought to dismiss this entity because it claimed the Sheriff's Department was not the correct legal entity. ROA, p. 25-27; 1-4. Instead, it sought to substitute Lott for the Sheriff's Department. ROA, pp. 1-4. In short, Lott was a named party only because he was the proper legal entity. He did not witness the wreck at issue, personally investigate the wreck or seemingly have involvement in this case until brought to trial on the second day of testimony. ROA, pp. 370-384. Irrespective on why he was brought to trial to testify, he was simply not disclosed as a witness and there is simply no legal authority supporting the trial court's conclusion that a named party can automatically testify even if they are not disclosed in response to discovery.

Just as importantly, the fact that Lott was a party and "can testify in his own defense" misses the pertinent legal issue altogether. The issue is not whether or not Lott has a right to testify in his own defense but whether that right can be exercised when he was never disclosed prior to trial. The same standard that the trial court used in excluding Sunny Fain (erroneous as that standard was), it did not apply the next day when Respondent sought to call Leon Lott as a witness.

The case law in South Carolina makes clear that once a party seeks to call an undisclosed witness at trial, the trial court must determine whether the witness' testimony should be allowed using the proper legal standard and proper legal factors. That standard and those factors are found in this Court's opinion in Jumper and throughout other case law. In this case, the trial court never utilized those factors in determining whether Lott should be allowed to testify.

In Callen v. Callen, 365 S.C. 618, 620 S.E.2d 59, 64 (2005) the Supreme Court reversed the trial court's decision on the ground that the trial court had not used the proper legal standard and the Jumper factors in determining whether two (2) surprise witnesses not disclosed in interrogatory responses should be allowed to testify. According to the Supreme Court, the trial court "committed reversible error in admitting the testimonies of allegedly surprise witnesses without first making the required inquiry and exercising discretion." In the case now before this Court, the trial court committed the same reversible error the Supreme Court corrected in Callen. Accordingly, this Court should reverse the trial court on this point and the case should be remanded for a new trial.

III. THE TRIAL COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF APPELLANT'S ONGOING MEDICAL CARE AND TREATMENT THAT WAS DISCLOSED AT LEAST FOURTEEN DAYS PRIOR TO TRIAL.

At the same time the trial court ruled Appellant could not call a witness to testify who was disclosed fourteen (14) days prior to trial, it also ruled Appellant could not produce evidence of ongoing medical care and treatment since his initial discovery responses. ROA, pp.95-105. This was an error of law that should be reversed by this Court.

As this Court recently noted, before a discovery sanction should be imposed, a court must first "determine whether a discovery violation occurred..." Holly Woods Ass'n of Residence

Owners v. Hiller, 392 S.C. 172, 186, 708 S.E.2d 787, 795 (Ct. App. 2011). A brief recitation of the chronology of discovery shows no discovery abuse which warranted a sanction. Appellant initially responded to written discovery on April 6, 2016. ROA, pp. 476-482. In his answers, he listed his medical providers, medical bills and evidence of damages. ROA, pp. 476-482. Thereafter, Appellant received additional medical care and treatment from the same providers. This additional treatment increased the total amount of his medical specials. When Respondent's Counsel deposed Appellant on December 30, 2015, Appellant testified about the ongoing treatment. Based on this testimony, Appellant's Counsel requested updated medical records and bills. He supplemented Appellant's responses to written discovery on December 31, 2015 and again on January 6, 2016. ROA, pp. 504-511; 512-514. The last supplement to written discovery was fourteen (14) days prior to trial. ROA, pp. 95-105. This was simply not abusive discovery that warranted any sanction, much less the harsh sanction of excluding evidence of Appellant's damages.

As this Court wrote, discovery is "[t]o prevent a trial from becoming a surprise or a guessing game for either party, discovery involves full and fair disclosure. Essentially, the rights of discovery provided by the rules give the trial lawyer the means to prepare for trial..." Holly Woods, *supra*. Nothing in the record shows Respondent wasn't given a fair opportunity to prepare for trial based on this evidence. As noted above, the evidence amounted to additional records and additional bills from the same medical providers who were previously disclosed months before trial. Just as importantly, a review the trial transcript, shows the thrust of Respondent's trial strategy was to deny liability for the wreck. Toward that end, Respondent called five (5) witnesses but they never sought to depose any of the medical providers Appellant

saw, nor did they offer any medical testimony at trial which tended to show that Appellant was not injured or not seriously injured.

Even assuming the disclosure of additional medical records and medical bills rose to the level of discovery abuse, the trial court was still obligated to "weigh the nature of the interrogatories, the discovery posture of the case, willfulness, and the degree of prejudice" before imposing a sanction. Samples v. Mitchell, 329 S.C. 105, 495 S.E.2d 213 (Ct. App. 1997). Even a cursory review of the trial transcript shows these factors were not considered by the trial court. ROA, pp. 95-105. While discovery sanctions are ordinarily in the discretionary judgment of the trial court, a failure to weigh the required factors demonstrates a failure to exercise discretion and amounts to an abuse of discretion. Samples, *supra.*

The exclusion of this evidence was prejudicial to the Appellant. Without evidence of ongoing medical care and treatment, the jury could not understand or appreciate the extent of Appellant's injuries. Even the trial judge minimized Appellant's injuries based on the fact that trial judge himself excluded evidence of additional and ongoing medical care and treatment. At post trial motions, the trial judge repeatedly remarked and commented on a lack of injuries and damages.

> [W]hat we had was a little old fender-bender wreck case. The guy, I think, went to the hospital – doctor one time, had some property damage…
> Well, they could have very well found that he did not suffer from any pain and – did not sustain and pain and suffering, that medical bills were necessary and reasonable, but that he wasn't hurt. And I can sort of see that…I don't know that the verdict screams that it's inadequate for his very minor injuries that were treated by a chiropractor once or twice…

ROA p. 465; 467. Ironically, it was the trial judge whose evidentiary rulings limited the evidence of injuries and damages the jury was allowed to hear.

This Court should reserve the trial court's ruling excluding this evidence. Appellant's Counsel disclosed and supplemented discovery responses as soon as he learned of ongoing treatment and received additional bills and records from the medical providers. This information was provided to Respondent's Counsel two weeks before trial. That is hardly the kind of surprise warranting the harsh sanction of evidence exclusion.

IV. THE TRIAL COURT ERRED IN DISALLOWING APPELLANT FROM INTRODUCING AND ELICITING TESTIMONY ABOUT THE SUBSTANCE OF A TRAFFIC ACCIDENT REPORT WHICH CITED RESPONDENT AT FAULT FOR THE WRECK.

At trial, Appellant attempted to introduce and elicit testimony about the substance of a traffic accident report that found Respondent contributed to and caused the wreck and Appellant did not contribute to or cause the wreck. ROA, pp. 278-293. The trial court disallowed this evidence and in effect ruled this evidence was inadmissible pursuant to Rule 803(8), SCRE and S.C. Code Ann. § 56-5-1290. This was plain error because Rule 803(8), SCRE and S.C. Code Ann. § 56-5-1290 only prohibit the introduction of accident reports made pursuant to S.C. Code Ann. §§ 56-5-1260 and 56-5-1280. The accident report at issue was generated pursuant to a different code section, S.C. Code Ann. § 56-5-765. Neither Rule 803(8), SCRE or S.C. Code Ann. § 56-5-1290 mandates that a traffic accident report generated pursuant to this code section be excluded from evidence. The trial court erred in effectively reading into Rule 803(8), SCRE and S.C. Code Ann. § 56-5-1290 a third statute section which is simply not in either the Rule of Evidence or the statute itself. This Court should correct that error.

The general rule is that most traffic accident reports must be excluded at trial pursuant to Rule 803(8), SCRE and S.C. Code Ann. § 56-5-1290. That is because most traffic accident

reports are made pursuant to one of two code sections: S.C. Code Ann. §§ 56-5-1260 and 56-5-1280. These code sections pertain to accidents between private citizens and they require an investigation and a corresponding accident report. In adopting Rule 803(8), SCRE and S.C. Code Ann. § 56-5-1290 the Legislature made the decision that traffic accident reports generated pursuant to S.C. Code Ann. §§ 56-5-1260 and 56-5-1280 be excluded from evidence.

However, the Legislature went a step further in the investigation that must be conducted when a law enforcement vehicle is involved in a wreck and the report that must be generated when a law enforcement vehicle is involved in a wreck. According to S.C. Code Ann. § 56-5-765(A):

> the State Highway Patrol must investigate the collision and must file a report with findings on whether the agency motor vehicle or motorcycle was operated properly within the guidelines of the appropriate statutes and regulations.

Thus, when law enforcement is involved the Highway Patrol must investigate and a report must be generated to determine if the agency being investigated by the Highway Patrol was acting properly. No such requirement is found in S.C. Code Ann. §§ 56-5-1260 and 56-5-1280. Subsection F of the statute goes on to provide an accident investigation:

> must include a field investigation to identify possible witnesses, including possible witnesses not involved in the traffic collision, but who may have witnessed the traffic collision from a vantage point other than the collision site.

As with subsection A, this requirement is conspicuously omitted S.C. Code Ann. §§ 56-5-1260 and 56-5-1280. This is because S.C. Code Ann. §§ 56-5-1260 and 56-5-1280 and § 56-5-765 are different statutes which require different information in the reports that are generated from the investigations.

In adopting Rule 803(8), SCRE and S.C. Code Ann. § 56-5-1290 the Legislature made the conscious decision that reports generated from S.C. Code Ann. §§ 56-5-1260 and 56-5-1280

would not be admissible at trial. But, Rule 803(8), SCRE, and S.C. Code Ann. § 56-5-1290 are silent about reports generated pursuant to S.C. Code Ann. § 56-5-765. The Legislature knew what it was doing. If the Legislature had intended that accident reports generated pursuant to S.C. Code Ann. § 56-5-765 also be excluded from evidence the Legislature could have easily listed this section in the exclusions found in Rule 803(8), SCRE and S.C. Code Ann. § 56-5-1290. It did not. Instead, the trial court read this into the Rules of Evidence and into the Code where the Legislature specifically omitted this. This was reversible error that should be corrected by this Court.

As this Court held in State v. Sheldon, 344 S.C. 340, 543 S.E.2d 585 (2001), an accident report generated under S.C. Code Ann. § 56-5-765 was admissible at trial even when the report did not strictly comply with the mandates of the code section. This was true in Sheldon even in the criminal context where a criminal defendant is afforded additional Due Process rights that are not part of this civil action.

Respectfully, this Court should not allow the trial court to read into statutes and rules, words and phrases that are not a part of the statutes and rules themselves. There was simply no basis for the trial court disallowing questions about the accident report and these questions were critical because they showed Respondent at fault. Accordingly, this Court should reverse the trial court's ruling on this and remand the case for a new trial.

V. THE TRIAL COURT ERRED IN NOT DIRECTING A VERDICT ON LIABILITY FOR APPELLANT AND IN CHARGING THE JURY ON APPLICATION S.C. CODE ANN. § 56-5-760 BECAUSE RESPONDENT'S DEPUTY WAS NOT TRAVELLING TO AN EMERGENCY, A PREREQUISITE FOR APPLICATION OF 56-5-760.

As this Court is no doubt aware, motorists, including the police, are required to obey red traffic lights. S.C. Code Ann. §56-5-970. There are limited exceptions for police "when responding to an emergency." S.C. Code Ann. § 56-5-760(A). "When responding to an emergency...an authorized emergency vehicle...may...proceed past a red or stop signal...only when the vehicle is making use of an audible signal..." S.C. Code Ann. § 56-5-760(A)-(C). The question before the trial court and the issue now before this Court is whether Respondent illicited sufficient evidence demonstrating that its deputy was responding to an actual emergency at the time he ran a red traffic light and slammed into Appellant's pick-up truck. Respondent's deputy was not responding to an actual emergency for at least two reasons and the trial court erred in submitting this issue to the jury.

First, the un-contradicted testimony at trial was that the deputy who slammed into Respondent's truck was responding to a call for backup assistance to another deputy who made a suspicious traffic stop. ROA, pp. 201-209. At no point did the deputy who called for backup make that call as an emergency call. ROA, pp. 201-209; 219-222; and 232-233. Indeed, she would have had no reason to do so because the occupants of the vehicle she stopped did not threaten her in anyway, did not have any weapons on them and were otherwise acting normally. ROA, pp. 201-209. Deputy Boyles testified she called for back-up merely because there were two (2) occupants in the vehicle she stopped and those occupants were physically bigger than she was. ROA, pp. 201-209. However, that simply does not constitute an emergency as required under S.C. Code Ann. § 56-5-760.

Just as importantly, the deputy who slammed into Appellant's truck admitted he was not responding to an actual emergency.

Q: She said she needed assistance. But she did not say over the radio that it was an emergency, correct?

A: Had she it'd been to late.

THE COURT: I'm sorry, what?

THE WITNESS: Had she, it would have been too late?

THE COURT: Please answer the question, and then you may explain.

A: No. She never said it was an emergency.

Q: ... She never referred to this as a code three, did she?

A: No.

ROA, pp. 296-297.

The second reason that no "emergency" existed at the time Deputy Proffitt ran a red light and slammed into Respondent's truck, was because Deputy Boyles called off her request for backup and indicated she was "OK for now." ROA, p. 203. She did this because another deputy was already assisting her in the suspicious traffic stop for which she initially called for backup. ROA, pp. 203-204.

Deputy Proffitt testified that he did not hear this call. ROA, p. 297. However, what he hears and what he claims he didn't hear is not the legal standard. The legal standard set forth in S.C. Code Ann. § 56-5-760(A) is that the driver of an emergency vehicle must be "responding to an emergency call" before he/she can disregard a red traffic light. In this respect, what Proffitt claims he heard or claims he didn't hear is irrelevant because the law requires that he be "responding to an emergency call" before S.C. Code Ann. § 56-5-760(A) applies. Thus, even if this Court were to find that the initial call for backup to a suspicious traffic stop created a factual

question for the jury to resolve, the simple fact is the purported "emergency" ended once Deputy Boyle radioed that she didn't need further backup or assistance.

Nonetheless, the trial court failed to direct a verdict on this issue and charged the jury on application of S.C. Code Ann. § 56-5-760(A). This was reversible error because Defendants presented no evidence that at the time he ran the red traffic light and hit Appellant, that Deputy Proffitt was responding to an emergency. Instead, he was responding to a request for backup at a suspicious traffic stop and that request for backup had been called off by the time he entered the intersection and slammed into Mr. Kim's pick-up truck. In this regard, it is significant, that the other officers who also initially responded to Deputy Boyles request for back-up were not treating the situation as an emergency because they heard Deputy Boyles indicate that she was "okay for now." Therefore, the other two deputies turned off their sirens and they proceeded through the intersection at question while following the regular traffic lights at the intersection. One of those deputies, William Weaver, actually arrived at the intersection before Proffitt. By the time he arrived at the intersection, he was no longer using his siren because Deputy Boyles had radioed that she was "okay for now." In short, there was no emergency and without an emergency S.C. Code Ann. § 56-5-760(A) does not apply.

Without applying S.C. Code Ann. § 56-5-760(A) the case is one of clear liability because the undisputed testimony at trial is that Mr. Kim had a green traffic light when he entered the intersection and Deputy Proffitt had a red traffic light when he entered the intersection. ROA, p. 314. For this reason, the trial court should have directed a verdict for Appellant on the issue of liability and charged the jury only on proximate cause and damages.

In Miller v. Ferrellgas, 392 S.C. 295, 709 S.E.2d 616 (2011), the Supreme Court reversed a Court of Appeals opinion which overturned the trial court's directed verdict on liability in a

case with similar facts to this case. In so doing, the Supreme Court cautioned against allowing a defendant in a wreck case to effectively manufacture an issue of liability when one does not truly exist. In Miller, the at-fault driver had a stop sign but pulled into an intersection anyway because his view was obstructed. The trial court directed a verdict on liability, finding the at-fault driver was negligent as a matter of law when he pulled into the intersection. The Court of Appeals reversed the trial court. However, the Supreme Court reversed this ruling and re-instated the trial court's directed verdict on liability.

If S.C. Code Ann. § 56-5-760(A) does not apply (and it should not) this case is a simple red light, green light case. Appellant entered the intersection on a green traffic light. Mr. Kim's testimony is that the intersection was clear before he entered it and he did not see Deputy Proffitt or his vehicle until impact. ROA, pp. 132-138. Meanwhile, Deputy Proffitt acknowledged he had a red traffic light when he entered the intersection. ROA, pp.295-296. His only defense was that he was responding to a call for backup at a traffic stop and that he had his lights and siren on when he entered the intersection. The latter point, that he had his lights and siren on, was contradicted by a host of other evidence: Mr. Kim's testimony; the expected testimony of Sunny Fain that the trial court excluded; and the fact that anytime Proffitt turned his lights and siren on a video recorder or dash cam was automatically turned on but here Respondent could not produce the dash cam. Nevertheless, even if Proffitt's contradicted testimony on the issue of having his lights and siren on is believed, the simple fact remains he was not responding to an emergency and S.C. Code Ann. § 56-5-760(A) only applies if an officer is responding to an emergency. Providing backup to a traffic stop is not an emergency within the meaning of S.C. Code Ann. § 56-5-760(A). Even if this were considered an emergency or were considered by this Court to be an issue for the jury's consideration, S.C. Code Ann. § 56-5-760(A) would still

not apply because Deputy Boyles called off her request for backup assistance and indicated she was "okay for now." ROA, p. 204. Whether Proffitt willfully disregarded this radio message from Deputy Boyles or inadvertently disregarded it is irrelevant. What is relevant is that at time he ran a red traffic light, he was not responding to an emergency. For this reason, S.C. Code Ann. § 56-5-760(A) does not apply and the trial court should have directed a verdict on liability in accordance with Miller v. Ferrellgas, 392 S.C. 295, 709 S.E.2d 616 (2011).

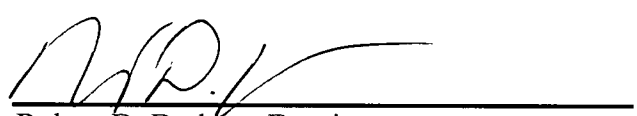
This Court should reverse the trial court and grant Appellant a new trial because S.C. Code Ann. § 56-5-760(A) does not apply and the jury should not have been charged with application of this statute. Instead, the trial court should have directed a verdict for the plaintiff on liability and charged the jury only on causation and damages but not liability.

CONCLUSION

For the reasons outlined above, this Court should issue an Order granting Appellant a new trial with specific instructions to the lower court to direct a verdict on liability in Appellant's favor. The case should be re-tried on the issues of proximate cause and damages only and Appellant should be allowed to introduce evidence of additional medical care and treatment previously excluded by the trial court.

In the alternative, this Court should issue and Order granting a new trial where Sunny Fain's testimony is allowed and Appellant is allowed to introduce evidence of additional medical care and treatment previously excluded by the trial court. If Lott is allowed to testify at a new trial, Appellant's Counsel should be given leave to depose Lott prior to re-trial.

Respectfully submitted,



January 9, 2017

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

Doyet A. Early, Circuit Court Judge

Appellate Case No. 2016-00713

Do Yeon Kim, v. Appellant,

County of Richland, Richland County Sheriff's Department and Leon Lott in his Official Capacity as Richland County Sheriff, Respondents,

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Appellant complies with Rule 211(b) of the South Carolina Appellate Court Rules. Counsel further certifies that the final brief of appellant complies with the Order of the Supreme Court of South Carolina, *Re Revised Order Concerning Personal Identifying Information and Other Sensitive Information in Appellate Court Filings,* 407 S.C. 607, 757 S.E. 2d 421 (April 15, 2014).

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