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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

ORIGINAL

D. Garrison Hill, Circuit Court Judge

Appeal Case No. 2016-000259

Corder & Sons, Inc. ..... Petitioner,

v.

Jerry Hogan. ..... Respondent,

PETITION FOR REHEARING

Jonathan R. Hendrix
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1622 Sunset Boulevard
PO Box 6398
West Columbia, SC 29171
(803) 200-2970
Attorney for Appellant

Other Counsel of Record:

Bradd W. Bunce
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Pursuant to Rules 221 and 224, SCACR, Corder & Sons, Inc. petition this Court to rehear and reconsider its ruling in Corder & Sons, Inc. v. Jerry Hogan Opinion No. 2017-UP-264 (Filed June 28, 2017) in which this Court affirmed the Circuit Court's jury verdict in favor of the Respondent on the Appeal. Petitioner contends that, in reaching its decision, this Court overlooked or misapprehended the points set forth below:

I. **This Court inappropriately found that the jury verdict below should be affirmed even though a critical link in the chain of causation (that is, why the Caterpillar front-end loader failed to hold the load when there was absolutely no evidence presented of any failure on the part of that piece of machinery), leaving to conjecture or speculation whether the misfortune suffered by Mr. Hogan was the result of negligence of Appellant.**

Our courts have steadfastly refused to impose liability when such a question is left to conjecture or speculation. Fletcher v. Medical University, 390 S.C. 458, 702 S.E. 2d. 372 (Ct. App. 2010). The record in this case is, quite simply devoid of any proof as to how or why the front-end loader, fully capable of lifting and holding loads three times the weight of the sports-utility vehicle, did not hold the load safely in this particular instance. Such constituted a fairy of proof on behalf of the Respondent and his case should, therefore, fail.

II. **The Court erred in affirming the jury verdict in this case because the facts established by both direct and circumstantial evidence are that the primary safety mechanism (the front-end loader's unquestioned ability to hold far in excess of the weight of the sports-utility vehicle) did not fail, therefore the Court's affirmation is a tacit, if not expressed, recognition of the *Doctrine of Res Ipsa Loquitur*. South Carolina does not recognize the *Doctrine of Res Ipsa Loquitur*. Tucker v. Doe, 413 S.C. 389, 413 S.C. 389, 776 S.E. 2d 121 (2015), Watson v. Ford Motor Company, 389 S.C. 434, 699 S.E. 2d 169 (2010).**

There is a gap in the causation in fact and legal causation of Respondent's injuries in this case created by the failure of proof as to what caused the load to shift or fall without any failure whatsoever on the part of the front-end loader.

There is no evidence in the record direct or circumstantial, to prove, beyond mere speculation, what caused the front-end loader to not hold the sports-utility vehicle. Respondent's expert, Stephen Fournier, was the only witness who attributed negligence to Appellant/Petitioner; but only because in his opinion, a secondary safety device (the axle used to help prop up the loader's forks) was inadequate. He could offer no opinion or evidence as to why the loader failed to safely hold the sports-utility vehicle. Mr. Fournier was not qualified as an expert in front-end loaders; only as an expert in "the field of engineering and rigging." (Rp. 120 L. 1-3). He could not offer any reasonable explanation as to why the front-end loader did not hold the vehicle safely. There was no evidence presented which would allow reasonable minds to determine that the reason the front-end loader did not hold the load was because of anything which was reasonably foreseeable. This expert admitted that his fault with Appellant was for not providing what he deemed an adequate "secondary mechanism" (Rp. 123 L. 4-16). Respondent's expert agreed that the front-end loader was capable of lifting and holding the weight of the vehicle on it. (Rp. 153 L. 6-22). The record is devoid of any evidence or testimony to explain how or why the front-end loader did not safely hold the load. There is ample evidence, both by testimony and expert testimony, that the front-end loader did not fail. (Rp. 200 L. 15 to P. 201 L. 9). The only other way for the loader to have let the weight down would have been for someone to have manually moved the levers controlling the "lifting arms" and fork. (R. 201 L. 10-13). Expert Fournier also admitted "... if the machine had held, I guess it [the accident] would not have happened..." (Rp. 159 L. 4-7) (bracketed language supplied).

It is undisputed that at the time of Respondent's accident, Respondent was alone with the machine. Mr. Corder was inside the shop talking to two ladies. The machine was heard being operated while Mr. Corder was inside the shop with the ladies. (Rp. 100 L. 1 to P. 1026.8).

Respondent's expert testified that, based upon the evidence known to him, "most likely" Mr. Hogan was the operator who set up the front-end loader and the vehicle it was holding just before the accident. (Rp. 157 L. 7-12).

Respondent had the burden of presenting sufficient evidence from which a jury could reasonably infer (without resorting to speculation or competence) that his injuries and damages were caused by specific negligent acts of omission or commission. Petitioner does not seek here to argue that an employer does not have a non delayable duty to provide a reasonably safe work place and suitable tools (Simmons v. Tuomey Reg'l Med. Ctr., 341 S.C. 32, 42, 533 S.E. 2d, 312, 317 (2000); rather, that there is not proof from which a reasonable jury could infer that the front-end loader was not safe and that some anticipated flaw in the performance of the loader caused or contributed to the Respondent's injuries. Such proof is completely lacking in this case.

The proof does prove the reasonable likelihood that, most probably, Respondent brought on his own injuries. In any event, the proof fails as to what caused the front-end loader to properly hold th vehicle and, therefore, fails to prove Petitioner was negligent or that the loader was not reasonably (as opposed to perfectly) safe. The reasonableness off the System in place cannot be adequately judged without knowing what started the problem. Petitioner's duty was to have a reasonably safe work environment. The duty was not to have an environment in which no injury could ever occur. Here, there is a gap in the proof which can only be cured by speculation and/or conjecture. There is absolutely no proof that whatever may have caused the front-end loader to not hold the vehicle safely was a hazard which should have been anticipated and guarded against. The evidence presented (both direct and circumstantial) was that there was no failure on the part of the loader.

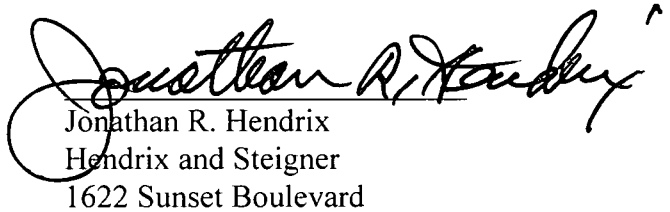
The fact finders are left to guess or speculate whether the primary system's not safely holding

the vehicle aloft was the result of some "normal" failure which was foreseeable. The evidence produced at trial is that the loader did not fail. To allow this verdict stand constitutes recognition, tacit or express, of the Doctrine of Res Ipsa Loquitur. This gap in proof should be fatal to Respondent's case and this case should be dismissed, with prejudice.

CONCLUSION

For the reasons stated, this Court should grant this Petition, rehear this matter, withdraw its prior opinion affirming the Circuit Court jury verdict and dismiss Respondent's case, with prejudice.

Respectfully submitted,



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July 10, 2017

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APPEAL FROM LEXINGTON COUNTY
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PROOF OF SERVICE

I certify that I have served the Petition for Rehearing on Jerry Hogan, Respondent, by placing same in the United States mail, postage prepaid on July 10, 2017 to his attorney of record, Bradd W. Bunce, 2821 Millwood Avenue, Columbia, SC 29202.

Dated: July 10, 2017

Jacqueline Aiken

SWORN TO and subscribed before me this
10th day of July, 2017.

NOTARY PUBLIC FOR SOUTH CAROLINA
My Commission Expires: 06/15/2026
Janine L. Maurer

HENDRIX STEIGNER
ATTORNEYS AT LAW

Jonathan R. Hendrix, Sr.
jhendrix@hendrixsteigner.com

July 10, 2017

The Honorable Jenny Abbot Kitchings
Clerk of Court for Court of Appeals
PO Box 11629
Columbia, SC 29211

Re: Corder & Sons, Inc. V. Jerry Hogan
Appeal Case No.: 2016-000259

Dear Ms. Kitchings:

Enclosed please find for filing an original and six (6) copies of the Petition for Rehearing relative to the above-referenced matter. After filing is complete, please forward the clocked copies to me in the self-addressed, stamped envelope that has been provided for your convenience.

Also enclosed is our check for the filing fee in the amount of $25.00.

By copy of this letter, I am serving said documents on Respondent.

Thanking you in advance, I am

Yours truly,

Jonathan R. Hendrix

JRH/ja
Enclosures

cc: Bradd W. Bunce, Esquie
James H. Corder

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