THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
COURT OF COMMON PLEAS

Opinion No. 2017-UP-264 (Filed June 28, 2017)

Appeal Case No. 2016-000259

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

v.

Jerry Hogan. ..... Respondent,

PETITION FOR A WRIT OF CERTIORARI

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CERTIFICATE OF COUNSEL

The Court of Appeals issued its decision on June 28, 2017. (App. pages 323 - 324). Petitioner's counsel certifies he filed for a rehearing on July 10, 2017. (App. pages 325 - 329). The Court denied rehearing on August 18, 2017. (App. page 331).

QUESTION PRESENTED

> Whether this Court should grant certiorari, dispense with further briefing, and order judgment entered in favor of Corder & Sons, Inc., because no evidence was presented from which reasonable jurors could conclude, other than by sheer speculation, as to what started the chain of events leading to Respondent's injuries; without which the secondary safety system would never have come into play and, without which, this accident would not have occurred?

STATEMENT OF THE CASE

This suit arose out of Respondent Jerry Hogan's allegations that he was injured on or about February 18, 2011, while working at Corder & Sons, Inc.'s salvage yard near the Town of Leesville in Lexington County, South Carolina. In Respondent's Complaint (App. page 9). Respondent alleged that "suddenly and without warning" the sports utility vehicle fell directly on the Plaintiff (Respondent Hogan herein) from above, resulting in significant physical injury to the Plaintiff. (Complaint, paragraph 11, App. page 10). The Complaint, however, makes no specific allegations of negligence attributable to Petitioner, Corder & Sons, Inc., concerning what caused or started the chain of events resulting in the injury to the Respondent. Respondent offered no proof at trial as to what caused the loader to fail to "hold" the load safely. Rather, Respondent claimed that a secondary safety devise 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, itself, failed to safely hold

the sports utility vehicle in the first place.

The Petitioner, in its Answer to the Complaint, denied negligence. Petitioner timely moved for a directed verdict in its favor before the trial court at the end of Respondent's case and, again, at the end of Petitioner's case. The case was submitted to the jury and the jury returned a verdict in favor of Respondent Hogan in the amount of $864,341.80.

The Respondent Hogan had been employed at Appellant's salvage yard for several months prior to the accident on or about February 18, 2011. He had previously worked for Petitioner when the salvage yard was run by Robert James "Bubba" Corder, the son of James Harold Corder (App. page 64 line 7-18, page 220 lines 10-12).

At some time in the past "Bubba" had seen workers at other salvage yards 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 a front-end loader would fall if the loader failed. (App. page 221, line 25, page 222, line 12). This practice was used, thereafter, at Corder and Sons, Inc.'s salvage yard. The only persons present at the salvage yard on the date the accident occurred where Respondent Hogan, James Harold Corder and two ladies visiting with Mr. Corder in the "office" of the salvage yard.

Natasha Smith was a witness called by Respondent Hogan and she testified that she heard machinery "moving around in the salvage yard" while she and her mother were inside the shop talking to James Harold Corder. Ms. Smith and her mother were the two ladies in the shop with James Harold Corder. Whoever was moving the equipment around just before the accident could not have been James Harold Corder (App. page 100 line 1, page 102 line 8). Ms. Smith estimated that she heard the machine running approximately 20 minutes before Respondent

Hogan called out for help (App. page 101 line 21, page 22 line 3). The evidence really makes the only reasonable inference being that Respondent, Hogan, was the person moving the machinery around.

Respondent Hogan's expert, Stephen Fournier, testified that, based upon the information available to him, "most likely" Respondent Hogan was the operator of the front-end loader who set the machine up just prior to the accident. (App. page 157 lines 7-12). Mr. Fournier further testified that, before the "secondary" safety measure of the mobile home axle under the fork of the front-end loader 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. (App. page 158, lines 4-14).

Mr. Fournier also admitted that the secondary safety device (the axle) would not come into use at all until the first one (i.e. the front-end loader) failed for some reason. (App. page 158, lines 15-24). Mr. Fournier went on to say "...if the machine had held, I guess it [the accident] would not have happened..." (App. page 159 lines 4-17) (bracketed language supplied). Respondent Hogan testified that the SUV was "rocking" and, after that, the forks lowered and, ultimately, were tilted at approximately a forty-five degree (45°) angle but the forks never touched the ground. (App. page 80 lines 20-25, page 81 lines 1-10).

The testimony of a front-end loader expert Chad Reeves was offered by Petitioner Corder & Sons, Inc. He was stipulated by the defense to be an expert (App. page 197 lines 9-13). Mr. Reeves testified that, essentially, there were only two ways the front-end loader could "fail" and suddenly let the load down. That would either be because of a catastrophic failure of a hydraulic

cylinder or hose or through human error. (App. page 199, lines 24-25, page 200, lines 1-6). If the cylinder or hose failed, there would have been five to ten gallons of hydraulic fluid or "oil" all over the machine and the ground at the scene. (App. pages 12-19), record on appeal, page 200, lines 12-19). There is absolutely no evidence that this type of leakage occurred. Mr. Reeves went on to testify that, without this amount 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 (i.e. the sports utility vehicle) unintentionally because of the lifting capacity of the front-end loader. (App. page 200 lines 20-25, page 201, lines 1- 9). Mr. Reeves also testified that, if the machine failed, the forks would not just have tilted forward but, rather, the entire lifting system would have failed and the forks and "lifting arms" would have been lowered to the ground, not tilted (App. page 203 lines 21-25, page 204 lines 10-25, page 205 lines 1-9).

The only other way for the load to have been "released" would have been for someone operating the controls for the lifting arms and the forks to have manually caused it to do so. (App. page 200 lines 3-6, page 201 lines 10-13). Another was of describing this would be "operator error."

The undisputed evidence was that the front-end 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 just prior to Respondent Hogan's injury. (App. page 202 lines 4-14).

Respondent Hogan offered no evidence of any failure on the part of the front-end loader or any rational reason why the front-end loader did not safely hold the front-end loader as it should have. Nonetheless, Respondent Hogan seeks to make Petitioner liable for this large

judgement with this gaping hole in his proof.

While it is most unfortunate that Respondent Hogan suffered his injuries, the only reasonable conclusion is that he, or someone other than anyone else associated with Corder & Sons, Inc., operated the front-end loader inappropriately in some fashion. It is clear from the evidence in this record that the front-end loader did not fail. There is absolutely no explanation offered by Respondent as to how the accident occurred in the first place. There is no proof that whatever "hazard" caused the accident to occur was one which should have been anticipated and foreseen by Corder & Sons, Inc. It is submitted that if the accident, itself, is unexplainable, then it should be deemed unforeseeable.

ARGUMENTS

Petitioner believes the Court of Appeals made an error in affirming the verdict in this matter. What is novel about this case is that the Court of Appeals appears to have tacitly, if not expressly, recognized some version of the doctrine of res ipsa loquitur as the law in this state. Petitioner believes this is something not currently found in our case law.

First, the Court of Appeals committed error by indicating that the decision of the jury in the lower court was supported by evidence. It is undisputed that no explanation for why the front-end loader failed to safely hold the sports utility vehicle is found in the evidence in this record. Petitioner believes that the Court of Appeals should have, but failed to, give appropriate attention to its own decision in the case of *O'Neal v. Carolina Farm Supply of Johnson, Inc.*, 279 S.C. 490, 309 S.E.2d 776 (Ct. App. 1983). In that case, the Court of Appeals acknowledged that "the burden of proving Defendant's negligence proximately caused the injury remains with the Plaintiff. There is no countervailing burden on the Defendant to prove that he was not at fault."

O'Neal v. Carolina Farm Supply of Johnson, Inc., 279 S.C. 490, 309 S.E.2d 776 (Ct. App. 1983). The crux of the differences between Petitioner and Respondent are focused on whether Respondent can be said to have met his burden of proof without offering any evidence as to what (other than Respondent's actions) caused the SUV to not be supported safely, in the first place. They have not even offered a theory, much less evidence, as to what initiated the events leading to this accident. Petitioner believes this constitutes a fatal gap in the proof needed to support this verdict.

Second, the evidence in the record supports Petitioner's claim that nothing which was foreseeable by Petitioner happened to cause the front-end loader to not safely hold the load as it was more than capable of doing. Since nothing has been proved to have happened which should have been foreseen by Petitioner, there should be no liability in this case.

Finally, the Court of Appeal's decision tacitly recognizes the theory of Res ipsa loquitur which has never been recognized by the Supreme Court of this State as being the law in South Carolina. Only the Supreme Court in our judicial system has the right to change to precedential law of this State. This Court has not yet done so. The Court of Appeals does not have the authority to do so and its tacit recognition should not been allowed to stand.

I. THERE IS NO EVIDENCE IN THE RECORD TO EXPLAIN HOW OR WHY THIS ACCIDENT TOOK PLACE.

The Court of Appeals did not address this lack of evidence as to what caused the front-end loader not to safely hold the load, as it should have and was more than capable of doing. The closest thing to an explanation was from Respondent Hogan who testified the SUV was "tilting, you know, because it was rocking." (App. page 77 lines 1-4).

Two experts testified and neither could offer an explanation which did not involve operator error on the part of Respondent Hogan. The front-end loader expert Chad Reeves, testified that there was no evidence in the testimony, photographic or other evidence to explain why the SUV was not safely held up by the loader other than operator error. The effects of operator error would have occurred "instantly" at the time of the accident. There would have been no delay. (App. page 205 lines 122-125, page 206 lines 1-5).

This leaves the integrity of this verdict to rely upon speculation, not proof.

II. THERE IS NO PROOF THAT SOMETHING FORESEEABLE HAPPENED (WITH THE POSSIBLE EXCEPTION OF OPERATOR ERROR ON THE PART OF RESPONDENT HOGAN) TO INITIATE THIS ACCIDENT.

The lack of proof of what initiated this accident should be fatal to Respondent's claim. Proving that Petitioner's negligence caused his injuries is Respondent's burden. Petitioner does not have the burden of proving he did not cause Respondent's injuries. The lack of proof as to what initiated the accident means there is no proof that whatever happened was foreseeable. The testimony from Respondent's expert attempted to fault Petitioner for not having a secondary system which would adequately support the weight of the sports utility vehicle. One is left to speculate, however, as to whether the mere weight of the sports utility vehicle led to the Respondent's injuries, the force of the front-end loader being negligently applied by Respondent, on any secondary safety system, or some other as yet unknown reason. Only through conjecture can one resolve that question.

III. THE COURT OF APPEALS DECISION ERRONEOUSLY RECOGNIZES (TACITLY, IF NOT EXPRESSLY) THE LEGAL THEORY OF RES IPSA LOQUITUR WITHOUT PERMISSION OF THIS COURT TO DO SO.

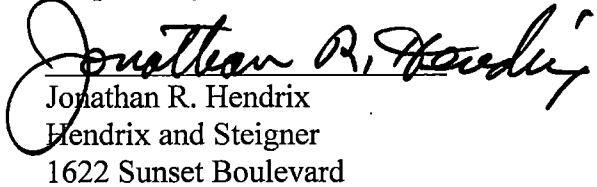
This Court has steadfastly refused to recognize the doctrine of Res ipsa loquitur. It has always required a Plaintiff such as Respondent, to prove his or her claims of negligence. "The thing speaks for itself" has never been deemed sufficient to support a verdict in this state. The Court of Appeals affirmation of this verdict does that, even if not expressly. The Court of Appeals lacks the authority to judicially change the law of this State without permission from this Court. *Langley v. Boyter*, 286 S.C. 85, 322 S.E.2d 100 (1985).

CONCLUSION

The Court of Appeals erred in affirming the verdict in this case the Respondent has failed to offer any proof as to what caused the sports utility vehicle not to be safely in place by the front-end loader. It is admitted that, if the front-end loader had held the load, this accident would never have happened. It was incumbent upon Respondent to prove Petitioner was negligent. Petitioner did not bear any burden of proving it was not negligent. This Court, upon review, is left to speculate that, whatever happened to initiate the falling of the SUV, it "must" have been something foreseeable. There are no evidentiary facts in the record to allow anything other than speculation on this point.

The Court of Appeals did not address these arguments. It ignored them. Petitioner requests that this Court address these arguments and reverse the decision of the Court of Appeals and remand this case to the lower Court with instructions to enter judgment in favor of Petitioner.

Respectfully submitted,



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