THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Opinion No. 2017-UP-264 (S.C. Ct. App. Filed June 28, 2017)

Jerry Hogan, ... Respondent,

v.

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

RETURN TO PETITION FOR A WRIT OF CERTIORARI

Bradd W. Bunce
Green Law Firm, LLC
Post Office Box 1698
Columbia, South Carolina 29202
(803) 771–2455
Attorney for Respondent

Other Counsel of Record:

Jonathan P. Hendrix
Hendrix and Steigner
Post Office Box 6398
West Columbia, South Carolina 29171
(803) 200–2970
Attorney for Petitioner

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QUESTION PRESENTED

Whether the Respondent presented evidence on each element of negligence by Petitioner, such that the Court of Appeals properly affirmed the trial court's ruling denying Petitioner's motions for directed verdict and judgment not withstanding the verdict (JNOV)?

STATEMENT OF THE CASE

On September 6, 2013, Respondent Jerry Hogan commenced this action, alleging negligence against Petitioner Corder and Sons, Inc. Respondent alleged personal injury caused by, among other allegations, Petitioner directing Respondent to work under a raised load without the load being secured and Petitioner's violation of S.C. Regulation 71–112A, resulting in a vehicle falling on Respondent. (R. p. 10, lines 8–10, 19–p. 11, line 3). Corder and Sons, Inc. answered, denying negligence and asserting negligence by Hogan. Petitioner's Answer further alleged that Hogan was never injured and instead staged an accident. (R. p. 14, lines 5–9). The action was tried by a jury beginning on January 4, 2016. The jury found for Hogan and awarded him $864,341.80. (R. p. 6, line 14). Corder and Sons promptly requested, and was granted, ten days to file post-trial motions. Petitioner timely filed and served its post-trial motions. The trial court denied the motions by order signed January 19, 2016, filed January 22, 2106. On February 10, 2016, Corder and Sons, Inc. served the Notice of Appeal on Hogan. The Court of Appeals affirmed the decision of the trial court by per curiam opinion filed June 28, 2017. Corder and Sons filed a Petition for Rehearing on July 10, 2017, which the Court of Appeals denied by order filed August 18, 2017.

FACTS

The Respondent's witnesses at trial were James H. Corder; Respondent Jerry Hogan; two women present at the incident location: Natasha Smith and Becky Davis; Respondent's rigging

expert, Stephen Fournier; Respondent's wife, Melinda Hogan; two physicians who performed surgery on Respondent: E. Myron Barwick and Karl Lozanne; and Respondent's psychology and vocational expert, Robert Brabham, Ph.D. Dr. Barwick's testimony largely concerned the initial stage of a surgery completed by Dr. Lozanne. The testimony of Respondent's spouse and Dr. Brabham chiefly concerned the amount of damages.

Petitioner's Business Operations

Petitioner Corder and Sons, Inc. owns a salvage yard in Lexington County. (R. p. 18, lines 23–25). Petitioner's business is to buy wrecked vehicles and sell parts from those vehicles. (R. p. 19, lines 5–9). James H. Corder (hereinafter "Harold Corder") is the sole shareholder and only corporate officer of Petitioner. (R. p. 18, lines 2–9). Prior to incorporating and operating a salvage yard, Harold Corder was in the used car business. (R. p. 18, lines17–19). Over time, he accumulated vehicles he bought for parts to fix the used cars, which led to the salvage business. (R. p. 33, line 22–p.34, line 3). Prior to opening the salvage business, he neither took courses nor read any books on salvage yard set-up. (R. p. 33, lines 22–25; p. 34, lines 4–6). Petitioner never employed a safety officer. (R. p. 34, lines 7–9). He taught Petitioner's employees safety based on his own life experiences. (R. p. 34, lines 4–12). From 1989 to 2005, Harold Corder's son, Robert, worked for Petitioner full time. (R. p. 217, lines 11–17).

When an engine was sold from a salvage vehicle, the entire vehicle was moved from the storage part of the yard to an area beside the garage. (R. p. 22, lines 2–5). The practice in Petitioner's salvage yard was to move vehicles at the yard with a Caterpillar loader that had forks instead of a bucket. (R. p. 19, line 20–p. 20, line 7; p. 271). An employee would then loosen and remove the bolts and parts that were accessible from above the vehicle while the vehicle sat on the ground. (R. p. 66, line 22–p. 67, line 18). The vehicle would then be raised to access

other parts that needed to be removed, such as exhaust and torque converter bolts. (R. p. 66, line 25–p. 67, line 22).

To access the lower part of the motor for removal, Petitioner's practice was to raise the vehicle on the forks of the loader and have the employees stand underneath while working. (R. p. 22, lines 9–15). Petitioner directed its employees to place a mobile home axle vertically under one fork of the loader as a "safety device". (R. p. 22, line 15–p. 23, line 10; p. 286). One end of the axle was placed under the loader's fork; the other end was placed into a wheel lying on a cement pad. (R. p. 23, line 16–p.24, line 12). One employee would hold the axle in place while Harold Corder would lower the forks. (R. p. 24, lines 21–24). Robert Corder testified that, with regard to setting the mobile home axle under the forks, "One man can't do it; it's a two-man operation." (R. p. 223, lines 12–15). Harold Corder testified that he or his oldest son would always run the Caterpillar loader. (R. p. 25, lines 8–13). He also, however, gave conflicting testimony that Respondent sometimes ran it. (R. p. 26, lines 3–16). Respondent presented impeachment evidence in the form of Harold Corder's prior deposition testimony that with respect to running the Caterpillar, "anytime there was something to be brought down or something, I always do it." (R. p. 26, line17–p.28, line 23).

With regard to when the use of the mobile home axle as a "safety device" began, Harold Corder gave conflicting testimony. He initially testified that the mobile home axle came into use after the previous forklift's hydraulic cylinder cracked. (R. p. 29, lines 20–25). Harold Corder then testified that he didn't know how long the axle had been in use. (R. p. 30, lines 1–6). Harold Corder then testified that he used the axle before the forklift cylinder cracked. (R. p. 31, lines 6–7). Respondent presented impeachment evidence in the form of Harold Corder's prior deposition testimony that, with reference to the prior forklift, "the cylinder cracked on it and so they got this thing and started using it." (R. p. 31, lines 19–25).

Respondent's Injuries

Respondent Jerry Hogan worked for Corder and Sons primarily in the salvage yard, pulling motors or transmissions. (R. p. 65, lines 8–10). At the time of Respondent's injuries, only Harold Corder and Respondent worked at the business. (R. p. 65, lines 22–24). The day of his injury, Respondent started removing a motor from an SUV for a customer of Petitioner. (R. p. 71, line 12–p. 72, line 8). He began right after lunch at noon and finished removing the bolts and parts on the upper part of the motor at approximately one o'clock p.m. (R. p. 72, lines 3–11). Respondent testified that Harold Corder then started the Caterpillar, raised up the vehicle, and Respondent placed the mobile home axle in place. (R. p. 72, lines 12–18). Respondent placed the mobile home axle the way he had been taught to place it. (R. p. 72, lines 19–23). The SUV was supported only by the mobile home axle and the loader forks. (R. p. 72, lines 24–25). Harold Corder did not stay outside to assist with the work on the lower half. (R. p. 73, lines 1–2).

Harold Corder alleged that Respondent left at noon to pull a motor for someone and he believed Respondent had left the property. (R. p. 39, line 23–p. 40, line 3). Harold Corder testified that the first time that he was aware Respondent had not left was when he heard him yelling. (R. p. 40, lines 10–14). Harold Corder testified that he did not hear the loader running that day. (R. p. 41, lines 11–13). Respondent impeached Harold Corder with his prior deposition testimony that Mr. Corder heard the loader running and went outside and saw Respondent "piddling around there. I didn't see him doing nothing; he was just piddling around and I went back in to there where the ladies was." (R. p. 43, line 16–p. 44, line 1). At trial Harold Corder agreed that two persons were present at the time, Natasha Smith and her mother. (R. p. 41, lines 21–25). Natasha Smith testified that about 15 or 20 minutes after she arrived, Respondent came into the office and spoke to Harold Corder, then left the office. (R. p. 99, lines 2–11). She and

her mother continued to speak to Harold Corder and then she heard Respondent screaming "help me." (R. p. 99, lines 12–16). They ran out of the office and found the SUV on top of Respondent. (R. p. 99, lines 16–19). Only about 10 or 15 minutes elapsed between Respondent leaving the office and when the SUV fell. (R. p. 99, lines 20–23). Likewise, Becky Smith, Natasha Smith's mother, testified that she was present at Petitioner's salvage yard on the day of the incident. (R. p. 110, lines 17–20). Ms. Smith recalls Respondent speaking in the office when Harold Corder was present. (R. p. 111, lines 6–16).

Respondent testified that he was underneath the vehicle when he noticed the SUV was leaning, was rocking, and the fork looked like it was going to come out from underneath the SUV. (R. p. 76, line 19–p. 77, line 4). Prior to this, Respondent had not hit or brushed against the axle or done anything to cause the SUV to fall. (R. p. 77, lines 5–15). The SUV fell onto Respondent and pushed him straight down. (R. p. 77, lines 16–19). He felt immediate severe pain in his back. (R. p. 78, lines 7–8). An ambulance transported Respondent from the Petitioner's facility to Lexington Medical Center. (R. p. 79, lines 9–17). Respondent suffered a burst fracture of his lumbar vertebrae, requiring surgery on February 25, 2011. (R. p. 166, lines 19–21; p. 169, line 4–p. 170, line 21; p. 171, lines 3–9; p. 172, lines 3–14). Dr. Lozanne later performed a second surgery to stabilize Respondent's spine on May 16, 2011. (R. p. 173, line 1–p. 175, line 4). Dr. Lozanne testified that Respondent's injuries and the surgery were caused by the injury he presented with on February 18—a car landing on him. (R. p. 176, line 24–p.177, line 14).

Evidence of Petitioner's Failure to Maintain a Safe Work Environment

Respondent presented testimony at trial from Stephen Fournier, a civil engineer. (R. p. 113, lines 18–18). Mr. Fournier was qualified as an expert in the field of engineering and

rigging. (R. p. 120, lines 1–3; p. 121, line 4). The field of rigging is a subset of engineering. (R. p. 119, lines 13–15). Rigging is the science of the process of safely lifting materials, whether by crane or, as in this case, by forklift type equipment. (R. p. 118, line 21–p. 119, line 12).

The chief deficiency Mr. Fournier identified in the work process utilized by Petitioner is that employees should not work underneath an elevated load unless there is secondary bracing, cribbing, or blocking underneath the load. (R. p. 122, line 14–p. 123, line 3). Further, the blocking and cribbing should have at least two forms of support. (R. p. 123, line 13–p. 124, line 2). Cribbing or blocking is a series of 4x4s, 6x6s, or things of that nature interlaced and stacked "so that if a load falls, it only falls an inch or two down onto the cribbing . . . ." (R. p. 138, lines 5–13). The two forms of support should be at "both sides of the load so you're bracketing the load." (R. p. 125, lines 6–10). Mr. Fournier testified that the mobile home axle used by Petitioner was only a single point of support. (R. p. 124, lines 4–5). Further, positioning the mobile home axle under the fork at the machine end of the fork caused a cantilever action because the load is applied outboard of the means of support. (R. p. 124, line 9–p. 124, line 5). The principles of working under an elevated load apply to lifting from below by a modified loader configured like a forklift. (R. p. 122, lines 17–21).

Mr. Fournier testified that the procedure that Petitioner designed and utilized was not safe. (R. p. 135, line 24–p. 136, line 2). He testified that the compressive strength of the mobile home axle was not the issue—it was the use of a single support, rather than two supports, and the placement of the support. (R. p. 136, line 3–p. 137, line 12). With respect to the nature of the work in the salvage yard, the supports should have taken into consideration the horizontal movement of the load caused by the forces involved with dismantling the vehicles. (R. p. 139, line 20–p. 140, line 10). Petitioner should have used either two sets of temporary cribbing or a stationary stand that was stable and structurally sound. (R. p. 137, line 25–p.138, line 4). Mr.

Fournier testified that working under a suspended load is a recognized hazard that could cause serious injury. (R. p. 142, lines 2–4). In summation, Mr. Fournier testified that the cause of Respondent's injury was the failure to provide secondary support underneath the load and the mobile home axle was not an adequate secondary support. (R. p. 163, lines 18–24).

STANDARD OF REVIEW

An appellate court will reverse the trial court's ruling on a directed verdict or JNOV motion "only where there is no evidence to support the trial court's ruling, or where the ruling was controlled by an error of law." *Pye v. Estate of Fox*, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006). The trial court must view all evidence and all inferences that can reasonably be drawn from the evidence in the light most favorable to the non-moving party. *Id.* When deciding a directed verdict or JNOV motion, the trial court "is concerned only with the existence or non-existence of evidence" and cannot consider credibility issues or conflicts in evidence or testimony. *Pond Place Partners, Inc. v. Poole*, 351 S.C. 1, 15, 567 S.E.2d 881, 888 (Ct. App. 2002). The appellate court therefore must determine whether any evidence existed on each element of the cause of action. *First State Sav.& Loan v. Phelps*, 299 S.C. 441,446, 385 S.E.2d 821, 824 (1989).

ARGUMENT

The errors Petitioner ascribes to the Court of Appeals depend wholly on accepting Petitioner's framing of the case. Petitioner, however, presents a straw man argument in alleging a failure of proof by Respondent concerning why the vehicle fell on Respondent. The case actually presented by Respondent proves negligence without regard to the reason the vehicle fell on Respondent. Respondent first will demonstrate how he presented evidence of negligence.

Respondent then will respond to Petitioner's argument that Respondent employed res ipsa loquitor in presenting his case.

1. **BECAUSE RESPONDENT PRESENTED EVIDENCE OF EACH ELEMENT OF NEGLIGENCE BY PETITIONER, THE COURT OF APPEALS PROPERLY AFFIRMED THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR DIRECTED VERDICT AND JNOV.**

Respondent presented evidence of Petitioner's breach of a duty to provide a place of employment which is free of recognized hazards which may cause death or serious physical harm to his employees, and that the breach proximately caused damage to Respondent.

The plaintiff in a negligence action must prove the familiar three elements: "(1) a duty of care owed by defendant to plaintiff; (2) defendant's breach of that duty by a negligent act or omission; and (3) damages to plaintiff proximately resulting from the breach of duty." *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 133, 558 S.E. 2d 271, 275 (Ct. App. 2001).

A. Petitioner Owed Respondent a Duty to Maintain a Place of Employment Free of Recognized Hazards

The existence of a duty is an issue of law. *Ellis by Ellis v. Niles*, 324 S.C. 223, 227, 479 S.E.2d 47, 49 (1996). Whether the parties have the relationship involved in the duty is a question of fact for the jury. *See Fay v. Grand Strand Reg'l Med. Ctr., LLC*, 412 S.C. 185, 194, 771 S.E.2d 639, 644 (Ct. App. 2015)(considering the existence of a doctor-patient relationship). South Carolina has long recognized that employers owe their employees the duty to provide them with reasonably safe and suitable machinery and a party who goes to work for a company has a right to assume that the company has reasonably safe and suitable appliances to do the

work. *Jackson v. Southern Ry.*, 73 S.C. 557, 570, 54 S.E. 231, 235–36 (1906); *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 42, 533 S.E. 2d 312, 317 (2000)(" An employer has a nondelegable duty to employees to provide a reasonably safe work place and suitable tools, and remains vicariously liable for injuries caused by unsafe activities or tools under the employer's control.").

Alternately, the existence of a duty can be established by statute and the breach of the duty can be established by showing a violation of the statute. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 133, 558 S.E. 2d 271, 275 (Ct. App. 2001). The existence and violation of an agency regulation may establish the duty and breach the same as a statute. *Norton v. Opening Break of Aiken, Inc.*, 313 S.C. 508, 512, 443 S.E.2d 406, 408 (Ct. App. 1994). South Carolina regulation charges employers with the duty to "maintain a place of employment which is free of recognized hazards which may cause death or serious physical harm to his employees and he shall comply with this regulation . . . ." 9 S.C.Code Ann.Regs. 71–112A (Supp. 2012).

The trial court charged the jury under *Jackson* and Regulation 71–112A. (R. p. 253, lines 1–25). There were no objections to these charges. (R. p. 268, line 25–p. 269, line 12; p. 270, lines 1–4).

Respondent Hogan presented evidence that he was an employee of Petitioner on the day of his injury. While Petitioner contended that Respondent was not about the business of Petitioner and was not supposed to be at the workplace, there was conflicting testimony on the issue. Respondent testified he was pulling a motor for Petitioner's customer. Harold Corder's testimonies at trial and at his prior deposition were in conflict about whether he knew Respondent was present. Ms. Smith and Ms. Davis testified that Respondent spoke to Harold Corder minutes before hearing him scream for help. It therefore was within the jury's province

to find that Respondent was an employee of Petitioner and Petitioner owed Respondent the duty to keep the workplace free of recognized hazards which may cause serious harm.

B. Petitioner Breached the Duty to Maintain a Place of Employment Free of Recognized Hazards

Respondent presented evidence of Petitioner's breach chiefly through his rigging expert, Stephen Fournier. Respondent's expert opined directly that working under a suspended load is a recognized hazard that could cause serious injury. Respondent presented evidence that he was working under a SUV held up by the Caterpillar. Mr. Fournier testified that the critical failure—the breach of the duty—in this matter was when Petitioner put Respondent underneath the raised vehicle without adequate support. Mr. Fournier testified that the mobile home axle was not an adequate support. Respondent therefore met his burden of presenting some evidence on the element of breach of duty.

C. Petitioner's Breach Proximately Caused Respondent's Damages

"As a general rule, the question of proximate cause is one of fact for the jury." *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 136, 558 S.E. 2d 271, 276 (Ct. App. 2001). To prove causation, a plaintiff must demonstrate both causation in fact ("but for" cause) and legal cause. *Parks v. Characters Night Club*, 345 S.C. 484, 491, 548 S.E.2d 605, 609 (Ct. App. 2001). The touchstone of legal cause is whether an injury is foreseeable from the breach. *Id.*

With regard to cause in fact, Mr. Fournier testified that the failure to provide secondary support underneath the raised vehicle was the cause of Respondent's injuries. Respondent testified that the SUV fell on his head, pushing him to the ground, causing immediate severe back pain. He testified that he was transported by ambulance from the scene of his injuries

directly to Lexington hospital. Dr. Lozanne testified that the Respondent's medical treatment and surgeries were caused by the injury he presented with at Lexington Medical Center on February 18, 2011. Respondent therefore presented evidence of cause in fact.

With regard to foreseeability, the injury suffered by Respondent is exactly the type of injury that adequate secondary supports are intended to prevent. Mr. Fournier testified: "that's the reason you have the secondary support is because something can happen and, . . . before you put a person underneath a suspended load, that support system, secondary support system, needs to be in place in order for it to be safe and compliant." (R. p. 158, lines 20–24). A reasonable employer in Petitioner's position could have foreseen that if there was not an adequate secondary support, a worker could be hurt by a falling vehicle. There was evidence presented that the mobile home axle came into use after a previously used forklift experienced a cracked cylinder. The Petitioner's use of the mobile home axle, although inadequate as an appropriate secondary support, demonstrated that the company had recognized the need for a secondary support. Respondent therefore presented evidence from which the jury could find that Petitioner's breach of its duty to provide an adequate secondary support proximately caused Respondent's damages.

With regard to the elements of a cause of action for negligence Respondent presented evidence that: (1) Petitioner owed a duty to provide a system of secondary bracing, cribbing, or blocking consisting of two points of support when employees are working underneath a suspended load; (2) that Petitioner breached this duty by having Respondent work under a vehicle suspended without adequate secondary bracing, cribbing, or blocking; and (3) that the improperly suspended vehicle fell onto him, causing a fractured spine. Respondent presented evidence of each of the required elements of the cause of action.

Appellant cites no authority for its assertion that Petitioner must present evidence of the reason for an antecedent event, the vehicle falling. Petitioner need only establish the elements of

his own claim. The trial court therefore properly denied Petitioner's motions for directed verdict and JNOV.

2. PETITIONER MISIDENTIFIES THE DUTY AND BREACH AT ISSUE IN THIS MATTER IN ALLEGING LACK OF PROOF AND ALLEGING RESORT TO RES IPSA LOQUITOR.

Petitioner misapprehends the duty owed to Respondent in raising issues of proof. Petitioner focuses on the reason for the vehicle beginning to move, and in so doing incorrectly suggests that the duty owed to Respondent is to provide any sort of support. Respondent need not demonstrate the reason for the falling vehicle, however, because Respondent did not proceed with a theory that Petitioner was negligent in causing the vehicle to fall.

Respondent instead has proven negligence through the breach of a duty to provide an adequate secondary support. The negligent act occurred when Petitioner designed a process that did not include adequate secondary supports. The need for the secondary support assumes that there may be a failure of the primary lifting mechanism. As the rigging expert, Mr. Fournier, testified, "that's the reason you have the secondary support is because something can happen and, . . . before you put a person underneath a suspended load, that support system, secondary support system, needs to be in place in order for it to be safe and compliant." (R. p.158 , lines 20–24). He continued: "With the secondary system in place, the accident would not have happened." (R. p. 159, lines 4–5). The negligent act was to put Respondent under a falling vehicle in the absence of an adequate secondary support system. In denying Petitioner's renewed directed verdict motion at the close of the evidence, the trial court recognized Respondent's negligence claim relied on the lack of an adequate secondary support and that the reason for the vehicle falling was immaterial. (R. p. 242, line 19–p. 243, line 8).

Res ipsa loquitor would only be an issue in a situation not present: if Respondent was injured in the presence of an adequate secondary support and could not explain the failure of the secondary support. That is not the case before the Court, however, and the Court of Appeals' decision does not rest on the doctrine of res ipsa loquitor.

SUMMARY

The Respondent presented evidence of duty, breach, and proximate cause without resorting to the doctrine of res ipsa loquitor. Respondent proved a different negligent act than the act Petitioner urges the Court to focus on. The strength of the primary system, the front loader, therefore is immaterial. The reason for the SUV beginning to fall toward Respondent is immaterial. Respondent is not required to prove any extraneous facts. There was an unbroken chain of events between the negligent act, Petitioner placing Respondent under a falling load in the absence of a secondary support, and Respondent's injuries. Accordingly, the Court of Appeals properly affirmed the trial court's denial of Petitioner's motions and submission of the case to the jury.

CONCLUSION

For the reasons stated, Respondent asks this Court to deny the petition for a writ of certiorari.

Respectfully Submitted,

October 12, 2017

Bradd W. Bunce
Post Office Box 1698
Columbia, South Carolina 29202
(803) 771–2465
Attorney for Respondent

THE STATE OF SOUTH CAROLINA
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PROOF OF SERVICE

I certify that I have served the Return to Petition for Writ of Certiorari on Corder and Sons, Inc., Petitioner, by the following means:

I hand delivered a copy to the office of Petitioner's attorney, Jonathan R. Hendrix, Sr., at 1622 Sunset Boulevard, West Columbia, South Carolina 29169 on October 12, 2017, and leaving the copy with the receptionist after identifying the nature of the document.

October 12, 2017

Bradd W. Bunce
Post Office Box 1698
Columbia, South Carolina 29202
(803) 771-2465
Attorney for Respondent