

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

The Honorable Benjamin H. Culbertson

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Case No: 2008-CP-22-00466  
Published Opinion No. 5055  
Filed November 28, 2012

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Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's  
Farm, J&J Logging, Inc and  
Edgar Rivera,

Appellants,

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DEC 10 2012

**SC Court of Appeals**

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**PETITION FOR REHEARING ON BEHALF OF  
PETITIONERS WARREN JARED NEWTON, NEWTON'S  
FARM, J&J LOGGING, INC ("NEWTON DEFENDANTS")**

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**TO: THE HONORABLE JUDGES OF THE COURT OF APPEALS:**

Appellants, Warren Jared Newton, Newton's Farm, and J&J Logging, Inc. (Hereinafter, collectively referenced as the "Newton Defendants") petition this Court for rehearing pursuant to Rule 219 and/or Rule 221 SCACR. on the ground that the Court overlooked or misapprehended the following points:

1. The Court's Opinion holds that the Newton Defendants were arguing in this appeal that the jury could have imputed co-Defendant Rivera's negligence to the Plaintiff. The Newton Defendants did not raise that argument, per se, but rather raised two (2) other issues or theories: (1) That the Plaintiff's testimony released or waived her claims against the co-Defendant; and/or (2) That the Plaintiff and co-Defendant were engaged in a joint enterprise such that the act of one was the act of both.

As to waiver, the jury could have construed the Plaintiff's testimony as releasing her brother/driver, co-Defendant Rivera, from liability. The jury's defense verdict was a finding in favor of the Newton Defendants, and it also affirmed the Plaintiff's release of her brother, whom the jury could otherwise have held liable. Testimony established that (1) Defendant Rivera was admittedly speeding on the night of this accident (R.p.171, l.12 - p. 173, l.12); and (2) Neither Defendant Rivera nor the Plaintiff (who was talking on a cell phone at the time) saw the Newton's tractor-trailer; and (3) Newton, Newton's expert and independent witness Ward testified that the tractor trailer was well-lit and visible and that several other vehicles had approached, saw the tractor trailer and turned around. (R.p.299, l.25 - p. 348, l.14); and (R.p.263, l. 5-11; p. 368, l 7-24) and (R.p.290, l.11- 22; p. 406, l.14-p. 321 l.4)

Despite Defendant Rivera's admission of speeding and the tractor trailer being well lit and visible to other approaching vehicles being operated more carefully, the Plaintiff testified that although she sued her brother, she did not believe her brother (co-Defendant Rivera) did anything wrong. (R.p.221, l.8 - p.222, l.2) The Plaintiff's testimony waived or released her claims against co-Defendant Rivera. That being the case, if the jury determined that the Newton Defendants were not negligent or that the Plaintiff didn't meet her burden of proving that the Newton Defendants were negligent, the jury would also have returned a defense verdict as to

co-Defendant Rivera based upon the Plaintiff's own waiver or release. **(Newton Defendants' Final Brief, page 22.)**

As to joint enterprise, to establish the doctrine, there must be a common purpose or community of interest between the driver and the passenger and the passenger must have the equal right to control the management of the vehicle. Pruitt v. Bowers, 330 SC 483, 499 SE2d 2500 (Ct. App. 1998) If there is conflicting evidence, such as in this case, then joint venture or joint enterprise is a jury issue. Ray v. Simon, 245 SC 346, 140 SE2d 575 (1965) The test is whether the driver is the agent of the passenger and whether the passenger therefore had some control over the automobile. *Id* The theory has been held to be a jury issue where the passenger's daughter was driving the family car to take a group of people to a church service. *Id*

In this case the Newton Defendants pled contributory-comparative negligence. **(See: R.p.15-23)** The co-Defendant and the Plaintiff were engaged in a joint enterprise or mission in that they were coming to the rescue of their father. Respondent/Plaintiff and her brother got a call that their Father had been mugged and they, with another car following, left to go to his aide. **(R.p.171, l.11 - p. 173, l.2)** So there was a joint enterprise or mission and additionally, the Plaintiff, who was a licensed driver, was chargeable with supervising and controlling the operation of this vehicle by the unlicensed driver, her younger brother, co-Defendant/co-Appellant Rivera . **(R.p.171, l. 11-p. 173 l. 2; p. 86, l. 3-4; p. 166, l. 5-6; p. 294, l.12-16; p. 165 l.24- p. 166, l.1; p. 171, l.2- p. 173, l.12)** Therefore, the Plaintiff was also chargeable with Edgar Rivera's negligence per the principals of joint enterprise.

2. **The Court's Opinion holds that the Newton Defendants failed to preserve their argument about imputed negligence because it was not raised to the trial court.** As noted above in #1, supra, the Newton Defendants contended that the Plaintiff waived her claims

against co-Defendant Rivera, and then the jury found in favor of the Newton Defendants and affirmed Plaintiff's waiver of her claims against Rivera. This argument was raised to the trial court. **(R.p.121; R.p.133)** The Newton Defendants' argument about joint enterprise was not raised by name but it was raised by concept and specification: The Newton Defendants' Motion for Reconsideration **(R.p.132)** specifically addressed the Plaintiff's duty – and, under these facts – her heightened duty to observe/monitor the driving of her brother, the co-Defendant. A party is not required to use the exact name of a doctrine (like joint enterprise) in order to preserve the issue for appellate review. The issues must have simply been raised with sufficient clarity for the trial judge to have a reasonable understanding and a reasonable opportunity to address them. Herron v. Century BMW, 395 SC 461, 719 SE2d 640 (2011). The Newton Defendants'/Appellants raised these and numerous other issues in a Motion for Reconsideration **(R.p. 130-135)** which the trial court chose to address via a Form Order. **(R.p.8)**

3. **The Court holds that no evidence was presented of the Plaintiff/Respondent's negligence and that absent circumstances indicating the driver is incompetent or careless that a passenger is not required to anticipate the driver's negligence. The Court holds that therefore the Plaintiff's comparative negligence was for the court rather than the jury. Bloom v. Ravoira, 339 SC 417, 4232, 529 SE2d 710, 713 (2000); Thompson v. Michael, 315 SC 268, 433 SE2d 853 (1993).** This misapprehends or overlooks that the facts show that the co-Defendant was younger and less mature, he was unlicensed, he would be driving at night, and he would be driving in a state of high anxiety because he'd been summoned by a call that their father had been injured in a fight. As a result of the circumstances, co-Defendant refused to allow the Plaintiff to ride in the car on this occasion but she took the keys, waited by the car while co-Defendant changed his shirt and made sure that he had to take her. **(R.p.171, l.11 - p. 173, l.12; R.p.166, l.3-4; R.p.211, l.1 - 6; p.493; R.p.165, l.24 - p. 166, l.1)** The Plaintiff knew her

brother, the co-defendant, was in a hurry to get to her father and knew of his youth and unlicensed status, yet given all the circumstances, the Plaintiff didn't buckle her seatbelt and spent the ride talking on a cell phone instead of being properly attentive to her incompetent or careless brother. (R.p.217, l.3-8; R.p.219, l.18 - p. 220, l.6; (R.p.266, l.13-20)

4. Per Thompson v. Michael, 315 SC 268, 433 SE2d 853 (1993) under the facts of this case as related in #3, supra, the Plaintiff had a duty to warn and if the warning was not heeded to demand the car be stopped and she be let out. Whether a warning should have been given was for the jury to decide. A passenger has a duty to use ordinary care and to employ her senses of sight, hearing and perception to protect herself and it is for the jury to determine whether co-Defendant was operating the vehicle in such a careless manner that the danger was or should have been reasonably apparent to the Plaintiff such that her failure to exercise due care contributed to her injuries – all within the meaning of Stone v. Barnes, 248 SC 28, 148 SE2d 738 (1966).

5. As the dissent in the Court's Opinion notes, the trial court essentially granted the Plaintiff/Respondent's motion for a new trial because it found that it should have directed a verdict as to liability within the general meaning or province of Howard v. Roberson, 376 SC 143, 654 SE2d 877 (Ct. App. 2007). This overlooks or misapprehends the existence of conflicting evidence as to liability including the position of the tractor trailer and its lights, the visibility of the tractor trailer, and the speed of the Rivera vehicle. The conflicting evidence includes the Plaintiff's testimony that the co-defendant did nothing wrong and could not have avoided the accident. The Court's duty at the directed verdict stage is to view the evidence and inferences to be made from it in the light most favorable to the parties opposing the motion for a directed verdict which must be denied if the evidence is susceptible of more than a single inference or if the inferences from the evidence are in doubt. Moore v. Levitre, 294 SC 453,

6. In a case where conflicting evidence mandates the denial of a directed verdict motion, as noted above, a Plaintiff, including a Plaintiff-passenger, has the burden of proof as to liability and a jury can find that the Plaintiff did not meet this burden of proof as to any or all drivers. In this case, as the dissent notes, the trial court's grant of a new trial was based "on an erroneous change of heart with respect to the directed verdict motion and therefore this Court should reverse the grant of a new trial and reinstate the jury's verdict.

7. The Howard v. Roberson case, *supra*, does not stand for the proposition that a passenger who files a civil lawsuit is automatically entitled to a jury verdict and the Court in that case did not hold that passengers lack the burden of proving their case. The Trial Court erred as a matter of fact and law in holding otherwise and its grant of a new trial should therefore be reversed and the jury verdict reinstated and this Court should take the opportunity to address a passenger's burden of proof under facts such as those present in this case.

8. The Court did not address the Newton Defendants'/Appellants' constitutional issues and concerns. Having this case tried before a jury of their peers was a Constitutional right and any jury's verdict deserves due deference. Given the clear weight and consideration that this jury placed upon deliberations, the trial court was, as a matter of law, obligated to respect the verdict, confirm the due process afforded to the parties and allow the jury's verdict to stand.

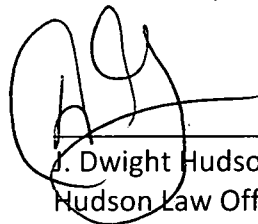
9. The Court deemed abandoned the co-Defendant's contention that sufficient evidence of the negligence of unnamed parties, like the State or Georgetown County, existed to support the jury's verdict. The Court's Opinion held that contention to be abandoned because it was supposedly made "without citation to legal authority in his initial brief" and that such a point could not be made in a reply brief. While this was addressed to co-Defendant, the

Newton Defendants'/Appellants note that the Court did not have issues with the unsupported facts alleged by the Plaintiff's brief, and in that context, at a minimum, this statement-holding raises the appearance of unequal treatment and/or inconsistency.

10. This Court should vacate the majority opinion and adopt the dissent written by Judge Konduras. The dissent goes to the heart of the issue which was largely unaddressed by the majority – that the grant of a new trial was motivated by the trial court's having second-guessed itself as to its failure to direct a verdict as to liability. However, as the dissent finds, a verdict should not have been directed as to liability.

WHEREFORE, Appellants Warren Jared Newton, Newton's Farm, and J&J Logging, Inc. move the Court to rehear the case.

Respectfully submitted,



J. Dwight Hudson, Esquire  
Hudson Law Offices  
1203 48th Avenue North  
Suite 111  
Myrtle Beach, SC 29577  
(843) 692-9889  
T: (843) 692-9889  
F: (843) 692-9190  
E: [Hudsonlaw@hudsonlawoffice.com](mailto:Hudsonlaw@hudsonlawoffice.com)

**Attorney For Appellants Newton,  
Newton's Farms, J&J Logging, Inc.**

Dated: December 5, 2012