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November 8, 2017

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Hand Delivered

The Honorable Jenny Abbott Kitchings
Clerk of Court
South Carolina Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: Kay F. Paschal v. Leon Lott, the Duly Elected Sheriff of Richland County,
South Carolina
Appellate Case Number: 2015-001153
Civil Action Number: 2012-CP-32-0342
Our File Number: 314.9502

RECEIVED
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SC Court of Appeals

Dear Ms. Kitchings:

The purpose of this letter is to provide the Court with supplemental citations resulting from oral argument held on November 7, 2017.

During oral argument, Judge Geathers raised a preservation issue that had not been raised by the Respondent-Appellant during briefing. He inquired of counsel whether Sheriff Lott's challenge to the trial court's reliance on and application of S.C. Code Ann. § 22-5-110(b) was preserved for appellate review because no objection was made when that Code section was charged to the jury. Counsel for Sheriff Lott responded that an objection to the charge was not required because the issue had been raised during both directed verdict motions and denied by the trial judge, and as a result, it is not necessary to object to the charge.

In support of that position, Sheriff Lott offers the supplemental citations of *Thomasko v. Poole*, 349 S.C. 7, 561 S.E.2d 597 (2002), and *Fettler v. Gentner*, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). In *Fettler*, this Court explained:

An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge. Once a party moves for a directed verdict on an issue, and that motion is denied, the party is not required to object again to the subsequent jury instruction regarding that issue. The issue is preserved.

The Honorable Jenny Abbott Kitchings
November 8, 2017
Page Two

722 S.E.2d at 30-31, *citing Thomasko*, 561 S.E.2d at 598-599. (Citations omitted)

I am enclosing with this letter a copy of these supplemental decisions. I am providing the Respondent-Appellant Kay F. Paschal's counsel with a copy as well.

Thank you for your assistance and the Court's consideration of this additional case law.

Sincerely,

DAVIDSON & LINDEMANN, P.A.



Andrew F. Lindemann

AFL/
Enclosures

cc: (w/ Enclosures)

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349 S.C. 7
Supreme Court of South Carolina.
Dr. Martha THOMASKO, Petitioner,
v.
Daniel E. POOLE, Jr., Respondent.

No. 25425.
|
Heard Oct. 11, 2001.
|
Decided March 11, 2002.
|
Rehearing Denied April 18, 2002.

Motorist brought negligence action seeking personal injury damages against other driver involved in accident. After jury verdict, the Richland County Circuit Court, J. Ernest Kinard Jr., J., entered judgment for defendant driver, and motorist appealed. The Court of Appeals affirmed, and motorist appealed. The Supreme Court, Burnett, J., held that question whether motorist failed to keep proper lookout was for jury.

Affirmed.

Toal, C.J., dissented and filed opinion in which Westbrook, A.J., joined.

West Headnotes (9)

[1] **Appeal and Error**
☞Direction of Verdict
Appeal and Error
☞Repetition of Objections

Plaintiff's objection upon denial of her motion for directed verdict on issue of comparative negligence was sufficient to preserve issue for appellate review; she was not required to object again to subsequent jury instruction.

2 Cases that cite this headnote

[2] **Appeal and Error**
☞Necessity of Presentation in General

An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge.

2 Cases that cite this headnote

[3] **Automobiles**
☞Vehicles Crossing

Question whether motorist who collided with vehicle that crossed over three lanes of traffic to make u-turn failed to keep proper lookout was for jury in motorist's negligence action against driver who made u-turn.

1 Cases that cite this headnote

[4] **Negligence**
☞Effect of Determination on Recovery;
Methods of Apportionment

Under comparative negligence, the plaintiff's contributory negligence does not bar recovery unless that negligence exceeds defendant's.

4 Cases that cite this headnote

[5] **Trial**
☞Hearing and Determination

A trial judge, when ruling on a motion for directed verdict, must view the evidence in the light most favorable to the non-moving party.

4 Cases that cite this headnote

[6] **Negligence**
⊕Effect of Determination on Recovery;
Methods of Apportionment
Negligence
⊕Effect of Others' Fault; Comparative
Negligence

care owed by the defendant to the plaintiff.

18 Cases that cite this headnote

In a comparative negligence case, the trial court should grant a motion for directed verdict if the sole reasonable inference from the evidence is that the non-moving party's negligence exceeded fifty percent.

6 Cases that cite this headnote

Attorneys and Law Firms

**597 *8 Robert L. Widener, of McNair Law Firm, of Columbia; and Robert A. Muckenfuss, of McGuire Woods, of Charlotte, NC, for petitioner.

David S. Cobb, of Turner, Padgett, Graham & Laney, of Charleston, for respondent.

Opinion

*9 BURNETT, Justice:

[7] **Negligence**
⊕Effect of Others' Fault; Comparative
Negligence

Because the term is relative and dependent on the facts of a particular case, comparing the negligence of two parties is ordinarily a question of fact for the jury.

3 Cases that cite this headnote

Dr. Martha Thomasko ("Thomasko") sued Daniel Poole, Jr., ("Poole") for negligence as a result of an vehicle accident. The trial court denied plaintiff Thomasko's motion for a directed verdict on the issue of her comparative negligence. The Court of Appeals affirmed the trial court in an unpublished opinion, **598 and Thomasko appealed to this Court. We affirm.

FACTUAL/PROCEDURAL BACKGROUND

Defendant Poole testified that on March 25, 1995, he exited a store parking lot in his vehicle and attempted to cross three lanes of traffic to make a u-turn on Highway 17 in Myrtle Beach. Poole testified to looking in the direction of on-coming traffic before exiting the parking lot. Poole noticed two vehicles approximately 150-200 feet away. Poole entered the far right lane and began to transverse the other lanes at 8-10 miles per hour.

Poole's Suburban collided with Thomasko's vehicle as he entered the far left lane. Poole's vehicle sustained damage to its driver's side rear panel while Thomasko's received damage to its front, passenger side wheel well. Thomasko did not see Poole's vehicle until the moment before impact. Poole did not realize he collided with another vehicle until after seeing Thomasko's vehicle in his rear view mirror.

[8] **Negligence**
⊕Elements in General

A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff, (2) breach of that duty by a negligent act or omission, (3) resulting in damages to the plaintiff, and (4) damages proximately resulted from the breach of duty.

23 Cases that cite this headnote

Thomasko testified to experiencing an uneasy feeling in the right side of her chest after the accident. The day after

[9] **Negligence**
⊕Necessity and Existence of Duty

An essential element in a cause of action for negligence is the existence of a legal duty of

the accident she began experiencing pain throughout her body.

On April 12, several weeks after the accident, Thomasko fell in a store parking lot. She later visited a doctor because of a pain in the right side of her chest. Thomasko testified her doctor suspected her right breast implant ruptured.

Thomasko filed a negligence lawsuit against Poole seeking damages for personal injuries sustained during the accident.¹ At the close of the evidence, Thomasko moved for a directed verdict on Poole's defense of comparative negligence. The trial court denied the motion ruling the jury could reasonably *10 find Thomasko negligent in failing to take all precautions to avoid the accident.²

The jury deliberated for approximately an hour and a half before sending a note to the judge asking: "If we find fault by the defendant and neglect by the defendant but do not feel that injuries were sustained by the accident, who do we rule for?" The trial judge instructed the jury that if Thomasko failed to prove damages caused by the accident, then she failed to prove her case. The jury continued deliberations for three more minutes and returned with a general verdict for Poole.

Thomasko argues on appeal that the trial judge's denial of her motion for directed verdict on the issue of comparative negligence was error requiring a new trial.

ISSUES

I. Did Thomasko preserve the issue of whether the trial judge erred in denying her motion for a directed verdict?

II. Did the trial court err in denying Thomasko's motion for a directed verdict on the issue of comparative negligence?

III. If the denial of the motion for directed verdict was error, did the ruling constitute prejudice sufficient to require a new trial?

LAW/ANALYSIS

I

^[1] As a threshold issue, Poole argues Thomasko failed to object to the trial judge's jury instruction and thus failed to preserve the directed verdict ruling for appellate review. We disagree.

^[2] An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge. *Staubes v. City of Folly Beach*, 339 S.C. 406, 529 S.E.2d 543 (2000). Thomasko moved for a directed verdict on the issue of comparative *11 negligence. The trial judge denied the motion. Thomasko objected, on the record, to the denial. She was not required to object again to the subsequent jury instruction regarding comparative **599 negligence. The issue is preserved for our review.

II

^[3] Thomasko argues the trial judge committed reversible error by denying her motion for directed verdict. We disagree.

^[4] The law of comparative negligence controls this case. *See Nelson v. Concrete Supply Co.*, 303 S.C. 243, 399 S.E.2d 783 (1991). Under comparative negligence, the plaintiff's contributory negligence does not bar recovery unless that negligence exceeds defendant's. *Id.*; *see Hubbard & Felix, The South Carolina Law of Torts* 174 (2d ed.1997).

^[5] ^[6] ^[7] A trial judge, when ruling on a motion for directed verdict, must view the evidence in the light most favorable to the non-moving party. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001). In a comparative negligence case, the trial court should grant the motion if the sole reasonable inference from the evidence is the non-moving party's negligence exceeded fifty percent. *Bloom v. Ravoira*, 339 S.C. 417, 529 S.E.2d 710 (2000). Because the term is relative and dependant on the facts of a particular case, comparing the negligence of two parties is ordinarily a question of fact for the jury. *Creech v. South Carolina Wildlife and Marine Res. Dep't*, 328 S.C. 24, 32, 491 S.E.2d 571, 575 (1997); *Mahaffey v. Ahl*, 264 S.C. 241, 214 S.E.2d 119 (1975). For these reasons, this Court is reticent to endorse directed verdicts in cases involving comparative negligence.

^[8] ^[9] A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in

damages to the plaintiff; and (4) damages proximately resulted from the breach of duty. *Bloom v. Ravoira, supra*. “An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff.” *12 *Bishop v. S.C. Dep’t of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998).

Both Poole and Thomasko have duties. Thomasko has a duty to adjust her speed to conditions and hazards. S.C.Code Ann. § 56-5-1520 (Supp.2000). Poole has a duty to yield to the favored driver, Thomasko, before switching lanes. S.C.Code Ann. § 56-5-1900 (Supp.2000).

Both parties have a duty to keep a reasonable lookout to avoid hazards on the highway. *See* 60A C.J.S. *Motor Vehicles* §§ 247, 343 (1969)(Having the right of way does not excuse an individual from the common law duty to keep a reasonable lookout to avoid hazards); *Cf. Brown v. Howell*, 284 S.C. 605, 327 S.E.2d 659 (1985)(Motorists must use ordinary care in keeping a proper lookout for vehicles approaching an intersection). The relation between contributory negligence and the common law duty to keep a reasonable lookout is not a novel issue. *See e.g., Williams v. Kinney*, 267 S.C. 163, 226 S.E.2d 555 (1976); *Wilson v. Marshall*, 260 S.C. 271, 195 S.E.2d 610 (1973).

This Court in *Williams v. Kinney, supra*, reversed a trial court’s directed verdict on the issue of contributory negligence. In the case, the defendant stopped at a traffic light in the left lane. Plaintiff, following Defendant’s vehicle, drove to the right lane. Defendant attempted to make a right hand turn from the left lane in violation of South Carolina law and collided with Plaintiff.

Plaintiff argued Defendant negligently failed to observe his turn signal. Defendant admitted she did not see Plaintiff’s signal, but countered no reasonable person would expect a driver to turn right from the left lane. This Court held, “[w]hether the failure of [Plaintiff], who was following [Defendant], to observe the flashing turn signals was a causative factor was for the jury ... [t]he jury could have concluded that this collision occurred due to the failure of the [Plaintiff] to observe the turning signals.” *Id.*, 267 S.C. at 166-67, 226 S.E.2d at 556.

In *Wilson v. Marshall, supra*, this Court again reversed the trial court’s granting Plaintiff’s motion for directed verdict. The uncontradicted evidence showed Defendant failed to stop at an intersection as required by law. Instead, Defendant *13 proceeded into the intersection and was struck by Plaintiff. **600 Despite an unobstructed view, Plaintiff testified he did not see Defendant until moments before impact. The Court held

that although the evidence left little doubt Defendant was the primary cause of the collision the jury could have reasonably inferred that Plaintiff failed “to exercise due care in keeping a proper lookout and driving at an appropriately reduced speed under the circumstances.” *Id.* 260 S.C. at 276, 195 S.E.2d at 612.

Viewing the evidence in the light most favorable to Poole, the evidence shows he came to a stop before entering the highway and observed two vehicles 150-200 feet away. Poole, exiting the parking lot, crossed over two lanes of traffic before the collision between Poole’s and Thomasko’s vehicles. Poole’s vehicle did not speed quickly through the lanes, but traveled across the road at 8-10 miles per hour.

Although nothing obstructed Thomasko from seeing Poole’s vehicle, she did not notice the vehicle until it was upon her. Thomasko testified seeing a brown vehicle coming towards her. Poole’s vehicle was white. Poole crossed in front of Thomasko, causing her vehicle to strike the vehicle at the rear wheel. There is no evidence Thomasko attempted to stop before the crash.

Thomasko asserts the trial court misinterpreted the evidence and erroneously relied on the severity of the accident in denying her motion for a directed verdict. The severity and location of the damage to both vehicles could have bolstered Poole’s version of the accident.

The damage to both vehicles was slight, suggesting both were traveling at a low rate of speed. The damage occurred at Thomasko’s front end and near Poole’s rear tire, suggesting Thomasko ran into Poole as he proceeded across traffic at an angle. The damage to the vehicles suggests both Thomasko and Poole were negligent in failing to keep a reasonable lookout.

Several inferences could be drawn from the facts, including, finding Poole or Thomasko could have failed to keep a proper lookout. A jury could find Poole blind-sided Thomasko or Thomasko was blind to her duty to keep a reasonable lookout. This Court is required to affirm the trial court’s denial of a *14 motion for directed verdict where multiple inferences can be drawn from the evidence. *In re Matthews*, 345 S.C. 638, 550 S.E.2d 311 (2001); *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999).

Thomasko’s failure to keep a proper lookout is a jury question. *See Mahaffey v. Ahl, supra*, (this Court held whether driver should have seen an individual approaching on a motorbike in time to stop or slow down to avoid an accident was a jury question); *Spurlin v.*

Colprovia Prod. Co., 185 S.C. 449, 194 S.E. 332 (1937). As an appellate court we decide issues of law leaving determination of the facts and credibility of witnesses to the jury. This Court's sole task is to determine if multiple inferences can be drawn from the evidence of Thomasko's negligence to uphold the denial of her motion for directed verdict. Viewing the evidence in light most favorable to Poole, we **AFFIRM**.³

MOORE and WALLER, JJ., concur. TOAL, C.J., dissenting in a separate opinion in which Acting Justice MARC H. WESTBROOK, concurs.

TOAL, Chief Justice:

I respectfully dissent. I agree with the majority that Thomasko properly preserved the directed verdict motion for appellate review. However, I would hold that the trial judge erred in denying Thomasko's motion for directed verdict and that Thomasko was prejudiced by the error.

In deciding a motion for directed verdict, the trial judge must consider the evidence in the light most favorable to the party opposing the motion. *Wintersteen v. Food Lion, Inc.*, 344 S.C. 32, 542 S.E.2d 728 (2001). If multiple inferences can be drawn from the evidence, this Court is required to affirm the trial court's denial of the motion. **601 *In re Matthews*, 345 S.C. 638, 550 S.E.2d 311 (2001); *Swinton Creek Nursery v. Edisto Farm Credit*, 334 S.C. 469, 514 S.E.2d 126 (1999). Inversely, if there is no evidence to support a material element of the plaintiff's cause of action, the issue should have never gone to the jury, and this Court is required to reverse the trial *15 court's denial of the motion. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 242 S.E.2d 671 (1978). Here, I cannot find any evidence in the record to support the trial court's ruling.

The record reflects that Poole looked in the direction of oncoming traffic before exiting the Wal-Mart parking lot. He stated that he saw two cars approaching his position both approximately 150-200 feet away. He then pulled out of the parking lot and proceeded to switch lanes at a speed of 8-10 miles/hour until he reached the third lane and struck Thomasko's vehicle.

In my opinion, the evidence favoring Poole's defense of comparative negligence, even in the light most favorable to him, is insufficient to present a jury question. Poole

claims the following facts support his position that Thomasko was comparatively negligent:

1. Poole testified that when he exited the Wal-Mart parking lot, there were only two vehicles approaching his position. Each of the two vehicles were at least 150 feet from Poole's position.
2. Poole testified that he began to cross three lanes at a speed of 8-10 miles/hour. Upon reaching the third lane, Poole testified that he felt his vehicle impact with Thomasko's vehicle.
3. Poole testified that he never saw Thomasko's vehicle until after impact.
4. Thomasko testified that she did not see Poole's vehicle until the moment before impact.

Based on these facts, the trial judge allowed the issue of plaintiff's comparative negligence to go to the jury stating that the jury could have found Thomasko was negligent in failing to avoid the accident because it was not a "bad accident."

First, I disagree that there was any evidence presented to the jury which even suggested Thomasko was negligent. The defense failed to produce evidence of speeding, violation of traffic laws, driver impairment, vehicle impairment, or any other type evidence which could support a reasonable inference of negligence on the part of Thomasko. The fact that Thomasko does not remember seeing Poole prior to the moment *16 of impact creates, at most, mere speculation as to Thomasko's negligence.

I agree with the Respondent and the majority that Thomasko has a duty to keep a reasonable lookout and adjust her speed to conditions pursuant to S.C.Code Ann. § 56-5-1520 (Supp.2000). However, mere accusation or speculation Thomasko may have failed to keep a proper lookout, without more, cannot rise to the level of negligence as a matter of law. To hold otherwise, as the majority's has done, will require the trial court to submit the issue of comparative negligence to the jury in every car accident case even without any evidence of negligence on the part of the plaintiff.

In addition, Thomasko was the favored driver because she was driving within the lane that Poole was entering. S.C.CODE ANN. § 56-5-1900 (Supp.2000) states that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from the lane until the driver has first ascertained that such movement can be made with safety." Therefore, it was Poole's duty to yield to all southbound traffic before

switching lanes. It strains logic to impose a duty on Thomasko to avoid being blind-sided by Poole as the result of his negligence without some evidence of Thomasko's own negligence.

Second, I do not agree that the severity of the accident alone should allow an inference of negligence. To entertain this argument would make the decision of whether to grant a directed verdict dependant on the trial judge's judgment as to the severity of the accident. This is not a precedent I am willing to create.

Poole argues that even if the denial of the Motion for Directed Verdict was in error, Thomasko suffered no prejudice. Poole argues that the jury's question to the bench, combined with the timing of the verdict suggests **602 that the jury found Thomasko did not sustain damages in the accident. I disagree.

When deliberating, the jury foreman came back with the following question: "If we find fault by the defendant and neglect by the defendant but do not feel that injuries were sustained by the accident, who do we rule for?" There is no indication as to whether this was a question by the entire jury *17 or just the foreman. In response to this question, the trial judge charged the jury that damages were an essential element in a cause of action for negligence; therefore, if the Plaintiff failed to prove damages, then she failed to prove her case. Three minutes later, the jury returned with a general verdict for Poole.

It is well established that an appellant seeking reversal of a decision by the trial court must show both error and

Footnotes

- 1 Thomasko claimed One Hundred and Sixteen Thousand Dollars (\$116,000.00) in damages for doctor visits, two new breast implants, lost wages, as well as pain and suffering.
- 2 The trial judge reasoned the jury could find Thomasko failed to take precautions to avoid the accident because it was not a "bad accident."
- 3 Because denial of the motion for directed verdict was not in error, we do not address the third issue.

prejudice. *McKissick v. J.F. Cleckley & Co.*, 325 S.C. 327, 479 S.E.2d 67 (1996). An alleged error does not prejudice the Appellant if the appellate court determines beyond a reasonable doubt that the alleged error did not contribute to the verdict. *Wells v. Halyard*, 341 S.C. 234, 533 S.E.2d 341(2000); *Visual Graphics Leasing Corp., Inc., v. Lucia*, 311 S.C. 484, 429 S.E.2d 839 (1993).

The jury returned a general verdict for Poole. Therefore, either the jury found (1) Thomasko was at least 51% at fault for the accident, or (2) Thomasko failed to prove damages. Because the verdict was a general verdict, drawing any conclusion from the jury's question would be nothing more than speculation.

CONCLUSION

Based on the foregoing reasons, I would **REVERSE** and order a new trial.

WESTBROOK, A.J., concurs.

All Citations

349 S.C. 7, 561 S.E.2d 597

396 S.C. 461
Court of Appeals of South Carolina.

Elizabeth FETTLER, Appellant,
v.
Frederick GENTNER, Respondent.

No. 4933.

Heard Nov. 17, 2011.

Decided Jan. 25, 2012.

Rehearing Denied March 2, 2012.

1 Cases that cite this headnote

[2]

Judgment

☞Where evidence is conflicting or where different inferences may be reasonably drawn therefrom

Trial

☞Inferences from evidence

Motions for directed verdict or judgment notwithstanding the verdict (JNOV) should be denied when the evidence yields more than one inference or its inference is in doubt.

1 Cases that cite this headnote

[3]

Appeal and Error

☞Appeal from ruling on motion to direct verdict

An appellate court will only reverse a trial court's ruling on a motion for directed verdict or judgment notwithstanding the verdict (JNOV) when there is no evidence to support the ruling or when the ruling is controlled by an error of law.

2 Cases that cite this headnote

[4]

Automobiles

☞Care required of following vehicle

Automobiles

☞Vehicles following, overtaking, or passing

Evidence established that driver of following vehicle was negligent in rear-ending leading vehicle; leading vehicle was stopped at a yield sign at the time of the accident, both driver and his wife admitted their failure to keep a lookout after leading vehicle reached the yield sign, and the only evidence supporting negligence on behalf of driver of leading vehicle was following

Synopsis

Background: Passenger in vehicle that was rear-ended by following vehicle brought an action for negligence and damages against driver of following vehicle. Following denial of passenger's motion for a directed verdict on the issue of negligence, the Circuit Court, Richland County, James R. Barber, III, J., entered judgment on jury verdict in favor of driver of following vehicle. Passenger appealed.

[Holding:] The Court of Appeals, Lockemy, J., held that evidence established that driver of following vehicle was negligent in rear-ending leading vehicle.

Reversed and remanded.

West Headnotes (18)

[1]

Appeal and Error

☞Judgment

When reviewing the denial of a motion for directed verdict or judgment notwithstanding the verdict (JNOV), appellate court applies the same standard as the trial court: appellate court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the nonmoving party.

driver's personal testimony that he did not think there was any reason for leading driver to stop at the yield sign because the oncoming car that eventually turned left was not close enough to disturb leading driver's travel.

Cases that cite this headnote

Cases that cite this headnote

^[5] **Negligence**
⊕Elements in general

A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the plaintiff; and (4) damages proximately resulted from the breach of duty.

4 Cases that cite this headnote

^[6] **Automobiles**
⊕Lookout

Parties have a duty to keep a reasonable lookout to avoid hazards on the highway.

Cases that cite this headnote

^[7] **Automobiles**
⊕Duties of Forward Vehicle
Automobiles
⊕Care required of following vehicle
Automobiles
⊕Following, overtaking, or passing

In determining issues of negligence and contributory negligence arising out of collisions between vehicles proceeding in the same direction, a leading vehicle has no absolute legal position superior to that of one following; each driver must exercise due care under the circumstances.

^[8] **Automobiles**
⊕Care required and liability in general
Automobiles
⊕Stopping, backing, or turning
Automobiles
⊕Care required of following vehicle
Automobiles
⊕Following, overtaking, or passing

With regard to negligence and contributory negligence arising out of collisions between vehicles proceeding in the same direction, as a general rule, the driver of the leading vehicle is required to make reasonable observations under the circumstances to determine that the particular movement of his vehicle, such as turning, slowing up, or stopping, can be made with safety to others, and to give adequate warning or signal of his intentions; the driver of the following vehicle owes a reciprocal duty to keep his vehicle under reasonable control and not to follow too closely.

Cases that cite this headnote

^[9] **Negligence**
⊕In general; foreseeability of other cause

Evidence of an independent negligent act of a third party is directed to the question of proximate cause.

Cases that cite this headnote

^[10] **Negligence**
⊕In general; foreseeability of other cause

The intervening negligence of a third person will not excuse the first wrongdoer if such intervention ought to have been foreseen in the exercise of due care; in such case, the original negligence still remains active, and a

contributing cause of the injury.

Cases that cite this headnote

[11] **Negligence**
⊖Proximate Cause

Ordinarily, proximate cause is a question for the jury.

Cases that cite this headnote

[12] **Appeal and Error**
⊖Sufficiency of Presentation of Questions

Passenger, who brought negligence action against driver of following vehicle after rear-end accident, preserved for appellate review her claim that trial court erred in denying her **directed verdict** motion, resulting in an erroneous **charge** of negligence to the jury which was unsupported by the evidence; while passenger did not **object** to the jury instruction of negligence, she argued a motion for a **directed verdict** and judgment notwithstanding the verdict (JNOV) on the issue of driver's negligence and was denied.

1 Cases that cite this headnote

[13] **Appeal and Error**
⊖Necessity of objections in general

An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge.

2 Cases that cite this headnote

⊖Repetition of objections

Once a party moves for a directed verdict on an issue, and that motion is denied, the party is not required to object again to the subsequent jury instruction regarding that issue in order to preserve claim of error for appeal.

Cases that cite this headnote

[15] **Appeal and Error**
⊖Sufficiency of Presentation of Questions

Appellate court does not require parties to engage in futile actions in order to preserve issues for appellate review.

3 Cases that cite this headnote

[16] **Appeal and Error**
⊖Conduct of trial or hearing in general

An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion.

Cases that cite this headnote

[17] **Appeal and Error**
⊖In general; abstract propositions

A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial.

Cases that cite this headnote

[14] **Appeal and Error**

[18] **Appeal and Error**

⚡Prejudicial Effect

An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party.

Cases that cite this headnote

Attorneys and Law Firms

**28 Everett Hope Garner, of Columbia, for Appellant.

Ronald E. Alexander, of Columbia, for Respondent.

Opinion

LOCKEMY, J.

*464 In this civil action for negligence and damages as a result of a vehicular accident, Elizabeth Fettler argues the trial court erred in (1) denying her motion for a directed verdict and *465 judgment notwithstanding the verdict (JNOV) on the issue of Frederick Gentner's negligence, and (2) presenting an erroneous and prejudicial charge to the jury as a result of the denial of her directed verdict motion. We reverse and remand.

FACTS

On December 25, 2002, Fettler was a passenger in the vehicle her husband was driving on White Pond Road in Columbia, South Carolina. Gentner stated his vehicle was "probably ten car lengths" behind the Fetters' vehicle. Fettler testified that before her husband could proceed down an on ramp to the interstate, he had to yield at a yield sign to avoid an oncoming car turning left onto the on ramp. While at the yield sign, the Fetters were rear-ended by Gentner. Gentner testified that while he saw the oncoming vehicle, it was in the distance at the time the Fetters came to the yield sign. He stated he saw no reason for the Fetters to stop at the yield sign because there was no vehicle in front of them. Gentner said after he saw the Fetters come to the ramp, he stopped looking in the direction he was traveling. He specifically stated he "focused [his] attention no longer on [the Fetters' vehicle] but on the vehicle that was coming across." Despite his actions, Gentner agreed he is required to look

where he is going while driving a vehicle.

At the close of evidence, Fettler made a motion for a directed verdict on the issue of Gentner's negligence. Gentner argued against the motion, stating Fettler's husband did not have the right to stop his car in the road for no good reason, particularly at a yield sign. In discussing the motion, the trial court noted Gentner admitted to failing to keep a proper lookout and stated:

What he said is I quit paying attention as soon as those cars turned. I don't know what they did; I didn't see them again. I didn't pay any attention until I saw this car stopped, and the guy that was driving that car stopped, and said he stopped it because he was yielding to the car, which he was required to do. And there was no testimony to the contrary. Your guy says I didn't see anything, so we're supposed to circumstantially **29 say okay, there wasn't anything there then?

*466 However, the court eventually denied the motion for a directed verdict on the issue of negligence.

At the conclusion of the trial, the jury returned a unanimous verdict for Gentner. After the verdict was read, Fettler made a motion for a JNOV, contending the evidence allowed only one reasonable inference in favor of Fettler on the issues of negligence and proximate cause. The trial court treated the JNOV motion as a thirteenth juror motion, and stated there was evidence in the record to support the jury's decision, and so it denied Fettler's motion.

STANDARD OF REVIEW

[1] [2] [3] " 'When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court.' " *Pridgen v. Ward*, 391 S.C. 238, 243, 705 S.E.2d 58, 61 (Ct.App.2010) (quoting *Gibson v. Bank of America, N.A.*, 383 S.C. 399, 405, 680 S.E.2d 778, 781 (Ct.App.2009)). " 'The Court is required to view the evidence and inferences that reasonably can be drawn from the evidence in the light most favorable to the nonmoving party.' " *Id.* (quoting *Gibson*, 383 S.C. at 405, 680 S.E.2d at 781). " 'The motions should be denied when the evidence yields more than one inference or its

inference is in doubt.’ ” *Id.* (quoting *Gibson*, 383 S.C. at 405, 680 S.E.2d at 781). “ ‘An appellate court will only reverse the [trial] court’s ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law.’ ” *Id.* (quoting *Gibson*, 383 S.C. at 405, 680 S.E.2d at 781).

LAW/ANALYSIS

I. Directed Verdict and JNOV on the Issue of Defendant’s Negligence

^[4] Fettler contends the trial court erred in denying her motion for a directed verdict and JNOV because the evidence was not susceptible to more than one reasonable inference on the issue of Gentner’s negligence. We agree.

^[5] ^[6] ^[7] ^[8] “A plaintiff, to establish a cause of action for negligence, must prove the following four elements: (1) a duty of care owed by defendant to plaintiff; (2) breach of that duty by a negligent act or omission; (3) resulting in damages to the *467 plaintiff; and (4) damages proximately resulted from the breach of duty.” *Thomasko v. Poole*, 349 S.C. 7, 11, 561 S.E.2d 597, 599 (2002) (citing *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000)). “[P]arties have a duty to keep a reasonable lookout to avoid hazards on the highway.” *Id.* at 12, 561 S.E.2d at 599. “In determining issues of negligence and contributory negligence arising out of collisions between vehicles proceeding in the same direction, [our supreme court has] held that a leading vehicle has no absolute legal position superior to that of one following.” *Still v. Blake*, 255 S.C. 95, 104, 177 S.E.2d 469, 473–74 (1970). “Each driver must exercise due care under the circumstances.” *Id.* at 104, 177 S.E.2d at 474. “As a general rule, the driver of the leading vehicle is required to make reasonable observations under the circumstances to determine that the particular movement of his vehicle, such as turning, slowing up, or stopping, can be made with safety to others, and to give adequate warning or signal of his intentions.” *Id.* “The driver of the following vehicle owes a reciprocal duty to keep his vehicle under reasonable control and not to follow too closely.” *Id.*

^[9] ^[10] ^[11] “ ‘Evidence of an independent negligent act of a third party is directed to the question of proximate cause.’ ” *Manios v. Nelson, Mullins, Riley & Scarborough, LLP*, 389 S.C. 126, 142, 697 S.E.2d 644, 652 (Ct.App.2010) (quoting *Matthews v. Porter*, 239 S.C. 620, 628, 124 S.E.2d 321, 325 (1962)). “ ‘The intervening negligence of a third person will not excuse the first wrongdoer if such

intervention ought to have been foreseen in the exercise of due care. In such case, the original negligence still remains active, and a contributing cause of the injury.’ ” *Id.* at 142, 697 S.E.2d at 653 (quoting *Bishop v. S.C. Dep’t of Mental Health*, 331 S.C. 79, 89, 502 S.E.2d 78, 83 (1998)). “Ordinarily, proximate cause is a question for the jury.” *Id.* (citing *McKnight v. S.C. Dep’t of **30 Corr.*, 385 S.C. 380, 387, 684 S.E.2d 566, 569 (Ct.App.2009)).

Both Gentner and Gentner’s wife admit their failure to keep a lookout after the Fetters reached the yield sign in front of the on ramp. The record reflects Gentner’s admissions:

Fettler’s counsel: After the Fetters entered the ramp, you were looking at this [oncoming] vehicle and weren’t looking where you were going down that ramp?

*468 Gentner: That’s correct, yes sir.

Fettler’s counsel: You weren’t looking? You weren’t looking where you were going?

Gentner: That’s correct.

Fettler’s counsel: That’s correct. Don’t you think you’re required to look where you’re going when you’re driving a vehicle?

Gentner: Yes, sir.

Gentner’s wife confirms Gentner’s admissions in the record, stating:

Fettler’s counsel: And you said you diverted your eyes somewhere and he diverted his eyes. Is that right?

Gentner’s wife: Yes.

Fettler’s counsel: So, both of you looked away from the lane of travel where you were headed. Is that right?

Gentner’s wife: Well, yes.

Fettler’s counsel: And subsequent to that, there was a car in front of you and it turned out to be the Fetters, and y’all hit them in the rear. Is that correct? Gentner’s wife: Yes.

Gentner argues there is evidence in the record supporting the inference that Fettler’s husband’s negligence caused or contributed to the accident by unnecessarily stopping at the yield sign. Thus, Gentner contends, there are conflicts of fact relating to his negligence to go to a jury. However,

the only evidence supporting negligence on behalf of Fettler's husband is Gentner's personal testimony. Gentner testified he did not think there was any reason for the Fetters to stop at the yield sign because the oncoming car that eventually turned left was not close enough to disturb the Fetters' travel. However, Fettler states there was an oncoming vehicle turning left onto the on ramp that they yielded for at the yield sign. Fettler's husband claimed he yielded because the oncoming car was in the process of making its left-hand turn onto the on ramp. Taking into consideration Gentner himself testified he was "10 car lengths" behind the Fetters, all parties agree there was a yield sign on the road before entering the interstate from the Gentners' and Fetters' direction, and the Gentners both testified they took their eyes off the direction they were traveling. *469 we find there was no evidence to provide a jury with any reasonable inference other than Gentner was negligent.

Gentner's position that the Fetters did not need to stop at the yield sign does not create an inference of negligence on Fettler's husband's part, it merely stands as a personal opinion from someone who did not have his eyes focused on his lane of travel. Thus, we reverse and remand the trial court's denial of the Fetters' directed verdict and JNOV motions for a new trial in accordance with this decision.

II. Prejudicial Jury Charge

^[12] Fettler argues the trial court erred in presenting a prejudicial and erroneous charge to the jury. Specifically, Fettler contends the trial court erred in denying her directed verdict motion, resulting in an erroneous charge of negligence to the jury which was unsupported by the evidence. We agree, but as a threshold matter, we will first address preservation of the issue.

^[13] ^[14] ^[15] "An appellate court cannot address an issue unless first raised by appellant and ruled on by the trial judge." *Thomasko v. Poole*, 349 S.C. 7, 10, 561 S.E.2d 597, 598 (2002) (citing *Staubes v. City of Folly Beach*, 339 S.C. 406, 412, 529 S.E.2d 543, 546 (2000)). Once a party moves for a directed verdict on an issue, and that motion is denied, the party is not required to object again to the subsequent jury instruction regarding that issue. *See id.* at 10–11, 561 S.E.2d at 598–99; *see also Carter v. Peace*, 229 S.C. 346, 355, 93 S.E.2d 113, 117 (1956) (finding a motion for a directed verdict on the issue of negligence had been refused; thus, the negligence instructions **31 were correct under the trial court's conception of the evidence and there was no duty upon appellant to object to the instruction because it would be futile and unnecessary). The issue is preserved. *See*

Thomasko, 349 S.C. at 10–11, 561 S.E.2d at 598–99. "This [c]ourt does not require parties to engage in futile actions in order to preserve issues for appellate review." *Staubes*, 339 S.C. at 415, 529 S.E.2d at 547.

While Fettler did not object to the jury instruction of negligence, she argued a motion for a directed verdict and *470 JNOV¹ on the issue of Gentner's negligence and was denied. Therefore, we find the issue sufficiently preserved, and an objection to the jury charge of negligence would have been futile, as the trial court had already ruled there was evidence to go to the jury on the issue. We continue below to the merits of this argument.

^[16] " 'An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion.' " *Berberich v. Jack*, 392 S.C. 278, 285, 709 S.E.2d 607, 611 (2011) (quoting *Cole v. Raut*, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)). " 'An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence.' " *Id.* (quoting *Cole*, 378 S.C. at 404, 663 S.E.2d at 33).

^[17] ^[18] " 'A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial.' " *Id.* (quoting *Cole*, 378 S.C. at 404, 663 S.E.2d at 33). "An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party." *Id.* (citing *Cole*, 378 S.C. at 405, 663 S.E.2d at 33); *see also Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("When instructing the jury, the trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence in support of those issues.").

Because we find the issue of Gentner's negligence should have been resolved by a directed verdict in Fettler's favor, we also find there was no evidence in the record to support a charge of negligence to the jury. As the issue of Gentner's negligence should have been decided as a matter of law, the irrelevant and inapplicable principles of negligence had the strong possibility of confusing the jury and affecting the outcome of the trial. We reverse and remand this issue to the trial court for a new trial in accordance with this decision.

*471 CONCLUSION

Based on the foregoing reasons, the trial court's decision

is

All Citations

REVERSED AND REMANDED.

396 S.C. 461, 722 S.E.2d 26

HUFF and PIEPER, JJ., concur.

Footnotes

¹ As previously stated, the trial court viewed the motion for a JNOV as a thirteenth juror motion.

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