THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2018-000894
Case No. 2017-CP-40-0329

Keith L. Montgomery, ... Respondent,

v.

Richland County, ... Appellant.

INITIAL BRIEF OF APPELLANT

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II. Did the trial court err in denying Richland County the opportunity to offer evidence that Keith Montgomery lied about the charges for which he had been detained at the Alvin S. Glenn Detention Center even after Montgomery had opened the door by voluntarily providing false testimony on that issue on re-direct examination?

STATEMENT OF THE CASE

This is an appeal from a gross negligence action brought by the Respondent Keith Montgomery against the Appellant Richland County pursuant to the South Carolina Tort Claims Act, S.C. Code Ann. § 15-78-10, *et seq*.

On March 26, 2013, Montgomery was a prisoner housed at the Alvin S. Glenn Detention Center located in Columbia, South Carolina. On that date, Montgomery was part of a work detail tasked with loading lawnmowers onto a flat-bed trailer that was hitched to a County-owned pick-up truck. The lawnmowers were being taken from a storage shed that had two steel doors hinged on the side that opened outward. While the doors to the storage shed were open and with Montgomery and two other prisoners working in or around the shed, the supervising officer, Johnnie Taylor, entered the pick-up truck and began backing the trailer. During the course of that action, the trailer came into contact with one of the open doors to the storage shed near where Montgomery was standing. The storage shed door then struck Montgomery in the back. (Tr. 65-67). He was not struck directly by the pick-up truck or the trailer. Montgomery testified that before Taylor got into the truck he was speaking on a walkie-talkie. (Tr. 125). But, there is no evidence that Taylor was still on the walkie-talkie when he began maneuvering the pick-up truck and trailer.

In his Complaint, Montgomery alleged causes of action for gross negligence, "deliberate indifference," and negligent infliction of emotional distress. (Complaint). After the completion of discovery, the case was called to trial on April 4, 2018, before Circuit Court Judge Alison Renee Lee and a jury. In his case-in-chief, Montgomery only presented his own testimony. At the close of his case-in-chief, Richland County moved for a directed verdict as to all causes of action. The trial court granted the directed verdict as to "deliberate indifference" and negligent infliction of emotional distress claims, but it denied a directed verdict on the gross negligence claim. (Tr. 173-174). The directed verdict motion was renewed and again denied at the close of all evidence. (Tr. 218-220). The jury ultimately returned a general verdict in Montgomery's favor in the amount of $48,000.00 in actual damages.

Richland County filed post-trial motions including a motion for judgment notwithstanding the verdict (JNOV), a motion for a new trial absolute, and a motion for new trial nisi remittitur. (R. ___). Those motions were denied by order filed April 17, 2018. (Order).

Richland County subsequently filed a timely appeal to this Court.

STANDARD OF REVIEW

When reviewing the trial court's ruling on a motion for a directed verdict or JNOV, the South Carolina appellate courts apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. South Carolina Department of Transportation*, 361 S.C. 9, 602 S.E.2d 772, 782 (2004).

An issue of gross negligence is ordinarily "a mixed question of law and fact." *Clyburn v. Sumter County School District No. 17*, 317 S.C. 50, 451 S.E.2d 885, 887 (1994). In reviewing mixed questions of law and fact, where the evidence supports but one reasonable inference, the question becomes a matter of law for the court. *Id.* at 887-888.

"Evidentiary rulings are within the sound discretion of the trial court, and such rulings will not be reversed absent an abuse of discretion or the commission of legal error that prejudices the defendant." *State v. Garner*, 389 S.C. 61, 697 S.E.2d 615, 617 (Ct. App. 2010). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Regional Medical Center Orangeburg*, 363 S.C. 19, 609 S.E.2d 506, 509 (2005).

ARGUMENTS

I. The trial court erred in denying Richland County's directed verdict and JNOV motions where the record contains no evidence to support a finding of gross negligence based upon the conduct of Johnnie Taylor.

The Appellant Richland County asserted in the trial court that it is entitled to a directed verdict and JNOV because the Respondent Keith Montgomery failed to present evidence to reasonably support a finding that Johnnie Taylor acted with gross negligence when he allegedly backed a trailer into a shed door which in turn struck and injured Montgomery. The trial court denied those motions on the limited basis that "[t]here was evidence to support the jury's verdict in favor of Plaintiff on the causes [sic] of action." (Order, p. 1).

The only cause of action submitted to the jury was one for gross negligence brought pursuant to the South Carolina Tort Claims Act. The trial court and the parties agreed that, in accordance with Section 15-78-60(25), the County is not liable for ordinary negligence, and as a result, Montgomery was required to prove gross negligence by Johnnie Taylor in order to prevail. Under South Carolina law, "[g]ross negligence is the intentional, conscious failure to do something which it is incumbent upon one to do or the doing of a thing intentionally that one ought not to do." *Clyburn v. Sumter County School District No. 17*, 317 S.C. 50, 451 S.E.2d 885, 887 (1994). "Negligence is the failure to exercise due care, while gross

negligence is the failure to exercise slight care." *Id.* "Where a person is so indifferent to the consequences of his conduct as not to give slight care to what he is doing, he is guilty of gross negligence." *Staubes v. City of Folly Beach*, 331 S.C. 192, 500 S.E.2d 160, 167 (Ct. App. 1998). "Gross negligence involves a conscious failure to exercise due care." *Id.* "Gross negligence ordinarily is a mixed question of law and fact." *Clyburn*, 451 S.E.2d at 887. "When the evidence supports but one reasonable inference, however, the question becomes a matter of law for the court." *Id.* at 887-888.

Admittedly, if the standard of liability at trial had been ordinary negligence, the evidence presented might yield more than one inference as to whether Taylor failed to exercise due care. However, that was not the standard. There was simply no evidence to support the allegation that Taylor's acts or omissions rose to the level of an intentional and conscious failure or that he failed to exercise slight care. As a result, the County was entitled to a directed verdict and JNOV.

The only testimony in Montgomery's case-in-chief regarding the incident was provided by Montgomery himself. He never presented testimony from Taylor or from the other two prisoners who were working with him. Montgomery testified that the prisoners were required to load lawnmowers from a storage shed onto a flat-bed trailer that was hitched to a pick-up truck driven by Taylor. No photographs of the storage shed were admitted into evidence, but the description of

the shed (or as Montgomery calls it, "storage bin") shows that it had two steel doors hinged on the sides. The two steel doors opened like barn doors or tractor-trailer doors do – they opened outward, one on each side of the shed. (Tr. 136). Montgomery testified that the steel doors were open. The accident occurred while Taylor was in the pick-up truck backing the trailer which struck one of the doors near where Montgomery was standing, and the swinging door then struck Montgomery in the back. (Tr. 65-67). Montgomery testified that before Taylor got into the truck he was speaking on a walkie-talkie. (Tr. 125). There is no evidence that Taylor was still on the walkie-talkie when he began maneuvering the truck and trailer. Montgomery also testified that once Taylor started moving the truck Montgomery was not looking at Taylor but rather was "looking toward the right." (Tr. 124-125). As a result, Montgomery was unable to describe what Taylor was physically doing in the pick-up truck when he maneuvered the trailer into the storage shed door.

In fact, Montgomery never testified to any act or omission that Taylor committed with the exception that he contacted the open door of the storage shed with the trailer. There is no evidence of excessive speed nor any aggravating circumstances. The trailer did not strike Montgomery or the other prisoners. There is no evidence that Taylor violated any statutory law in his operation of the

pick-up truck and trailer. There is likewise no evidence that Taylor violated any County or Detention Center policy.

In denying the directed verdict motion, the trial judge explained that Taylor "[is] on his walkie-talkie, he's getting in the car and he's moving without observing, looking and paying attention." (Tr. 173). The trial judge stated that Taylor was "preoccupied doing something else" and "that could rise to the level of gross negligence." (Tr. 173). That ruling was in error as a matter of law for several reasons.

First, the evidence in the record describes at most ordinary negligence. No reasonable inference can be made from the evidence that Taylor was grossly negligent. There is no evidence that he intentionally and consciously drove the trailer against the door of the storage shed. There is no evidence that he failed to exercise slight care and was recklessly indifferent to the consequences of his conduct. If this verdict is allowed to stand, there will be no discernible distinction under South Carolina law between ordinary negligence and gross negligence.

Second, the factual record does not support the trial court's ruling. There is no evidence that Taylor continued to speak on his walkie-talkie once he entered his truck and began maneuvering the trailer. No witness testified that they observed him speaking on the walkie-talkie while driving. Moreover, there is no evidence that Taylor was distracted or not looking or not paying attention as he backed the

trailer. That was pure speculation by the trial judge. In fact, no witness testified about Taylor's actions in the truck or while backing the trailer. The mere fact that he made a mistake and contacted one of the doors of the storage shed with the trailer does not give rise to an inference that he was not paying attention -- and certainly does not give rise to an inference that he was reckless and consciously indifferent. *See, Snow v. City of Columbia*, 305 S.C. 544, 409 S.E.2d 797, 803 (Ct. App. 1991) ("No inference of negligence arises from the mere fact of injury"). At most, the evidence shows carelessness, that is, ordinary negligence, for which the County may not be held liable under the Tort Claims Act.

Third, even if Taylor was still speaking on the walkie-talkie while backing the trailer, which is pure speculation, that would not support a finding of gross negligence. There is no statutory law nor any County or Detention Center policy that prohibits speaking on a walkie-talkie or a two-way radio or a cell phone while operating a motor vehicle. Accordingly, the use of such a device while driving is not illegal, nor does such conduct constitute the failure to exercise slight care that is required to support a finding of gross negligence.

In fact, courts in other jurisdictions have concluded that speaking on a cell phone while driving, where not statutorily prohibited, is not sufficient to support a finding of gross negligence. For example, in *Thompson v. Cooper*, 290 P.3d 393 (Alaska 2012), the Alaska Supreme Court explained that "Alaska law does not

prohibit talking on a cell phone while driving. We have never ruled that using a cell phone while driving, alone, amounts to reckless indifference, and we decline to do so here." 290 P.2d at 402. Similarly, in *Fuller v. Finley Resources, Inc.*, 176 F.Supp.3d 1263 (D.N.M. 2016), the federal district court ruled that the conduct of a driver who caused an accident by failing to yield right of way while using a cell phone, which was legal in New Mexico, "does not rise to a willful, wanton, malicious or reckless level." 176 F.Supp.3d at 1268. The court noted that "[t]here is no evidence that [the driver] was speeding or driving erratically or recklessly at the time of the accident." *Id.* The court surveyed the pertinent case law nationally and noted that cases where a driver was speaking of a cell phone, but otherwise was not driving recklessly or dangerously, did not support an award of punitive damages or, in effect, did not give rise to gross negligence or a similar standard of recklessness. 176 F.Supp.3d at 1267. *See also*, *Southard v. Belanger*, 966 F.Supp.3d 727 (W.D. Ky. 2013) ("alleged misconduct of driving while using a hands-free cell phone in violation of company policy ... does not match the level of culpability in the cases where punitive damages were available").

In sum, the factual scenario described by Keith Montgomery in his testimony supports only one reasonable inference – that Johnnie Taylor was at most careless in his maneuvering of the trailer and in allowing the trailer to come into contact with the door of storage shed. Taylor did not strike or run over

Montgomery or any of the workers; he accidentally backed the trailer into the shed door. Likewise, there is no evidence that Taylor was distracted or not paying attention, and that cannot be inferred from the evidence presented. The factual scenario may support a finding of ordinary negligence, but it just simply does *not* support a finding of gross negligence. The trial judge erred in submitting this claim to the jury based upon the scant and non-supporting evidence presented. Clearly, the County is entitled to a directed verdict and JNOV on the gross negligence claim.

II. The trial court erred in denying Richland County the opportunity to offer evidence that Keith Montgomery lied about the charges for which he had been detained at the Alvin S. Glenn Detention Center even after Montgomery had opened the door by voluntarily providing false testimony on that issue on re-direct examination.

During the cross-examination, counsel for the County elicited testimony from Keith Montgomery that he had numerous other detentions at the Alvin S. Glenn Detention Center. The purpose of such testimony was to show his bias or prejudice against the County and Detention Center and his motive to misrepresent the facts of his claim. The factual credibility of Montgomery's account and legitimacy of his claimed injuries were very much at issue, and the County sought to show that Montgomery would have a reason to seek retribution against the Detention Center and its staff by bringing a false or exaggerated legal claim.

Counsel for the County was careful not to elicit any testimony as to the offenses that led to those eight other detentions. Importantly, the evidence about the other detentions was presented without any objection from Montgomery. (Tr. 150-153).

Thereafter, on re-direct examination, Montgomery's own counsel elicited the following testimony:

> Q. Mr. Montgomery, I know on this detainer sheet the majority of them are just for a few hours, is that right?
>
> A. Yes, ma'am.
>
> Q. Okay. So there was nothing that was actually as a felony?
>
> A. No, ma'am.
>
> Q. Okay. It was just family court matters, the majority?
>
> A. Yes.
>
> Q. Okay. And you were able to take care of those matters?
>
> A. Yes, ma'am.
>
> Q. And you were released?
>
> A. Yes, ma'am.

(Tr. 154). Thus, Montgomery, through questions posed by his own counsel, then opened the door and testified that he was not detained for any felonies, which is demonstrably false and dishonest. Thereafter, counsel for the County, on re-cross

examination, attempted to show that the denial of felony arrests was dishonest, as was the testimony that the majority of detentions were "family court matters." Following an objection and bench conference, the County was not permitted to demonstrate that Montgomery's testimony was false and dishonest, which obviously would have been compelling given that Montgomery's credibility was a critical issue. (Tr. 158-168). Thereafter, in adjudication of the County's motion for new trial absolute on this issue, the trial court cited Rule 609, SCRE, and ruled that "[w]hat was not permissible ... was to discuss the specific charges because the admission of those charges did not comport with the Rules of Evidence relating to impeachment." (Order, p. 2).

The trial court abused its discretion and committed reversible error in denying the County the opportunity to prove that Montgomery's testimony was false particularly given that he opened the door to such testimony. This Court has held that "[t]he door-opening doctrine applies in both criminal and civil cases." *Gibson v. Wright*, 403 S.C. 32, 742 S.E.2d 49, 55 (Ct. App. 2013). As this Court explained, "[t]he primary purpose for the rule is that of fairness and completeness of the information for making a decision. If a party chooses to forego the protection of a rule by introducing evidence the opposing party would not be permitted to go into, then it is unfair not to allow the opposing party to go into the

matter and provide more information to the fact-finder." *Id.* That is precisely what the trial court did in this case.

Similarly, the Supreme Court has held that "[w]here one party introduces evidence as to a particular fact or transaction, the other party is entitled to introduce evidence in explanation or rebuttal thereof, even though the latter evidence would be incompetent or irrelevant had it been offered initially." *State v. Stroman*, 281 S.C. 508, 316 S.E.2d 395, 399 (1984). It is well settled that a party "may be cross-examined as to all matters which he himself has brought up on direct examination." *State v. Young*, 364 S.C. 476, 613 S.E.2d 386, 393 (2005). "As a general rule, any matter is proper subject of cross-examination which is responsive to testimony given on direct examination, or which is material or relevant thereto, and which tends to elucidate, modify, explain, contradict or rebut testimony given in chief by the witness." *Id.* "The cross-examination of matters which were addressed in direct-examination is not objectionable, even if the answers affect a witness' credibility and character." *Id.*

As indicated, Montgomery, by questions from his own counsel, testified on re-direct examination that he had never been detained at the Detention Center on any felonies. That was demonstrably false. As the proffer shows, Montgomery had been booked on a drug charge, a criminal domestic violence charge, and weapons charges, three of which were felonies. (Tr. 161-162). Yet, despite

Montgomery opening the door by offering demonstrably false testimony, the trial court did not permit the County to provide the jury with the accurate information. The trial court deemed the testimony to be impermissible impeachment under Rule 609, SCRE. Yet, that was in error. As the Supreme Court made clear in *Young*, the fact that such evidence affects Montgomery's credibility and character does not render the evidence objectionable. Once the door was opened, it makes no difference that the evidence to be elicited would not have been admissible under Rule 609 had it been offered initially by the County.

In sum, by excluding the re-cross examination testimony on the actual charges for which Montgomery had been detained, the trial court committed a clear error of law and thus abused its discretion. That critical evidentiary error prejudiced the County in that the jury was denied accurate information about Keith Montgomery, and at the very least, that error warrants a new trial absolute.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Richland County respectfully requests that this Court reverse the jury's verdict and the denial of its directed verdict and JNOV motions with respect to the gross negligence claim that was submitted to the jury. The County requests a remand with instructions that judgment be entered in its favor on the remaining gross negligence cause of action. In the alternative, the County submits that it is entitled to a new trial absolute and the case should be remanded for a new trial.

Respectfully submitted,

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October 8, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Alison Renee Lee, Circuit Court Judge

Appellate Case No. 2018-000894
Case No. 2017-CP-40-0329

Keith L. Montgomery,..... Respondent,

v.

Richland County,..... Appellant.

CERTIFICATE OF SERVICE

The undersigned employee of Lindemann, Davis & Hughes, P.A., counsel for the Appellant Richland County, does hereby certify that service of the **Initial Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above-captioned matter was made upon all counsel of record by placing copies in the United States Mail, first class postage prepaid, at the below listed addresses clearly indicated on said envelopes this the 8th day of October 2018:

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October 8, 2018

The Honorable Jenny Abbott Kitchings
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RE: Keith L. Montgomery v. Richland County
Appellate Case Number: 2018-000894
Civil Action Number: 2017-CP-40-0329
Our File Number: 314.20024

Dear Ms. Kitchings:

Please find enclosed the originals and one copy each of the **Initial Brief of Appellant** and **Appellant's Designation of Matter to be Included in the Record on Appeal** in the above referenced matter. I would appreciate you filing the originals and returning a clocked-in copy of each document to me by in the enclosed envelope. By copy of this letter, I am serving copies on all counsel of record.

Thank you for your assistance in this matter.

Sincerely,

LINDEMANN, DAVIS & HUGHES, P.A.

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Enclosures

cc: (w/ Enclosure)

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