THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2017-002520

Maurice Dawkins, Appellant,

v.

James A. Sell, Respondent.

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE CASE

This case arises from a series of events that occurred in the early morning hours of August 21, 2010, on Interstate 95 ("I-95") in Hampton County, South Carolina. Respondent, James Sell ("Sell") was operating a Budget Rental Truck ("Budget truck"), and was helping his son's family move from Columbus, Ohio, to Savannah, Georgia. Sell lost control of the Budget truck, and it overturned, blocking the southbound lanes of I-95. Sell and his grandson were able to exit the vehicle with the assistance of some other motorists, including Appellant Maurice Dawkins ("Dawkins"). Approximately five (5) to ten (10) minutes later, the Budget truck was then struck by the tractor trailer owned by Pierce National, Inc. ("Pierce National") and operated by Dennis J. Owens ("Owens"). The impact from the tractor trailer caused parts of the Budget truck to strike Sell, Dawkins, and other bystanders.

On July 1, 2011, Dawkins filed his Amended Summons and Complaint (Amd. Compl.), asserting causes of action against Sell, Owens, and Pierce National for

negligence and negligence per se. Dawkins then filed a Second Amended Summons and Complaint on June 11, 2015, setting forth additional causes of action as to Pierce National for negligent supervision, negligent retention, and negligent entrustment. Dawkins' specific allegations against Owens and Pierce National were:

> a) In failing to keep a proper lookout;
> b) In failing to keep his vehicle within his lane of travel;
> c) In failing to apply or use the brakes;
> d) In failing to stop, slow, or turn his vehicle to avoid colliding with other vehicles which collided with the Plaintiff;
> e) In failing to use the degree of care and caution that a reasonably prudent person would have used under the circumstances then and there existing; and
> g) In operating a vehicle in disregard for the safety of others.

(2nd Amd. Compl. ¶ 11). Dawkins further alleged that Owens was not a competent and careful driver, based upon:

> a. His actions which gave rise to the collision in this matter, specifically, his operating a vehicle in such a negligent manner, as set out above, for which actions he was found to be at fault in causing the collision with the rental vehicle by investigating law enforcement;
> b. His record of infractions related to competent and safe vehicle operation; and
> c. His driving a vehicle without properly functioning equipment.

(2nd Amd. Compl. ¶ 30). Dawkins also asserted that Pierce National knew or should have known of the failure of Owens to maintain proper logs or records of his driving hours.

Sell filed timely responsive pleadings, and asserted the affirmative defense of intervening and superseding negligence on the part of Owens and Pierce National. Sell also asserted a cross-claim against Owens and Pierce National for injuries he sustained

after the Pierce National tractor trailer collided with Sell's overturned vehicle. Following a period of discovery, Sell settled his cross-claim against Owens and Pierce National. Dawkins also settled his claims against Owens and Pierce National. The case came for trial before the Honorable Roger M. Young, Sr., on October 9, 2017, with Sell as the sole Defendant in the case. Following several days of testimony, the jury then returned a verdict in favor of Sell on October 12, 2017.

Following the denial of Dawkins' Motion for Judgment Notwithstanding the Verdict and For New Trial, this appeal followed.

STATEMENT OF THE FACTS

This case arises out of an accident that occurred in the early morning hours of August 21, 2010, on I-95 in Hampton County, South Carolina. (2d. Amd. Compl.) At the location where the accident occurred, there are two southbound lanes, two northbound lanes, and a central grassy median. (Tr. 120). There is also an emergency lane on the outside of the right lane in either direction. (Tr. 121). This is a straight stretch of road. (Tr. 427). Sell was operating a Budget Rental truck ("Budget Truck"), which he had rented from Columbus, Ohio, with Savannah, Georgia as the destination. (Tr. 354, 366). Sell's grandson was in the truck with him, and other family members were also en route in other vehicles some distance behind them. (Tr. 365 – 366). It was raining, and Sell was in the right lane of Interstate 95, when he felt the right front tire drop into the emergency lane. (Tr. 366 – 367, 382). Sell attempted to get the vehicle under control, but it rolled onto its left side, blocking both southbound lanes of travel. (Tr. 367). The headlights of the Budget truck were facing toward the right hand side of the road, with the taillights of the Budget truck facing toward the median. (Tr. 153-154, 367).

Sell and his grandson then exited the vehicle with the assistance of bystanders, including Dawkins, Kristen Starnes Sparkman ("Kristen"), and Joshua Sparkman ("Joshua"), who stopped to render aid. (Tr. 368, 384). Dawkins was also traveling south on I-95 and had seen the Budget truck swerve and then flip on its side. (Tr. 242, 287). He slowed, went around the Budget truck, and parked his vehicle on the left side of the road, in the grass, with his hazard lights on. (Tr. 242-243, 287, 313). Dawkins had no difficulty navigating around the Budget truck. (Tr. 314). Dawkins helped Sell over to the grassy median. (Tr. 288). Dawkins had no injuries at that time, as he had not been injured as a result of the Budget truck rolling on its side. (Tr. 288 – 289). While assisting Sell, Dawkins observed that Sell appeared to be dazed. (Tr. 246). Kristen also noted that Sell appeared upset and he looked like he was about to pass out. (Tr. 167).

Kristen and Joshua had been on the way to Florida for a cruise. (Tr. 146). They had been riding in a vehicle operated by Joshua's mother. (Tr. 147-148). Joshua felt his mother apply the brakes, and he saw the Budget truck on its side. (Tr. 148). Joshua's mother then drove around the Budget truck, and parked approximately 100 – 150 feet away on the south side of the Budget truck, on the right side of the road. (Tr. 149-150, 164, 314). Joshua then exited the vehicle and ran back to the Budget truck. (Tr. 150). He helped pull Sell's grandson out of the truck. (Tr. 150). Joshua observed that traffic began to backup and come around the Budget truck in the emergency lane. (Tr. 152, 156). At one point, Joshua looked around and could see headlights as far back as he could see. (Tr. 157). He saw at least three (3) tractor trailers go around the Budget truck. (Tr. 152, 156). In particular, one of these 18-wheelers stopped and asked if they needed any help. (Tr. 152, 156, 172). Joshua estimated that at least ten (10) vehicles went around the Budget

truck in the emergency lane, while Kristen estimated that twenty (20) vehicles went around. (Tr. 152, 166). Sell observed a "steady stream" of vehicles coming around the Budget truck. (Tr. 387). With all of the traffic backing up, Joshua did not believe he was in any danger while he was rendering aid. (Tr. 157). He never thought that another vehicle was going to come along and strike the Budget truck. (Tr. 157). Dawkins, likewise, did not contemplate that another vehicle would come down the road and not be able to see the Budget Truck, because of the other vehicles going around it. (Tr. 316).

Kristen estimated that she and Joshua were on the scene for approximately ten (10) minutes before the tractor-trailer operated by Owens struck the Budget Truck. (Tr. 165, 172-173). In this time period, Sell had enough time to call his son, speak with him about the accident, and then attempt to call his wife. (Tr. 373, 385). As Sell was about to press the button on his cell phone to initiate the call with his wife, he heard a loud noise as the Pierce National truck crashed into the Budget truck. (Tr. 386, 388). He then recalled waking up in the grass. (Tr. 388).

Owens had picked up a load in the Summerville area, and was on the way to Alabama when the accident occurred. (Tr. 416, 433 – 434). Owens is a professional driver, and has held a CDL for 15 years. (Tr. 415, 429). He has driven for Pierce National for 12 years. (Tr. 415). According to Owens' log book, he was in a sleeper berth from 10:30 a.m. until 1:00 in the morning. (Tr. 431). However, Owens testified that he was not in the sleeper berth the whole time, and may have gone into the truck stop to get something to eat. (Tr. 432 – 433). He then started driving at 1:15 a.m., and drove continuously until 3:30. (Tr. 431). He was pulling a loaded dry box trailer, grossing almost 80,000 pounds in total. (Tr. 425). His tractor is governed at 68 miles per hour,

meaning that is the fastest speed the tractor will go. (Tr. 418). He had the headlights on dim, and was watching the lines on the highway. (Tr. 418). The line disappeared and he appeared to come up on a wall. (Tr. 419). Mr. Owens stated that he was about 45 feet away when he realized that the line ran out. (Tr. 423). He did not see anything else up ahead of him. (Tr. 419). He did not see the brake lights from any traffic ahead of him. (Tr. 421). He did not see anything in the emergency lane to his right. (Tr. 425). He applied his brakes, and his speed at impact with the Budget truck was approximately 65 miles per hour. (Tr. 425).

John Pinckney, an expert in Federal Motor Carrier Safety Regulations (FMCSA) compliance and safety, determined that Owens' conduct violated FMCSA regulations. (Tr. 445). Trucking is a regulated industry. (Tr. 447). Drivers who hold a Commercial Driver's License (CDL) are professional drivers. (Tr. 454). Under FMCSA regulations, a driver has to have ten (10) consecutive hours away from work, or off duty. (Tr. 452). During the remaining fourteen (14) hours of the day, a driver can only drive eleven (11) hours. (Tr. 453). The purpose is to keep drivers alert when they are driving. (Tr. 453). Drivers keep track of their hours of service in a logbook, which is kept day to day. (Tr. 457, 459). When drivers violate hours of service, it is considered a fatigued driver situation. (Tr. 452, 465). Although Owens noted in his logbook that he was in the sleeper berth from approximately 10:00 a.m. until 1:00 in the morning on the date of the accident, the bills of lading show that Owens picked up a load, inspected it, and signed for it. (Tr. 461 – 463). Therefore, Owens participated in driving time and on duty time that was not written in the logbook, which demonstrates that Owens had falsified his log. (Tr. 464). Based on the time stamps of the bills of lading, Owens had five (5) hours of

rest instead of the required ten (10) hours. (Tr. 465). He was therefore fatigued when he started the trip from Summerville. (Tr. 465). Owens also was not scanning down the road looking for hazards ahead, as he was apparently only looking at the white line in front of him, which is also evidence of a degree of impairment as the result of fatigue. (Tr. 449 – 450, 469). Additionally, Owens was running close to maximum speed at night and in a rain storm, thereby not appropriately slowing for the hazards. (Tr. 451, 466-468). Owens also overdrove his headlights, due to faulty equipment and driving too fast for conditions.. (Tr. 451, 470). All of these factors demonstrate that Owens was not in compliance with the FMCSR. (Tr. 471).

A transportation safety expert was identified by Dawkins in discovery but did not testify at trial. (Tr. 512 – 513).

STANDARD OF REVIEW

The question of whether or not there was error in refusing the motions of the Appellant for a nonsuit, directed verdict, *judgment non obstante veredicto*, and alternatively for new trial, requires the reviewing Court to consider the testimony and the reasonable inferences to be drawn therefrom in the light most favorable to the Respondent. Matthews v. Porter, 239 S.C. 620, 625, 124 S.E.2d 321 (1962). If more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. Id. at 625, 124 S.E.2d at 323. When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or the evidence. Hurd v. Williamsburg County, 353 S.C. 596, 579 S.E.2d 136 (2003), citing Harvey v. Strickland, 350 S.C. 303, 566 S.E.2d 728 (2001). The issue must be submitted to the jury whenever there is

material evidence tending to establish the issue in the mind of a reasonable juror. Hurd at 609, S.E.2d at 136, citing Hanahan v. Simpson, 326 S.C. 140, 485 S.E.2d 903 (1997). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. Hurd at 609, S.E.2d at 136, citing Long v. Norris & Assocs., Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). The reviewing Court may only reverse the trial court when there is no evidence to support the ruling below. Id. at 609, 353 S.E.2d at 143, citing Steinke v. South Carolina Dep't of Labor, Licensing & Regulation, 336 S.C. 373, 520 S.E.2d 142 (1999).

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DAWKINS' MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO SELL'S AFFIRMATIVE DEFENSE OF INTERVENING NEGLIGENCE BECAUSE THE POSITION WAS NOT INCONSISTENT WITH SELL'S CROSS-CLAIM

Sell's allegations in the cross-claim are not inconsistent with the affirmative defense of intervening negligence. In a negligence action, a plaintiff (or a party asserting a cross-claim) must show: (1) the defendant owes a duty of care to the plaintiff; (2) the defendant breached the duty by a negligent act or omission; (3) the defendant's breach was the actual and proximate cause of the plaintiff's injury; and (4) the plaintiff suffered an injury or damages. Andrade v. Johnson, 356 S.C. 238, 245, 588 S.E.2d 588, 592 (2003). To establish proximate cause, the Plaintiff must provide proof of causation in fact, as well as legal cause. Bray v. Marathon Corp., 356 S.C. 111, 116–17, 588 S.E.2d 93, 95 (2003). Causation in fact is often referred to as the 'but for' cause, and legal cause turns on the issue of foreseeability. An injury is foreseeable if it is "the natural and probable consequence of a breach of duty." Schmidt v. Courtney, 357 S.C. 310, 326, 592 S.E.2d 326, 335 (Ct.App.2003). That said, foreseeability is not determined from

hindsight, but, rather, from the *defendant's* perspective at the time of the alleged breach. Hurd v. Williamsburg County, 353 S.C. 596, 579 S.E.2d 136 (2003)(emphasis added)(string cite omitted).

Therefore, to establish proximate cause on his cross-claim against Owens, Sell would be required to show that *Owens* must have foreseen, or by the exercise of ordinary care should have foreseen, the probability that Owens' conduct would likely cause injury to another. By contrast, the foreseeability component of proximate cause as to Dawkins' claim against Sell requires Dawkins to show that *Sell* must have foreseen, or by the exercise of ordinary care should have foreseen, the probability that Sell's conduct would likely cause injury to another. It is to this latter chain of events that Sell has asserted that the causal link was broken by the intervening negligence of Owens.

Sell's challenge to the element of proximate cause in this case is the assertion that the causal link between Sell's conduct and Dawkins' injuries was severed by the conduct of Owens. As a defense to Dawkins' claims, Sell has always maintained that Owens' conduct was not foreseeable by Sell, and, as a result, Owens' conduct is not chargeable against Sell. As an element to his cross-claim, Sell maintained that his injuries were the natural and probable consequence of Owen's conduct, and Owens should have foreseen that his conduct in driving under fatigue, too fast for conditions, and without proper functioning headlights, would likely cause injury to another. These are not inconsistent positions.

The fact that Dawkins and Sell were standing near each other on the morning of August 21, 2010 as argued by the Appellant is of no consequence to the analysis of foreseeability, because foreseeability is not determined from the perspective (or location,

for that matter) of the injured party. It is not incongruous for Sell to argue that Owens should have foreseen that Owens' conduct would cause injury to others, while also arguing that Sell could not have foreseen the intervening conduct by Owens.

II. THE TRIAL COURT PROPERLY CHARGED THE JURY ON INTERVENING NEGLIGENCE AND DENIED DAWKINS' MOTION FOR NEW TRIAL BECAUSE THERE WAS EVIDENCE IN THE RECORD THAT THE INTERVENING CONDUCT BY OWENS BROKE THE CAUSAL CONNECTION

The issue of whether an intervening act breaks the causal connection is a question for the fact finder which will not be disturbed on appeal unless found to be without evidence which reasonably supports the finding. Dixon v. Besco Engineering, Inc. 320 S.C. 174, 181, 463 S.E. 2d 6363 (1995), citing Bethea v. Pedro Land, Inc., 290 S.C. 341, 350 S.E.2d 392 (Ct.App.1986). Only when the evidence is susceptible to only one inference does it become a matter of law for the court." Small v. Pioneer Mach., Inc., 329 S.C. 448, 464, 494 S.E.2d 835, 843 (Ct. App. 1997). By taking the position that Owens' conduct could not have been an intervening superseding cause so as to exculpate Sell from liability, Dawkins is therefore arguing that there are no facts in the record that Owens' conduct broke the causal connection.

In large part, Dawkins relies on Matthews, supra, in support of this assertion. The Court's analysis in Matthews, though, is not inconsistent with the trial court's ruling in the instant case. In Matthews, the plaintiff had brought an action to recover damages for the injuries sustained through the alleged negligence of Porter. Id. Porter had been involved in a collision with a third party, Singletary, which resulted in the Porter vehicle blocking the eastbound lane of traffic. Id. at 623, 124 S.E.2d at 322. Matthews then stopped to render aid, and was injured when a vehicle operated by McKnight skidded sideways down the road, crushing Matthews between the Porter and McKnight vehicles.

Id. As one of his defenses, Porter alleged that, assuming he was negligent in first collision with the Singletary vehicle, his negligence was cut off or insulated by the intervening negligence of McKnight. Id. at 626, 124 S.E. 2d at 324. At trial, there was testimony presented that the conditions were dark, foggy and raining. Id. at 628, 124 S.E. 2d at 325. McKnight testified that, as he came up on the location where the roadway was blocked, he saw headlights from one of the stopped vehicles, so he slowed down. Id. at 629, 124 S.E.2d at 325. He then sideswiped a car parked in his lane of travel, which caused his vehicle to slide down the road and strike Matthews. Id.

Porter then made motions for nonsuit and directed verdict, on the grounds that the only reasonable inference to be drawn from the testimony was that Matthews' injuries were caused by the intervening negligence of McKnight. Id. at 624, S.E.2d at 322. The motion was then denied and the case went to the jury. Id. The Supreme Court found that the trial court had properly denied Porter's motion for directed verdict, and agreed with the trial court's finding that the testimony at trial presented factual issues that were properly submitted to the jury for determination. Id. at 632, S.E.2d 327. The Court was skeptical of Porter's intervening negligence argument because it did not find merit in his assertion that the chain of causation was broken by McKnight's conduct. Id. However, the Court still acknowledged that evidence of an independent negligent act of a third party is directed to the question of proximate case, and the testimony in the case therefore presented a factual issue to be determined by the jury. Matthews, at 628 and 632, 124 S.E.2d at 325 and 327. Indeed, the question of proximate cause is ordinarily one of fact for the jury and the trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the

evidence. Hurd at 145, 353 S.C. at 613, citing McNair v. Rainsford, 330 S.C. 332, 499 S.E.2d 488 (Ct. App. 1998). If there is a fair difference of opinion regarding whose act proximately caused the injury, then the question of proximate cause must be submitted to the jury. Id. at 145, 353 S.C. 596 at 615 (emphasis added). Therefore, the key question in the instant case is whether there was *any* evidence presented at trial that allows one to infer that the chain of causation was broken by Owens' conduct.

In that vein, Sell presented testimony regarding the negligent conduct on the part of Owens. Owens acknowledged that his speed at impact with the Budget truck was approximately 65 miles per hour. (Tr. 425). Although he could evidently only see 45 feet in front of him due to dim headlights, he did not slow his speed. (Tr. 418 – 419). Owens testified that he was simply looking down and following the line on the highway. (Tr. 418 – 419). Sell's expert, John Pinckney, further testified regarding Owens' falsification of his logbook. (Tr. 464). He noted that, based on the bills of lading, Owens had participated in driving time and on duty time that was not written in the logbook, and therefore he had violated hours of service as set forth in the Federal Motorist Carrier Safety Regulations (FMCSA). (Tr. 465). Mr. Pinckney therefore concluded that Owens was fatigued, and this was further evidenced by Owens' testimony that he was looking at the white line in front of him, instead of scanning for hazards ahead. (Tr. 449 – 450, 469). Mr. Pinckney also testified that Owens was also traveling at a speed close to the maximum speed of the tractor-trailer, in the dark and in the rain, although he could not see very well. (Tr. 451, 466-468). There was therefore evidence presented at trial to support the inference that the chain of causation was broken by Owens' conduct.

The Court of Appeals also examined this issue in Gibson v. Gross, 280 S.C. 184,

311 S.E.2d 736 (Ct. App.)(*rehearing denied* Jan. 25, 1984). In Gibson, Gibson was a motorist who stopped after seeing an argument between Gross and a third party, after Gross's vehicle struck a telephone pole and collided with the other vehicle. Id. at 195, 311 S.E.2d at 737. Gross's vehicle came to rest on the paved portion of the highway. Id. While standing on the highway next to Gross's vehicle, Gibson was struck by an automobile driven by Edwards. Id. at 195, 311 S.E.2d at 738. At the conclusion of Gibson's case in chief, the trial judge granted Gross's motion for involuntary nonsuit, after finding that there was no testimony from which the jury could infer that Gibson's injury was proximately caused by the negligence shown, and, even if there was some negligence on the part of Gross, it was only an indirect or remote cause of Gibson's injury. Id.

The Court then went through an analysis of whether Gross had done anything other than simply brought on a "condition of affairs," which would not have been sufficient to find him liable. Id. The Court quoted Stone v. Bethea, 251 S.C. 157, 161 S.e.2d 171, 173 (1968), which addressed intervening negligence, in part:

> When the negligence appears merely to have brought about a condition of affairs, or a situation in which another and entirely independent and efficient agency intervenes to cause the injury, the latter is to be deemed the direct or proximate cause, and the former only the indirect or remote cause.

Gibson at 197, 311 S.E.2d. at 739, quoting Stone, supra. In denying the Petition for Rehearing, the Court examined the difference in facts between the Gibson and Matthews cases. Id. at 198, 311 S.E.2d at 739. The Court noted that the injured plaintiff in Matthews brought witnesses before the court whose testimony established an unbroken chain of causation from the negligent act of Porter to Matthews' injuries. Id. Specifically,

the driver who struck the Matthews testified that the blocking of the highway without warning caused him to strike Matthews. Id. On the other hand, in Gibson, there was no evidence that Edwards struck Gibson because the highway was blocked, which warranted the trial judge grant of Gross's motion for involuntary nonsuit. Id.

In examining the record in the instant case, there were facts presented at trial that challenged Dawkins's argument that Owens struck the Budget truck simply because it was blocking the roadway. Although the Budget truck was blocking the southbound lanes of travel, the interstate was not impassable. Dawkins, in fact, testified that he had no difficulty getting around the Budget truck by using the emergency lane. (Tr. 314). There was also testimony by Kristen and Joshua that the operators of other vehicles, including tractor-trailers, were going around the Budget truck in the emergency lane. (Tr. 152, 156, 166). Simply put, there were facts presented at trial that the blockage of the interstate was simply a condition of affairs brought on by Sell's conduct. There were facts that established that the overturned Budget truck merely created a roadblock, but not an impassable one, and this roadblock was an obstacle that a motorist exercising reasonable care could have avoided.

In sum, there were sufficient facts presented at trial that Sell's conduct merely created a condition, and that Owens' conduct was the entirely independent and efficient agency that intervened to cause Dawkins' injuries. Therefore, because there was an issue of fact for the jury to decide, the jury was properly charged on the issue of intervening negligence.

III. THE TRIAL COURT PROPERLY DENIED DAWKINS' MOTIONS FOR DIRECTED VERDICT AND JNOV ON THE ISSUE OF SELL'S NEGLIGENCE IN OVERTURNING THE BUDGET TRUCK BECAUSE THERE WERE QUESTIONS OF FACT AS TO WHETHER THE VIOLATION CAUSED DAWKINS' INJURIES AND WHETHER SELL COULD HAVE COMPLIED WITH THE STATUTE

Dawkins also argues that the Court should have ruled, as a matter of law, that Sell was negligent in overturning the Budget truck, and in not placing the appropriate warning devices or flares as set forth in the statutes that were charged to the jury. (Appellant's Initial Brief, p. 11 -13). However, only a "causative violation" of an applicable statute constitutes actionable negligence. Fairchild v. SCDOT, 398 S.C. 90, 100, 727 S.E.2d 407, 412 (2012). The question then becomes whether there is conclusive evidence that the purported violation was causative of Dawkins' injuries. The question again turns on proximate cause, which must be decided by the jury, unless there is only one inference that can be drawn from the evidence. Hurd at 145, 353 S.C. at 613

The Court of Appeals in Gibson, discussed above, analyzed whether a violation of S.C. Code §56-5-2540, which prohibits the blocking of a highway without warning, established negligence on the part of Gross. Gibson, supra, at 196-197, 311 S.E.2d at 738. After Gross's car came to a rest on the paved portion of the highway, Gross did not place warning devices in or near his car or otherwise warn others of the dangerous condition. Id. at 195, 311 S.E.2d at 737. The Court concluded that, although there was evidence that Gross had violated the statute in not warning other motorists, Gibson's injury was not the injury intended to be prevented by the statute because the injury was not the natural and probable consequence of the violation of the statute. Id. The issue, again, turns on causation. The Court was not convinced that Gross could have been expected to foresee that his conduct in violation of the statute would have caused injury to a person in

Gibson's circumstances, i.e. a person who had stopped to render aid. Id.

The same analysis applies in this case. Although Sell blocked the highway and did not place flares or warning devices, there is a question as to whether he could be expected to foresee that not placing flares would have caused injury to Dawkins. Sell testified that he observed a "steady stream" of vehicles coming around the Budget truck. (Tr. 387). This testimony was corroborated by Joshua, who also observed traffic backing up in the emergency lane. (Tr. 152). Joshua also testified that he saw headlights "just as far as I could see back through there." (Tr. 157). There would have also been observable taillights from these vehicles in the emergency lane. Additionally, there was testimony Budget truck's headlights, and possibly taillights, were still on and functioning, creating additional light for vehicles approaching from the north. (Tr. 153-154, 367).[1] Joshua testified that, with all of the traffic backing up, he did not believe he was in any danger. (Tr. 157). He did not think another vehicle would come along and strike the Budget truck. (Tr. 157). Dawkins, too, testified that he thought, with all of the other vehicles going around the Budget truck, he never thought another vehicle would crash into it. (Tr. 316). In light of all of this testimony, there was a sufficient issue of fact raised as to whether Sell could have been expected to foresee that his conduct in violation of the statute would have caused injury to a person in Dawkins' circumstances.

There is also a question as to whether Sell could have even complied with the statutes regarding warning devices or flares. Violation of a specific statute was discussed in Howey v. Jordan's, 223 S.C. 71, 74 S.E.2d 216 (1953). In that case, a passenger in a motor vehicle died after the vehicle collided with a disabled truck which was partially in

[1] As a practical matter, there is also a question as to whether Owens would have even seen flares, if they had been placed. Inexplicably, Owens did not see brake lights from the traffic in the emergency lane. (Tr. 421, 425).

the roadway. Id. at 73, 74 S.E.2d at 216-217. The disabled truck was completely in the right lane of the paved portion of the highway. Id. Whether the operator of the disabled truck placed flares around the truck was disputed. Id. However, it was apparent that the operator of the disabled truck made no effort to move the truck off the highway. Id. at 78, S.E.2d at 219. The Court noted:

> It is the decided law of this State that ordinarily it is a question for the jury as to whether it was reasonably possible or practicable within the meaning of Statutory provisions or rules of law, for one temporarily stopping a car (or truck) along the improved or main traveled portion of the highway for necessary purpose, to have removed it therefrom as required by the Statute.

Id. at 79. In other words, the operator's ability to comply with the statute was an issue of fact for the jury to decide. In Matthews, supra, the Court conducted a similar analysis. The Court stated that a motorist who causes a highway to be blocked has a duty to warn others using the highway of the dangerous condition he has created. Matthews, supra, at 629, 124 S.E.2d at 326. In that case, McKnight testified that there was no one warning traffic that the highway was blocked and impassable. Id. However, Porter claimed that he was disabled in the first collision and was unable to give any warning. Id. at 630, 124 S.E.2d (1962). The Court then concluded there was an issue of fact created as to whether Porter was so disabled that he could not give warning of the dangerous condition, and therefore this was an issue of fact for the jury. Id. at 327, 239 S.C. at 631. Id. at 195, 311 S.E.2d at 737. In the instant case, Sell testified that he did not even know whether the Budget truck had any flares or warning signs in it. (Tr. 372). Obtaining any flares or reflective devices from the overturned truck would have involved him going back to the truck, climbing up the side of the truck then down into it, finding the flares,

getting back out of the truck, and climbing back down.[2] (Tr. 391). As if the task was not difficult enough because the truck was resting sideways, there was also testimony from Dawkins and Kristen that Sell appeared dazed and unsteady. (Tr. 246, 167). Therefore, the issue of whether Sell could have even complied with the statute was an issue for the jury to determine as part of its negligence analysis.

IV. SELL'S COUNSEL WAS PROPERLY PERMITTED TO PRODUCE EVIDENCE SUPPORTING THE EMPTY CHAIR DEFENSE

In S.C. Code Ann. § 15-38-15, the legislature took steps to protect nonsettling defendants by codifying a nonsettling defendant's right to present an empty chair defense. Smith v. Tiffany, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017). Under subsection (D) of the Act, "a defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party." Importantly, the statute does not set forth any restrictions to the empty chair defense and Dawkins does not cite any case law to support the assertion that there are indeed "bounds" to the defense.

Dawkins points out that he tried to narrow the issues to Sell's negligence and whether he proximately caused Dawkins' damage. (Appellant Initial Brief, p. 20). As discussed above, the intervening negligence on the part of Owens is integrally tied to the issue of proximate cause. Therefore, as a practical matter, it could not have been parsed out in the manner Dawkins seeks. By asserting that another party is liable, Sell did not extract a benefit from Pierce National's settlement; rather, he simply presented a defense contemplated and codified by the legislature.

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[2] The Budget truck came to rest on its left side. (Tr. 367).

Dawkins also argues that he moved *in limine* on numerous grounds related to Owens and Pierce National. (Appellant's Initial Brief, p. 20). However, a ruling on a motion in limine is not the ultimate disposition on the admissibility of evidence, which is subject to change based upon developments at trial. State v. Floyd, 295 S.C. 518, 369 S.E.2d 842 (1988). If a motion in limine to exclude evidence is denied, a party must renew its objection when the evidence is presented at trial. Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992). In reverse, if the court excluded the evidence in its in limine ruling, the proponent should be alert for an opportunity to proffer the evidence during the trial, and must proffer it to preserve any error on appeal. Id. To the extent the record is void of a contemporaneous objection to the introduction of evidence pertaining to Sell's empty chair defense, Dawkins' argument is not preserved for review.

V. THE TRIAL COURT PROPERLY PERMITTED SELL'S COUNSEL TO PUBLISH DAWKINS' INTERROGATORY RESPONSES IDENTIFYING A TRUCKING EXPERT AS PART OF THE EMPTY CHAIR DEFENSE

Dawkins argues that Sell should not have been allowed to publish to the jury Dawkins' discovery responses listing an expert witness. As an initial matter, this issue is not preserved for review because a contemporaneous objection was not raised at trial. (Tr. 511-513). A party, who during trial makes neither a contemporaneous objection nor a motion to strike, will not be heard on appeal to complain of the admission of evidence. State v. Wingo, 304 S.C. 173, 403 S.E.2d 322 (Ct. App. 1991). Although the record indicates that a sidebar conference may have been held at this point in the proceedings, any objection by Dawkins and any ruling by the trial judge was not reiterated for the record. (Tr. 511 – 515). Sidebar conferences without the presence of a court stenographer must be reiterated for the record, or it is not part of the record for purposes of a later appeal. Davis v. Davis, 372 S.C. 64, 641 S.E.2d 446 (Ct. App. 2006).

Additionally, Rule 33(d) of the South Carolina Rules of Civil Procedure specifically permits publishing the answers to Interrogatories at trial, to the extent permitted by the rules of evidence. An interrogatory answer may be admitted as substantive evidence. Camlin v. Bi-Lo, Inc., Store No. 2, 311 S.C. 197, 428 S.E.2d 6 (1993). It is also a proper argument to call attention to a party's failure to call an expert witness it had retained to testify at trial. Holmes v. Black River Elec. Co-op., Inc., 274 S.C. 252, 260–61, 262 S.E.2d 875, 879 (1980). A jury is permitted to draw any inferences warranted by the party's failure to call its own witness. Holmes 274 S.C. at 260–61 (*citing* State v. Hammond, 270 S.C. 347, 242 S.E.2d 411 (1978). Dawkins' retainer of a transportation safety expert who was prepared to offer opinions regarding Owens and Pierce National was relevant to the issue of intervening negligence, as a jury may then have inferred that the expert, if called to testify, would not have contradicted the testimony of Sell's expert witness. It was therefore proper, and permitted under the South Carolina Rules of Evidence, to allow Sell to publish the interrogatory answer to the jury.

Finally, Dawkins maintains that it was improper for Sell to cross examine Dawkins on the allegations in the Complaint. Parties are judicially bound by their pleadings unless withdrawn, altered or stricken by amendment or otherwise. Additionally, prior pleadings may be received in evidence against the pleader. Young v. Martin, 254 S.C. 50, 58, 173 S.E.2d 361 (1970). During trial, Sell elicited testimony from Dawkins regarding the particulars set forth in the Complaint against Owens and Pierce National; specifically, that Owens was driving too fast for conditions, did not keep a proper lookout, did not keep the vehicle within the right lane of travel, failed to use or

apply brakes, failed to stop, slow or turn his vehicle, and operating in disregard for the safety of others. (Tr. 292 – 294). This line of questioning again went to the issue of the intervening negligence of Owens. When Dawkins denied making the statement that Owens had failed to use his brakes, counsel for Sell then used the Complaint as impeachment as addressed in Lucht v. Youngblood, 266 S.C. 127, 221 S.E.2d 854 (1976). In Lucht, the plaintiff had initially alleged in his complaint that another driver was at fault for the collision, but, when that driver settled, the plaintiff amended his pleadings to allege that Youngblood was at fault. Id. at 134, 221 S.E.2d at 857-858. Youngblood's attorney then attempted to impeach the plaintiff on his prior pleadings. Id. The trial court did not permit the cross examination on the prior pleadings because it was concerned that evidence of the settlement and covenant not to execute would be disclosed to the jury. Id. However, the Supreme Court held that the defendant in that case should have been permitted to cross examine the plaintiff on his prior inconsistent statement. Id. at 135, 221 S.E.2d at 858. The Court further acknowledged that the trial court was "rightfully concerned" that the existence of the covenant and its details might be spread before the jury, as evidence of settlement with a third party should be excluded from consideration of the jury unless there are fact questions concerning the settlement.[3] Id, *citing* Powers v. Temple, 250 S.C. 149, 155, 156 S.E.2d 759 (1967) and McCombs v. Stephens, 252 S.C. 442, 166 S.E.2d 814 (1969). Therefore, it was proper to permit Sell to cross examine Dawkins on his prior allegations as to Owens and Pierce National, and it was proper to exclude evidence of their settlement.

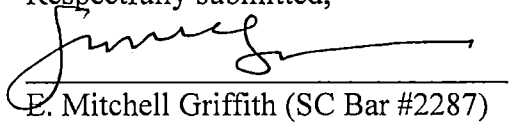
[3] Dawkins made no proffer regarding any fact questions concerning the settlement. See Parr v. Gaines, 309 S.C. 477, 424 S.E.2d 515 (Ct. App. 1992).

CONCLUSION

For the reasons stated, the decision by the trial court should be affirmed. Additionally, pursuant to Rule 220(c), SCACR, Sell asks the Court to affirm on any ground appearing in the Record on Appeal.

DATED this 26th day of October, 2018, at Beaufort, South Carolina, and

Respectfully submitted,



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In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Appellate Case No. 2017-002520

Maurice Dawkins, Appellant,

v.

James A. Sell, Respondent.

PROOF OF SERVICE

I certify that on October 26, 2018, I served *Respondent's Initial Brief and Designation of Matter on Appeal* by depositing it in the United States Mail with postage prepaid and addressed as follows:

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October 26, 2018

The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
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RE: Dawkins v. Sell
Appellate Case No: 2017-002520
GF&L File No: 1013-056

Dear Madam Clerk:

Please find enclosed the original and one copy each of *Respondent's Initial Brief*, *Respondent's Designation of Matter to Be Included in the Record on Appeal*, and the *Proof of Service*. I would appreciate you filing the originals and returning the clocked copies to me in the enclosed envelope. By copy of this letter and enclosures, I herewith serve Appellant's counsel with same.

Thank you for your assistance. If you have any questions, please do not hesitate to contact me.

With kindest regards, I remain

Very truly yours,

E. Mitchell Griffith

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Enclosures
cc: R. Alexander Murdaugh
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