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 REPLY BRIEF OF APPELLANT

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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 parties are in agreement that the Respondent Keith Montgomery was required to prove gross negligence on the part of former Richland County employee Johnnie Taylor to prevail in this case. Thus, the critical question on appeal is whether the record contains evidence to support a finding of gross negligence. The Appellant Richland County contends that there is no evidence to support a reasonable finding that gross negligence occurred.

A. Definition of "Gross Negligence"

As a threshold issue, however, the County is compelled to address one aspect of the definition of "gross negligence" that is included in Montgomery's response brief. Citing the case of *Hollins v. Richland County School District One*, 310 S.C. 486, 427 S.E.2d 654, 656 (1993), Montgomery contends that gross negligence "is a relative term and means the absence of care that is necessary under the circumstances." *See*, Respondent's Brief, p. 6. That is an *incorrect* definition of "gross negligence" and should not be considered by this Court in its

analysis in this case. In fact, Judge Lee did not charge that definition of "gross negligence" and correctly so. (Tr. 267).

The County recognizes that that particular definition of "gross negligence" has been often cited by this State's appellate courts, but when carefully examined, that definition is actually a definition of *simple or ordinary* negligence and not *gross* negligence. It is a lack of due care or "the absence of care that is necessary under the circumstances" that characterizes simple negligence. In other words, the definition at issue equates with the "absence of due care" and not the absence of slight care.

The County's position on this very point is fully supported by an analysis of the origins of that erroneous definition. Specifically, that definition has its origins in the case of *Hicks v. McCandlish*, 221 S.C. 410, 70 S.E.2d 629 (1952), where the Supreme Court wrote:

> Gross negligence is a relative term, and means the absence of care that is necessary under the circumstances, but the absence of this care alone, *whether called 'gross' or 'ordinary' negligence*, does not authorize the jury to give exemplary damages. We have held in many cases that *exemplary damages should not be awarded for mere gross negligence*, and that the element that distinguishes actionable negligence from wilful tort is inadvertence.

70 S.E.2d at 631. (Emphasis added). The definition does not pre-date *Hicks*, and *Hicks* is the case that has been routinely cited in many Tort Claims Act cases for

this erroneous definition.[1] This definition represents a misreading of *Hicks* as is evident when the definition is read in the context of that case. In actuality, that definition describes simple or ordinary negligence which is the absence of due care, i.e., "the care that is necessary under the circumstances." Importantly, in *Hicks*, the Supreme Court was commenting on the type of negligence that did not support an award of punitive damages. The Supreme Court explained that regardless of its name, gross negligence or ordinary negligence, the "absence of care that is necessary under the circumstances" will not support an award of punitive (or exemplary) damages. In fact, the Supreme Court explicitly stated that "exemplary damages should not be awarded for mere gross negligence." 70 S.E.2d at 631. As such, it is clear that the Supreme Court was describing what is today recognized as simple or ordinary negligence because, under today's law, gross negligence will support an award of punitive damages but simple negligence will not. *See, Cohen v. Allendale Coca-Cola Bottling Co.*, 291 S.C. 35, 351 S.E.2d 897, 900 (Ct. App. 1986) ("[s]imple negligence affords no basis for an award of punitive damages"); *Carter v. R.L. Jordan Oil Co., Inc.* 301 S.C. 84, 390 S.E.2d 367 (Ct. App. 1990) (same).

In short, the *Hicks* definition of "gross negligence" is not accurate in current jurisprudence. The "absence of care that is necessary under the circumstances" --

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[1] In fact, *Hicks* is the citation given in the *Hollins* case which is cited by

which *Hicks* states will not support an award of punitive damages -- is a definition of simple or ordinary negligence but certainly not gross negligence as those terms are currently used and understood. Thus, in adjudicating the appeal in this case, the Court is urged to reject the erroneous definition from *Hicks* and to apply strictly the definition of gross negligence as charged by Judge Lee, which is also the law of this case.

B. No Evidence of Grossly Negligent Conduct

When the proper definition of gross negligence is applied to this record, it is clear that the conduct of Johnnie Taylor, as described by Montgomery in his testimony, does not rise to the level of gross negligence. In his response brief, Montgomery takes issue with the County's understanding of the facts that Montgomery was struck by the storage shed door when Taylor was backing the pick-up truck and trailer. In contrast, Montgomery contends that Taylor was not backing the trailer but instead was pulling forward when the contact with the shed door occurred. That recitation of the facts actually strengthens the County's case that gross negligence did not occur.

In his testimony, Montgomery never clearly states that Taylor was driving in a forward direction when the trailer contacted the shed door. His counsel used the

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Montgomery in his brief. *Hollins*, 427 S.E.2d at 656.

words "pull off" in describing the driving of the truck and trailer. But, the direction in which Taylor was proceeding does not make this a case of gross negligence. To the contrary, Montgomery was not located in front of the truck or at the rear of the truck (i.e., between the truck and trailer) so there is no reason for the driver to anticipate that Montgomery was at risk of being struck or contacted. In addition, when being pulled in a forward direction, the trailer follows the path of the truck pulling it, which does not support Montgomery's claim that the trailer (and not the truck) contacted the shed door. Notably, Montgomery testified that he was not directly struck by the truck or the trailer. Instead, he maintains that it was the trailer that contacted the shed door which in turn swung and struck him. (Tr. 67).

With Montgomery's clarification that Taylor was driving in a forward direction, the fact that the trailer, which was a one-axel utility trailer, would strike the shed door when the truck pulling the trailer did not is not likely from a mere physics standpoint, that is, absent a very sharp turning motion which was never described in the testimony, nor would it be feasible given the physical layout. But aside from these points, Montgomery's clarification that Taylor was driving in a forward direction is most important in assessing whether the trailer contacting the shed door was a mere driving error -- at most, an inadvertent mistake in steering -- as opposed to reckless conduct necessary to rise to the level of gross negligence.

The answer seems obvious. If Taylor pulled the truck and trailer forward and the trailer contacted the open shed door, that was not such an outrageous or egregious act to qualify as recklessness or conscious indifference necessary to support a finding of gross negligence.[2]

In sum, Montgomery has not shown that a 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. As the County has previously pointed out, if this verdict is allowed to stand, there will be no discernible distinction under South Carolina law between ordinary negligence and gross negligence. It is really that simple.

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[2] Montgomery claims that Taylor was driving in a forward direction and that he was not struck by the truck or trailer -- those facts negate the argument that Taylor was grossly negligent even if he was speaking on a walkie-talkie while driving as is alleged. The County continues to maintain that there is no evidence that Taylor continued to speak on his walkie-talkie once he entered his truck and began driving. As shown, no witness testified that they observed him speaking on the walkie-talkie while driving. -- only that he was speaking on the walkie-talkie when he "got in the truck." (Tr. 66). But, even if Taylor were, the fact that he was pulling forward, and there was no one in the direct path of the truck or trailer shows that Taylor was not distracted to the point of operating the truck in a dangerous manner. At best, Montgomery has shown that Taylor made a steering error, and a freak accident resulted when the trailer came into contact with the shed door. That is not gross negligence.

CONCLUSION

Based on the foregoing discussion and analysis, the Appellant Richland County respectfully renews its request 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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November 13, 2018

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Alison Renee Lee, Circuit Court Judge

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

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

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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 Reply 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 13th day of November 2018:

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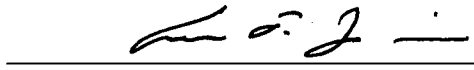

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November 13, 2018

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 Reply 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.

Andrew F. Lindemann

AFL/jmb
Enclosures

cc: (w/ Enclosure)

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