

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY
Common Pleas Court
Edgar W. Dickson, Circuit Court Judge

Case No. 2009-CP-38-1258

Aubrey Alexander..... Respondent

v.

South Carolina Department of Transportation..... Appellant,

BRIEF OF APPELLANT

Pete Kulmala, Esquire
HARVEY & KULMALA, LLC
Attorneys at Law
110 Main Street
Post Office Box 705
Barnwell, South Carolina 29812
(803) 259-5531
Attorney for Appellant

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SC Court of Appeals

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ISSUES ON APPEAL

- I. The Trial Court erred in denying SCDOT's Motion for JNOV, because Respondent presented no evidence that SCDOT's acts/omissions proximately caused his injury

- II. The Trial Court erred in denying SCDOT's Motin for JNOV, because Plaintiff presented no evidence of the standard of care to be observed by SCDOT in its mowing operation, and therefore no evidence of any breach

STATEMENT OF THE CASE

This personal injury lawsuit was commenced by the service of Respondent, Aubrey Alexander's Summons and Complaint, filed on August 3, 2009, seeking actual damages for personal injuries he sustained when his pickup truck collided with a mowing deck being pulled by an SCDOT tractor on state highway 453 between Eutawville and Holly Hill on July 23, 2008. Appellant, South Carolina Department of Transportation, answered on October 8, 2009, following extension of time in which to plead, asserting defenses which included denial of negligence, comparative negligence and sole negligence of Respondent.

The case was tried before a jury on October 31, 2011 - November 2, 2011, resulting in a Plaintiff's verdict, which included comparative negligence, finding Respondent 49% negligent, with total damages in the amount of \$ 150,000.00, so that Respondent's recovery would be \$ 76,500.00. Appellant's motions for Directed Verdict were denied. Following the jury verdict, the trial court granted the parties ten days in which to make their post-trial motions.

Thereafter, on November 10, 2011, Appellant timely moved for JNOV. Respondent also moved, post trial, for new trial *nisi additur*. By Order dated February 3, 2012 and filed February 9, 2012, Appellant's motion for JNOV was denied and Respondent's motion for new trial *nisi additur* was granted, increasing the damages to a total of \$ 400,000.00, and Appellant's 51% to \$ 204,000.00. Appellant's Notice of Appeal was served on March 7, 2012 and filed March 8, 2012.

ARGUMENT

I. THE TRIAL COURT ERRED IN DENYING SCDOT'S MOTION FOR JNOV, BECAUSE RESPONDENT PRESENTED NO EVIDENCE THAT SCDOT'S ACTS/OMISSIONS PROXIMATELY CAUSED HIS INJURY

Appellant, South Carolina Department of Transportation (SCDOT), asserts on appeal that Respondent, Aubrey Alexander, Sr., presented no evidence that any failure to warn by SCDOT proximately caused his injuries. In returning a verdict finding Respondent comparatively negligent in the amount of 49%, the jury concluded that Respondent's own conduct was almost equally at fault with SCDOT in bringing about his injury. In trial, Respondent targeted a failure to warn by SCDOT's having not placed roadside signs to warn motorists of a mowing operation ahead, and a failure to warn by not having the required red flag mounted in place on the left rear portion of its mower.

Nowhere in the evidence is there a causal connection between a lack of the "Mowing" and "Next 3 miles" signs and Respondent's collision with the DOT tractor/mower. Neither can Respondent point to any evidence that the absence of the left-side red flag contributed to Mr. Alexander's collision. To the contrary, Respondent's own testimony negates any such causal connection. As a result, Respondent has failed to demonstrate that, but for either of the two referenced warning omissions, the accident would not have happened.

On July 23, 2008, Respondent was driving his pickup truck, towing a trailer, southbound on state highway 453, between Eutawville and Holly Hill (R.p. 73, l. 20 – p. 74, l. 25); when "all of a sudden, I see this cloud of dust halfway covering my side of the road, but I didn't see no tractor, I didn't see the

mower, all I seen was this cloud of dust a boiling”. (R.p. 75, l. 23 – p. 76, l. 1).

At that time, SCDOT’s grass mowing procedure was set forth in a document, called Engineering Directive # 29, (Exh. P- 1; R.p. 303 - 344) which served as its guidance for grass mowing and other roadside vegetation control procedures.

Engineering Directive # 29 provided, among other things, that:

“MOWING” signs supplemented with Standard W7-3a-42 “NEXT 3 MILES” signs shall be used on Interstate, and on Primary, and Secondary routes greater than three miles long. Signs should be moved as necessary to remain within three miles of the mowing operations.

Exh. P-1; R.p. 308-309.

During the trial, it was stipulated that the foregoing “MOWING” and “NEXT 3 MILES” signs had not been placed on the roadside as provided in Engineering Directive # 29.

That Engineering Directive also specified equipment and accessories, including visual attenuators for the tractor/mower combination, as follows:

The following will be required for each tractor unit:

- Two double-face (amber front, red rear) flashing lights prominently mounted on the rear wheel fenders
- One top-mounted amber revolving light or flashing neon light visible from both directions. If a canopy is not used, the light shall be mounted on a mast suitably attached to the tractor frame at an elevation slightly higher than the roll bar
- A sign reading “MOWING” on the rear of the unit. The sign shall be black legend on an orange non-reflectorized background with minimum eight-inch series C letters. In addition to the above, the fifteen foot mower shall have a red flag near the outer edge of each bat wing on a three foot long or greater staff.

Exh. P-1; R.p. 310.

Respondent testified that he did not see either the “Mowing”/”Next 3 miles” sign or the mower-deck left-side red flag. (R.p. 77, ll. 7 – 12).

Respondent also presented the testimony of Patricia Walls, the driver of the vehicle following immediately behind Respondent at the time of the collision, that she did not see the “Mowing” sign or the left-side red flag. (R.p. 46, ll. 21 – 25; R.p. 47, ll. 10 – 12). Witness Walls further testified that she did not see a flag that had become dislodged or in the road after the accident. (R. p.49, ll. 1 – 5). It is upon this evidence that Respondent seeks to establish a causal relationship between the absent roadside signs or the unseen left side red flag and the collision.

Respondent presented no evidence that the absence of the sign or the flag was a cause in fact of the collision; that is, there is no evidence on which it could be concluded that, but for the missing or unseen attenuators, the accident would not have occurred.

In a negligence action, a plaintiff must show that the (1) defendant owed a duty of care to the plaintiff, (2) defendant breached the duty by a negligent act or omission, (3) defendant's breach was the actual and proximate cause of the plaintiff's injury, and (4) plaintiff suffered an injury or damages. Steinke v. South Carolina Dep't of Labor, Licensing and Reg., 336 S.C.373, 520 S.E. 2d 142 (1999).

“Proximate cause requires proof of causation in fact and legal cause. Causation in fact is proved by establishing the injury would not have occurred “but for” the defendant's negligence.” Rife v. Hitachi Construction Machinery Co. Ltd., 363 S.C. 209, 609 S.E. 2d 565 (Ct. App. 2005).

Before a plaintiff can recover in a negligence action, the plaintiff must prove, among other things, causation in fact. Causation in fact is proved by establishing the injury would not have occurred “but for” the defendant's negligence. Thomas v. South Carolina Department of Highways and Public Transportation, 320 S.C. 400, 465 S.E. 2d 578 (Ct. App. 1995). See, also, Baggerly v. CSX Transportation, Inc., 370 S.C. 362, 635 S.E. 2d 97 (2006); citing, Bramlette v. Charter-Medical-Columbia, 302 S.C. 68, 393 S.E.2d 914 (1990); and Cody P. v. Bank of America N.A., 395 S.C. 611, 720 S.E. 2d 473 (Ct. App. 2011).

Careful examination of the testimony reveals that the evidence presented by Respondent falls far short of that needed to establish the cause in fact component of proximate causation, and establishes that the absence of either the “Mowing”/ “Next 3 miles” sign or the left side red flag played no role whatsoever in bringing about the collision. Even without the roadside “Mowing” sign, or the left side flag, Respondent had ample information to see, recognize, and know of the mowing operation and the presence of the DOT mower.

Only three individuals had the opportunity for firsthand observation of the events of July 28, 2008: Respondent, Aubrey Alexander, Patricia Walls, the motorist following Respondent, and SCDOT's tractor operator, Holman Bookhart. There is no testimony by Respondent or Walls tending to show that the collision would not have happened but for the absence of the “Mowing”/“Next 3 miles” signs or the left side red flag. Tractor operator, Holman Bookhart, was not in a position to testify to the visibility of the mower from Respondent's

perspective. The testimony of Respondent and Patricia Walls demonstrates that the absent "Mowing" roadside sign was inconsequential and not a factor in bringing about the collision with the mower.

Before the accident, Respondent was driving about 50-55 miles per hour and could see ahead about one-quarter mile. (R.p. 95, ll. 1 -10). Respondent maintained that he kept his speed at around 50. (R.p. 96, l. 24-25). He had "pretty good visibility of the location where the mower was, even though it was within that cloud of dust".(R.p. 102, ll. 9 – 12).

When questioned on direct examination, why he did not see the mower deck and go around it, Respondent essentially conceded that he had the knowledge which he would have received from seeing the sign: "It was so much dust and debris flying from it that I didn't see the mower or the tractor". (R.p.78, ll. 20 – 23).

Again on cross examination, Respondent reiterated his awareness of the mower:

Q: --- you didn't go completely around the dust cloud, did you?

A: Well, the dust cloud was not all the way across the road.

Q: But you didn't go all the way out to where you had clear sight, you went through part of the dust cloud?

A: I had clear sight on my side, the driver's side of the truck.

Q: But over on the passenger side of the truck the dust cloud was in front of you?

A: That's right.

* * *

Q: The passenger side went through part of the dust cloud?

A: Right, sir.

* * *

Q: And if I understand you correctly, you couldn't see the mower because there was so much dust and debris coming from the mower?

A: Right, sir.

R.p. 97, l. 3 – p. 98, l. 3.

Q: Now, you also, at the time of the accident you believed that the dust was coming from a highway department mowing operation, is that correct?

A: Yes, sir.

Q: Okay. And you could not see through the cloud of dust?

A: No, sir.

R. p. 101, ll. 5 – 10.

Nevertheless, even though he could not see through the cloud of dust which obscured the road ahead of the right side of his vehicle, Respondent elected to drive through the cloud:

Q: But you felt comfortable with part of your car going through the cloud of dust even though you couldn't see inside it?

A: Yes, sir.

R. p. 104, ll. 9 – 12.

The testimony of Patricia Walls undermines Respondent's efforts to suggest that the absence of the roadside sign contributed in any causal way to the collision. She testified very clearly, that she saw the tractor/mower from her position behind Respondent's vehicle:

Q: . . . So, as you're coming down the highway toward Holly Hill you see a truck in front of you pulling a trailer, and then up ahead of that at some distance could you see the mower, the tractor?

A: Absolutely, uh-huh.

R. p. 43, l. 21 – 25.

Ms. Walls further testified to the lack of notice value of a roadside sign:

Q: Did it appear to you that he was aware that there was a mowing tractor in front of him?

A: Yes.

Q: With him knowing that there was a mowing tractor in front of him creating a cloud of dust, what, what value would it be to having a sign a mile or two or three miles back, saying, mowing ahead, what more information would get from the sign than from seeing the mower right in front of you?

A: None. It was obviously there.

R. p. 52, ll.6 – 15.

Ms. Walls went on to explain the degree of visibility from her perspective, saying “You couldn’t miss it”, (R. p. 52, l. 22); agreeing that it would have been easier to see the mowing tractor than a sign on the side of the road two or three miles earlier. (R.p. 52, l. 23 – p.53, l. 2). She also testified:

Q: So, he didn’t miss anything if he missed the sign?

A: No. The only thing the sign, what it might have done was given him a heads up three miles earlier, but he was well aware of the tractor, that the tractor was in front of him, I can, no doubt.

R.p. 53, ll. 3 – 7.

Walls believed that Mr. Alexander must have seen the mower also, because she had to slow her speed when she came upon Mr. Alexander, who was following along behind the mower at about the same, slower speed. (R.p. 50, l. 14 - p. 51, l. 18).

Clearly, Mr. Alexander knew that inside the cloud of dust which he had observed as he exited the curve, nearly a quarter mile away, DOT was mowing grass; which is the same information that one would receive from reading the roadside “Mowing” /”Next 3 miles” sign. If there had been a sign on the roadside, announcing “Mowing”/”Next 3 miles”, Respondent could have learned nothing more about the circumstances than what he saw with his own eyes as he approached the dust cloud. The roadside sign would let him know that SCDOT was mowing within the next 3 miles. What the sign would not do, however, is

inform him where, within the mower's dust cloud, was the edge of the mowing deck.

Respondent's assertion of negligence in the missing left side red flag¹, also lacks evidence of causation in fact. Mr. Alexander's own testimony indicates his recognition that a flag properly placed on the left side would have been useless as an attenuator, because of the cloud of dust from the mower. Respondent candidly acknowledged in cross examination:

Q: Now, there's been some discussion about a flag not being present on the left side of the mower, *but in this case it really wouldn't have made any difference*, would it?

A: No, sir.

Q: Because you couldn't see the back end of the mower because of the cloud of dust, so you wouldn't have seen the flags?

A: I didn't see the lights either if it had lights on it, or the flag.

R.p. 104, ll. 13 – 21. Emphasis added.

Respondent can point to no testimony in the record which tends to establish that Mr. Alexander's collision would not have happened if the roadside sign and/or the left side red flag had been in place. To the contrary, the evidence reveals that Respondent was the beneficiary of the same or greater degree of notice by seeing the mowing operation, as if the roadside sign were in place. As to the left side red flag, Respondent acknowledged that he would not have seen the flag because of the dust coming from the mower.

“[I]f the accident would have happened as a natural and probable consequence, even in the absence of the alleged breach, then a plaintiff has failed

¹ Holman Bookhart, the tractor operator testified that the left side flag was in place about 5-6 minutes before the collision. (R. p. 206, ll. 8 - 10.

to demonstrate proximate cause.” Olsen v. Faculty House of Carolina, Inc., 344 S.C. 194, 544 S.E. 2d 38 (Ct. App. 2001).

Here, Respondent saw the mowing operation, and indicated he could not actually see the mower because of the dust and debris coming from the mower. Nevertheless, he chose to drive into the cloud which obscured sight of the road in front of the right side of his vehicle. His own testimony totally undercuts his ability to contend that either the omitted roadside sign, or the “missing” red flag, played any role in causing the collision. He admittedly made the conscious choice to drive through the cloud, knowing he was looking at a dust cloud from a mower, even though he could not see the edge of the mower inside the cloud.

Upon this lack of evidence on the matter of causation, the trial court’s denial of Appellant’s motions must be reversed.

II. THE TRIAL COURT ERRED IN DENYING SCDOT'S MOTION FOR JNOV, BECAUSE PLAINTIFF PRESENTED NO EVIDENCE OF THE STANDARD OF CARE TO BE OBSERVED BY SCDOT IN ITS MOWING OPERATION, AND THEREFORE NO EVIDENCE OF ANY BREACH

Respondent also appeals from the trial court's denial of its motion for JNOV insofar as relates to negligence by SCDOT in having its mower excessively intrude onto the paved portion of the highway, because Respondent failed to present any evidence upon which the jury could determine whether or not SCDOT had or had not met the appropriate standard of care.

"A plaintiff must identify a duty that the defendant has to protect him or her from a particular harm to merit consideration of his or her claim by a jury." Nelson v. Piggly Wiggly Central, Inc., 390 S.C.382, 701 S.E. 2d 776 (Ct. App. 2010).

"Once a duty has been established, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform". 57A Am.Jur.2d Negligence § 132. "The fact finder may consider relevant standards of care from various sources in determining whether a defendant breached a duty owed to an injured person in a negligence case." Madison ex rel. Bryant v. Babcock Center, Inc., 371 S.C. 123, 140, 638 S.E.2d 650, 659 (2006): "The standard of care in a given case may be established and defined by the common law, statutes, administrative regulations, industry standards, or a *defendant's own policies and guidelines*." (Emphasis added).

Except for a single sentence contained in SCDOT's Vegetation Control memo, (Exh. P-1; 303-344), Respondent has presented no evidence of the duty owed by SCDOT in the conduct of its roadside mowing operation. That sentence states: "On other roads, encroachment on the travelway should be held to the minimum possible to satisfactorily accomplish mowing". (R.p. 310). Respondent called no witness to describe the proper method for grass-cutting on highway shoulders. Only Holman Bookhart testified on the matter of the "minimum possible" encroachment, explaining that the encroachment over the white line depends upon shoulder conditions and limitations, saying "It all depends on how much room we got on the right side" (R.p. 204, ll. 16 - 22. Bookhart further testified that his left mower edge was about a foot over the white line when he looked in his mirror about 5-6 minutes before the accident. (R. p. 206, l. 8 - 10).

Respondent called no expert, nor other witness, to explain what amount of encroachment, under particular circumstances, would be unacceptable or excessive; nor to state that the encroachment described by Holman Bookhart, or Respondent, or witness Walls, was in any manner a deviation from the "minimum possible" described in the Vegetation Management Guidelines. Although Respondent testified to his driving through the dust cloud, and coming into contact with the mowing deck, Respondent offered no testimony concerning the appropriateness of the encroachment at the time and place of the collision. Consequently, without any evidence of the appropriate limits of encroachment, there was no evidence upon which the jury could conclude that SCDOT had breached its duty of due care, to support a finding of negligence by SCDOT.

Absent evidence to define the proper standard for the mowing operation, Plaintiff cannot have proven any deviation by SCDOT from the appropriate methodology or standard of care, and cannot therefore succeed in establishing negligence on the part of SCDOT.

CONCLUSION

Appellant respectfully urges this Honorable Court to consider the evidence in light of the law applicable to negligence actions, and to recognize the failures of proof by Respondent on the issue of causation in fact on the matter of negligence in failure to warn, and the failure of proof as to breach of duty on the matter of negligence in mowing, and to reverse the decision of the trial court.



Pete Kulmala
Harvey & Kulmala, LLC
110 Main Street
PO Box 705
Barnwell, South Carolina 29812
(803) 259-5531
Attorney for Appellant

January 29, 2013
Barnwell, South Carolina

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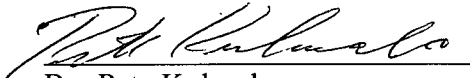
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CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with
Rule 211(b), SCACR.

Pete Kulmala, Esquire
Harvey & Kulmala, LLC
110 Main Street
PO Box 705
Barnwell, South Carolina 29812
(803) 259-5531


By: Pete Kulmala
Attorney for Appellant

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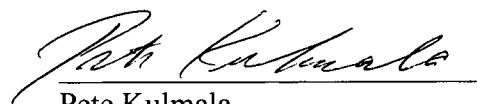
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PROOF OF SERVICE

I certify that I have served Appellant's Brief, on Respondent's Counsel, C. Bradley Hutto and Paul Tinkler, by depositing a copy in the United States Mail, Postage prepaid, on January 31, 2013, addressed as follows:

C. Bradley Hutto, Esquire
Post Office Box 1084
Orangeburg, SC 29115

Paul Tinkler, Esquire
154 King St.- 3rd Floor
Charleston, SC 29401


Pete Kulmala
HARVEY & KULMALA, LLC
Post Office Box 705
Barnwell, South Carolina 29812
(803) 259-5531
Attorney for Appellant

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