THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ORANGEBURG COUNTY

Court of Common Pleas

Edgar W. Dickson, Circuit Court Judge

CASE NO. 2009-CP-38-1258

Aubrey Alexander .....Respondent,

v.

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

FINAL BRIEF OF RESPONDENT

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I. Whether there was sufficient evidence that SCDOT's negligence was a proximate cause of the accident to create a jury issue.

II. Whether there was sufficient evidence of SCDOT's negligence to create a jury issue.

STATEMENT OF FACTS

Respondent Aubrey Alexander was injured on July 23, 2008, when the right front tire of his pickup truck came into contact with mowing equipment being operated by Appellant South Carolina Department of Transportation (SCDOT). He was 76 years old at the time of the accident. The accident occurred on a rural road in Orangeburg County. The mower deck was being pulled by a tractor operating on the right shoulder of the road. The mower deck protruded into the road approximately one to two feet at the point of impact. (R. p. 53, ll. 15-19). After the contact Mr. Alexander lost control of his vehicle and ran off the right side of the road, hitting a pine tree.

The parties stipulated that there were no warning signs placed along the road to warn drivers of the presence of mowing equipment. Also, although a warning flag had been attached to the left side of the mower deck five or six minutes before the collision (according to the testimony of Holman Bookhart), photographs of the accident scene taken after the accident do not show a warning flag on the left side of the deck nor could such a flag be found. The photographs do show a flag on the right side of the mower deck.

Mr. Alexander suffered severe injuries, breaking his right femur, his left tibia and fibula and his right humerus. (R. p. 148, ll. 15-18). He was transported to a hospital in Richland County. Subsequently, he was admitted to the Medical University of South Carolina in Charleston, and for a considerable time he was in rehabilitation. His medical bills were approximately $200,000. (Plaintiff's Exhibit 13, R. at p. 345). Mr. Alexander's injuries from the accident caused prolonged pain in his legs (R. pp. 165-166) and require him to use a cane to walk.

ARGUMENT

I. The Trial Judge properly denied SCDOT's Motion for JNOV, because the issue of proximate cause was a factual issue for the jury.

Appellant, South Carolina Department of Transportation (SCDOT), contends that Respondent, Aubrey Alexander, Sr., presented no evidence that SCDOT's negligence proximately caused the accident. It is asking this Court to substitute its judgment for that of the jury. SCDOT concedes that there was no warning sign placed along the roadway as required by SCDOT guidelines, and it concedes there was no red warning flag on the left side of the mower deck also required by the same guidelines. It argues simply that there is no evidence that these failures caused the accident. SCDOT made the same argument to the jury and the jury rejected it. SCDOT made the same argument to the trial judge, who saw the witnesses testify, and the trial judge rejected it. Now, SCDOT asks this Court to find facts contrary to what the jury found. This is outside the scope of this Court's function.

Alexander relied in part on the absence of any warning signs notifying him of a mowing operation in progress. The parties stipulated that SCDOT's engineering directives provided:

> "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.

(Plaintiff's Exhibit 1). The parties further stipulated that the mowing signs were not placed in accordance with this directive. (Brief of Appellant, p. 3, R. p. 201). Alexander also proved that immediately after the accident there was no warning flag on left side of

the mower deck, as required by SCDOT's directives, although there was one on the right side of the deck.

Alexander could see about one-quarter of a mile ahead and was traveling at 50-55 miles per hour when he approached the tractor. (R. p. 94, ll. 20-25, p. 95, ll. 1-10). He saw only a "cloud of dust" partially obscuring the roadway ahead. If the warning signs had been placed as required by the SCDOT's own directives, Alexander would have had perhaps minutes as opposed to mere seconds in order to understand, evaluate and avoid the danger ahead. Patricia Walls, who was driving behind Mr. Alexander, referred to this as "a heads up." (R. p. 53 ll. 4-7). This is, no doubt, why the SCDOT directive to place warning signs exists: in order to give drivers ample time to understand there is a potential danger ahead and prepare accordingly.

In a negligence action, the plaintiff must prove proximate cause. *Bramlette v. Charter-Medical-Columbia*, 302 S.C. 68, 393 S.E.2d 914 (1990). This requires proof of both causation in fact and legal cause. *Id.* at 72, 393 S.E.2d at 916. Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. *Id.* In ruling on directed verdict and JNOV motions, the evidence must be considered in the light most favorable to Alexander. *Graham v. Whitaker*, 282 S.C. 393, 321 S.E.2d 40 (1984). Questions of proximate cause are ordinarily for the jury. *Horton v. Greyhound Corp.*, 241 S.C. 430, 128 S.E.2d 776 (1962); *Buff v. South Carolina Dept. of Transportation*, 332 S.C. 472, 505 S.E.2d 360 (Ct. App. 1998). When the evidence yields only one inference, a directed verdict in favor of the moving party is proper, but if more than one reasonable inference can be drawn from the evidence, the case must be submitted to the jury. *R&G Const. Inc. v. Lowcountry Regional Transp. Authority*, 343

S.C. 424, 540 S.E.2d 113 (Ct. App. 2000). Here, there was ample evidence that the failure to place warning signs, the absence of a warning flag and the encroachment of the mower onto the highway all combined to contribute to the accident. The trial judge correctly denied SCDOT's motion for JNOV.

II. The Trial Judge properly denied SCDOT's Motion for JNOV, because there was evidence that SCDOT breached its duty of care owed to motorists.

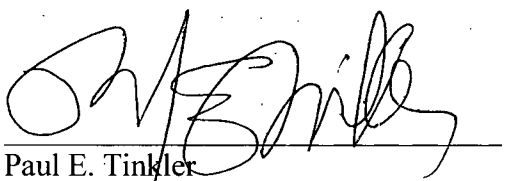
SCDOT has conceded that it failed to place the warning signs required by its own guidelines on mowing operations. It also conceded that there was no warning flag on the left side of the mower deck at the time the accident was being investigated, immediately after it occurred.

SCDOT acknowledges in its brief that breach of duty may be proved by showing defendant's own policies and guidelines. (Brief of Appellant p. 11). *See Madison ex rel. Bryant v. Babcock*, 371 S.C. 123, 638 S.E.2d 650 (2006). SCDOT further agrees that its policies and guidelines require that encroachment of mowing equipment be held to a minimum. It tacitly concedes that this encroachment was the proximate cause of the accident, but contends there was no proof that this encroachment was a breach of duty. The jury apparently concluded that the combination of facts- the lack of warning signs and flag coupled with the encroachment of the mower deck on the roadway- was evidence of negligence that proximately caused Alexander's injuries. SCDOT suggests that Alexander had the burden of proving by expert testimony the "appropriate limits of encroachment" of the mower upon the roadway. (Brief of Appellant p. 12). However, expert testimony is not required to enable the jury to decide matters within their common experience. *O'Leary-Payne v. R.R. Hilton Head, Inc.*, 371 S.C. 340, 638 S.E.2d 96 (Ct. App. 2006). Alexander introduced into evidence photographs taken after the accident

that show grass clippings where the mower had been. (Plaintiff's Exhibit 4). The jury could view this evidence and determine, without the need of expert or other technical evidence that the amount of encroachment of the mower, coupled with the absence of the sign and warning flag combined to cause the accident. *See Anderson v. South Carolina Dept. of Highways and Public Transportation*, 322 S.C. 417, 472 S.E.2d 253 (1996). The jury, in addition, concluded that Alexander's own negligence contributed to the extent of 49%. Such apportionment of responsibility is entirely within the jury's province. *See Cunningham v. Helping Hands, Inc.*, 346 S.C. 253, 550 S.E.2d 872 (Ct. App. 2001). The trial judge properly denied SCDOT's motion for JNOV.

CONCLUSION

The trial judge properly denied SCDOT's motion for JNOV finding that the issues of negligence and proximate cause were jury issues. Alexander respectfully requests that the judgment be affirmed.



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At Charleston, South Carolina

This 29th day of January, 2013

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PROOF OF SERVICE

I certify that on February 1, 2013, I served the Respondent's Final Brief on Appellant's counsel of record, by depositing a copy in the United States Mail with the proper postage affixed thereon, addressed as follows:

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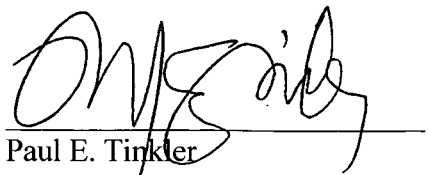
CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Respondent's Final Brief complies with the Supreme Court's order of August 13, 2007, and that no personal identifiers and sensitive information are included.



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The undersigned hereby certifies that the Respondent's Final Brief complies with Rule 211(b), SCACR, and that no matter has been included which is irrelevant to this appeal.

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