THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Michael G. Nettles, Circuit Court Judge

Civil Action No. 2009-CP-07-04592
Appellate Case No. 2012-206486

Jeffrey Johnson and Kristina Johnson ..... Respondents,

v.

Beaufort County..... Appellant.

REPLY BRIEF OF APPELLANT

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Argument

I. Because South Carolina does not follow the doctrine of *res ipsa loquitur*, the Johnsons had the burden of proving that the County was negligent.

"*Res ipsa loquitur* is a rebuttable presumption that the defendant was negligent where an accident is one which ordinarily does not occur in the absence of negligence." *Watson v. Ford Motor Co.*, 389 S.C. 434, 453 n.7, 699 S.E.2d 169, 179 n.7 (2010). The facts of this case present an example of when the doctrine of *res ipsa loquitur* could apply, as dump trucks do not ordinarily run into houses absent some act of negligence. However, that doctrine has been repeatedly rejected in South Carolina. *See, e.g., id.* at 453, 699 S.E.2d at 179 ("South Carolina does not follow the doctrine of *res ipsa loquitur.*"); *Snow v. City of Columbia*, 305 S.C. 544, 555 n.7, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991) ("South Carolina's rejection of *res ipsa loquitur* is consistent with its general adherence to fault based liability in tort.").

> The plaintiff has the burden of proving each element of negligence, including the defendant's lack of due care. This burden of proof cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care. No inference of negligence arises from the mere fact of injury.

Snow, 305 S.C. at 555, 409 S.E.2d at 803.

In considering the Johnsons' case, it is helpful to look back at the case, familiar to every first-year law student, that is credited with creating the doctrine of *res ipsa loquitur*: *Byrne v. Boadle*, 159 Eng. Rep. 299 (Exch. 1863). There, the plaintiff was walking underneath a flour dealer's shop window when a barrel of flour fell out of the window and hit him. *Byrne*, 159 Eng. Rep. at 299. There were no witnesses to describe how the barrel fell out of the window. *Id.* The flour dealer asserted that he was entitled to judgment because there was no evidence of negligence, and the lower court agreed. *Id.* On appeal, Chief Baron Pollack famously remarked that "[i]t is the duty of persons who keep barrels in a warehouse to take care that they do not roll out, and I think that such a case would, beyond all doubt, afford prima facie evidence of negligence." *Id.* at 301. He went on to hold that "if there are any facts inconsistent with negligence it is for the defendant to prove them." *Id.*

The facts are different in the instant case, but the same premise applies. Here, instead of a flour barrel falling out a window, a dump truck ran into a house. Neither would normally occur absent negligence. Like in *Byrne*, there were no witnesses to this accident who could testify as to how it occurred. In *Byrne*, the court held that the failure to prevent the barrel of flour from falling out of the window was prima facie evidence of negligence

and that the flour dealer had the burden of proving that it did not occur as a result of his negligence. *Id.* Here, this would mean that the failure to prevent the dump truck from running into the Johnsons' house was prima facie evidence of negligence and that the County had the burden of proving that it did not occur as a result of its negligence.

While this is the scenario that would exist if South Carolina followed the doctrine of *res ipsa loquitur*, South Carolina does not. *See Watson*, 389 S.C. at 453, 699 S.E.2d at 179; *Snow*, 305 S.C. 544, 555 n.7, 409 S.E.2d 797, 803 n.7 (Ct. App. 1991). Thus, the burden of proof remained on the Johnsons to prove that the County was negligent; the burden did not fall on the County to rebut a prima facie case of negligence.

II. The Johnsons did not provide any evidence that proves the County was negligent.

The only evidence offered by the Johnsons to prove that the County was negligent (other than the fact of the accident itself—that the dump truck ended up in their living room) is that Powell's cell phone was found on the floor of the dump truck. The Johnsons' claim rests on the theory that Powell must have been doing something with his cell phone, whether talking on it or trying to pick it up off the floor, when he and his dump truck hopped the curb, crossed the sidewalk, traversed the grass right-of-way, rolled up the

berm, bowled through the bushes, sped down the berm, careened through the backyard, smashed the back deck, and crashed into the Johnsons' living room. While that was a fine theory, it was only a theory. The Johnsons did not offer any evidence at trial that proves it.

The only evidence about whether or not Powell was on the phone at the time of the accident was his unambiguous testimony that he was not. (R. p. 58, lines 20–22.)

The Johnsons offered the testimony of the trooper who investigated the accident and noticed Powell's phone out of its magnetic holster and on the passenger side floorboard. (R. p. 39, lines 20–23.) Not surprisingly, the trooper also recognized that it is not unusual for things to fly around the inside of vehicles after collisions, and he did not place any particular importance on the location of the phone. (R. p. 42, lines 13–19.) He did not do anything to investigate whether Powell had been using the phone, and he did not even find it important enough to put in his written report. (R. p. 42, line 22–p. 44, line 8.) Additionally, Powell testified that his phone had popped out of its magnetic holster on other occasions. (R. p. 49, lines 7–11.)

The Johnsons make much of the fact that the County did not get Powell's cell phone records for them and that he admitted at trial that he misled their counsel at his deposition about the name of his service provider.

(Resp'ts' Br. 4–5.) As an initial matter, it is not clear that he admitted that he misled the Johnsons' counsel. Powell did answer "yes" to the question about whether he intentionally misled the Johnsons' counsel about the cell phone provider, but this answer came immediately after a long string of seven other "yes" questions. (R. p. 57, line 9–p. 58, line 8.) Furthermore, he testified immediately afterwards that he did not intend to mislead the Johnsons' counsel and was merely mistaken about the name of his cell phone provider. (R. p. 58, line 23–p. 59, line 11.)

Additionally, if the Johnsons wanted Powell's cell phone records, they could have easily obtained them merely by sending out subpoenas to the limited number of local service providers. Instead, they chose to rely on the County to obtain the records. The County sent subpoenas to two local providers, but in October 2010, these providers responded that they did not have any records for Powell. (R. pp. 148–55.)

The trial took place the following October—a full year later. The Johnsons could have used this time to try to obtain the records on their own, but chose not to do so, even though their cell phone theory formed the foundation of their entire case. Because the phone records were never found, their existence or inexistence should not have factored into the jury's decision. *See, e.g.*, *Watson*, 389 S.C. at 445, 699 S.E.2d at 174 (noting that

the jury is charged with weighing the evidence admitted at trial).

Thus, the Johnsons' phone theory was solely based on the fact that the phone was found on the floor of the passenger side of the dump truck after the accident. (R. p. 39, lines 20–23.) The unsurprising fact that a phone in a magnetic holster ended up on the floor of the dump truck after it ran off the road and into a house is not evidence upon which a jury could have found that Powell was negligent. This is particularly so because the uncontroverted testimony was that he was not on his phone at the time of the accident, (R. p. 58, lines 20–22), and that his phone had popped out its holster on other occasions, (R. p. 49, lines 7–11), presumably from a lesser impact than running into a house with a dump truck. The fact that the phone was found on the floor proves nothing more than that there was a phone in the dump truck at the time of the accident.

Furthermore, the Johnsons' phone theory is inconsistent with the facts of the case. The dump truck traveled in essentially a straight path from when it jumped the curb until it ran into the Johnsons' house. (R. pp. 144–45.) Even if Powell had been on the phone, it defies logic to believe that he would have been so distracted by his conversation that he would have jumped the curb and continued in a straight line until he and his dump truck ended up in the Johnsons' living room. If he had merely gone through a stop

sign or drifted into an oncoming lane, the phone theory would be more plausible. However, the facts of this case—driving in a straight line into the Johnsons' house—is not at all consistent with an accident that might have occurred because of a driver being on a cell phone, and therefore is not evidence that supports the Johnsons' claim.

Because there was no evidence that Powell was on his phone at the time of the accident and there is no other evidence that supports the Johnsons' theory, the County was entitled to a directed verdict. *See Jamison v. Morris*, 385 S.C. 215, 225, 684 S.E.2d 168, 173 (2009) (reversing the jury verdicts against the defendants and holding that they were entitled to a directed verdict where there was no evidence to support the plaintiffs' theory).

III. The parties' experts agreed that Powell suffered an event that caused the accident.

Even if the Court believes that the facts of the accident and Powell's cell phone on the floor provided sufficient evidence of negligence to get to a jury, the County is still entitled to judgment because there is no dispute that the event Powell suffered was what caused the accident.

Dr. Bettle's opinion was that Powell suffered an epileptic seizure at the time of the accident. (R. p. 100, line 21–p. 101, line 10.) Dr. Brannon's

opinion was that Powell did not suffer an epileptic seizure.[1] (R. p. 80, lines 14–19.) The Johnsons spent much of their brief debating the merits of Dr. Bettle's and Dr. Brannon's competing theories. (Resp'ts' Br. 6–11, 20–23.) However, the Johnsons ignore the fact that, though Dr. Brannon did not believe that it was an epileptic seizure, he believed that Powell suffered "some kind of event." (R. p. 85, line 25–p. 86, line 10.) Dr. Brannon's testimony sums up the facts of this case quite nicely:

> Q: So, you don't dispute the fact that Mr. Powell had some kind of event. What you do dispute is a diagnosis of epilepsy?
>
> A: Well, I think it was some kind of event. People don't usually drive trucks into houses intentionally, I don't think.

(R. p. 86, lines 5–10.)

The important takeaway from the testimony of Dr. Bettle and Dr. Brannon is not the quibbling about whether or not the event that Powell suffered was technically an epileptic seizure; it is that they agreed that he suffered "some kind of event," and that this event is what caused his dump truck to end up in the Johnsons' living room. (R. p. 100, line 21–p. 101, line

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[1] The County's Brief stated that Dr. Brannon did not testify that Powell did not have an epileptic seizure. (Appellant's Br. 9.) This was an oversight by counsel, as Dr. Brannon did, in fact, opine that Powell did not suffer an epileptic seizure. (Trial Tr. p. 106, lines 14–19.)

10; p. 86, lines 5–10.) Because both parties' experts agreed that the event Powell suffered was what caused the accident, there is no evidence to support the verdict and this Court should reverse.

Conclusion

For the reasons stated, the circuit court erred in failing to grant the County's motions for a directed verdict, motion for judgment notwithstanding the verdict, and motion for a new trial. Accordingly, the County asks the Court to reverse and enter judgment for the County.

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March 19, 2013
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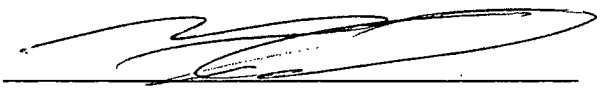
CERTIFICATE OF COUNSEL

I certify that the Brief of Appellant and Reply Brief of Appellant comply with Rule 211(b), SCACR. In addition to those changes provided in Rule 211(b), I changed the font size and formatting in the Initial Brief to match the font size and formatting in the Initial Reply Brief. These changes were made for the sole purpose of uniformity, and no substantive changes were made to the briefs. I consulted with L. Darby Plexico III, counsel for the Respondents, and there was no objection to these changes.

I also certify that the Brief of Appellant, Reply Brief of Appellant, and

Record on Appeal comply with the South Carolina Supreme Court's Order dated August 13, 2007, regarding personal data identifiers and other sensitive information in appellate court filings.

GRIFFITH, SADLER & SHARP, P.A.

By: 

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March 26, 2013
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I certify that I am a legal assistant at Griffith, Sadler & Sharp, P.A., and on March 26, 2013, I placed a copy of the *Record on Appeal, Brief of Appellant, Reply Brief of Appellant,* and *Certificate of Counsel* in the US Mail, with first-class postage prepaid, and addressed as follows:

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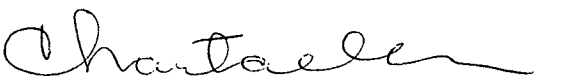

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