

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Diane Schafer Goodstein, Circuit Court Judge

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MAY 30 2013

Civil Action No. 2010-CP-15-00894

Appellate Case No. 2012-212865

SC Court of Appeals

Jake Wright and Theresa Gadsden, as
Personal Representatives of the Estate
of Jacob Cleveland Wright, and Jake
Wright and Theresa Gadsden, individually Respondents

v.

Colleton County Sheriff's Department Appellant

REPLY BRIEF OF APPELLANT

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Argument

- I. **The Department is entitled to judgment as a matter of law on the speeding claim because the accident would have happened even if Deputy McCoy had been traveling the speed limit.**

The Wrights argue that “[i]t is a rare case which is controlled by the *Odom* and *Horton* argument.” (Resp’t Br. 10.) This is such a case.

- A. **The Wrights’ expert used the incorrect standard.**

The Department acknowledges that Deputy McCoy was speeding at the time of the accident. The speed limit on that portion of Green Pond Highway was 55 MPH. (R. p. 112, lines 3–4; p. 137, lines 22–23; p. 147, lines 2–20.) The Wrights’ expert testified that the cruiser was traveling 83 MPH. (R. p. 108, lines 20–21.) Though the Highway Patrol sergeant who investigated the accident and the Department’s expert calculated much lower speeds, (R. p. 131, lines 20–23; p. 144, line 23–145, line 3), taking the evidence in the light most favorable to the Wrights, this Court can assume that the Wrights’ expert was correct in his calculation. *See RFT Management Co. v. Tinsley & Adams, LLP*, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012). However, this is irrelevant because the accident would still have occurred even if Deputy McCoy had been traveling the

speed limit.

The Department's expert testified that if Deputy McCoy had been traveling 55 MPH at the time when the Wrights' vehicle became a hazard, the accident would still have occurred; the Wrights' vehicle would have advanced another four feet and the impact would have been to the passenger side of the vehicle, rather than in the front. (R. p. 137, lines 7-12.) As the Department's expert testified, the collision avoidance analysis begins when the vehicle actually becomes a hazard—in this case, when the Wrights' vehicle pulled into Deputy McCoy's lane. (R. p. 138, lines 1-8.)

The Wrights' expert did not conduct this analysis. He did not calculate how far away the cruiser was when the Wrights' vehicle pulled into Deputy McCoy's lane. (R. p. 117, line 3-p. 118, line 1.) Instead, the Wrights' expert prepared his analysis by looking at what would have happened if the cruiser had been traveling the speed limit from a point 360 feet away from the intersection. (R. p. 111, line 13-p. 112, line 6.) He chose this point because there was a yellow sign indicating an intersection ahead and he arbitrarily decided that this was an appropriate point to start his analysis. (R. p. 111, line 21-p. 112, line 6.) He calculated that the Wrights' vehicle would have cleared the intersection by about 40 feet if the cruiser had been traveling 55 MPH from this point. (R. p. 112, lines 7-21.)

However, this analysis is irrelevant because the location that he chose to begin his analysis was completely arbitrary—there was nothing special about that location. This sign merely indicated that there was an intersection ahead; it did not change the speed limit from 55 MPH. (R. p. 111, line 21–p. 112, line 6; p. 146, line 22–p. 147, line 20.) The sign could have just as well have been 500 feet away, or 150 feet away, or nonexistent.

Furthermore, as the Department's expert testified, looking at the accident from any point other than when the vehicle actually became a hazard gets into too many "what ifs." (R. p. 138, lines 1–8.) What if Deputy McCoy had gotten the call later? What if he had been driving 120 MPH the whole time, but slowed down to 55 MPH 100 feet before the Wrights' vehicle pulled into his lane? What if he had been traveling 55 MPH the entire time, but had rolled through a stop sign while he was driving through Walterboro? These actions would be irrelevant because they would have served merely to put his vehicle at a particular location on the highway at a particular time. As our Supreme Court has stated, it is irrelevant "[t]hat speed was a contributing factor in placing the [vehicle] at a particular location on the highway when the emergency arose ... because the defendant[] had the legal right to occupy that portion of the highway." *Horton v. Greyhound Corp.*, 241 S.C. 430, 439, 128 S.E.2d 776, 781 (1962);

accord Odom v. Steigerwald, 260 S.C. 422, 427, 196 S.E.2d 635, 637 (1973).

The proper analysis was that conducted by the Department's expert—whether the accident would have occurred if Deputy McCoy had been traveling the speed limit at the moment when the Wrights' vehicle entered his lane. If the accident would have occurred anyway, then the speed "created merely a circumstance or condition of the accident and not its proximate cause." *Kennedy v. Carter*, 249 S.C. 168, 178, 153 S.E.2d 312, 317 (1967).

B. Deputy McCoy's speed was not a proximate cause of the accident.

The Department was entitled to a directed verdict because the accident still would have occurred even if Deputy McCoy had been traveling the speed limit when the Wrights' vehicle pulled into his lane.

The test described above is consistent with the entire *Horton* line of cases, including the cases relied on by the Wrights. In *Horton*, which involved a pickup pulling directly into the path of a speeding bus, the court noted that, even if the bus had been going the speed limit when the pickup pulled into the bus's lane, the vehicles were already at less than half of the required stopping distance at that speed. *Horton*, 241 S.C. at 440, 128

S.E.2d at 782. The court therefore held that “the excessive speed of the bus must be regarded as coincidental rather than as causal. Its mere concurrence with the efficient cause of the collision does not impose liability on the defendants.” *Id.* Accordingly, the court affirmed the trial court’s grant of a directed verdict to the defendants. *Id.* at 442, 128 S.E.2d at 783.

Similarly, in *Odom*, which involved the defendant making a left turn from a stop sign on the disfavored street in front of the speeding plaintiff traveling on the favored street, the court held that the plaintiff was entitled to a directed verdict because it was “without legal significance that speed was a contributing factor in placing [the plaintiff’s vehicle] at a particular location on [the highway] when the emergency arose, because the plaintiff had the legal right to occupy that portion of the street.” *Odom*, 260 S.C. at 427, 196 S.E.2d at 637. The court held that even if the plaintiff was speeding and was negligent, this negligence was not a proximate cause of the accident. *Id.* at 428, 196 S.E.2d at 638. “The real cause, the more immediate and efficient cause, was the improper driving conduct of [the defendant]. By driving his car directly into the path of plaintiff’s vehicle when plaintiff was obviously so close to the intersection, [the defendant] created a trap from which plaintiff could not escape.” *Id.* Thus, the court held that the plaintiff was entitled to a directed verdict. *Id.*

Blanding v. Hammell, 267 S.C. 352, 228 S.E.2d 271 (1976) also presents a similar factual scenario. There, the plaintiff pulled out in front of the speeding defendant, resulting in an accident. *Blanding*, 267 S.C. at 355, 228 S.E.2d at 272. The plaintiff argued that evidence of the defendant speeding and failing to keep a proper lookout was enough to require the submission of the case to a jury, but the court disagreed, holding that the defendant's speed "was not a contributing factor in the mishap." *Id.* The court noted that, in these types of cases, the focus is "on the inevitability of the accident, irrespective of the defendant's speed, due to an unexpected entry of the plaintiff into the defendant's right of way." *Id.* at 357, 228 S.E.2d at 272-73. Accordingly, the court affirmed the trial court's grant of a directed verdict to the defendant. *Id.* at 355, 228 S.E.2d at 271-72.

The Wrights rely on the case of *Carter v. Beals*, 248 S.C. 526, 151 S.E.2d 671 (1966), but this case does not support their argument. There, the plaintiff was traveling north on Fishburne Street in Walterboro and the defendant, a police officer, was traveling east on Wichman Street. *Carter*, 248 S.C. at 528, 151 S.E.2d at 672. The streets intersected at right angles, with Wichman being the primary street and Fishburne being controlled by a stop sign. *Id.* at 530, 151 S.E.2d at 673. The speed limit on Wichman was 25 MPH. *Id.* The defendant testified that he was traveling 35 MPH, but the

plaintiff testified that the defendant was traveling at least 60 MPH. *Id.* at 531, 151 S.E.2d at 674. Importantly, the plaintiff also testified that if the defendant had been traveling 25 MPH, the plaintiff would have had time to clear the intersection. *Id.* Here, in contrast, the only testimony in the record is that even if Deputy McCoy had been driving the speed limit when the Wrights' vehicles pulled into his lane, the accident still would have occurred. (R. p. 137, lines 6–12.) Thus, the instant case is distinguishable from *Carter*.

The Wrights also place a great deal of reliance on *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000), but that case is also distinguishable. In *Clark*, the defendant was speeding down Highway 24 toward Anderson when the plaintiff turned left out of a service station across two lanes of traffic in front of the defendant, resulting in the accident. *Clark*, 339 S.C. at 375–76, 529 S.E.2d at 531–32. The speed limit was 35 MPH. *Id.* at 376, 529 S.E.2d at 532. The defendant's expert estimated that the defendant was traveling 57 MPH, and the investigating officer estimated the defendant's speed at 67–71 MPH. *Id.* Both testified that if she had been traveling 35 MPH, the accident probably would not have occurred. *Id.* Like in *Carter*, this point makes *Clark* distinguishable from the instant case.

Furthermore, the court in *Clark* stated that judgment as a matter of

law pursuant to *Horton* is proper “when the evidence, viewed in the light most favorable to the non-moving party, shows that the speed of a vehicle could not have contributed to the cause of the accident.” *Id.* at 389, 529 S.E.2d at 539. That is precisely the situation in the instant case, as the only testimony in the record is that the accident would still have occurred even if Deputy McCoy had been traveling 55 MPH when the Wrights’ vehicle pulled into his lane. (R. p. 137, lines 6–12.) For these reasons, the trial court erred in denying the Department’s motions for a directed verdict and this Court should reverse.

II. The Department is entitled to judgment as a matter of law on the negligent hiring claim because the Wrights failed to provide expert testimony on the standard of care for a sheriff.

This Court should reverse because the Wrights failed to provide expert testimony on the standard of care for a sheriff in making hiring decisions. “Expert testimony . . . is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge.” *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010); *see also 5 Star, Inc. v. Ford Motor Co.*, 395 S.C. 392, 399, 718 S.E.2d 220, 224 (Ct. App. 2011) (“[T]he requirement of presenting expert testimony to meet the burden of proof on subjects beyond the knowledge and understanding of lay jurors

is by no means new.”). Despite the Wrights’ protests to the contrary, expert testimony is necessary for any subject that is beyond the realm of ordinary lay knowledge, not just subjects involving bona fide professions. *See, e.g., Parker v. Grand Hyatt Hotel*, 124 F. Supp. 2d 79, 89–90 (D.D.C. 2000) (requiring expert testimony regarding a claim of negligent supervision of police officers); *Campbell v. DiSabatino*, 947 A.2d 1116, 1118 (Del. 2008) (requiring expert testimony regarding the source of mold). “Whether expert testimony is required is a question of law.” *Graves v. CAS Med. Sys., Inc.*, ___ S.C. ___, ___, 735 S.E.2d 650, 659 (2012) (citation omitted).

As the Sheriff testified, Deputy McCoy was hired as a regular deputy after he had been working as a reserve deputy for a period of time. (R. p. 38, lines 2–3.) The Sheriff testified that during the hiring process, his office would review an applicant’s criminal and civil history, work record, references, driving record, reputation, and other activities. (R. p. 38, line 17–p. 39, line 13.) He did not conduct these inquiries himself; he relied on his subordinates, including his Chief Deputy, three captains, and several lieutenants, to review the application documents. (R. p. 39, lines 14–22; p. 42, lines 5–14.) His expectation was that if there was anything in the application that would disqualify the applicant, he would never see the application because it would get turned away before it reached his desk. (R.

p. 25, line 24–p. 26, line 6.)

The Wrights misconstrue this testimony. They argue that they did not need expert testimony because “the Sheriff testified to his standard for hiring a deputy sheriff and admitted that he did not follow his own standards in hiring McCoy.” (Resp’t Br. 20.) He did no such thing. He testified that his standard was for his subordinates, including his Deputy Sheriff, captains, and lieutenants, to review the information and weed out any applicants that should be disqualified. (R. p. 25, line 24–p. 26, line 6; p. 38, line 17–p. 39, line 22; p. 42, lines 5–14.) He acknowledged that he did not personally review the application materials, (R. p. 40, lines 2–9), but he never testified that it was his standard to do so. Thus, it cannot be said that he violated his own standard.

Furthermore, even if he had violated his own standard, this would not indicate that he violated the standard of care applicable to a sheriff. If his standard were higher than the general standard, then his violation of his own standard would not necessarily mean that he violated the general standard.

Because the Wrights failed to offer expert testimony as to the standard of care applicable to a sheriff, the jury was left groping in the dark to determine whether the Sheriff’s actions in this case violated the standard of care. As discussed above, the Sheriff testified that he had his subordinates

review the application, but he did not personally review the provided documents. (R. p. 38, line 17–p. 39, line 22; p. 42, lines 5–14.) Without expert testimony on the issue, a jury could not determine whether or not this violates the standard of care. Because the question of whether or not a sheriff violates the standard of care by not personally reviewing application documents is “outside the realm of ordinary lay knowledge,” expert testimony was required. *Watson*, 389 S.C. at 445, 699 S.E.2d at 175. The Wrights failure to provide such expert testimony entitles the Department to judgment as a matter of law, and this Court should therefore reverse.

III. If the Court finds in favor of the Department only on the negligent hiring claim, then the case must be remanded for a new trial.

If this Court were to rule against the Department on the speeding claim and in favor of the Department on the hiring claim, then the case must be remanded for a new trial on the wrongful death cause of action. The jury returned a verdict for the Wrights on the wrongful death cause of action for \$700,000, which was later reduced to the statutory cap of \$300,000.¹ (R. pp. 5–6; p. 152, lines 4–6.) The verdict form did not specify what amount was

¹ The jury returned nothing on the survival claim, and that is now the law of the case.

allocated to which claim. As discussed in the Department's primary brief, if the Court rules in favor of the Department on the speeding issue, then the Department is entitled to a directed verdict on both the negligence and negligent hiring causes of action because there can be no negligent hiring without an underlying actionable tort. (Appellant Br. 21-22.) However, if the Court were to rule in favor of the Department only on the hiring issue, then a new trial is required because it cannot be determined how much the jury allocated to which cause of action.

To use a hypothetical example, if the jury had felt that the speeding claim was worth \$100,000 and the negligent hiring claim was worth \$600,000, then, if this Court finds in favor of the Department on the negligent hiring claim, the Wrights would only be entitled to the \$100,000 awarded to the Wrights for the speeding claim. Conversely, if the awards were reversed and the jury had felt that the speeding was worth \$600,000 and the negligent hiring was worth \$100,000, then this Court's ruling on the Department's negligent hiring argument would be irrelevant because the Wrights would still be entitled to the full amount of the \$300,000 cap. However, we do not know how the jury felt about the merits of each claim because the jury only returned a general verdict on the entire wrongful death cause of action. Accordingly, if the Court finds in favor of the Department

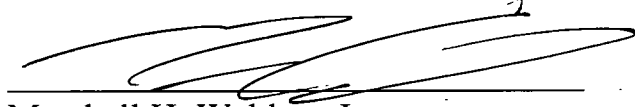
only on the negligent hiring issue, then the case must be remanded for a new trial on the wrongful death cause of action.

Conclusion

For the reasons stated, the trial court erred in failing to direct a verdict for the Department. Accordingly, the Department respectfully asks this Court to reverse and enter judgment for the Department.

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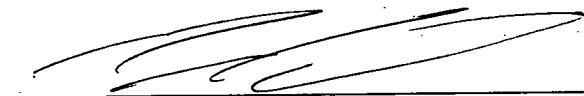
CERTIFICATE OF COUNSEL

I certify that the Brief of Appellant and Reply Brief of Appellant
comply with Rule 211(b), SCACR. 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
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[SIGNATURE PAGE FOLLOWS]

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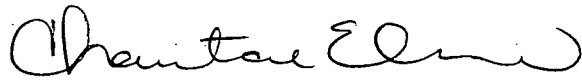
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I am a legal assistant at Griffith, Sadler & Sharp, P.A., and on May 13, 2013, I placed a copy of the *Record on Appeal*, *Brief of Appellant*, *Reply Brief of Appellant*, and *Certificate of Counsel* in the US Mail, with first-class postage prepaid, and addressed as follows:

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A handwritten signature in cursive script, appearing to read "Chautae Elmore", written over a horizontal line.

Chautae Elmore