

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No: 2008-CP-22-00466
Published Opinion No. 5055
Filed November 28, 2012

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's
Farm, J&J Logging, Inc and
Edgar Rivera,

Appellants,

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SC Court of Appeals

**REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR
REHEARING BY PETITIONERS WARREN JARED NEWTON, NEWTON'S
FARM, J&J LOGGING, INC ("NEWTON DEFENDANTS")**

TO: THE HONORABLE JUDGES OF THE COURT OF APPEALS:

Appellants, Warren Jared Newton, Newton's Farm, and J&J Logging, Inc. (Hereinafter, collectively referenced as the "Newton Defendants") would Reply herein to Respondent's Return to the Newton Defendants' Petition for Rehearing and show unto this Honorable Court as follows:

- The Newton Defendants hereby incorporate by reference their Petition for Rehearing as fully as though the same were repeated verbatim herein.
- All grounds/arguments/allegations contained in the Newton Defendants' Petition for Rehearing are affirmed and are re-alleged in response to the Respondent's Return to the same.
- To the extent the same are not conflicting; all grounds/arguments/allegations contained in the Rivera Defendant/Appellant's Petition for Rehearing are also incorporated herein.

1. The Respondent's Return incorrectly and inaccurately contends that the Newton Defendants' Petition for Rehearing "raised the same arguments again" as to imputed negligence, waiver, release, and this particular passenger/appellant's duty to supervise/control the operation of the Rivera vehicle under these facts.

On the contrary, the Newton Defendants' Petition for Rehearing responded specifically to the Court's Opinion, including the dissent by Judge Konduras, and it contended that this Court should vacate the majority opinion and adopt the dissent written by Judge Konduras.

Specifically, the Newton Defendants contend that the majority Opinion erred in considering the testimonial waiver claim as only alleging imputed negligence. Because it found, incorrectly, that these issues were not raised to the trial court, **(R.p. 121, 132, 133, 130-135)** the majority did not consider either imputed negligence or waiver. Therefore, the majority did not consider the impact on the jury verdict of plaintiff/respondent Ms. Rivera's testimonial waiver/release of her brother, the co-Defendant.

Judge Konduras' dissent considers at least some of these issues and finds that the trial court should be reversed and the jury verdict sustained.

2. **The Respondent's Return incorrectly agrees with the majority that the Newton Defendants imputed negligence argument was not preserved, it does so without distinguishing between the waiver and imputed negligence arguments, and it then states that "the Trial Court dismissed all such arguments and was certainly within its authority to do so.**

While the Newton Defendants contend that all claims of waiver/release/negligence (comparative-contributory, including imputed) were properly made and preserved, those claims are differentiated. The imputed negligence/joint enterprise argument was made without specific reference to the doctrine, via allegations of negligence (R.p.15-23) and evidence/testimony at trial. (R.p.171 l. 11-p.173, l. 2; p. 86, l.3-4; p.166, l.5-6; p. 294, l. 12-16; p. 165, l. 24-p.166 l. 1; p. 171 l. 2-p.173, l. 12)

The Newton Defendants' argument that the Plaintiff waived her claim against co-Defendant or released it was made and raised to the trial court by way of a Motion for Reconsideration. (R.p.130-135).

However, the Respondent's Return specifically addresses only the claims regarding imputed negligence and as to those, Respondent admits these were raised to and addressed by the trial court. As to imputed negligence, Respondent's Return states: **"the Trial Court dismissed all such arguments and was certainly within its authority to do so.**

3. **The Respondent's Return agrees with the majority's incorrect holding that no evidence was presented of Jeisel's negligence. Like the majority, the Respondent fails to consider that under these facts, Jeisel was on notice that her brother, the co-Defendant, was incompetent or careless.**

Jeisel was an older, licensed driver who knew that her younger brother was unlicensed, driving at night, and rushing to reach their father who had been involved and injured in a fight. (R.p.171, l.11 - p. 173, l.12; R.p.166, l.3-4; R.p.211, l.1 - 6; p.493; R.p.165, l.24 - p. 166, l.1) The

majority cites Thompson v. Michael, 315 S.C. at 271, 433 S.E.2d at 854 as standing for the proposition that IN THE ABSENCE OF any fact or circumstance indicated that the driver is incompetent or careless, a vehicle passenger isn't required to anticipate a driver's negligence. In this case, the facts and evidence, at a minimum, raise a jury issue as to the Plaintiff's negligence, sufficient to withstand a Motion for a Directed Verdict. This further supports Judge Konduras' dissent finding that the trial court erred in granting a new trial based on its failure to grant the directed verdict motion.

4 – 9. Respondent's Return to #s 4-10 of the Newton Defendant's Petition is generally to the effect that the Petition does not "raise any new matter."

The Newton Defendants' Petition for Rehearing could not have properly raised new matter or material. The purpose of the Petition for Rehearing was to show that material raised by the briefs and argument and documented by the Record was misapprehended by the majority opinion. The Petition for Rehearing could not have properly raised new matter or arguments.

10. The Respondent's Return is incorrect in summarily dismissing the import of the dissent by Judge Konduras. As Judge Konduras stated, the trial court granted a new trial because it found it should have granted a Directed Verdict.

However, as Judge Konduras noted, at the directed verdict stage the trial court was required to view all evidence and inferences most favorably to the parties opposing the motion. Moore v. Levitre, 294 SC 453, 453-454, 365 SE2d 730, 730 (1988) In that light, enough evidence existed for this jury to have found that the Plaintiff failed to meet her burden of proof and to support the jury's defense verdict, making it an error of law for the trial judge to have granted a new trial on the bases for which it was granted in this case.

The Respondent's Return does not appear to address the arguments made by Edgar

Rivera in his Petition for Rehearing – *which is incorporated herein by reference, except to such extent that the same may conflict herewith.* This argument was also made by the Newton Defendants in their Petition for Rehearing. This includes allegations that the accident could have been caused by an unnamed party in the design of the intersection, lighting in the area and lack of adequate warning signs, which the majority incorrectly determined was not preserved. It was presented in testimony and argued to the jury at closing by Rivera’s lawyer. **(R.p.360, lines 1-17; p. 361, l 23; p. 362, l. 2 p. 363, l. 1-4)** This argument was also preserved by the Newton Defendant’s Motion for Reconsideration, made after the grant of a new trial. That Motion for Reconsideration specifically incorporated both Defendants’ Briefs/Memoranda opposing the Respondent-Plaintiff’s Motion for a New Trial. **(R. p. 134, p. 130-135; p. 119-123)**

The Respondent concludes the Return by raising the clear implication that what motivated this verdict was racial animus by a “twelve (12) person non-Hispanic jury from Georgetown County.” Respondent’s conclusion even manages to IMPROPERLY raise the issue of insurance – which alone justifies the Return being struck.

If there were any basis for Respondent’s contentions about the jury’s verdict being motivated by racism, then jury deliberations would have concluded very quickly, with little to no evidence of the jury having seriously considered the facts and the law. Instead, this jury spent approximately a week listening to the arguments, testimony and charges and deliberated for roughly eight (8) hours. **(R.p.389, l.1-2; p.403, l.24-p. 405, l.12; p.406, l.16- p 407, l 4; quote at p. 407, l.1-4)** During deliberations, the jury made the following requests: (1) for Trooper Surratt’s testimony to be read back to them (which was done); (2) for a complete definition of the term intersection as it applied to this intersection on the night of this accident (the court re-read its charge as to right of way, favored and un-favored highways, and the right of way changing to the traveler on the un-favored road after entering when no traffic is approaching

so as to constitute an immediate hazard); and (3) a copy of the judge's full charge or that it be read again (the full charge was sent to the jury). (R.p.389, l.1-2; p.389, l.1-8; p.393, l.5-10; p..393, l.22- p. 394, l.21; p.397, l.21-23; p.397, l.21-p 402, l.21) The facts show that this jury took a lot of time and closely considered the evidence and the law. The only one focused on racial bias appears to be Respondent's counsel.

As Judge Konduras' dissent points out, the trial judge essentially granted a New Trial because he felt, after the fact, that he should have granted the directed verdict motion. However, granting that motion in this case would have been an error of law, because there was conflicting evidence, to wit; (1) the plaintiff's testimony that she didn't believe her brother did anything to cause the accident (R.p.221, l.8 - p.222, l.2); (2) conflicting testimony and evidence about whether the Newton truck's headlights were pointed towards the wood or the highway at the time of the crash; (R.p.258, l. 3 - p 260, l. 9; R.p.262, l.10- p.265, l. 9; p. 272, l.3-25; p.293, l.7-13; p. 362, l. 2-7; p. 364, l. 8- p. 370, l. 13; p.173, l. 5 - p. 174, l.11; p.176, l.6 - p. 178, l.24; p.176, l.17 - p. 177, l.12); (3) conflicting evidence about lighting in the area and whether Rivera had enough warning by flashers, posted signs and illumination that he should have slowed his vehicle, which was admittedly speeding; (R.p.333, l.25 - p. 334, l.25; p.335, l.1 -12; p.219, l.18 - p. 220, l.6; p.176, l.17 - p. 177, l.12; p.258, l. 3 - p 260, l. 9; p.259, l. 20-22; p. 260, l.1-5 and l. 6-13; p.290, l.11- 22; p. 406, l.14-p. 321 l.4) Again, the conflicting evidence includes the plaintiff's testimony that she didn't believe her brother did anything wrong, which conflicted with the fact that she sued him and conflicted with some of the foregoing evidence and the fact that other cars approached, saw the Newton tractor-trailer and turned around. (R.p.263, l. 5-11; p. 368, l 7-24)

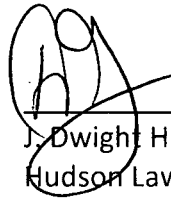
Based upon the foregoing, as stated, denial of the directed verdict would have been an error, and given all of the conflicting evidence, changes in testimony, and the plaintiff's own testimony, there were real issues about whether the Plaintiff's case would or could meet the

requisite burden of proof – as Judge Konduras also points out in the dissent.

Because it would have been an error of law to grant the directed verdict motion in this case, granting a new trial based in any part on the judge's belief that he should have granted the directed verdict is an error of law, justifying reversal of the grant of a new trial and reinstatement of the verdict rendered by this hard-working jury that deliberated at length and returned three (3) times during deliberation with questions and requests.

WHEREFORE, Appellants Warren Jared Newton, Newton's Farm, and J&J Logging, Inc. in Reply to the Return of the Respondent, reiterate their request and motion that the Court rehear the case.

Respectfully submitted,



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Dated: January 23, 2013