THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM FLORENCE COUNTY
Court of Common Pleas
D. Craig Brown, Circuit Court Judge

Case No.: 2016-CP-21-1831
Appeal No.: 2018-001016

Isabelle MacKenzie .....Appellant/Respondent,

v.

C&B Logging and
Charles Brandon Barr .....Respondents/Appellants

RESPONDENT'S INITIAL BRIEF OF RESPONDENTS/APPELLANTS

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STATEMENT OF THE CASE

On August 4, 2016, Appellant brought this action alleging negligence against Respondents related to an April 23, 2016 incident involving a C&B logging truck operated by its employee, Charles Brandon Barr ("Barr") and Appellant's operation of her motorcycle. Appellant alleged causes of action in negligence against both Respondents, including negligently hiring, employing, retaining, supervising, and training as against C&B Logging, LLC. Respondents filed an Answer on August 26, 2016, denying the allegations set forth in the Complaint, asserting affirmative defenses, including comparative negligence.

The case was tried on April 23, 2018 before the Honorable D. Craig Brown. The Honorable Alex Kinlaw was also present. On April 26, 2018, the jury issued a verdict finding that Barr was sixty (60) percent at fault and C&B Logging, LLC was forty (40) percent at fault.(See Verdict Form) The jury awarded Appellant $179, 678.49 in actual damages. The jury declined to award punitive damages.

Appellant filed a Motion for New Trial Nisi Additur or in the Alternative, New Trial Absolute on May 8, 2018, but subsequently withdrew this Motion on May 8, 2018.

On May 29, 2018, Appellant filed her Notice of Appeal. Respondents filed their notice of cross-appeal on June 1, 2018, and an amended notice of cross-appeal on June 7, 2018.

STANDARD OF REVIEW

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." State v. Saltz, 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or, when grounded in factual conclusions, is without evidentiary support." State v. Jennings, 394 S.C. 473, 477-78, 716 S.E.2d 91, 93 (2011).

A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. State v. Kelley, 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). "Determining whether prejudice exists 'depends on the circumstances[,]' and 'the materiality and prejudicial character of the error must be determined from its relationship to the entire case.'" Keene v. CNA Holdings, Op. No. 5625 (S.C.Ct.App. Filed February 13, 2019)(Shearouse Adv. Sh. No. 7 at 16)(citing State v Commander, 396 S.C. 254, 721 S.E.2d 413 (2011); quoting State v. Taylor, 333 S.C. 159, 172, 508 S.E.2d 870, 876 (1998)).

> This court has held if "an on-the-record Rule 403 analysis is required, [we] will not reverse the conviction if the trial judge's comments concerning the matter indicate he was cognizant of the evidentiary rule when admitting the evidence of [a defendant's] prior bad acts." State v. King, 349 S.C. 142, 156, 561 S.E.2d 640, 647 (Ct.App. 2002). In King, this court determined the trial court's ruling was "a compressed Rule 403/404(b) analysis" with "some indicia of his consideration of whether admission of the testimony was fair to King (*i.e.*, more probative than prejudicial)." *Id.* at 157, 561 S.E.2d at 647.
>
> State v. Spears,403 S.C. 247, 742 S.E.2d 878, 880 – 881(Ct. App. 2013)

"The dictates of Rule 401 are subject to the balancing requirement of Rule 403, SCRE, which requires a court to exclude relevant evidence upon a showing that its admission would be more prejudicial than probative." Proctor v. Dept. of Health, 368 S.C. 279, 628 S.E.2d 496, 515 (Ct. App. 2006) (quoting Watson ex rel Watson v. Chapman, 343 S.C. 471, 478, 540 S.E.2d 484, 487 (Ct. App.2000))

The standard of review is limited to determining whether the trial court's ruling is supported by any evidence. State v. Breeze, 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008).

FACTS

On the evening of April 23, 2016, Brandon Barr was operating a C&B logging truck northbound on Pamplico Highway (SC-51) when he pulled over to address a low tire on his trailer. (Transcript ("Tr.") p. 318, line 7-p. 319, line 3). Due to construction barrels along the highway for impending changes to the roadway and a ditch on the right, he pulled over to his left hand side, in front of a trailer park entrance closest to a northbound curve to the left. (Tr. p. 338, lines 3-18; p. 369, lines 16-21; p. 437, line 21–p. 438, line 16; p. 464, lines 12-15). Unable to obtain the assistance desired he began to pull back onto the highway to continue northbound. He maintained that no traffic was visible in either direction as he began to cross the southbound the lane. (Tr. p. 370, lines 18-25). Numerous witnesses confirmed that southbound traffic rounded a dark, "blind curve" to the right as they approached the trailer park, with a yellow curve sign beforehand. (Tr. p. 436, lines 4-7; p. 446, line 17; p. 436, line 18-p. 437, line 4). While at least a portion of the logging trailer was still crossing the southbound lane, a pickup truck driven by a third-party rounded the southbound curve and struck the front axle on the trailer's driver side. (Tr. p. 371, lines 6-9; p. 374, line 23-p. 375, line 4). Barr believed that his trailer would've fully cleared the southbound land in another five seconds; at some point soon thereafter Appellant rounded the corner on her motorcycle. (Tr. p. 318, line 15–p. 319, line 3). The responding Trooper was notified of the incident around 10:30 p.m. (Tr. p. 411, lines 23-25) and recalled that, per his notes from his accident investigation, Appellant informed him she had laid her bike down to avoid the collision and there was no collision between the tractor-trailer and the motorcycle. (Tr. p. 419, line 15–p. 420, line 21; p. 421, lines 3-5). At trial, Appellant recalled seeing "trees sideways," attempting to avoid the "trees" and then laying down in the mud. (Tr. p. 200, lines 2-18; p. 206, lines 11-13; p. 219, line 2–p. 220, line 4). Barr denied Appellant struck the trailer. (Tr. p. 397, lines 4-5). Joshua

Ryan, an alleged independent witness traveling behind Appellant, provided testimony that Appellant swerved to avoid both of the trucks involved in the initial accident, leaving the roadway into the grass, likely slipping in the mud. (Tr. p. 438, lines 15-16; p. 439, line 22–p. 440, line 15; p. 447, lines 6-19). While the Trooper claimed the speed limit was 55 at the time and Appellant told him she was traveling at the speed limit, Mr. Ryan believed the speed limit was 50 -55 mph, but that all three vehicles were traveling together in a line at 50 to 55 mph, though he may've tapped his brakes when he saw the caution sign. (Tr. p. 435, line 16–p. 437, line 2; p. 437, lines 12-18; p. 452, line 6–p. 453, line 3)

The accident was within a mile or two of Appellant's home. Appellant's husband and daughter visited the scene together and Appellant assured her daughter at the scene she was OK (Tr. p. 461, lines 14-21; p. 462, lines 16-21; p. 463, lines 11-13). Appellant's accident was written on a separate accident report and did not even mention Barr since the Trooper knew of no contact between the vehicles (Tr. p. 89, lines 14-19; p. 96, lines 13-17; p. 420, line 22–p. 421, line 8; p. 476, line 25–p. 477, line 2)

Soon after the accident all the trees and bushes contributing to the blind curve were removed, the road has since been widened, the entrance to the trailer park blocked with Jersey barriers, and the speed limit reduced to 45 mph. (Tr. p. 418, lines 15-18; p. 464, line 8–p. 467, line 1).

The Trooper noted his satisfaction from his investigation that there was no evidence of alcohol or drug use involved. (Tr. p. 423, lines 10-12). In addition, he had the DOT/State Transport police respond and agreed he had no knowledge of any issue regarding lighting on the logging truck, the load being overextended or any safety issue with regard to the logging truck and trailer. (Tr. p. 425, line 13–p. 426, line 8).

ARGUMENT

I. THE TRIAL COURT PROPERLY EXCLUDED PROFFERED EVIDENCE OF DEFENDANT BARR'S CRIMINAL HISTORY PER RULE 403 ANALYSIS

Respondents moved, in limine, for the exclusion of all Barr's alleged criminal or driving infractions on relevancy and on Rule 403 considerations. (Tr. p. 97, lines 6-19). Appellant submitted a Memorandum in support such admission (Tr. p. 97, lines 21-24; Court's Exhibit 2), along with the proffered paperwork related to criminal charges. (Plaintiff's Exhibits 4, 5 and 6).[1] As at trial, Appellant equates/conflates criminal indictments and warrants with the eventual, greatly reduced pleas of guilty. Given the trial court's thoughtful analysis, especially as related to the facts of Appellant's accident and her desired presentation, the determination that the proffered criminal history evidence was "clearly more prejudicial than probative" was proper. (Tr. p. 97, line 6–p. 103, line 6; p. 112, line 3–p. 120, line 20; p. 265, line 3–p. 267, line 16). In conjunction with her request for admission, Appellant's reliance on Green v. Hewett, 305 S.C. 238, 407 S.E.2d 651 (1991) is misplaced.

Appellant's initial argument was that Barr's criminal "convictions" were admissible as crimes of Moral Turpitude and prior bad acts for impeachment, utilizing Green for support. (Court's Exhibit 2). Moreover, three of the four "convictions/violations" were mischaracterized. (Court's Exhibit 2, page 4). Only a general conspiracy charge, to which Barr received a five year YOA, suspended upon one year of probation, could qualify as impeachment evidence per Rule 609, SCRE.[2] As noted by the trial court, Green was decided when moral turpitude was the

[1] §56-5-6160, S.C. Code, was also discussed. (Tr. p. 244, line 24–p. 246, line 7).

[2] SCRE 609(a)(1) states For the purpose of attacking the credibility of a witness, evidence that a witness other than an accused has been convicted of a crime shall be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an

consideration rather than Rule 609, SCRE. (Tr. p. 121, lines 22-25). At present, such trial court determinations may involve the following considerations:

1. The impeachment value of the prior crime.

2. The point in time of the conviction and the witness's subsequent history.

3. The similarity between the past crime and the charged crime.

4. The importance of the defendant's testimony.

5. The centrality of the credibility issue.

Green v. State, 338 S.C. 428, 433–34, 527 S.E.2d 98, 101 (2000); *See* State v. Colf, 337 S.C. 622, 525 S.E.2d 246 (2000).

Given the Appellant's presentation, the trial court wisely found, per Rule 609 analysis, that the probative value of admitting the convictions for general conspiracy and possession of greater than one ounce of marijuana[3] did not outweigh its prejudicial effect.

Thereafter, the Appellant argued that Barr's "prior bad acts" were relevant to the hiring claim and sought the support of James v Kelly, 661 S.E.2d 329 (S.C. 2008). (Court's Exhibit 2, p. 5)

The suggestion that Green should be read in conjunction with and somehow inform the James v. Kelly decision is also misplaced. Nothing about the Green moral turpitude discussion equates to consideration of what an employer knew or should have known regarding the foreseeability that employment of a specific person might create an undue risk of harm to the public. This is especially so given the facts of Appellant's case, wherein no contact even occurred, speed played no role and the initial and subsequent accident unfortunately occurred just around a

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accused has been convicted of such a crime shall be admitted if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.

[3] A misdemeanor with a sentence of up to six months, with an actual sentence of a $200 fine and time served. (Plaintiff's Exhibit 5).

dark, blind curve that endured substantial change soon thereafter to lessen the likelihood of any repeat event.

Likewise, Appellant's assertion that James v Kelly urges reversal is without basis. The resolution of a certified question from the U.S. District Court, Kelly Trucking merely declined to prohibit the pursuit of claims for negligent hiring, etc. once respondeat superior liability has been admitted. As recognized by the trial court, such was not even the case in this wholly contested, comparative liability case. (Tr. p. 292, lines 5-24). In denying the UIM carrier's requested "public policy" prohibition, the Kelly Trucking Court assured that such allowance will not require that evidence of an employee's past negligence be admitted, reminding of the trial court's ability to determine the admission of evidence. Kelly Trucking, 661 S.E.2d at 632-633. The trial court, recognizing both Green and Kelly Trucking and applying those factors under both Rules 403 and 609, SCRE, found that they were not probative and any probative value was certainly outweighed by the potential prejudicial effect. (Tr. p. 291, line 1–p. 293, line 19).[4] Ultimately, the trial court thoroughly and thoughtfully considered the contested admissions in making its determination. (Tr. p. 97, line 6-p.103, line 6; p. 112, line 3-p.123, line 9; p. 132, line17-p. 136, line 3; p. 228, line 18-p.234, line 22; p. 244, lin 3-p. 246, line 4; p. 284, line 19-p. 299, line 8).

Per the standards of review, there is ample evidence indicating the trial court's cognizance of the applicable evidentiary rules and cases, with consideration of fairness to all parties. No showing of probable prejudice exists, especially in relation to the facts of the entire case. The discretionary ruling of the trial court should be affirmed.

[4] See also Tr. p. 293, line 20–p. 296, line 9, detailing admissions per Appellant's Memo (Court's Exhibit 2), further evidencing the trial court's determination regarding the admission of evidence, all over the objection of Respondents.

II. THE PROFFERED CRIMINAL HISTORY OF BRANDON BARR IS NOT SPECIFICALLY RELATED TO THE ALLEGED CONDUCT THAT GAVE RISE TO APPELLANT'S DAMAGES AND THEREFORE EXCLUSION WAS PROPER

In James v Kelly, discussions were had regarding the impact of punitive damage claims in negligent hiring causes of action, as well as the fact that, despite the various causes of action, a plaintiff may ultimately recover only once for an injury. Id. at 633 – 634. In State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 123 S.Ct. 1513, 155 L.Ed.2d 585 (2003), the United States Supreme Court discussed the constitutional limitations on the use of punitive damages to punish Respondents for conduct not related to the harm suffered by the Appellants. In Durham v. Vinson, 360 S.C. 639, 602 S.E.2d 760 (2004), the Court not only found the admission of a doctor's misconduct towards a party other than the plaintiff violated Rule 403, SCRE because the prejudicial effect outweighed an probative value, but additionally noted the wrongful punishment of the doctor for a bad act unrelated to his actions toward Durham, citing Campbell as it reversed and remanded for anew punitive damages phase. Durham, at 652-653. Similarly, the Court in Webb v. CSX Transp., Inc., 364 S.C. 639, 615 S.E.2d 440 (2005) referenced Campbell in reversing the punitive damage award and instructing that on retrial, evidence sought to be admitted on the issue of punitive damages should be closely scrutinized for its relationship to the particular harm suffered by the Plaintiff. Webb, 615 S.E.2d at 450.

Appellant improperly seeks to base her punitive damage claim on conduct other than that which allegedly harmed her - i.e., Barr's allegedly negligent operation of the logging truck. Campbell . is instructive in this instance.

> A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . .

Campbell, 538 U.S. at 422-23.

The Supreme Court highlighted the potential for double jeopardy if a jury is allowed to consider such evidence because a defendant could be punished more than once for the same conduct. *See* Campbell, 538 U.S. at 423.

Respondents assert that the Trial Court correctly excluded consideration of Barr's proffered criminal history. There is no evidence that drugs or conspiracy contributed to the accident. As earlier referenced, the responding Trooper found no evidence of drug usage on the part of the Barr. Accordingly, Respondents assert that the trial court's exclusion, in accord with Campbell, was proper.

III. NOTWITHSTANDING THE ABOVE ARGUMENTS THE PRIOR CONVICTIONS OF BARR DID NOT VIOLATE ANY DRIVER HIRING REGULATIONS

Appellant has argued that the prior convictions of Brandon Barr should be admitted as they are relevant to their negligent hiring, training, and supervision cause of action, as well as their claim for punitive damages. Respondents contest this assertion.

§ 56-1-2110, S.C. Code lists those matters which disqualify a person from driving a commercial motor vehicle.

> (1) A person is disqualified from driving a commercial motor vehicle for not less than one year if convicted of a first violation of:
>
> (2) Driving a motor vehicle under the influence of alcohol, a controlled substance, or a drug which impairs driving ability as prescribed by state law;
>
> (3) Driving a commercial motor vehicle while the alcohol concentration of the person's blood or breath or other bodily substance is four one-hundredths or more;
>
> (4) Leaving the scene of an accident involving a motor vehicle driven by the person;

(5) Using a motor vehicle in the commission of a felony as defined in this article;

(6) Refusal to submit to a test to determine the driver's alcohol concentration while driving a motor vehicle;

(7) Driving a commercial motor vehicle when, as a result of prior violations committed while operating a commercial motor vehicle, the driver's commercial driver's license is revoked, suspended, or canceled, or the driver is disqualified from operating a commercial motor vehicle;

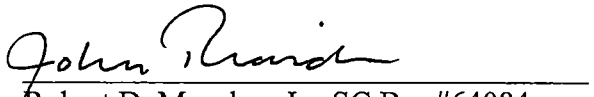
(8) Causing a fatality through the negligent operation of a commercial motor vehicle, including, but not limited to, the crimes of motor vehicle manslaughter, homicide by a motor vehicle, and negligent homicide. If any of the above violations occur while transporting a hazardous material required to be placarded, the person is disqualified for not less than three years.

No portion of the proffered criminal history, including the two contested criminal convictions, fall within the purview of the above statute. Even were it assumed that the standard of care is that of general negligence or negligence per se, none of the proffered criminal acts disqualified Barr from being driving a commercial motor vehicle. The Trial Court properly excluding the proffered criminal history of Barr. For all of the above arguments and upon any other ground fairly appearing on the record, the trial court should be affirmed.

CONCLUSION

For the foregoing reasons, this Court should affirm the contested determination of the circuit court.

February 22, 2019



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THE STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

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APPEAL FROM FLORENCE COUNTY
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THE HONORABLE D. CRAIG BROWN
CIRCUIT COURT JUDGE

APPELLATE CASE NO.: 2018-001016

Isabelle MacKenzie .....Appellant/Respondent,

v.

C&B Logging, LLC and
Charles Brandon Barr ..... Respondents/Appellants.

PROOF OF SERVICE

The undersigned certifies that on the 22nd day of February, 2019, (s)he caused to be served the Respondent's Initial Brief of Respondents/Appellants and Designation of Matter on counsel for Appellant/Respondent by regular U.S. mail, copies of the same addressed to:

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February 22, 2019

VIA U.S. MAIL
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RE: Isabelle MacKenzie, Appellant/Respondent v. C&B Logging LLC and Charles Brandon Barr, Respondents/Appellants, Appellate Case No.: 2018-001016

Dear Ms. Kitchings:

Enclosed for filing in the above referenced matter are the following:

1. Initial Brief of Respondents/Appellants to the appeal of Appellant along with Designation of Matter and Proof of Service;

2. Initial Brief of Respondents/Appellants on the cross claim of Respondents/Appellants along with Designation of Matter and Proof of Service.

Sincerely,

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