THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit

Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-001158

Curtis Mills .....Respondent

v.

The South Carolina State Ports Authority .....Appellant

INITIAL REPLY BRIEF OF APPELLANT

Randolph R. Lowell, Esq.
WILLOUGHBY & HOEFER, P.A.
133 River Landing Drive, Suite 200
Charleston, SC 29492
(843) 619-4426

Randell C. Stoney, Esq.
John W. Fletcher, Esq.
BARNWELL WHALEY PATTERSON & HELMS, LLC
288 Meeting Street, Suite 200 (29401)
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708
Counsel for Appellant South Carolina State Ports Authority

Other Counsel of Record:

Ladson F. Howell, Jr., Esq.
Howell & Christmas, LLC
PO Box 1896
Mount Pleasant, SC 29465

Counsel for Respondent Curtis Mills

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

ARGUMENT

I. The Evidence Plainly Supports the Defense of Comparative Negligence

A. The Ports Authority Does Not Attempt to Use the Doctrine of *Res Ipsa Loquitur* in This Appeal, as a Shield or Otherwise

In an effort to inaccurately discredit Appellant the South Carolina State Ports Authority's ("Ports Authority") arguments in this appeal, Plaintiff confusingly tries to tie those arguments to the doctrine of *res ipsa loquitur*, which has been rejected in South Carolina:

> Defendant was unable to produce any evidence, in the form of testimony, video surveillance, or otherwise, that Plaintiff committed any act or omission that might be construed as negligence. The reason for Defendant's failure to do so is because no such evidence exists.
>
> As the doctrine of *res ipsa loquitor* [sic], or rather the absence thereof, applies to Plaintiffs in South Carolina, Where [sic] circumstantial evidence is relied upon to establish liability, the plaintiff must show such circumstances as would justify the inference that his injuries were due to the negligent act of the defendant, and not leave the question to mere conjecture or speculation.

(Resp.'s Br., at 5-6). Plaintiff's argument misses the mark.

Res ipsa loquitur is a strawman that has nothing to do with this case. It 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). It is not recognized in this State. *Graham v. Town of Latta, S.C.*, 417 S.C. 164, 186–87, 789 S.E.2d 71, 82 (Ct. App. 2016) (citing *Crider v. Infinger Transp. Co.*, 248 S.C. 10, 16, 148 S.E.2d 732, 734-35 (1966). However, an argument that the evidence demonstrates a plaintiff's comparative negligence does not invoke *res ipsa loquitur*. *See Tucker v. Doe*, 413 S.C. 389, 407, 776 S.E.2d 121, 131 (Ct. App. 2015) ("Tucker did not rely on *res ipsa loquitur* to prove Doe was negligent, and he put forth circumstantial evidence the bearing block caused his accident because it was inadequately strapped in the flatbed of the blue freightliner and consequently fell into the road.").

The Ports Authority does not cite to or urge the application of *res ipsa loquitur* in any way, nor does it seek to infer some comparative negligence simply from the mere occurrence of the

accident. The record includes ample evidence proving Plaintiff did not fulfill *his* obligations to protect his own safety. (*See* Appellant's Br., at 5-8.) As discussed below and in the Ports Authority's opening brief in more detail, the evidence showed that it was *Plaintiff's* sole obligation to ensure, by whatever means, that all four pins were disengaged at the time of the lift. (*E.g.*, Tr. Transcr., at 424:5-11, 426:4-7.) In order for the incident to occur at all as Plaintiff contends, one or more locking pins on Plaintiff's chassis necessarily had to be engaged. This is not speculation or conjecture, it is a simple fact. Plaintiff does not dispute that at least some, if not all, of the pins on his trailer *were* engaged at the time of the lift at issue in this lawsuit. Moreover, for Plaintiff's truck to be lifted entirely off the ground as he claims, *all four* pins must have been engaged. (Tr. Transcr., at 370:2-18, 423:12-21). From these facts, the jury permissibly could infer that Plaintiff failed to take proper steps to fulfill his duty, thereby contributing to his injuries..

This is not *res ipsa loquitur*. This is a common-sense application of well-established legal principles to the record. The Court should reject Plaintiff's effort to muddy the waters with irrelevant and inapplicable legal principles.

B. The Ports Authority Presented Sufficient Evidence of a Duty That Plaintiff Breached to Warrant an Instruction on Comparative Negligence

Attempting to salvage the trial court's erroneous refusal to charge comparative negligence, Plaintiff makes multiple material misrepresentations regarding the evidence in the record—sometimes highlighting them in bold for emphasis. In each instance, Plaintiff proclaims a lack of evidence to support the requested charge. And in each instance, Plaintiff is incorrect.

Plaintiff begins with the following: "Plaintiff clearly testified at trial that upon approaching the gate, he stopped and got out of his truck. Plaintiff then testified that he proceeded to walk around the truck and removed all four locking pins. **This testimony was uncontroverted at trial.**" (Resp.'s Br. at 5 (internal citations omitted).) This is not true. As noted, the lift Plaintiff described necessarily meant that all four locking pins were engaged. (Tr. Transcr., at 370:2-18, 423:12-21.) The evidence showed it is "unlikely" all four pins re-engaged *en route* to the crane from the gate. (*Id.* at 369:7-16; *see also id.* at 421:10-422:7 (explaining front pins typically "jostle

back" into place, not rear ones that must be twisted).) This suggests Plaintiff neglected to disengage them at the outset. The Ports Authority also presented evidence that drivers sometimes intentionally leave the front pins engaged, a dangerous practice they use solely for their own convenience. (*Id.* at 304:7-307:4, 310:18-24, 364:9-365:23.) This would result in a lift consistent with the crane operator's description of what occurred. (*Id.* at 301:22-304:23.) Once again, evidence was presented to the jury directly refuting Plaintiff's assertion that he disengaged all pins upon passing through the gate.

Next, Plaintiff writes:

> Appellant makes the argument that Plaintiff breached his duty to exit his truck after arriving at the crane to check for a second time whether the pins had jostled back into place. However, at trial, **Defendant offered zero evidence that any driver at the port has ever gotten out of his truck to check the pins a second time, either before or after this accident.** The reason no drivers get out of their truck upon arrival at the crane is because that would be dangerous.

(Resp.'s Br. at 6.) Yet again, this is not true. Damion Solomon, Plaintiff's key witness, testified nothing prevents drivers from checking the pins a second time and, critically, "[y]ou got some drivers who actually wait until they get to the crane" to disengage them. (Tr. Transcr., at 188:6-13; 192:10-20.) "It's according to the driver." (*Id.* at 192:17.) Mr. Solomon also agreed that re-checking the pins a second time is the "*safer*" practice.[1] (*Id.* at 187:22-23 (emphasis added).) Plaintiff admits in his brief that the "proper maneuver" when a lift begins with pins still engaged "is for the crane operator to lower the container and chassis back on to the ground, flag the driver, and *let him know to come out and either slide out his front pins or twist the rear pins. This is the safe way to handle the situation such as the accident that caused Plaintiff's injuries.*" (Resp.'s Br., at 4 (emphasis added).) If this is the proper procedure once a lift begins, it cannot be too dangerous to prevent a lift with the pins engaged from commencing to begin with.

---

[1] On page 7 of his brief, Plaintiff attributes a quote to Barney Washington, who is a Ports Authority employee. The referenced exchange is with Mr. Solomon. Plaintiff then omits the remainder of the discussion where Mr. Solomon agrees there is nothing stopping him from re-checking the pins and refuses to disclaim responsibility for ensuring they remain disengaged. (Tr. Transcr., at 187:19-188:13.)

Additionally, even accepting Plaintiff's truncated factual recitation, the mere fact that others may also violate the standard of care does not justify Plaintiff's failure to act for his own protection. To the contrary, there was more than sufficient evidence to support a jury conclusion that Plaintiff was obligated to act to protect himself (and others) by accurately representing that, when his container was presented for a lift, the pins were fully disengaged.

Continuing the trend, Plaintiff further claims that "[n]ot one witness testified at trial that a truck driver has a duty to check the pins a second time while at the crane." (Resp't's Br. at 7.) Yet Barney Washington, whom both Plaintiff and the Ports Authority called to testify, explained the responsibility for ensuring the pins remain disengaged at the time of the lift "is *strictly on the driver.*" (Tr. Transcr., at 424:5-11, 426:4-7.) A driver presenting a container for removal represents that it is ready to be lifted and for the crane operator to take possession of it. (*Id.* at 425:23-426:3; *see also id.* at 365:24-366:17 (Jarod Brown testifying that a driver presenting a box for a lift represents it is safe, the crane operator relies on the driver to safely remove the pins and cannot know there is a problem with the pins until after the lift begins, absent some communication from the truck driver).) The record most certainly established that Plaintiff owed a duty of care to ensure that the pins were fully disengaged at the time of the lift.

The claims that form the basis of Plaintiff's argument — it is "uncontroverted" Plaintiff removed all of his pins at the gate, there is no evidence drivers double check the pins, and there is no duty for them to do so — are directly contradicted by the record. As further explained in detail in the Ports Authority's opening brief, there is copious evidence demonstrating Plaintiff had a duty to ensure all pins remained disengaged at the time of the lift and that he breached this duty, whether the lift occurred as he described or as the crane operator recalled. (*See* Appellant's Br., at 5-8.) What truly is undisputed is that Plaintiff did not ensure that the pins were fully disengaged at the time of the lift. On top of this is consistent evidence that it was his duty to do so. Had he complied with his obligations, this accident would not have occurred. The record contains more than sufficient evidence for the jury to consider the question of whether Plaintiff engaged in conduct in violation of his duties to protect his own safety.

For the foregoing reasons (and for the reasons set forth in the Port Authority's opening brief), there was sufficient evidence to present comparative negligence to the jury. Therefore, this Court should reverse the trial court's ruling and remand for a new trial.

II. Plaintiff Fails to Overcome the Trial Court's Abuse of Discretion In Upholding an Excessive and Improper Verdict Primarily Comprised of Unsupported Lost Wages and Lost Earning Capacity

A. The Ports Authority Did Not Fail to Preserve This Issue for Appellate Review

Plaintiff first argues that the Ports Authority failed to preserve this issue for review because it "failed to take exception to any charges related to past and future lost wages." (Resp.'s Br., at 8). His argument rests on a misconstruction of the Ports Authority's argument. The Port Authority properly and completely preserved for appellate review the question of the excessiveness of the verdict and the fact that it is not properly grounded in evidence.

"To preserve an issue for appellate review, the issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial court." *Doe v. Doe*, 370 S.C. 206, 212, 634 S.E.2d 51, 54 (Ct. App. 2006). The South Carolina Supreme Court has reiterated the rules governing the analysis of issue preservation:

> "Issue preservation rules are designed to give the trial court a fair opportunity to rule on the issues, and thus provide us with a platform for meaningful appellate review." *Queen's Grant II Horizontal Prop. Regime v. Greenwood Dev. Corp.*, 368 S.C. 342, 373, 628 S.E.2d 902, 919 (Ct. App. 2006). At a minimum, issue preservation requires that an issue be raised to and ruled upon by the trial judge. *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). It is "axiomatic that an issue cannot be raised for the first time on appeal." *Id.* Imposing such a requirement on the appellant "is meant to enable the lower court to rule properly after it has considered all relevant facts, law, and arguments." *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000). . . . Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue. *See State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (finding issue was preserved even though defendant did not use exact words "corpus delicti" in his request for a directed verdict). Nonetheless, the issue must be sufficiently clear to bring into focus the precise nature of the alleged error so that it can be reasonably understood by the judge.

Herron v. Century BMW, 395 S.C. 461, 465, 719 S.E.2d 640, 642 (2011). "Post-trial motions are not necessary to preserve issues that have been ruled upon at trial; they are used to preserve those that have been raised to the trial court but not yet ruled upon by it." *Wilder Corp. v. Wilke*, 330 S.C. 71, 77, 497 S.E.2d 731, 734 (1998) (citation omitted).

Plaintiff's waiver argument misapprehends and mischaracterizes the Ports Authority's arguments in this appeal. The Ports Authority does *not* argue in this appeal that the trial judge erred in instructing the jury on lost wages and earning capacity.[2] Rather, the Ports Authority argues that, even assuming the trial judge properly instructed the jury on that issue, the jury's ultimate award was grossly excessive "so as to be the result of passion, caprice, prejudice, or some other influence outside of the evidence." *O'Neal v. Bowles*, 314 S.C. 525, 527, 431 S.E.2d 555, 556 (1993).

In its Post-Trial Motions, the Ports Authority argued, in great detail, that the jury's verdict was not supported by the evidence, was excessive, and was speculative:

> Plaintiff did not present a scintilla of evidence supporting any specific figures of damages, aside from his medical bills. Plaintiff has presented no competent evidence documenting alleged lost wages or lost earning capacity - aside from vague testimony that he was making approximately $2,000 per week at some point during his career. He presented no tax returns, pay stubs or other documentation of his actual wages. He presented no evidence documenting that he was unable to work in another job. He presented no evidence of his actual impairment. He presented no evidence of his life expectancy. He presented no evidence of his vocational abilities after the accident. He presented no evidence from a vocational rehabilitation or other expert supporting his alleged inability to work and the

[2] Plaintiff claims it is "simply untrue" that he originally believed the trial court did not charge lost wages. (Resp.'s Br., at 8 n.1.) When the trial court asked if counsel had objections to the charge, wherein the trial court inadvertently read that instruction after refusing it over Plaintiff's objection, Plaintiff's counsel queried if he was "on the record with respect to the lost wages." (Tr. Transcr., at 491:2-3.) The trial court responded, "Yes. Twice. . . . Now, three times." (*Id.* at 491:4-6.) Plaintiff at that time did not understand the court gave the charge. That he may have figured it out soon thereafter is immaterial. This Court must disregard Plaintiff's reference to an off-the-record chambers conference and his subjective intent to exploit the trial court's accidental instruction that likewise appears nowhere in the record. *See S.C. State Highway Dept. v. Meredith*, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) ("This Court will not consider any fact which does not appear in the transcript of record . . . . Likewise, counsel is prohibited from embodying in their briefs any fact which does not appear in the record.").

> amount of harm. Plaintiff offered absolutely no evidence as to future lost wages and no testimony that he was ever actually out of work. Any determination by the jury of lost wages or future reduced earning capacity was sheer speculation.

(June 8, 2018 Def. S.C. State Ports Auth.'s Post-Trial Mots., at 7). The Ports Authority further argued that the jury's award of lost wages was improper because "Doctor Timothy Zgleszewski, Plaintiffs treating physician, testified that in February 2014 he was released to return to work at his full driving duties." (*Id.* at 8). The trial judge rejected these arguments and denied the Ports Authority's Post-Trial Motions. (June 8, 2018 Form 4 Order Denying Ports Authority's Post-Trial Motions). Thus, the Ports Authority properly raised the issues it argues in this appeal and had them decided by the trial judge. The issues have been preserved for appellate review.

B. The Evidence Does Not Support the Jury's Award of Lost Wages and Lost Earning Capacity

Plaintiff does not, and cannot, present any evidence supporting the jury's verdict granting him lost wages and lost earning capacity for the remainder of his working life. Thanks to the jury's express statements of its allocation of damages, the Court and parties are aware that these improper damages constituted the bulk of the jury's $616,710.07 verdict. In his brief, Plaintiff does not directly confront and address the Port Authority's arguments. Instead, Plaintiff distracts from the lack of supporting evidence by focusing on evidence justifying an award the jury did not make. This is unavailing.

The Ports Authority explained in detail how the jury awarded Plaintiff a significant sum of money constituting 23 years' worth of lost wages—the rest of his working life—despite the evidence showing Plaintiff missed at most 14 months of work. Indeed, Plaintiff's counsel admitted in closing arguments that Plaintiff "wants to work," "[h]e went back to work as soon as can," and "[h]e's working now with pain." (Tr. Transcr., at 459:24-25). Plaintiff presented no evidence whatsoever to support a finding that he cannot work (at least after February 24, 2014) and would be out of work for the remainder of his working life.[3] As a result, the jury's massive award for lost

[3] Plaintiff's brief purports to calculate Plaintiff's lost wages for his entire life (not just his working life) assuming he works 365 days per year. (Resp.'s Br., at 10.) It is unclear what purpose this irrelevant and unfounded calculation serves.

wages/earning capacity was without any evidentiary support. Plaintiff disputes none of this and does not contend there is sufficient evidence of lost future wages to support the verdict. By failing to challenge this argument, he has conceded the jury's verdict has no foundation. *See Cannon v. Georgia Attorney General's Office*, 397 S.C. 541, 546, 725 S.E.2d 698, 701 (2012) (noting the general rule in civil cases that issues must be raised at the earliest opportunity, or they will be considered waived)).

Plaintiff deflects the issue raised on appeal and argues instead that he continues to suffer pain from the accident. With due respect to any pain he does suffer, it is of no moment to this appeal as the verdict did not compensate him for it. The jury's verdict was precise: $616,710.07. In Court's Exhibit 9, the jury provided a detailed explanation of how they arrived at that figure. This was not just a random note taken from the pad of one juror. As the trial court explained, "the jury indicated *they wanted [the court] to have that to be a part of the record.*" (Post-Trial Tr., at 11:18-20 (emphasis added).) This figure has no other relevance to this case, and there is no other way the jury could have arrived at it. The jury explained that $398,665 of the total is for lost wages *after* Plaintiff was cleared to and did in fact return to work. (*See* Court's Trial Ex. 9.) There is no evidence—irrespective of whether Plaintiff suffered any pain—that he was unable to work after that date or did not return to work after being cleared. His counsel actually admitted just the opposite. (Tr. Transcr., at 459:24-25.) Plaintiff never asked for these damages and did not introduce any evidence supporting them. Yet the jury went out of its way to award them anyway to the tune of hundreds of thousands of dollars. Another $75,000 in the verdict is unaccounted for. The jury's verdict necessarily was "the result of passion, caprice, prejudice, or some other influence outside of the evidence." *O'Neal*, 314 S.C. at 527, 431 S.E.2d at 556.

The trial court's similar focus on Plaintiff's pain, when pain was not the basis for the award was an error of law. Moreover, there is no evidence to support the trial court's conclusions. The court's denial of the Ports Authority's new trial motion therefore was an abuse of discretion. For the reasons set forth herein and in the Ports Authority's opening brief, this Court should vacate the jury's verdict and remand this case for a new trial.

CONCLUSION

For the reasons set forth above, this Court should reverse the trial court's denial of Appellant The South Carolina State Ports Authority's Post-Trial Motions and should vacate or reverse the jury's verdict and judgment in this matter.

April 19, 2019

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: _____
Randell C. Stoney, Esq.
John W. Fletcher, Esq.
288 Meeting Street, Suite 200 (29401)
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708

Randolph R. Lowell, Esq.
WILLOUGHBY & HOEFER
133 River Landing Drive, Suite 200
Charleston, SC 29492
(843) 619-4426

Counsel for Appellant South Carolina State Ports Authority

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Circuit
Kristi Lea Harrington, Circuit Court Judge

Appellate Case No. 2018-001158

Curtis Mills .....Respondent

v.

The South Carolina State Ports Authority .....Appellant

PROOF OF SERVICE

I certify that I have served the Initial Reply Brief of Appellant South Carolina State Ports Authority on the above-referenced Respondent by depositing a copy of it in the United States Mail, postage prepaid, on April 19, 2019, addressed to his attorneys of record:

Ladson F. Howell, Jr., Esq.
Howell & Christmas, LLC
PO Box 1896
Mount Pleasant, SC 29465

BARNWELL WHALEY PATTERSON & HELMS, LLC

By:_____
Randell C. Stoney, Esq.
John W. Fletcher, Esq.
288 Meeting Street, Suite 200 (29401)
P.O. Drawer H
Charleston, SC 29402
(843) 577-7700 Fax: (843) 577-7708

Randolph R. Lowell, Esq.
WILLOUGHBY & HOEFER
133 River Landing Drive, Suite 200
Charleston, SC 29492
(843) 619-4426
Counsel for Appellant

BARNWELL WHALEY
PATTERSON & HELMS LLC
80 YEARS 1938-2018
Attorneys for businesses & professionals since 1938

April 19, 2019

2207.135
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211

Re: Curtis Mills v. South Carolina State Ports Authority
Appellate Case No. 2018-001158

Dear Ms. Kitchings:

Enclosed for filing please find the original and one (1) copy of each of the following:

(1) Initial Reply Appellants Brief of Appellant;
(2) Appellant's Reply Designation of Matter for Inclusion in the Record on Appeal; and
(3) Proofs of Service.

We would appreciate if you would file the original documents and return the filed, stamped copies to us in the self-addressed, stamped envelope provided.

By copy of this letter, we are serving copies of the enclosures upon counsel of record.

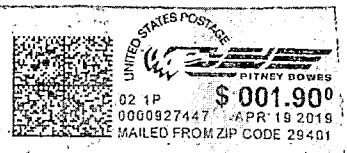
Sincerely,

Randell C. Stoney
John W. Fletcher

RCS/JWF/jgc
Enclosures

cc (w/enclosures): **VIA U.S. MAIL**
Ladson F. Howell, Jr., Esq.

{00891617.DOCX.1 }



BARNWELL WHALEY
PATTERSON & HELMS LLC
80 YEARS 1939 2019
P.O. Drawer H | Charleston SC 29402-0197

2207.135
The Honorable Jenny Abbott Kitchings
South Carolina Court of Appeals
Post Office Box 11629
Columbia, SC 29211