

STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

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SC Court of Appeals

APPEAL FROM KERSHAW COUNTY  
COURT OF COMMON PLEAS

THE HONORABLE DeANDREA G. BENJAMIN  
CIRCUIT COURT JUDGE

CONSOLIDATED CASES  
CIVIL ACTION NO. 2015-CP-28-00852  
CIVIL ACTION NO. 2016-CP-28-00758

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APPELLATE CASE NO.: 2018-001798

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Heather Anne Bundy and W.H. Bundy, Jr.....APPELLANTS

v.

Thomas Elroy Jett and Haier America  
Research & Development Co., LTD.....RESPONDENTS

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INITIAL BRIEF OF APPELLANTS

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May 6, 2019

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### STATEMENT OF ISSUES ON APPEAL

1. **The Trial Court committed reversible error in admitting Defendants' Exhibit 13 and permitting Defendant Jett to testify about speculative events of which he had no first hand knowledge as required by Rule 602, SCRE.**
2. **The Trial Court committed reversible error in admitting the testimony and opinions of defense witness Brian Boggess.**
3. **The Trial Court committed reversible error in refusing to allow Plaintiffs to publish the Rule 34, SCRCRCP Request for production of the Sterling Truck while allowing Defendants to cross examine Plaintiffs' expert on his failure to inspect the Sterling Truck.**
4. **The Trial Court committed reversible error in failing to grant Plaintiffs' directed verdict motion and post-trial motions as to liability.**
5. **The Trial Court committed reversible error in failing to grant Plaintiffs' directed verdict motion and post-trial motions on the issue of damages for Plaintiff Heather Bundy's medical bills and life care plan.**

### STATEMENT OF THE CASE

This action was originally filed by Appellant Heather Bundy (hereinafter sometimes referred to as "Heather Bundy") on September 8, 2015 (*See* Heather Bundy Complaint R. p. ). Heather Bundy alleged causes of action for Negligence and Respondent Superior against Thomas Elroy Jett and his employer Haier America Research and Development Co., Ltd. (hereinafter "Respondents") arising out of a motor vehicle crash. Respondents answered the complaint on September 29, 2015 with a general denial and certain other affirmative defenses. (*See* Answer to Heather Bundy Complaint R. p.) On August 26, 2016, Appellant W.H. Bundy, Jr. (hereinafter

sometimes referred to as “W.H. Bundy”) filed an action against Respondents for loss of consortium (See W.H. Bundy Complaint R. p. ). Respondents answered the W.H. Bundy Complaint on October 12, 2016 with a general denial and certain other affirmative defenses. The parties engaged in discovery. Notable to the present appeal, on April 21, 2017, Heather Bundy sent a Supplemental Request for Production to Respondents, pursuant to Rule 34, SCRPC, to produce for inspection the Sterling Tractor Trailer driven by Respondent Jett in the crash. (See Court’s Exhibit 1, R. p. ) The Respondents did not produce the Sterling Tractor for inspection as required by Rule 34, SCRPC.

On July 20, 2017, the Honorable L. Casey Manning entered an order consented to by the parties to consolidate the Heather Bundy case and W.H. Bundy case (See Order of Judge Manning R. p. ).

The consolidated cases were tried before a jury in Kershaw County which began on January 16, 2018 and concluded on January 23, 2018. The Honorable DeAndrea G. Benjamin presided over the trial. Prior to the trial, the Bundy’s moved in limine to limit the testimony and prepared exhibit (Defendant Ex. 13 R. p.) of Defendant Thomas Elroy Jett and limit the testimony of a proposed Defendant’s expert named Brian Boggess. (See Motion in Limine to Limit the Testimony of Defendant Jett R. p. ; Motion in Limine to Limit the Testimony of Brian Boggess R. p. ; see also Trial Transcript, pp. 32-51 R. pp. ). The Court denied the motion related to Defendant Jett and did not contemporaneously rule on the motion in limine related to the proposed expert Bogess. (See Trial Transcript, pp. 32-51 R. pp.). During the trial, counsel for the Bundy’s contemporaneously objected certain testimony and exhibits from Respondent Jett and Bogess. (See Trial Transcript pp. 348-350 R. pp. ; Trial Transcript pp. 453-463 R. pp. ). The objections were overruled by the Trial Court. Id.

At the conclusion of the Defendants' case, Plaintiff moved for a directed verdict on the following grounds: (1) That without the improperly admitted testimony of Defendant Jett, the improperly admitted diagram exhibit (Defendants' Ex 13 R. p.), and the testimony and opinions of Boggess there was no conflicting evidence as to the testimony of Heather Bundy regarding liability for the crash; and (2) there was no conflicting evidence as to the reasonableness of Heather Bundy's Medical Bills (Plaintiffs' Ex. 9 R. p.) or Heather Bundy's Life Care Plan. (See Trial Transcript pp. 516-519 R. pp. ). The Trial Court denied the directed verdict motion. *Id.*

At the conclusion of the trial, on January 23, 2018, the jury found in favor of the Defendants on all causes of action. (*See* Verdict Form R. p. ). On February 2, 2018, counsel for the Bundys filed timely post-trial motions pursuant to Rule 50(b) and Rule 59, SCRPC for an Order from the Trial Court for Judgment n.o.v, a new trial and altering and amending the Judgment entered on January 23, 2018. (*See* Plaintiffs' Post-Trial Motions R. p.) On July 26, 2018, a hearing was held before the Honorable DeAndrea G. Benjamin on the post-trial Motions. A Form 4 Order denying the post-trial motions was entered on August 1, 2018 with a statement that a more formal order would follow. (*See* August 1, 2018 Form 4 Order R. p. ). On September 10, 2018, the Trial Court entered the formal order denying the post-trial motions. (*See* September 10, 2018 Order R. p. ). On October 3, 2018, the Bundy's timely served their Notice of Appeal. (*See* Notice of Appeal dated October 3, 2018 R. p.).

Appellant contends the amount in controversy in this action is in excess of \$2,000,000.00. There has not been any change in parties throughout the pendency of this action or appeal.

#### **STANDARD OF REVIEW**

The admission or exclusion of evidence is left to the discretion of the trial judge and Appellant must show a clear abuse of discretion amounting to an error of law. *Vaught v. A.O.*

*Hardee and Sons, Inc.*, 366 S.C. 475, 623 S.E.2d 373 (2005). “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is reasonable probability the jury’s verdict was influenced by the wrongly admitted or excluded evidence.” *Connor v. City of Forest Acres*, 363 S.C. 460, 611 S.E.2d 905 (2005).

On appeal from a directed verdict and JNOV motions, the reviewing court must view the evidence in a light most favorable to the non-moving party. *Miller v. Ferrell Gas, L.P.*, 392 S.C. 295, 709 S.E.2d 616 (2011). When considering the directed verdict or JNOV motions, neither the trial court nor the appellate court has the authority to decide credibility issues or to resolve conflicts in testimony or the evidence. *Curcio v. Caterpillar, Inc.*, 355 S.C. 316, 585 S.E.2d 272 (2003).

The denial of a motion for new trial will not be disturbed on appeal unless the findings are wholly unsupported by the evidence or the conclusions reached are controlled by an error of law. *Norton v. Norfolk S. Ry.*, 350 S.C. 473, 567 S.E.2d 851 (2002).

### **FACTS**

Heather Bundy has lived in Boykin, South Carolina for many years and has operated her automobile countless times through the intersection where the crash occurred. (Complaint (R. p. ; Trial Transcript pp. 110-126 R. pp. ). On September 3, 2013, Heather Bundy dropped off her recycling at the Recycling Center located on Black River Road near Camden, South Carolina at approximately 7:30 a.m. Id. Just East of the Recycling Center on Black River Road is the Haier facility. Id. She pulled out from the Recycling Center to begin to travel west on Black River Road towards the intersection with U.S. 521 (Sumter Highway). Id. Respondent Jett was operating a Tractor-Trailer and leaving the Haier facility. Id. He was also traveling West on Black River Road. Heather Bundy approached the intersection of U.S. 521 and came to a complete stop. Id. At the

intersection U.S. 521 is four lanes wide, (*See* Plaintiffs' Ex. 14 R. p.), and a vehicle attempting to turn left onto U.S. 521 from Black River Road is often required to cross over the first two lanes of traffic and then stop in the wide median to wait for an opening in the final two lanes of traffic. *Id.* Importantly, Heather Bundy testified that she observed Respondent Jett's truck behind her on Black River Road at the intersection. *Id.* She waited for the traffic heading North on US 521 to clear and crossed over the North bound lanes in order to again come to a complete stop in the median area. She testified she was completely stopped in the median waiting for the traffic heading South on U.S. 521 to clear when suddenly and without warning of any kind the Haier Tractor-Trailer being driven and operated by Respondent Jett crashed into her while she was in the median.

Respondent Jett testified as follows:

Q And on that morning, the first time that you ever saw Ms. Bundy was after the collision, correct?

**A That's correct.**

Q Okay. You don't have any testimony, memory of anything of seeing her prior to the collision, correct?

**A No, sir.**

Q And, in fact, the first time you saw her is when you opened your door after the collision, that's the first time you ever laid eyes on her, correct?

**A Yes, sir.**

(Trial Transcript, p. 318, line 21-p. 319, line 6 R. p. ). Respondent Jett also testified that when the crash occurred his truck did not move at all but was rather prevented from moving forward. (Trial Transcript, p. 325, lines 1-12 R. p. ).

After the crash, Heather Bundy underwent two significant back and neck fusion surgeries. (Complaint R. p. ; Trial Transcript pp. 126-146 R. p. ). Dr. Andrew Cannestra, the treating neurologic surgeon, testified to a reasonable degree of certainty that the surgeries performed on

Heather Bundy were caused by the September 3, 2019 crash. (See Deposition Testimony used at Trial for Dr. Cannestra R. p.). The medical bills, including costs for the two surgeries, and life care plan for Heather Bundy were admitted into evidence without objection. (Plaintiffs' Exhibits 8 and 9 R. p. ; Trial Transcript pp. 63-65 R. pp. ).

### ARGUMENT

**I. The Trial Court committed reversible error in admitting Defendants' Exhibit 13 and permitting Defendant Jett to testify about speculative events of which he had no first hand knowledge as required by Rule 602, SCRE.**

Rule 602, SCRE requires that a witness may not testify unless the witness has personal knowledge of the matter that is the subject of the testimony. By its plain terms, Rule 602, SCRE is subject only to the provisions of Rule 703, SCRE regarding expert testimony.

In both his deposition and at trial, Respondent Jett testified that he never saw Heather Bundy until after the crash. (*See* Motion in Limine to Limit the Testimony of Defendant Jett R. p. ; *see also* Trial Transcript, pp. 32-51 R. p.; Trial Transcript, p. 318, line 21-p. 319, line 6 R. p. ). Notwithstanding this admission by Respondent Jett, the Trial Court, over the objection of Plaintiffs' counsel, entered into evidence Defendants' Exhibit 13—a diagram and writing created by Respondent Jett after the crash purporting to describe the conduct and movements of Heather Bundy **prior to** the crash. (Defendant's Ex. 13 R. p. ) Defendants' Exhibit 13 states: "Car pull in on my left side trying to beat me making a left turn." Respondent Jett, however, has no personal knowledge of this as required by Rule 602, SCRE. He has no personal knowledge of the movements or conduct of Heather Bundy prior to the crash. Instead, the Trial Court ruled that Rule 701, SCRE evidence allowed the admission of the Exhibit because it was based upon the "perception" of Defendant Jett. This was error. First, Rule 602, SCRE is not made subject to the

provisions of Rule 701, SCRE regarding opinions of lay witnesses. Respondent Jett was not offered nor qualified as an expert witness pursuant to Rule 703, SCRE. Therefore, the requirements of Rule 602, SCRE must be met prior to the application of Rule 701, SCRE. Second, Respondent Jett did not perceive anything Heather Bundy did prior to the crash and could not have any lay opinion rationally based on a perception that never occurred. Perceive is defined as “to notice something or someone using sight, sound touch, taste or smell.” *See* Cambridge Online Dictionary.

The Trial Court also erred in ruling, over the objection of the Plaintiffs, that Defendants’ Exhibit 13 was admissible hearsay pursuant to Rule 803(6), SCRE. Rule 803(6) requires that the evidence submitted pursuant to that Rule must be created by “a person with knowledge.” Once again, Respondent Jett admitted that he had no knowledge of what he purports to state in Defendants’ Exhibit 13. Perhaps more importantly, Rule 803(6) does not apply because it expressly excludes the admission of “subjective opinions and judgments” in a purported business record. The Court erred in ruling that the document was a lay witness opinion in order to get around Rule 602, SCRE, and then rule that the “opinion” was admissible hearsay pursuant to Rule 803(6).

The Bundy’s were prejudiced by the admission of Defendants’ Exhibit 13. The very theory of the case presented by Appellants was that Respondent Jett in fact never saw Heather Bundy. This is what he testified to at trial. The Plaintiffs presented the expert testimony of Woodrow Poplin—an expert in accident reconstruction showing that the “A-Frame” (the pillar between the windshield and the drivers’ side door) of the Truck driven by Respondent Jett was capable of concealing Heather Bundy’s vehicle in the median. (Trial Transcript, pp. 199-215 R. pp.). The only “fact”<sup>1</sup> admitted into evidence regarding the defense theory as to how Heather Bundy drove

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<sup>1</sup> The improper expert opinion testimony is discussed below.

into the median while Respondent Jett was already there was Defendants' Exhibit 13. The admission of this "fact" then became a basis for which the Jury could conclude that's what happened. It is not a weight and credibility issue for this evidence. It is an admissibility issue. It must be an admissibility issue because the standard of review when challenging a jury verdict is that the appellate court will not overturn a jury verdict if there is "any evidence" supporting the factual finding implicit in the jury's decision. *Welch v. Epstein*, 342 S.C. 279, 536 S.E.2d 408 (Ct.App. 2000). This standard of review necessarily makes the improper admission of Defendants' Exhibit 13 reversible error. Both parties readily admit that the determination of which party was in the median first is the central issue in this case. The admission of the document was an error of law, and it was prejudicial as there is a reasonable probability that the Jury was influenced by the improperly admitted evidence. Appellants are entitled to a new trial.

**II. The Trial Court committed reversible error in admitting the testimony and opinions of Defense witness Brian Boggess.**

The prejudice from the improper admission of Defendants' Exhibit 13 was compounded by the improper admission of testimony and opinions from Respondents' expert Brian Boggess. Mr. Boggess represented the only other defense witness to speak about the actions of Heather Bundy prior to the crash. Appellants objected to the testimony and opinions of Mr. Boggess in limine, during the proffer of the witness' testimony, and during the testimony on from of the jury. (Trial Transcript, pp. pp. 32-51 R. pp.; Trial Transcript pp. 454-463 R. pp. ; Trial Transcript p. 475 R. p.).

- a. Mr. Boggess improperly weighed the credibility of the witnesses in arriving at his opinion. Therefore, it was improper for his opinion to be admitted into evidence, and the Appellants were prejudiced thereby.**

Mr. Boggess testified that there were three areas of his opinions to be offered in this case were (1) accident reconstruction; (2) dynamics of inter-vehicle contact; and (3) biomechanics. (Motion in Limine to Limit the Testimony of Brian Boggess R. p. ). With regard to the first (accident reconstruction) and third (biomechanics), Mr. Boggess testified in his deposition that he forms the basis of those opinions by weighing the “credibility and reliability” of witness testimony. (See Boggess Deposition, pp. 39-41 (first opinion) and Boggess Deposition, 65-66 (third opinion) attached as Exhibit A to Motion in Limine to Limit the Testimony of Brian Boggess R. p. ).

“While experts may give an opinion, they are not permitted to offer an opinion as to the credibility of others.” *State v. Chavis*, 412 S.C. 101, 109, 771 S.E.2d 336, 340 (2015). “The issue of credibility is for the jury alone.” *Collins v. Fraiser*, 378 S.C. 249, 662 S.E.2d 464, 466 (Ct.App. 2008) citing *Parsons v. Georgetown Steel*, 318 S.C. 63, 67, 456 S.E.2d 366, 368 (1995) (stating the credibility and weight of testimony is for the trier of fact).

Because Mr. Boggess testified in his deposition that in order to form his opinion he weighed the credibility of the witnesses, his opinions themselves were improper. Indeed, Mr. Boggess gave the exact version of events as his “opinion” of how the accident happened that was contained on Defendants’ Exhibit 13. (Trial Transcript pp. 478-485 R. pp. ). The Trial Court stated that he would not be permitted to speak about credibility in front of the jury. (Trial Transcript, p. 459 R. p. ). However, this limitation of the use of the word “credibility” is no limitation at all. He still gave the opinions that were based upon weighing the credibility of the witnesses. It was error for the opinions to be admitted at all.

Appellants were prejudiced by the admission of the opinion testimony because it was the only other piece of evidence (other than Defendants’ Exhibit 13) that the defense offered to show the pre-crash actions of Heather Bundy. The Court ruled that the objections to the opinion

testimony went to the weight of the testimony and not to its admissibility (Order Denying Post-Trial Motions, p. 3 R. p.). This was error because it is an absolute rule that experts cannot give opinions on credibility of witnesses. Cross examination of the witness on the fact that his opinion was based on the credibility of the witnesses does nothing to enforce the rule on inadmissibility of such opinions or accomplish any legitimate end. The admission of the document was an error of law, and it was prejudicial as there is a reasonable probability that the Jury was influenced by the improperly admitted evidence. Appellants are entitled to a new trial.

**b. Mr. Boggess improperly gave testimony regarding a hypothetical person.**

Mr. Boggess entire opinion on biomechanics related to whether or not “someone’s” neck or back could be hurt in this crash. (Trial Transcript, p. 490 R. p.). Mr. Boggess had no opinions as to whether Heather Bundy was injured in the accident. (Trial Transcript, p. 501 R. p.). The issue in the case was whether or not Heather Bundy was injured in the crash. Opinion testimony related to some other hypothetical person is irrelevant. *See* Rule 402, SCRE. Even if it were considered somehow relevant, the probative value is substantially outweighed by the unfair prejudice and confusion of the issues. Rule 403, SCRE. This point is solidified by considering if the Appellant had attempted to present evidence of some other person in some other automobile crash that Appellant contended was similar to her crash. Clearly, that evidence would have been objectionable and inadmissible.

The admission of the opinion testimony on the hypothetical person prejudiced Appellants because the testimony made it appear to the Jury that if some hypothetical person would not have been injured, in the opinion of Mr. Boggess, then Heather Bundy was not injured. This is opinion testimony was misleading. The admission of the hypothetical person opinion testimony was an error of law, and it was prejudicial as there is a reasonable probability that the Jury was influenced

by the improperly admitted evidence. Appellants are entitled to a new trial.

**III. The Trial Court committed reversible error in refusing to allow Plaintiffs to publish the Rule 34, SCRCF Request for production of the Sterling Truck while allowing Defendants to cross examine Plaintiffs' expert on his failure to inspect the Sterling Truck.**

Pursuant to Rule 34, SCRCF, Appellants requested that Respondents produce the Sterling Truck (*See* Court's Exhibit 1, R. p. ). Respondents failed to produce the Truck in accordance with Rule 34, SCRCF. At the trial, after Respondents' counsel cross examined Appellants' expert Woodrow Poplin on his failure to inspect the Truck (Trial Transcript, pp. 219-222 (R. p.)), Appellants sought to introduce the Rule 34, SCRCF Request for Production (Trial Transcript, pp. 231-239 R. p.). The critical point to be made was that the Respondents were required to produce the Truck for inspection pursuant to the South Carolina Rules of Civil Procedure. While Appellants were permitted to ask Mr. Poplin whether he was aware that representatives of Appellants asked Respondents to produce the Truck, the Court refused to allow the publication of the actual request. (Trial Transcript, p. 296 R. p.). This was error.

The Court ruled in its order on Appellants' post-trial motions that Appellants' waived the right to publish the request because they did not file a motion to compel. (Order Denying Post-Trial Motions, p. 3 R. p.). However, there is nothing that requires the Appellant to file a motion to compel the Respondents to comply with the South Carolina Rules of Civil Procedure. It was the Respondents themselves who sought to cross examine the Appellants expert on his failure to inspect the Truck and opened the door to the publication of the Requests for Production. As stated before, one of the central issues in this case was the A-Pillar blind spot in the Truck. Appellants were prejudiced by the exclusion of the request for production because the Appellants could have been entitled to a jury charge explaining why Respondents were required as a matter of law to

produce the Truck. This would have given rise to a stronger inference that Respondents failure to produce the Truck was calculated to prevent Appellants from inspecting it to further demonstrate their theory on the A-Pillar blind spot. Appellants are entitled to a new trial.

**IV. The Trial Court committed reversible error in failing to grant Plaintiffs' directed verdict motion and post-trial motions as to liability.**

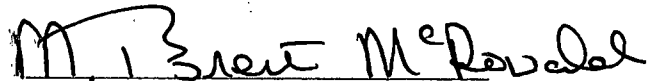
Given the foregoing, Appellants were entitled to a directed verdict and Judgement n.o.v. In the absence of the improperly admitted evidence, identified above, there was no question of fact on the issue of liability to be submitted to the jury when the evidence is viewed in the light most favorable to the Respondents. Appellants request this Court reverse the Trial Court's denial of the motions for a directed verdict and Judgement n.o.v. on the issue of liability. In the alternative, Appellants are entitled to a new trial.

**V. The Trial Court committed reversible error in failing to grant Plaintiffs' directed verdict motion and post-trial motions on the issue of damages for Plaintiff Heather Bundy's medical bills and life care plan.**

Appellants submitted Plaintiffs Exhibits 8 and '9 without objection into evidence. (Trial Transcript pp. 63-65 R. pp. ). These exhibits represented the Life Care Plan for Heather Bundy and the medical bills for Heather Bundy. There was no evidence submitted by the Respondents challenging the reasonableness of the amounts of the Life Care Plan and medical bills. Appellants were entitled to a directed verdict and Judgment n.o.v. because there was no question of fact on the issue of the reasonableness of the amount of the Life Care Plan and medical bills to be submitted to the jury when the evidence is viewed in the light most favorable to the Respondents. Appellants request this Court reverse the Trial Court's denial of the motions for a directed verdict and Judgement n.o.v. on the issue of the reasonableness of the amount of the Life Care Plan and medical bills. In the alternative, Appellants are entitled to a new trial.

CONCLUSION

For the reasons stated herein, the Judgment in this matter and the trial Court's order on Appellant's post-trial motions should be reversed and remanded for a new trial.



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May 6, 2019

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**SC Court of Appeals**

**Via Hand-Delivery**

The Honourable Jenny Abbott Kitchings  
Clerk of Court – The South Carolina Court of Appeals  
1220 Senate Street  
Columbia, SC 29201

Re: Heather Anne Bundy, vs. Thomas Elroy Jett and Haier America Research & Development Co., LTD.  
Appellate Case No.: 2018-001798

Dear Ms. Kitchings:

Enclosed for filing please find the original and one copy of Appellants' Initial Brief, Appellants' Designation of Matter and Proof of Service of the same upon all counsel of record.

Please file the original and return a file stamped copy to our courier.

I thank you for your attention to this matter, and as always, please do not hesitate to call me should you require anything further.

Sincerely yours,



M. Brent McDonald

MBM/kjw  
Enclosure

cc: *via Email Only*  
John M. Grantland, Esquire  
Rogers Harrell, III, Esquire