IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-001798

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SC Court of Appeals

Heather Anne Bundy..... Appellant,

v.

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

And

W.H. Bundy, Jr..... Appellant,

v.

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

FINAL BRIEF OF RESPONDENTS

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John M. Grantland, Esquire
S.C. Bar No. 64158
Megan Walker, Esquire
S.C. Bar No. 103069
Murphy & Grantland, P.A.
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
jgrantland@murphygrantland.com
Attorneys for Respondents

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STATEMENT OF THE CASE

This case arises out of an auto accident between Appellant Heather Bundy and Respondent Thomas Jett that occurred on September 3, 2013. The accident occurred in a median on Highway 521 in Camden, South Carolina. At the time of the accident, Ms. Bundy was operating her Mercedes station wagon and Mr. Jett was operating a Sterling tractor-trailer in the course of his employment with Haier America Research & Development Co., LTD ("Haier"). At the time of the accident, both vehicles were in the median on Highway 521 attempting to turn left. The central issue in the case is which vehicle entered the median first. Ms. Bundy testified that Mr. Jett's vehicle was behind her at a stop sign on Black River Road prior to entering the median. She testified that she entered the median first. Mr. Jett testified that there were no cars in front of him when he was stopped at the stop sign on Black River Road. He testified that there were no other vehicles in the median when he entered it.

After a trial with multiple witnesses testifying for each side, the jury entered a verdict in favor of the Defendants on Plaintiffs' negligence and loss of consortium claims. The Circuit Court denied Plaintiffs' post-trial motions. Appellants now challenge several evidentiary rulings and the Circuit Court's denial of their post-trial motions in an attempt to obtain reversal of the jury's verdict and a new trial.

STATEMENT OF FACTS

On September 8, 2015, Heather Bundy filed suit against Thomas Jett and Haier asserting a negligence claim against them arising out of the September 3, 2013 accident. (R. pp. 18-27). On August 26, 2016, W.H. Bundy, Jr. filed suit against Thomas Jett and Haier asserting a loss of consortium claim arising out of the September 3, 2013 accident. (R. pp. 34-39). By Consent Order dated July 10, 2017, these cases were consolidated for trial. (R. pp. 1-3). The trial of this case began on January 16, 2018 in the Kershaw County Court of Common Pleas. On January 23, 2018, the jury returned a verdict unanimously finding for the Defendants on the negligence and loss of consortium causes of action. (R. pp. 6-7). By Order dated January 23, 2018, the Circuit Court entered judgment for the Defendants based on the jury's verdict. (R. pp. 4-5). On February 2, 2018, the Plaintiffs moved for "Judgment n.o.v., a new trial in the above captioned matter, and/or an Order altering and amending the Judgment entered in the above captioned case." (R. pp. 66-69). On February 9, 2018, the Defendants filed a Memorandum in Opposition to Plaintiffs' Motion for Judgment N.O.V. or New Trial. (R. pp. 857-861). On September 10, 2018, the Circuit Court entered an Order denying the Plaintiffs' post-trial motions. (R. pp. 11-17). On October 5, 2018, Plaintiffs filed their Notice of Appeal in this Court. (R. pp. 931-937).

STANDARD OF REVIEW

A. Admitted Evidence – Issues I and II

"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. Byers*, 392 S.C. 438, 444, 710 S.E.2d 55, 57–58 (2011). To be entitled to a new trial on the basis of admitted evidence, the Appellants must show both: (1) that the evidence at issue was improperly admitted; and (2) the admission of the evidence resulted in prejudice to them. *Fields v. J. Haynes Waters Builders, Inc.*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008) ("[T]o warrant reversal based on the admission or exclusion of evidence, the appealing party must show both the error of the ruling and prejudice."). "Though testimony may constitute inadmissible hearsay evidence, no prejudice is shown when it merely corroborates other evidence admitted in the case." *Starkey v. Bell*, 281 S.C. 308, 315, 315 S.E.2d 153, 157 (Ct. App. 1984) (citing *Crowder v. Carroll*, 251 S.C. 192, 161 S.E.2d 235 (1968)). Additionally, "as a settled principle of law, the admission of improper evidence is harmless where it is merely cumulative of other evidence." *Ramos v. Hawley*, 316 S.C. 534, 537, 451 S.E.2d 27, 28 (Ct. App. 1994).

B. Denied Directed Verdicts/Judgments Notwithstanding the Verdict ("JNOV") – Issues IV and V

"On review from a trial court's denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court and views the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016) (citing *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 28, 602 S.E.2d 772, 782 (2004)). "Motions for directed verdict or JNOV should be denied if the evidence yields more than one reasonable inference or its inference is in doubt." *Id.* (citing *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429–30, 445 S.E.2d 439, 440 (1994)). "A motion for JNOV may

be granted only if no reasonable jury could have reached the challenged verdict." *Gastineau v. Murphy*, 331 S.C. 565, 568, 503 S.E.2d 712, 713 (1998). "In essence, we must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor." *Harvey v. Strickland*, 350 S.C. 303, 309, 566 S.E.2d 529, 532 (2002) (quoting *Bultman v. Barber*, 277 S.C. 5, 7, 281 S.E.2d 791, 792 (1981)). "When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence." *Wright v. Craft*, 372 S.C. 1, 18, 640 S.E.2d 486, 496 (Ct. App. 2006). "An appellate court will reverse the trial court's ruling only if no evidence supports the ruling below." *Allegro, Inc.*, 418 S.C. at 32, 791 S.E.2d at 144 (citing *Welch v. Epstein*, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct. App. 2000)).

ARGUMENT

I. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING DEFENSE EXHIBIT 13, AND EVEN IF NOT PROPERLY ADMITTED, APPELLANTS CAN SHOW NO PREJUDICE DUE TO THE CUMULATIVE NATURE OF SUCH EVIDENCE.

As a basis for demanding a new trial, Appellants challenge the Circuit Court's admission of defense Exhibit 13. Exhibit 13 is a drawing of the accident scene created by Thomas Jett on the day of the accident. In addition to its hand-drawn diagram, Exhibit 13 contains handwriting which states: "Car pull in on my left side trying to beat me making a left turn." (R. p. 853). Appellants are unable to show that this piece of evidence was improperly admitted under the South Carolina Rules of Evidence. Appellants are also unable to show that admission of this piece of evidence was prejudicial. As Appellants cannot demonstrate reversible error in the admission of Exhibit 13 without making both showings, the Circuit Court's admission of defense Exhibit 13 does not entitle Appellants to a new trial.

A. Defense Exhibit 13 was properly admitted in accordance with Rule 701 of the South Carolina Rules of Evidence.

South Carolina Rule of Evidence 701 provides that lay witnesses may provide certain opinion testimony:

> If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which (a) are rationally based on the perception of the witness, (b) are helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) do not require special knowledge, skill, experience or training.

Rule 701, SCRE.[1] "Conclusions or opinions of laymen should be rejected only when they are superfluous in the sense that they will be of no value to the jury." *Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 468, 494 S.E.2d 835, 845 (Ct. App. 1997). As the trial judge correctly found, the opinion testimony contained in Exhibit 13 meets all the requirements of South Carolina Rule of

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[1] As noted in Appellants' Brief, Rule 701 is subject to Rule 602, which states that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony." Rule 602, SCRE. Appellants' Brief contends that the written statement on Exhibit 13 violates Rule 602 because Mr. Jett "has no personal knowledge of the movements or conduct of Heather Bundy prior to the crash." (Appellants' Br. p. 6).

Appellants' argument would limit witness testimony to direct evidence of personal knowledge. However, Rule 602 permits circumstantial evidence of personal knowledge giving rise to inferences and impressions. *See, e.g., Small v. Pioneer Mach., Inc.*, 329 S.C. 448, 468, 494 S.E.2d 835, 845 (Ct. App. 1997) (affirming admission of testimony of log skidder operator that throttle stuck because of debris accumulation in throttle even though he did not stop the skidder when he had a problem to examine the throttle linkage area or examine the throttle after accident but he had knowledge of environment in which skidder was used and previously clearing debris from hood of skidder); *McCray v. Valle*, No. 2014-UP-313, 2014 WL 3845087, at *1 (S.C. Ct. App. Aug. 6, 2014) (affirming admission of officer's opinion as to facts of accident derived from his observations of the scene of the accident). "Some statements are not mere opinions but are impressions drawn from collected, observed facts. A natural inference based on stated facts is not opinion evidence. Where the distinction between fact and opinion is blurred, it is often best to leave the matter to the discretion of the trial judge." *State v. Williams*, 321 S.C. 455, 464, 469 S.E.2d 49, 54 (1996). As described below, Mr. Jett's opinion contained in Exhibit 13 is based on his impressions/inferences drawn from observed facts of which he had personal knowledge.

Evidence 701 for admissible opinion evidence by a lay person. *See* (R. p. 108, line 14-p.109, line 3 (admitting Exhibit 13)).

With regard to the first requirement of 701, the opinions of Thomas Jett contained in Exhibit 13 were rationally based on his perception of the accident. Exhibit 13 contained two opinions: (1) Thomas Jett's opinion on the location of the vehicles at the time of the accident (i.e. the diagram); and (2) Thomas Jett's opinion as to the cause of the accident (i.e. the writing). As to the first opinion, it does not appear from Appellants' Brief or the arguments of their counsel at trial that they challenge the admission of the first opinion contained in Exhibit 13. *See* (R. p. 104, line 14-p. 105, line 4); (Appellants' Br.). As to the second opinion contained on Exhibit 13, it was rationally based on Mr. Jett's perception of the accident.

Mr. Jett testified at trial that there were no other cars in front of him when he stopped at the stop sign at the intersection of Highway 521 and Black River Road prior to pulling into the median:

Q. Okay. Do you remember pulling up to that stop sign?
A. Yes, sir.
Q. Okay. Did you come to a complete stop?
A. Yes, sir.
Q. Was there any cars in front of you?
A. No, sir.
Q. Are you sure?
A. I'm positive, 100 percent.

(R. p. 406, line 24-p. 407, line 7). He also testified that there was no other car in the median when he stopped in the median. (R. p. 392, line 23-p. 393, line 3; p. 407, lines 14-24). He testified that after stopping in the median he felt a bump on the side of his truck. (R. p. 398, lines 16-21; p. 399, lines 6-8; p. 411, line 23-p. 412, line 3; p. 424, lines 22-24; p. 425, lines 7-13; p. 426, lines 3-8).

He also testified that when he opened his truck door after feeling the bump, he saw Ms. Bundy's vehicle against the driver's side of his vehicle. (R. p. 412, lines 6-22). These are all perceptions – things he saw, felt, and observed – that led to his opinion of what happened. *See Small*, 329 S.C. at 469, 494 S.E.2d at 845 (holding operator's opinion as to the cause of the accident "were based upon his observations and perceptions as the operator of the log skidder" and no abuse of discretion in admitting his lay opinion testimony).

Under the second requirement of Rule 701, the evidence must be "helpful to a clear understanding of the witness' testimony or ***the determination of a fact in issue***." Rule 701, SCRE (emphasis added).[2] Exhibit 13 also meets this requirement. As described above, Exhibit 13 contained a handwritten statement by Mr. Jett stating that the other vehicle in the accident pulled beside his vehicle, which was already in the median, in an attempt to beat him in making a left turn. As Appellants' Brief acknowledges, "which party was in the median first is the central issue in this case." (Appellants' Br. p. 12). Exhibit 13 shows that from day one, the day of the accident, Mr. Jett asserted he was in the median first. His story as to the cause of the accident has not changed. Thus, it was helpful to the determination of the main fact in issue – who was in the median first.

With regard to the third requirement of Rule 701, Mr. Jett's opinion as to the cause of the accident in Exhibit 13 did not "require special knowledge, skill, experience or training" but was based upon his perception of his interaction with Ms. Bundy and her vehicle. *See Huffman v. Sunshine Recycling, LLC*, 426 S.C. 262, 281, 826 S.E.2d 609, 619 (2019) ("We find Officer Aldridge's and Officer Ethridge's testimony was based on their perceptions of their interactions

[2] Exhibit 13 also contains a hand-drawn diagram of the accident scene, which would be helpful for the jury to understand Mr. Jett's testimony concerning the accident scene and where both vehicles were at the time of the collision.

with Goss; did not require special knowledge, skill, experience, or training; and did not stray into the realm of expert testimony."). Therefore, the opinion contained in Exhibit 13 satisfied all the requirements of South Carolina Rule of Evidence 701 and was properly admitted.

B. Pursuant to South Carolina Rules of Evidence 801 and 803, Defense Exhibit 13 was properly admitted.

South Carolina Rule of Evidence 802 states that hearsay is not admissible subject to certain exceptions. Rule 802, SCRE. South Carolina Rule of Evidence 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, SCRE. Exhibit 13 contained the following statement: "Car pull in on my left side trying to beat me making a left turn." This statement is not hearsay because it was not presented at trial to prove the truth of the matter asserted – i.e. that Ms. Bundy was trying the beat Mr. Jett in making a left turn. Rather, Exhibit 13 was presented to prove that immediately after the accident Mr. Jett asserted that he did not cause the accident and that he was in the median first.

However, in the event this Court determines that the statement in Exhibit 13 qualifies as hearsay, Exhibit 13 comes within the business records exception contained in South Carolina Rule of Evidence 803(6). "Rule 803(6), SCRE, provides that memorandum, reports, records, etc. in any form, of acts, events, conditions, or diagnoses, are admissible as longs as they are (1) prepared near the time of the event recorded; (2) prepared by someone with or from information transmitted by a person with knowledge; (3) prepared in the regular course of business; (4) identified by a qualified witness who can testify regarding the mode of preparation of the record; and (5) found to be trustworthy by the court." *Ex parte Dep't of Health & Envtl. Control*, 350 S.C. 243, 249–50, 565 S.E.2d 293, 297 (2002) (citing Rule 803(6), SCRE). Mr. Jett testified that he made Exhibit 13 as a report of the accident for his supervisor. (R. p. 418, line 23-p. 419, line 16; p. 422, lines 20-

22). He also testified that it was made on the same day as the accident and was kept in his personnel file. (R. p. 418, line 23-p. 419, line 16). Therefore, Exhibit 13 was also properly admitted under the hearsay rules.

C. Alternatively, even if improperly admitted, Appellants cannot show they were prejudiced by the admission of Exhibit 13 as it is merely cumulative of Respondent's testimony that he was in the median first.

Appellants can show no prejudice due to the admission of the opinion contained in Exhibit 13 because it was merely cumulative of Mr. Jett's testimony at trial that he entered the median first. As Appellants' Brief states, "which party was in the median first is the central issue in this case." (Appellants' Br., p. 12). The heart of the opinion in Exhibit 13 – "Car pull in on my left side trying to beat me making a left turn" – was that Mr. Jett was in the median first and Ms. Bundy subsequently pulled into the median to turn. Mr. Jett repeatedly testified at trial that he was in the median first. (R. p. 392, line 23-p.393, line 3; p. 407, lines 14-24). He also testified at trial that he did nothing to cause the accident. (R. p. 420, lines 22-25). Therefore, Appellants cannot show that the admission of Exhibit 13 prejudiced them. *See Gulledge v. McLaughlin*, 328 S.C. 504, 509, 492 S.E.2d 816, 818 (Ct. App. 1997) (holding cumulative opinion testimony regarding cause of auto accident did not provide sufficient grounds for reversal); *Williams*, 321 S.C. at 463, 469 S.E.2d at 54 (holding improperly admitted evidence that was cumulative to other, properly admitted evidence, was harmless); *State v. Blackburn*, 271 S.C. 324, 329, 247 S.E.2d 334, 337 (1978) ("Under settled principles, the admission of improper evidence is harmless where it is merely cumulative to other evidence."). Thus, the Circuit Court's admission of defense Exhibit 13 does not entitle Appellants to a new trial.

II. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN ADMITTING THE TESTIMONY OF EXPERT WITNESS BRIAN BOGGESS, AND EVEN IF NOT PROPERLY ADMITTED, APPELLANTS CAN SHOW NO PREJUDICE DUE TO THE CUMULATIVE NATURE AND SUBJECT MATTER OF HIS OPINIONS.

As another basis for demanding a new trial, Appellants challenge the Circuit Court's admission of Brian Boggess's expert witness testimony. Mr. Boggess's expert testimony includes his opinions concerning: (1) the cause of the accident based upon accident reconstruction, and (2) the type of injuries possible as a result of the accident based upon biomechanics. Appellants do not argue that Mr. Boggess was unqualified as an expert witness. *See* (Appellants' Br., pp. 8-10). Rather, Appellants argue that Mr. Boggess testimony was improperly admitted because he: (1) "improperly weighed the credibility of the witnesses in arriving at his opinion"; and (2) "improperly gave testimony regarding a hypothetical person." (Appellants' Br., pp. 8-10). Appellants are unable to show that Mr. Boggess's expert witness testimony was improperly admitted based upon either of these alleged grounds. Appellants are also unable to show the admission of his testimony was prejudicial. As Appellants cannot demonstrate reversible error in the admission of this testimony, the Circuit Court's admission of Mr. Boggess's expert witness testimony does not entitle Appellants to a new trial.

A. The fact that Mr. Boggess' expert opinions contradicted Ms. Bundy's version of events does not make his testimony subject to exclusion as an improper opinion on the credibility of Ms. Bundy.

Appellants' Brief cites two sections of Mr. Boggess' deposition for the proposition that Mr. Boggess "improperly weighed the credibility of the witnesses in arriving at his opinion." (Appellants' Br., pp. 8-9). In the first section cited, pages 39-41 of Mr. Boggess' deposition, Mr. Boggess testified that he found Mr. Jett's testimony of how the accident occurred to be more plausible based on the "physical layout" of how the vehicles ended up together, where the drivers'

"visibilities are," and where people generally look when they are making a left turn. (R. pp. 900-902).

While experts are not permitted to offer an opinion regarding the credibility of others, they are permitted to use their expertise to determine which version of events more likely occurred. At trial, Mr. Boggess did not offer an opinion on the credibility of Ms. Bundy. (R. p. 548, line 13-p. 555, line 16). He merely testified as to which version of events was more likely given the physical evidence and the science of accident reconstruction. (R. p. 484, lines 18-20).

In a similar case, *Watts v. Hollock*, the plaintiffs argued that an accident reconstruction expert's testimony should be excluded because his opinions comparing eyewitness testimony in the record with the results of his accident reconstruction were "a transparent attempt to have [the expert] provide an expert opinion on the credibility of the Plaintiff and other eyewitnesses." No. 3:10CV92, 2011 WL 6026998, at *5 (M.D. Pa. Dec. 5, 2011). The defendants argued that the expert's opinion were not mere statements challenging the credibility of eyewitness accounts but the opinions of a professional engineer applying his investigation and analysis to the facts of record in the case. *Id.* at *5. The court held that the opinions were admissible and explained:

> [The expert's] opinions are not mere comments on the credibility of eyewitness testimony, but the result of accident reconstruction analysis. This analysis produced results contrary to the eyewitness accounts of plaintiffs' witnesses. [The expert's] opinions are not unhelpful to the jury simply because they highlight the contradictions between his accident reconstruction analysis and eyewitness testimony....The court does not agree with plaintiffs' assertion that [the expert's] opinion somehow usurps the role of the jury....[The expert's] opinions are derivative of the methodology he employed in conducting his accident reconstruction analysis, as such, these opinions are admissible under the rules of evidence. They are admissible even if [his] opinions call into question the accounts of eyewitnesses, whose ultimate credibility is to be determined by the jury.

Id. at *6; *see also Withrow v. Spears*, 967 F. Supp. 2d 982, 999 (D. Del. 2013); *Phillips v. Raymond Corp.*, 364 F. Supp. 2d 730, 743 (N.D. Ill. 2005) (holding biomechanical engineer's testimony that

plaintiff's alleged version of events "did not and could not have happened" was not improper opinion on witness' credibility where expert "relied on objective analysis" to come to "conclusion at odds with [plaintiff's] testimony and theory of the case").

Likewise, Mr. Boggess did not improperly testify as to the credibility of Ms. Bundy but relied on objective factors – the layout of the accident scene, the physical evidence, where persons reasonably look when turning in a certain direction, the route of both vehicles through a stop sign before approaching the median, the vehicle visibilities – to come to his conclusion that Mr. Jett's vehicle was in the median first. *See* (R. p. 548, line 13-p. 555, line 16). As he explained on cross-examination:

> The opinion is what necessarily happens by physics, by human factors, by the dynamics of a collision. They're going to either fall in line with someone's testimony or not. The jury assigns credibility. They decide do they believe Person A or Person B. That's their job. I'm not saying to this jury and never have said to a jury Person A is lying, Person B, they're telling the truth. It's which one fits with the evidence and which one does not....I use evidence and I figure out which one is consistent with the evidence and which one is not in terms of physical evidence, the engineering facts.

(R. p. 509, lines 1-18). Therefore, admission of his testimony was proper.

In the second section cited in Appellants' Brief, pages 65-66 of Mr. Boggess' deposition, Mr. Boggess testified that the kinematics to which Ms. Bundy testified – i.e. the motions of her body at the time of the accident – "are inconsistent with that which necessarily occurs per the laws of physics and, therefore, are not plausible." (R. p. 964, Dep. p. 65, lines 15-18).[3] He also testified that "[t]he kinetics, which is the forces and accelerations imparted to her body, are not beyond reasonable injury thresholds and are well within or below activities of daily living, and are,

[3] Ms. Bundy testified that she was thrown forward into the steering wheel upon impact, but Mr. Boggess testified at trial that based upon the physics of the impact she would necessarily move back and toward the right on impact, not forward. (R. p. 507, lines 7-22).

therefore, not consistent with causing or aggravating injury for someone such as Ms. Bundy." (R. p. 965, Dep. p. 66, lines 3-8).

At trial, Mr. Boggess testified that "the forces are not consistent with causing the types of injuries that have been diagnosed in this case." (R. p. 561, lines 12-14). A biomechanical expert is permitted to testify as to whether an impact could cause the alleged injury, regardless of whether his testimony contradicts the plaintiff's testimony. *See Wilson v. Rivers*, 357 S.C. 447, 454, 593 S.E.2d 603, 606 (2004) (holding trial court erred in excluding biomechanical expert's opinion that "low-impact collision, as it occurred, could not have caused respondent's back injury"); *Baerwald v. Flores*, 122 N.M. 679, 683, 930 P.2d 816, 820 (N.M. Ct. App. 1997) (allowing defendant's biomechanical expert to testify that it was not likely accident could have caused TMJ injuries like those plaintiff alleged). Therefore, admission of Mr. Boggess' testimony was proper, regardless of its contradiction of Ms. Bundy's testimony.

B. Mr. Boggess' testimony in response to a hypothetical question was properly admitted.

The other basis Appellants assert for their argument that Mr. Boggess' expert testimony was improperly admitted is that his opinion was given in response to a hypothetical question about a hypothetical person with all the attributes and in the same position as Ms. Bundy. (Appellants' Br., p. 10). "Opinion testimony of an expert witness may be based upon a hypothetical question" provided the hypothetical question is "based upon facts supported by the evidence." *Brown v. La France Indus., a Div. of Riegel Textile Corp.*, 286 S.C. 319, 326, 333 S.E.2d 348, 352 (Ct. App. 1985); *Duncan v. Ford Motor Co.*, 385 S.C. 119, 132, 682 S.E.2d 877, 883 (Ct. App. 2009) ("An expert can offer opinions based upon hypothetical questions embracing facts supported by the evidence."); *Hartfield v. Getaway Lounge & Grill, Inc.*, 388 S.C. 407, 414, 697 S.E.2d 558, 561 (2010) ("A party may ask a hypothetical question of an expert, but the hypothetical must be based

on facts supported by the evidence."). "Counsel may rely upon circumstantial evidence to prove an essential fact in framing a hypothetical question." *Gathers By & Through Hutchinson v. S.C. Elec. & Gas Co.*, 311 S.C. 81, 83, 427 S.E.2d 687, 688 (Ct. App. 1993).

Mr. Boggess testified that Ms. Bundy was exposed to about .8 Gs when the tractor-trailer hit the rear corner of her car. (R. p. 559, lines 6-8). He also testified that the body of the person sitting in the driver's seat would move back and to the right of the seat during impact. (R. p. 559, lines 8-25). Appellants Brief points to the following hypothetical question posed to Mr. Boggess thereafter:

> Q. Do you have an opinion to a reasonable degree of biomechanical certainty as to whether this .8 G impact would cause injuries to someone's neck or back in those circumstances?
>
> A. Sure, I do.
>
> Q. What's your opinion?
>
> A. So the biomechanicals kind of have, I guess, bear in on a couple of opinions. One, I was just talking about the direction of movement. Those movements are not going to be outside the normal range of motion. So you're not going to move, hyperextend, hyperflex anything to reasonably cause, especially in a lumbar spine that's completely supported by this nice padded seat behind you sitting in your driver's seat. It's not going to take the joints out of normal range of motion. On the flip side, the testimony is that she said -- she testified she was thrown forward into the steering wheel. That's counterintuitive to physics and what necessarily has to happen. But, ultimately then the force side of it, the forces are -- I mean, we've talked about some basic activities of daily living. It's well below the most benign things we do 200 times a day. And if you start running calculations on picking up things like bags of dog food or even just bending over to tie one's shoes, the lumbar feels more doing that action than this accident causes. So it's not consistent -- the forces are not consistent with causing the types of injuries that have been diagnosed in this case.

(R. p. 560, line 6-p. 561, line 14); (Appellants' Br. p. 10).

When questioned about his response to this hypothetical question, Mr. Boggess stated that his opinion took into account a person of the same age, same height, same pre-existing conditions, same weight, same gender, same seating position, and same exposure as Ms. Bundy "and the

potential for injury from a less than a 1 G of incident." (R. p. 571, lines 8-25). Therefore, the hypothetical question and response were "based upon facts supported by the evidence" – i.e. amount of force from the collision, point of impact, and age/height/weight/gender/seating position/pre-existing conditions of driver – and are admissible for an expert opinion. *See Redman v. Ford Motor Co.*, 253 S.C. 266, 278, 170 S.E.2d 207, 213 (1969) (holding admission was proper of expert opinion in response to hypothetical question as to what would cause axle shaft to become disengaged from cylinder in accident involving automobile in substantially the same circumstances as plaintiff's deceased's automobile); *Clark v. Ross*, 284 S.C. 543, 552, 328 S.E.2d 91, 97–98 (Ct. App. 1985), *abrogated on other grounds by Sherer v. James*, 290 S.C. 404, 351 S.E.2d 148 (1986) (holding no error in allowing expert to give his opinion in response to hypothetical question about hypothetical child).

C. Alternatively, Appellants are not entitled to a new trial based upon the admission of Boggess' testimony because they cannot show they were prejudiced by the admission of his above-described testimony.

With regard to the admission of Mr. Boggess' opinion as to the cause of the accident – i.e. who was in the median first – Appellants cannot show that the admission of this testimony is prejudicial as it is merely cumulative to Mr. Jett's testimony that he was in the median first and did not cause the accident. *See* discussion supra Part I.C.

As to the admission of Mr. Boggess' opinion concerning the type of injuries that could be sustained in this accident, Appellants also cannot show that the admission of this testimony is prejudicial. "Error is harmless when it could not reasonably have affected the result of the trial." *State v. Mitchell*, 286 S.C. 572, 573, 336 S.E.2d 150, 151 (1985); *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 32, 609 S.E.2d 506, 512 (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., that there is a reasonable probability the jury's verdict was influenced by the challenged evidence or the lack thereof."); *First State Sav. & Loan v. Phelps*, 299 S.C. 441, 449, 385 S.E.2d 821, 826 (1989) (holding any error in exclusion of evidence on damages issue was harmless where party failed to establish liability of other party). Here, evidence related to Plaintiff's injuries "could not reasonably have affected the result of the trial" because the jury found the Defendants were not at fault for the accident. (R. pp. 6-7). Appellants cannot show any prejudice in the admission of evidence related to damages without first showing reversal of the jury verdict as to liability. Therefore, Appellants' are not entitled to a new trial based upon the admission of Mr. Boggess' testimony.

III. THE CIRCUIT COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING APPELLANTS' REQUEST TO PUBLISH THEIR REQUEST FOR PRODUCTION TO THE JURY, AND APPELLANTS CAN SHOW NO PREJUDICE BECAUSE THEY WERE PERMITTED TO PRESENT TESTIMONY CONCERNING ITS SUBSTANCE.

During the trial, Plaintiffs' counsel presented Woodrow Poplin as an accident reconstruction expert. (R. p. 268, lines 6-10). Mr. Poplin testified that the A pillar in Mr. Jett's tractor-trailer created a blind spot which could have obscured Ms. Bundy's vehicle. (R. p. 274, lines 8-16; p. 277, lines 10-23). Mr. Poplin testified that he made observations at the accident site using his own Honda pickup truck as the exemplar A pillar. (R. p. 281, lines 20-22; p. 290, lines 22-24; p. 291, lines 5-12). Mr. Poplin testified during direct examination that it did not matter that he did not have the actual Sterling truck out at the accident site because the A pillar is an obstruction in all vehicles. (R. p. 281, line 24-p. 282, line 3). During cross examination, Mr. Poplin testified that he had inspected a thousand tractor-trailers but did not use a tractor trailer at the accident site to see what he could see from the stop sign. (R. p. 289, lines 10-17).

After direct and cross examination of Mr. Poplin and during a bench conference, Plaintiffs' counsel stated to the court that he wanted "to say we sent a request for production, asked for the truck and it wasn't produced. That's the only thing I want to go into." (R. p. 302, lines 13-16). Later during the bench conference, Plaintiffs' counsel requested to publish his discovery request for production of the Sterling truck to the jury. (R. p. 304, line 12-p. 305, line 5). The court held that the proper way to raise failure to respond to a request for production is pursuant to a pre-trial motion to compel, not during trial by publishing requests for production to the jury. (R. p. 305, line 19-p.306, line 20). Plaintiffs' counsel then stated: "I simply wanted to say, Do you know whether a request was made, okay, to have the truck available for inspection? He does. Yes, I do know that. Okay. Did they produce the truck for your inspection at any time after that request?" (R. p. 307, lines 9-14).

Plaintiffs' counsel then proffered his requested questions to Mr. Poplin during the bench conference. (Transcript p. 238, lines 3-16). The Circuit Court allowed Plaintiffs' counsel to ask his proffered questions concerning production of the truck on redirect examination before the jury:

> Q. Mr. Poplin, do you know whether or not representatives of Ms. Bundy asked the Defendants to produce the Sterling truck at the intersection that is subject here today?
>
> A. Yes.
>
> Q. And do you know whether or not the Defendants actually produced that truck?
>
> A. It was not produced.

(R. p. 309, lines 11-18).

As shown above, during the bench conference, Plaintiffs' counsel reiterated at both the beginning and end of the conference that he merely wanted to have before the jury the fact that Plaintiff had requested the production of the truck and Defendants had not produced it. (R. p. 302 lines 13-16; p. 307, lines 9-14). This is exactly the information Plaintiff's counsel was permitted

to present to the jury. (R. p. 309, lines 11-18).[4] Therefore, except for putting the actual discovery request paper before the jury, Plaintiffs' counsel got exactly what he asked for during the bench conference. Consequently, the Circuit Court's denial of Plaintiff's request to publish was harmless error, if error at all, because equivalent testimony was presented.

IV. THE CIRCUIT COURT PROPERLY DENIED PLAINTIFFS' LIABILITY DIRECTED VERDICT MOTION AND JNOV MOTION AS THERE WAS SOME EVIDENCE FROM WHICH A JURY COULD FIND FOR RESPONDENTS ON THE ISSUE OF LIABILITY.

The Circuit Court properly denied Plaintiffs' motions concerning liability because there was some evidence from which the jury could find Mr. Jett did not cause the accident. The main issue in this case with respect to negligence was whether Mr. Jett's or Ms. Bundy's vehicle was in the median first. (Appellants' Br., p. 12 ("[W]hich party was in the median first is the central issue in this case.")). As explained above, Mr. Boggess' testimony was properly admitted, and he testified that Mr. Jett's vehicle was in the median first based upon his expertise as an accident reconstructionist. (R. p. 548, line 19-p. 549, line 6). This is some evidence from which a jury could find for Respondents on the issue of liability.

Even excluding the evidence to which Appellants' raised admissibility disputes, Mr. Jett himself testified that he was in the median first, which is some evidence from which the jury could find for Respondents on the issue of liability. (R. p. 392, line 23-p. 393, line 3; p. 407, lines 14-24). He also testified that he did nothing to cause the accident. (R. p. 420, lines 22-25). Appellants have not challenged the admission of this testimony by Mr. Jett. Therefore, regardless of the

[4]Mr. Poplin was also allowed to give additional testimony about requesting production of the truck. *See* (R. p. 282, lines 3-6 ("At one point, we discussed getting the truck out there and made an effort to get the truck, the actual truck there. For whatever reason, that did not work out.")); (R. p. 289, lines 16-17 ("I did make the request that we attempt to get this particular truck out at the accident site.")).

evidentiary disputes raised by Appellants, there was some evidence from which a jury could find for Respondents on the issue of negligence, and Appellants' directed verdict motion and JNOV motion concerning liability were properly denied.

V. THE CIRCUIT COURT PROPERLY DENIED PLAINTIFFS' DAMAGES DIRECTED VERDICT MOTION AND JNOV MOTION AS THERE WAS SOME EVIDENCE FROM WHICH A JURY COULD FIND THAT PLAINTIFFS' ALLEGED INJURIES WERE NOT CAUSED BY THE ACCIDENT.

Although Respondents did not object to the introduction Ms. Bundy's medical bills and proposed life care plan, numerous pieces of evidence presented at trial challenged whether Ms. Bundy's alleged injuries/damages were caused by the accident at issue. In a negligence action, the issue of damages includes proximate causation. *See Vinson v. Hartley*, 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct. App. 1996) ("To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty.... The damages allegedly sustained must be shown to have been proximately caused, i.e. causally connected, to the breach of duty in order to warrant a recovery."). Therefore, the Circuit Court properly denied Plaintiffs' directed verdict motion and JNOV motion as to damages.

The following evidence was introduced at trial: (1) photographs of the damage to the vehicles; (2) testimony from Mr. Boggess that the force of the impact was less than 1G; and (3) testimony from Mr. Boggess that a person in Ms. Bundy's position and with her characteristics would not have suffered the injuries in the accident that Ms. Bundy claimed. (R. p. 182, line 11-p. 183, line 22; p. 505, lines 4-5; p. 505, line 23-p. 506, line 5; p. 518, lines 8-23). Ms. Bundy also testified to the following at trial: (1) prior injuries from another car wreck; (2) prior injuries from a boating accident; (3) prior epidural and facet joint injections for neck and back pain; and (4) prior

acupuncture treatments, massage treatments, and prescriptions for neck and back pain. (R. p. 179, lines 17-24; p. 222, lines 17-25; p. 223; lines 5-8; p. 225, lines 10-16). Thus, there was some evidence from which the jury could find that Ms. Bundy's alleged injuries to her neck and back were not caused by the accident.

Even if Ms. Bundy's testimony concerning her damages was uncontradicted – which it was not – the question of whether her alleged damages were proximately caused by the accident would be a question for the jury. In *Black v. Hodge*, 306 S.C. 196, 410 S.E.2d 595 (Ct. App. 1991), the plaintiff alleged substantial injuries from a minor collision. No witness directly contradicted the plaintiff's testimony or that of the doctors she called to testify on her behalf. Nevertheless, the jury returned a verdict for the defendant. In affirming the verdict, this Court held that the jury does not have to believe uncontradicted testimony. The Court stated:

> Mrs. Black makes several arguments on appeal, but the essential issue is whether the jury was required to accept her uncontradicted testimony that she was injured. Stated in the larger sense, the question is simply this: must a trier of fact always believe uncontradicted testimony? The answer to the question is, plainly, no.
>
> The fact that testimony is not contradicted directly does not render it undisputed. *Terwilliger v. Marion*, 222 S.C. 185, 72 S.E.2d 165 (1952). There remains the question of the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation. *Id.* "If there is anything tending to create distrust in his [or her] truthfulness, the question must be left to the jury." *Id.* at 188, 72 S.E.2d at 166.
>
> The fact that the collision between the two vehicles was slight, to say the least, together with the fact that Mrs. Black has an obvious interest in the outcome of the case, is sufficient to cast doubt on the testimony that she was injured. Under the circumstances, the jury had the right to find that she was not injured, and we do not have the right to second-guess the jury. *See Hobgood v. Pennington*, 300 S.C. 309, 313, 387 S.E.2d 690, 692 (Ct.App.1989) ("If there is any evidence to sustain the factual findings implicit in the jury's verdict, this court must affirm.").

Black, 306 S.C. at 198, 410 S.E.2d at 596. Likewise, there is uncontroverted testimony that this collision was minor (less than 1G of force), and Plaintiffs have an obvious interest in the outcome

of this case. Therefore, the question of damages should have been left to the jury, and the Circuit Court properly denied Plaintiffs' directed verdict motion and JNOV motion on damages.

CONCLUSION

For the reasons set-forth above, Appellants are not entitled to a new trial. The Circuit Court made proper rulings on all of the evidentiary issues discussed above. Alternatively, even if any of the Circuit Court's rulings were in error, Appellants are not entitled to a new trial because they have not shown prejudice from such rulings. Thus, Respondents respectfully request that this Court deny Appellants' request to reverse the jury verdict entered in this case and remand the case for a new trial.

MURPHY & GRANTLAND, P.A.

John Grantland, Esquire
S.C. Bar No. 64158
Megan Walker, Esquire
S.C. Bar No. 103069
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
Attorney for Respondents

Columbia, South Carolina
August 19, 2019

IN THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

DeAndrea Gist Benjamin, Circuit Court Judge

RECEIVED
AUG 19 2019
SC Court of Appeals

Appellate Case No. 2018-001798

Heather Anne Bundy..... Appellant,

v.

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

And

W.H. Bundy, Jr..... Appellant,

v.

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

CERTIFICATE OF COMPLIANCE

I, John M. Grantland, Esquire, attorney for Respondents, certify that the Respondents' Final Brief complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

MURPHY & GRANTLAND, P.A.

John M. Grantland, Esquire
S.C. Bar No. 64158
Megan Walker, Esquire
S.C. Bar No. 103069
P.O. Box 6648
Columbia, SC 29260
(803) 782-4100
jgrantland@murphygrantland.com
Attorneys for Respondents

Columbia, South Carolina
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