THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

D. Craig Brown, Circuit Court Judge

Case No. 2013-002474

Catherine Virginia Cox, ...Appellant,

v.

Kenneth L. Pinckney, Sr. and Stacy Marie St. Pierre, ...Respondents.

BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Whether the Circuit Court properly declined to adopt an expanded version of the tort of negligent entrustment after South Carolina's Supreme Court refused to do so on two occasions.

STATEMENT OF THE CASE

This appeal arises out of an automobile accident that occurred on July 11, 2012, between a vehicle operated by Appellant Courtney Cox and a vehicle owned by Respondent Stacy Marie St. Pierre and operated by Kenneth Pinckney. Cox filed a Complaint on September 10, 2012, asserting claims against Pinckney for negligence and against St. Pierre for negligent entrustment.

After receiving responses to Requests to Admit revealing that Cox did not have any evidence that Pinckney was intoxicated at the time of the accident or that he had a propensity to drive while intoxicated, Respondent Stacy Marie St. Pierre filed a Motion for Summary Judgment on January 29, 2013. The Circuit Court heard arguments on the motion on September 30, 2013. After considering the briefs, exhibits and arguments, the Honorable Craig D. Brown found that Plaintiff failed to present any evidence that Pinckney was intoxicated on the night of the accident, that he was addicted to intoxicants, that St. Pierre knew that Pinckney was addicted to intoxicants or that she knew that Pinckney was likely to drive while intoxicated. Because Cox failed to meet her burden at the summary judgment stage, the Circuit Court granted summary judgment in St. Pierre's favor on October 4, 2013. (R. pp. 11-13).

On October 16, 2013, Cox filed a Motion to Reconsider, and the Circuit Court signed an Order denying the Motion to Reconsider on October 23, 2013. (R. pp. 9-10).

The Order was filed with the Clerk of Court on October 25, 2013 and this appeal followed.

ARGUMENT

On two separate occasions, this Court has expanded South Carolina's narrowly tailored version of negligent entrustment by adopting the Restatement (Second) of Torts §§ 308 and 390. Both times, the Supreme Court reversed, declining to expand the tort of negligent entrustment beyond its traditional confines of accidents arising out of the entrustment of vehicles to intoxicated drivers or drivers who are likely to drive while intoxicated. Once again, Cox asks this court to adopt the Restatement version of negligent entrustment because there is no evidence that Pinckney was intoxicated, addicted to intoxicants or that he had a propensity to drive while intoxicated. As an initial matter, Cox failed to present any evidence at the summary judgment hearing of Pinckney's driving habits or St. Pierre's knowledge thereof. Therefore, regardless of what version of negligent entrustment this Court applies, the Circuit Court's Order should be affirmed. Moreover, South Carolina only recognizes negligent entrustment in the limited context of intoxication. Because the Supreme Court has expressly declined to expand the tort beyond those traditional confines, this Court should affirm the Circuit Court's decision.

I. The Circuit Court properly held that Cox failed to present any evidence to support a claim for negligent entrustment.

In its most recent recital of the elements of a cause of action for negligent entrustment, the Supreme Court held:

> According to our case law, the elements of negligent entrustment are: (1) knowledge of or knowledge imputable to the owner that the driver was either addicted to

> intoxicants or had the habit of drinking; (2) the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver.

Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc., 374 S.C. 171, 176, 648 S.E.2d 585, 588 (2007) (citing *Jackson v. Price*, 288 S.C. 377, 342 S.E.2d 628 (Ct. App. 1986)). To date, South Carolina has never recognized a different version of the tort of negligent entrustment. Because Cox failed to present any evidence of intoxication at the summary judgment hearing, and admitted that she had no such evidence in the responses to the Requests for Admissions, the Circuit Court properly granted summary judgment.

A. Cox failed to present any evidence of negligent entrustment.

At the summary judgment stage, "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided [in Rule 56], must set forth specific facts showing that there is a genuine issue for trial." Rule 56(e), SCRCP. Plaintiff failed to present any evidence – by affidavit or otherwise – to support a cause of action for negligent entrustment.

On July 11, 2012, an accident occurred between a vehicle operated by Cox and a vehicle owned by St. Pierre and operated by her husband Pinckney. Plaintiff did not take any depositions or submit any affidavits at the summary judgment hearing. Therefore, there is no evidence of how the accident happened. In the Initial Brief of Appellant, Cox makes a number of factual claims that are wholly unsupported in the record, including how the accident happened, who was at fault and the nature of her injuries and medical treatments. There is no evidence in the record to support any of her assertions.

At the hearing on the Motion for Summary Judgment, Cox did provide the Court with two items: 1) Pinckney's 10 Year Driver Record; and 2) a recorded statement of St.

Pierre.[1] Pinckney's driver record reveals that Pinckney surrendered his driver's license on July 29, 1999, for failure to pay traffic tickets and a controlled substance violation. At the time of the accident at issue in this case, Pinckney had not been charged with any traffic offense for over a decade. Moreover, there was no evidence presented regarding the nature of any of his past violations.

In addition to failing to present evidence that Pinckney was addicted to intoxicants or that he had a habit of drinking and driving, Cox failed to present any evidence that St. Pierre was aware of Pinckney's driving record or ability. In the recorded statement, St. Pierre only admits that she was aware that Pinckney did not have a driver's license:

Q: Does he have an active driver's license?

A: No.[2]

In her Initial Brief, Cox misrepresents the statements from the recorded statement by alleging that St. Pierre knew that Pinckney was prohibited from driving because of controlled substance violations and various traffic infractions. This assertion is

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[1] Cox did not provide any affidavits or other sworn evidence at Summary Judgment. She also did not request time to conduct any additional discovery. *See* Rule 56(e) and (f), SCRCP.

[2] This Court can affirm on any ground appearing in the record. *See* Rule 220(c), SCACR. Cox failed to present evidence by affidavit or otherwise that Cox had any knowledge of Pinckney's driving habits or her knowledge that he was likely to drive in a negligent or reckless manner. St. Pierre does not concede that the transcribed recorded statement – which was handed to the court without any accompanying affidavits – was admissible or proper evidence under Rule 56, SCRCP. Moreover, standing alone, such knowledge does not constitute evidence of knowledge that Pinckney was unlikely to drive in a safe manner. Therefore, this Court should affirm the grant of summary judgment without considering Cox's request to adopt §§ 308 and 390 of the Restatement (Second) of Torts because she failed to present evidence to support her claim.

completely false. St. Pierre never stated that she was aware of any controlled substance violations or traffic violations.

B. The Circuit Court properly granted summary judgment after Cox failed to present any evidence to support her claim for negligent entrustment.

Once St. Pierre filed a motion for summary judgment, Cox had the burden of presenting some evidence to support each element of negligent entrustment. "To survive a motion for summary judgment, [a plaintiff] must offer some evidence that a genuine issue of material fact existed as to each element of" the cause of action asserted in the Complaint. *McLaughlin v. Williams*, 379 S.C. 451, 456, 665 S.E.2d 667, 670 (Ct. App. 2008); *see also Baughman v. American Tel. and Tel. Co.*, 306 S.C. 101, 410 S.E.2d 537 (1991) (affirming grant of partial summary judgment where plaintiffs failed to present any competent evidence of property damage). Like the plaintiffs in *McLaughlin* and *Baughman*, Cox did not present evidence of any of the three necessary elements for negligent entrustment.

In *McAllister v. Graham*, 287 S.C. 455, 339 S.E.2d 154 (Ct. App. 1986), the Court of Appeals held that a similarly-situated plaintiff failed to present sufficient evidence of negligent entrustment to withstand a motion for summary judgment. In that case, an employee was operating a vehicle provided by his employer while on a personal errand when he caused an accident. The employee was charged with operating the vehicle under the influence. *Id.* at 457, 339 S.E.2d at 155.

At summary judgment, plaintiff's only evidence regarding negligent entrustment was a ten-year-old DUI conviction and the fact that the accident occurred while the employee was operating a vehicle under the influence. *Id.* at 458, 339 S.E.2d at 156. The Court of Appeals assumed for purposes of the appeal that the employer was aware of

the ten-year old DUI conviction.[3] After setting out the elements for negligent entrustment, the Court of Appeals held: "Under this doctrine we hold (1) that the DUI conviction in 1971 was too remote, in itself, to meet the test and (2) that the record before us does not contain evidence to be susceptible of the inference of the required knowledge or imputable knowledge above set forth." *Id.* Because a ten-year old conviction for DUI was too remote to create an inference of knowledge and there was no additional evidence of knowledge imputable to the employer, the Court of Appeals affirmed the grant of summary judgment in favor of the defendant owner. *Id.*

The facts of this case are a step removed from those in *McAllister*. Whereas in *McAllister* the driver had at least consumed some alcohol and had a prior DUI conviction, there is no evidence in this case of alcohol having any involvement in either the subject accident or the suspension of Pinckney's driver's license. Moreover, there is no evidence that Pinckney was addicted to intoxicants. Like the DUI in *McAllister*, all of the conduct reflected in Pinckney's 10-Year Driver Record was at least thirteen years old on the date of the accident. Moreover, Cox failed to present any evidence that St. Pierre was aware of any of those violations.

There is no evidence that Pinckney had a habit of driving while under the influence. In fact, there is no evidence of Pinckney's driving habits at all for more than ten years leading up to the accident. There is certainly no evidence that St. Pierre had knowledge of either of these two facets of the negligent entrustment analysis and, under those circumstances, then entrusted her vehicle to Pinckney. Most importantly, there is

[3] Cox failed to present any evidence that St. Pierre was aware of any of Pinckney's prior violations. The only possible evidence is her statement that she was aware that he did not have a license.

no evidence that St. Pierre had any knowledge of Pinckney's driving habits whatsoever. Because Cox failed to present any evidence at summary judgment to support her cause of action, the Circuit Court correctly granted the motion.

II. South Carolina's Supreme Court has rejected the expansive Restatement version of negligent entrustment on two occasions.

Since its inception in *Nettles v. Your Ice Co.*, 191 S.C. 429, 4 S.E.2d 797 (1939), the tort of negligent entrustment of a vehicle to an allegedly incompetent driver has been confined to the context of intoxicated drivers. In *Nettles*, the Supreme Court recognized a cause of action where the plaintiff "alleged [a] reckless and wilful act of the master himself in placing for operation on the public highways a motor vehicle in the hands of a servant whom he allegedly knew partook frequently of intoxicating liquors to excess, and which said act resulted in injuries and damage to Plaintiff." *Id.* at 798-99. More recently, the Supreme Court in *Gadson* adopted this Court's articulation of three elements for negligent entrustment requiring that the owner 1) knew the driver was addicted to intoxicants or had a habit of driving while intoxicated; 2) knew the driver was likely to drive while intoxicated; and 3) entrustment under those circumstances resulting in injury to a third person. *Gadson*, 374 S.C. at 176 648 S.E.2d at 588 (citing *Jackson*, 288 S.C. at 382, 342 S.E.2d at 631).[4]

[4] In her brief, Cox asserts that this Court's opinion in *Jackson* was ambiguous as to whether it was applying the narrower intoxication-based form of negligent entrustment or a broader standard as defined in the Restatement. (Initial Br. of Appellants, p. 5). There is nothing in the *Jackson* opinion to support this contention. In the very brief discussion of negligent entrustment in the *Jackson* case, this Court quoted the intoxication elements set out in *McAllister*, and affirmed the denial of a J.N.O.V. on negligent entrustment because there was evidence that "even though [the owner] knew that [the driver] had consumed three beers within an hour and a half of the accident, he permitted him to drive his car." *Jackson*, 288 S.C. at 282, 342 S.E.2d at 631.

Twice this Court has adopted the standard for negligent entrustment set out in §§ 308 and 390 of the Restatement. Both times, the Supreme Court has reversed and declined to expand South Carolina's historically narrow view of the cause of action for negligent entrustment of a vehicle. Despite the Supreme Court's clear refusal to adopt the Restatement's version of negligent entrustment, Cox cites the Supreme Court's language in *American Mutual Fire Insurance Company v. Passmore*, 275 S.C. 618, 274 S.E.2d 416 (1981), and argues that South Carolina has always recognized the broader version of negligent entrustment endorsed by the Restatement. However, the Supreme Court's holding in *Passmore* did not work an expansion in South Carolina's law of negligent entrustment.

First, although the Supreme Court could have quoted §§ 308 and 390 of the Restatement in setting out the standard for negligent entrustment, the Supreme Court in *Passmore* chose to cite sources dealing with intoxication. Cox quotes the following language from *Passmore*: "The theory of negligent entrustment provides: 'the owner or one in control of the vehicle and responsible for its use who is negligent in entrusting it to another can be held liable for such negligent entrustment.'" *Passmore*, 275 S.C. at 621, 274 S.E.2d at 418. While this is a correct quotation from *Passmore*, Cox fails to note the full context of that decision. The ALR provision cited by the Supreme Court, 19 A.L.R.3d 1175, is entitled "Liability based on entrusting automobile ***to one who is intoxicated or known to be excessive user of intoxicants***." 19 A.L.R.3d 1175 (emphasis added). Since the Supreme Court's decision in *Passmore*, the article has been superseded by 91 A.L.R.5th 1, which bears the same title, and provides:

> The owner of a vehicle or one responsible for its use, who entrusts it to a person whom the responsible person knew,

> or should have known, ***was intoxicated at the time of the entrustment*** or whom the responsible person knew ***was a habitual user of alcohol or drugs***, may be held liable for damages caused by the person to whom the vehicle was entrusted.

91 A.L.R.5th 1 (emphasis added). Therefore, the Supreme Court's source citations in *Passmore* do not indicate an intent to expand negligent entrustment to non-intoxication cases. Rather than citing the Restatement's broader standard, the Supreme Court chose to cite a narrower standard from the American Law Reports article.

Second, the Supreme Court's focus in *Passmore* was on the ownership element of negligent entrustment. In *Passmore*, the Supreme Court addressed whether an insured who added another's automobile to his liability insurance had any insurable interest in the vehicle based the possibility of facing suit for negligent entrustment. Without considering the circumstances surrounding the accident, the Supreme Court found that the insured did not own or control the vehicle. *Passmore*, 275 S.C. at 621, 274 S.E.2d at 418. Because ownership and control are essential elements of a cause of action for negligent entrustment, the insured could not be subject to suit for the owner's operation of the vehicle and, therefore, did not have an insurable interest. *Id.* Because ownership was the only element at issue in *Passmore*, there was no need for the Supreme Court to restate the other elements of negligent entrustment. However, this silence does not indicate an intent to expand South Carolina tort law. The Supreme Court never addressed the other elements of negligent entrustment because it was not necessary for the insurable interest analysis.

Third, when faced squarely with the question of whether South Carolina recognizes the broad Restatement version of negligent entrustment, the Supreme Court

has expressly declined the opportunity to expand negligent entrustment beyond intoxication cases. To the extent that the quoted language in *Passmore* could ever have been construed to create doubt as to the scope of South Carolina's version of negligent entrustment, the Supreme Court's clear and unequivocal language in *Lydia v. Horton*, 355 S.C. 36, 583 S.E.2d 750 (2003), and *Gadson, supra*, removes any doubt. South Carolina only recognizes the tort of negligent entrustment of a vehicle in situations dealing with intoxicants.

In *Lydia*, the plaintiff asserted a first-party negligent entrustment claim when his friend allowed the drunk plaintiff to borrow his car. The drunk plaintiff then drove and wrecked in a single-vehicle accident that rendered him a quadriplegic. *Id.* at 37, 583 S.E.2d at 751. Although the Circuit Court granted defendant's motion for judgment on the pleadings, the Court of Appeals adopted the Restatement's broader version of negligent entrustment and reversed, finding that the plaintiff's negligence did not necessarily outweigh the defendant's. *Lydia v. Horton*, 343 S.C. 376, 540 S.E.2d 102 (Ct. App. 2001), *rev'd* 355 S.C. 36, 583 S.E.2d 750 (2003). The Supreme Court granted certiorari and reversed. After discussing §§ 308 and 390 of the Restatement and the illustrations provided in the Restatement's comments, the Supreme Court expressly declined to adopt the Restatement version of negligent entrustment. *Lydia*, 355 S.C. at 43, 583 S.E.2d at 754 ("We also decline to adopt sections 308 and 390 of the Restatement based on this set of facts.").

Two years later, the Court of Appeals in *Gadson ex rel. Gadson v. ECO Services of South Carolina, Inc.*, Unpublished Op. No. 2005-UP-130 (Feb. 18, 2005), again adopted the Restatement version of negligent entrustment in a case with negligible

evidence of intoxication. Once again, the Supreme Court reversed and expressly declined to adopt the Restatement's version of negligent entrustment, holding:

> According to our case law, the elements of negligent entrustment are: (1) knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking; (2) the owner knew or had imputable knowledge that the driver was likely to drive while intoxicated; and (3) under these circumstances, the entrustment of a vehicle by the owner to such a driver. However, in determining whether Respondent met her burden of proving the elements of negligent entrustment, the Court of Appeals applied Restatement (Second) of Torts §§ 308 and 390, which extend liability when the owner knows or had reason to know that such person is likely because of his youth, inexperience, or otherwise, to create an unreasonable risk of physical harm to himself and others. ***We decline to adopt sections 308 and 390 of the Restatement based on this set of facts, and we analyze this case under the elements of negligent entrustment set forth in Jackson.***

Id. at 176-77, 648 S.E.2d at 588 (emphasis added). Importantly, the Supreme Court found insufficient evidence of intoxication in the record and therefore the defendant was entitled to a directed verdict. *Id.* at 178, 648 S.E.2d at 589.

In her brief, Cox argues that the elements set forth in *McAllister*, *Jackson*, and *Gadson* only apply in cases where the driver is intoxicated. However, the Supreme Court's analysis in *Gadson* disproves her theory. *Gadson* was not an intoxication case. The Supreme Court in *Gadson* held that there was no evidence of intoxication. *Id.* at 374 S.C. at 177, 648 S.E.2d at 588-89 ("Knowledge that a driver has had a drink or two is a far cry from meeting the first element of negligent entrustment that there be knowledge of or knowledge imputable to the owner that the driver was either addicted to intoxicants or had the habit of drinking."). If South Carolina recognized the Restatement version of negligent entrustment as an alternative in cases where there was no evidence or

insufficient evidence of intoxication, then the Supreme Court's next step in the analysis should have been to analyze whether the evidence supported a cause of action for negligent entrustment under the Restatement version of negligent entrustment. However, the Supreme Court did not evaluate the evidence of negligent entrustment under the Restatement. Instead, the Supreme Court ***declined to adopt*** the Restatement and held that the defendant was entitled to a directed verdict.

Cox also cites three non-binding authorities to support her assertion that this Court should make a third attempt at adopting the Restatement. First, she quotes from Judge Anderson's *Requests to Charge – Civil*, § 28-10 (2d ed. 2009). Not only is Judge Anderson's book not binding, but the quoted charge cites §§ 308 and 390, which the Supreme Court has declined to adopt. Moreover, Judge Anderson's book also provides model charges for a first-party cause of action for negligent entrustment to an intoxicated driver. *Anderson, South Carolina Requests to Charge – Civil*, § 28-12. The Supreme Court in *Lydia* unequivocally held that South Carolina does not permit a first-party negligent entrustment case where intoxication is involved. Therefore, not only is Judge Anderson's book not binding authority, but it appears to disregard binding caselaw to the contrary.[5]

Second, Cox cites Justice Pleicones' concurrence in *Gadson* where he states that the Court should adopt §§ 308 and 390 of the Restatement as alternative methods for proving negligent entrustment. However, the applicable authority is the Supreme Court's majority opinions in two cases declining to adopt the Restatement, not a single Justice's

[5] Judge Anderson cites *Lydia* for the proposition that South Carolina does not permit first-party negligent entrustment claims.

concurrence. Moreover, the discussion in Justice Pleicones' concurrence reveals his concern about negligent entrustment in intoxication cases:

> I fear that our current formulation would not admit of liability where a person permitted an individual to drive an automobile ***knowing that the driver was intoxicated, but where there was no evidence the supplier knew the driver was a habitual drinker or addicted to alcohol.*** In my view, ***adoption of sections 308 and 390 would eliminate this loophole.***

Gadson, 374 S.C. at 179, 648 S.E.2d at 589 (emphasis added). Therefore, Pleicones's concurrence actually supports the narrower view that South Carolina continues to only apply an intoxication-based form of negligent entrustment.

Third, Cox cites an unpublished decision from the District Court of South Carolina denying summary judgment and finding that South Carolina has never explicitly held that negligent entrustment is limited to cases involving intoxicated drivers. *Becker v. Estes Exp. Lines, Inc.*, 2008 WL 701388 (D.S.C. March 13, 2009). The unpublished decision has no precedential value. Rule 268(d)(2), SCACR. Also, like the two other non-authoritative sources, there is no need to resort to secondary non-binding sources when South Carolina's Supreme Court has spoken on the issue in two published, binding opinions. Moreover, the district court in *Becker* relied upon the Supreme Court's statement in *Passmore*. However, the district court failed to discuss the Supreme Court's citation in *Passmore* to the American Law Reports article that dealt specifically with negligent entrustment in intoxication cases. The district court also ignored the plain language of the Supreme Court's holdings in *Lydia* and *Gadson* expressly declining to adopt the Restatement.

The only cause of action for negligent entrustment of a vehicle recognized in South Carolina is one involving intoxication of the driver. The Supreme Court has expressly declined multiple opportunities to expand the tort of negligent entrustment to include §§ 308 and 390 of the Restatement. Cox failed to present any evidence that Pinckney was intoxicated, addicted to intoxicants or that he had a habit of driving while intoxicated. Therefore, the Circuit Court appropriately granted St. Pierre's Motion for Summary Judgment.

CONCLUSION

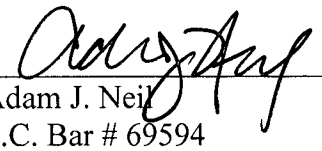
Regardless of the theory of negligent entrustment asserted in her Complaint, Cox failed to present any evidence of intoxication or that Pinckney had a habit of driving while intoxicated. In fact, Cox failed to present any evidence of Pinckney's driving habits at all. She also failed to present any evidence of St. Pierre's knowledge of Pinckney's driving habits. Because Cox bore the burden at the summary judgment stage of presenting evidence to support each element of her cause of action for negligent entrustment and she failed to do so, the Circuit Court's Order granting summary judgment should be affirmed.

Additionally, South Carolina has adopted a narrowly-tailored version of negligent entrustment of vehicles that is confined solely to cases dealing with intoxication. On two occasions this Court has attempted to broaden the scope of the tort of negligent entrustment by adopting §§ 308 and 390 of the Restatement and, on both occasions, the Supreme Court has reversed and expressly declined to adopt the Restatement's broader version of the tort. South Carolina only recognizes negligent entrustment of a vehicle when that entrustment is to an intoxicated individual or an individual who has a habit of

driving while intoxicated. Because Cox conceded that she has no evidence that Pinckney was intoxicated or addicted to intoxicants at the time of the accident, this Court should affirm.

Respectfully submitted,

MURPHY & GRANTLAND, P.A.



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PROOF OF SERVICE

I certify that I have served the Brief of Respondent on Catherine Virginia Cox by depositing a copy of it in the United States Mail, postage prepaid, on June 6, 2014, addressed to her attorney of record, Kimberly Smith, Esquire, Moss, Kuhn & Fleming, P.A., Post Office Drawer 507, Beaufort, SC 29901-0507.

June 6, 2014

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CERTIFICATE

I, Adam J. Neil, Esquire, attorney for Respondent, certify that the Brief of Respondent complies with the South Carolina Supreme Court Order of August 13, 2007 and Rule 211(b) of the South Carolina Court Rules.

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