STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

Appeal from Florence County
Court of Common Pleas
D. Craig Brown, Circuit Court Judge

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

Isabelle MacKenzie.....Appellant/Respondent,

v.

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

FINAL BRIEF OF APPELLANT/RESPONDENT

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STATEMENT OF THE CASE

This matter arises out of a logging truck upon motorcycle accident that occurred on April 23, 2016 in Florence County, State of South Carolina. [Complaint]. According to an independent eyewitness, Appellant/Respondent Isabelle MacKenzie ("MacKenzie") was traveling Southbound on her motorcycle when Charles Brandon Barr ("Mr. Barr") allegedly was traveling in the wrong lane. R. p. 133, l. 15-19; R. p. 134, l. 6-15; R. p. 143, l. 21 – 16. The eyewitness testified that as Mr. Barr began to move the logging truck into the correct lane, Mr. Barr collided with a vehicle driven by Arthur Lee Gregg ("Gregg"). R. p. 135, l. 9 – p.136, l. 4. Moments after the collision with Mr. Gregg, as Mr. Barr attempted to further move the logging truck into the correct lane, MacKenzie collided with the logging truck and sustained injuries. R. p. 133, l. 15- 19; R. p. 134, l. 21 – R. p. 135, l. 16;

MacKenzie thereafter filed a Summons and Complaint in the Florence County Court of Common Pleas against Mr. Barr, individually and as an employee/agent of C&B Logging, LLC, and C&B Logging LLC on August 4, 2016. R. p. 4 - 11. The matter was assigned case number 2016-CP-21-1831. *Id.* In her Complaint, MacKenzie alleged causes of action for negligence as against Mr. Barr, and negligence and negligent hiring, training, supervision, and entrustment against C&B Logging, LLC (the "employer") *Id.* MacKenzie further prayed for punitive damages. *Id.* On August 26, 2016, Mr. Barr and C&B Logging, LLC filed their Answer, denying the material allegations of the Complaint. R. p. 14 – 20. Mr. Barr and C&B Logging, LLC further asserted comparative negligence as an affirmative defense. *Id.*

The case came to trial on April 23, 2018 before the Honorable D. Craig Brown. During the trial of the case, MacKenzie sought to introduce into evidence and elicit testimony regarding Mr. Barr's prior criminal convictions and history. R. p. 31, l. 6 – p. 37, l. 7; p. 77, l. 9 - p. 90, l. 19. The circuit court denied MacKenzie's request to do so and she was barred from discussing those

issues during the trial of the case. R. p. 110, l. 14 – p. 111, l. 4.

On April 26, 2018, the jury issued a verdict finding that Mr. Barr was sixty (60) percent at fault and C&B Logging, LLC forty (40) percent at fault. R. p. 1 – 2. The jury awarded MacKenzie $179,678.49 in actual damages. *Id.* The jury declined to award punitive damages. *Id.*

On May 29, 2018, Mackenzie filed her Notice of Appeal. Mr. Barr and C&B Logging, LLC filed their notice of cross-appeal on June 1, 2018, and their amended notice of cross-appeal on June 7, 2018.

STATEMENT OF FACTS

On the night of April 23, 2016 Isabelle MacKenzie was traveling Southbound on SC-51 on her motorcycle. R. p. 133, l. 15 – 19; p. 144, l. 6 – 15; p. 144, l. 21 – p. 145, l. 16. Moments earlier, Brandon Barr, who was operating a logging truck owned by C&B Logging, LLC and traveling Northbound on SC-51, was involved in a collision with another driver, Mr. Gregg. R. p. 135, l. 9 – p. 136, l. 4. It is alleged that, at the time of the collision, Mr. Barr was in the incorrect lane. *Id.* MacKenzie alleges that just after the collision with Mr. Gregg, Mr. Barr began driving the logging truck from the left lane to the right lane. R. p. 133, l. 15 – 19; p. 134, l. 6 – 15; p. 134, l. 21 – p. 135, l. 16. It is MacKenzie's allegation and the testimony of the independent eye-witness that she then collided with the logging truck operated by Mr. Barr as the logging truck attempted to move into the correct lane. *Id.*

Mr. Barr has an extensive criminal history. R. p. 77, l. 11 – p. 90, l. 20. This includes, but is not limited to, an indictment for possession with intent to distribute marijuana and an indictment for possession with intent to distribute cocaine base. *Id.* The indictment for PWID cocaine base was pled down to a general conspiracy charge, and the indictment for PWID marijuana was pled down to possession of marijuana. *Id.* MacKenzie sought to question Mr. Barr and, potentially,

the corporate representative for C&B Logging, LLC, regarding said criminal indictments and pleas. R. p. 31, l. 6 – p. 103, l. 7; p. 77, l. 9 – p. 90, l. 20. Notably, Plaintiff's counsel sought to question the Defendants regarding the indictments and pleas for the purpose of proving her case for negligent supervision, retention, hiring, and entrustment and imposing punitive damages. *See* R. p. 110, l. 14 – p. 111, l. 4.

The circuit court denied Plaintiff's request to admit the above criminal indictments and pleas into evidence or question Mr. Barr or a corporate representative of C&B Logging, LLC regarding the same. In doing so, the circuit court found that the probative value as it relates to those criminal matters was outweighed by the prejudicial effect, particularly when they were not to be used for impeachment purposes. R. p. 110, l. 14 – p. 111, l. 4.

STANDARD OF REVIEW

"The admission or exclusion of evidence is left to the sound discretion of the trial judge, whose decision will not be reversed on appeal absent an abuse of discretion." *State v. Saltz,* 346 S.C. 114, 121, 551 S.E.2d 240, 244 (2001). An abuse of discretion occurs when the conclusions of the trial court are based on an error of law. *State v. McDonald,* 343 S.C. 319, 325, 540 S.E.2d 464, 467 (2000). A trial judge has considerable latitude in ruling on the admissibility of evidence and his rulings will not be disturbed absent a showing of probable prejudice. *State v. Kelley,* 319 S.C. 173, 177, 460 S.E.2d 368, 370 (1995). The standard of review is limited to determining whether the trial court's ruling is supported by any evidence. *State v. Breeze,* 379 S.C. 538, 543, 665 S.E.2d 247, 250 (Ct. App. 2008).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN REFUSING TO ADMIT EVIDENCE OF DEFENDANT BARR'S CRIMINAL HISTORY TO PROVE PLAINTIFF'S CLAIMS FOR NEGLIGENT HIRING, TRAINING, SUPERVISION, AND ENTRUSTMENT AND IMPOSE PUNITIVE DAMAGES AGAINST DEFENDANT C&B LOGGING, LLC

Plaintiff brought causes of action against C&B Logging, LLC for negligence as well as negligent hiring, training, supervision, entrustment, and retention, and prayed for punitive damages. R. p. 4 – 11. As stated below, because Mr. Barr's criminal history was relevant to the above causes of action and to the issue of whether to impose punitive damages against C&B Logging, LLC, the circuit court committed reversible error by failing to allow the jury to consider that essential evidence.

A. Mr. Barr's Criminal History was Relevant to Proving Plaintiff's Causes of Action Against C&B Logging LLC and Punitive Damages, and the Probative Value of Said Evidence was not Outweighed by Potential Prejudice to the Defendant

"In circumstances where an employer knew or should have known that its employment of a specific person created an undue risk of harm to the public, a plaintiff may claim that the employer was itself negligent in hiring, supervising, or training the employee, or that the employer acted negligently in entrusting its employee with a tool that created an **unreasonable risk of harm to the public**." *James v. Kelly Trucking Co.*, 377 S.C. 628, 631, 661 S.E.2d 329, 330 (2008)(emphasis added). Because these actions sound in negligence, the standard to be applied is one of ordinary care. *See id.* "Negligent hiring cases 'generally turn on two fundamental elements—knowledge of the employer and foreseeability of harm to third parties.' " *Kase v. Ebert,* 392 S.C. 57, 707 S.E.2d 456, 459 (2011) (quoting *Doe v. ATC, Inc.*, 367 S.C. 199, 624 S.E.2d 447, 450 (2005)). Put differently, the issue of an employer's knowledge concerns the employer's awareness that the employment of a specific individual created a risk of harm to the public.

Williams v. Preiss–Wal Pat III, LLC, 17 F.Supp.3d 528, 538 (D.S.C. 2014). Thus, to render a verdict on the negligent hiring, supervision, and training causes of action, the jury must determine what information the employer knew or should have known regarding the employee's past conduct and actions. Without reviewing that evidence, a jury cannot wholly determine the risk of harm the employee presents to the public or judge the egregiousness of the employer's action or inactions.

Here, the jury was entitled to hear only part of the story: a story that omitted Mr. Barr's criminal history and instead contained only a smattering of his numerous driving infractions. The circuit court took away from the jury essential evidence regarding how C&B Logging, LLC created an unreasonable risk of harm to the public by putting Mr. Barr behind the wheel of a logging truck.

Green v. Hewett is instructive. 305 S.C. 238, 407 S.E.2d 651 (1991). In *Green*, the trial court excluded testimony that the adverse driver was convicted of trafficking marijuana in 1983 as being unduly prejudicial in his trial regarding the motor vehicle collision. The collision occurred in 1991. *Id.*, 407 S.E.2d at 652. The South Carolina Supreme Court deemed the trial court's decision reversible error because the adverse driver's prior crime was a "breach of [his] duty to his fellow man and society as a whole." *Id.* The fact that the case was decided when South Carolina courts were tasked with determining which crimes constituted those of "moral turpitude" does not render *Green* inapplicable to the present matter. Indeed, *Green* stands in part for the proposition that the driver's crime of trafficking marijuana harmed not only the public (as is required to prove a claim of negligent hiring, supervision, or training), but harmed society as a whole. *Id.* at 652-53. Moreover, the harm to society and the public was *one single instance* of trafficking drugs – an incident that happened nearly eight (8) years prior to the collision that was the subject of the civil action. *Id.* at 652.

Here, Mr. Barr's drug-related offenses were not so remote in time, but instead occurred in 2011 and 2012, and during the period in which he was employed by C&B Logging, LLC. R. p. 77, l. 11 – p. 90, l. 20. Without having the ability to view exactly what kind of unreasonable danger C&B Logging, LLC unleased upon the public by allowing Mr. Barr to drive a 60,000 pound logging truck despite having convictions that harmed society as a whole, the jury was unable to properly apportion liability or determine whether to impose punitive damages upon the employer. Instead, the jury only was allowed to consider selected driving infractions Mr. Barr incurred.

The circuit court based its decision to exclude Mr. Barr's criminal convictions and charges on Rule 403, SCRE. Specifically, the circuit court ruled that those charges are "more clearly prejudicial than probative." R. p. 110, l. 15 – p. 111, l. 4. When read in conjunction with *Green*, *supra*, the case of *James v. Kelly Trucking Co.* shows the circuit court's decision to be error. In *James,* the defendant argued that public policy precluded the pursuit of an independent negligent hiring, training, supervision, or entrustment claim against an employer when the employer admits vicarious liability. *James*, 661 S.E.2d at 331. Defendant was concerned that a plaintiff pursuing those causes of action would be allowed to show a jury "highly prejudicial" evidence that would "lead to a jury verdict driven more by emotion than by law." *Id.* Specifically, defendant worried that evidence such as "a prior driving record, **an arrest record**, or other records of past mishaps or misbehavior by the employee" would improperly inflame a South Carolina jury. *Id.* (emphasis added). The South Carolina Supreme Court disagreed, finding that such a paternalistic view of the law was improper, stating "the argument that an independent cause of action against an employer must be precluded to protect the jury from considering prejudicial evidence presumes too much." *Id.*

To be sure, when *James* and *Green* are taken together, it is clear that an arrest record regarding drug charges evidences a harm to the public and society – even when the criminal charges arose long before the subject motor vehicle collision and despite the fact that the criminal charges were unrelated to the cause of the collision. Moreover, *Green* shows that an eight (8) year old conviction for a drug related charge is not unduly prejudicial to a defendant in a civil action involving a motor vehicle collision. *Green*, 407 S.E.2d at 652

Here, there can be no doubt that the evidence MacKenzie sought to introduce would not lead to unfair prejudice, confusion of the issues, or mislead the jury. Instead, the excluded evidence would show the jury precisely how C&B Logging, LLC endangered the public: not by just putting a man with driving infractions behind the wheel, but by entrusting a dangerous instrumentality to a man whose criminal convictions could rightfully be considered a harm against society as a whole. Without being provided the benefit of such evidence, the jury could not accurately apportion fault to the employer. Moreover, the exclusion of said evidence deprived the jury of essential information that could have led to the imposition of punitive damages.

The circuit court further based its ruling partly on the proposition that *Green* stands for the tenet that the introduction of criminal offenses can be used only for the purposes of impeaching a witness. R. p. 110, l. 15 – 25. In doing so, the circuit court failed to consider that whether or not Mr. Barr lied about his driving history was wholly immaterial to the fact that C&B Logging, LLC had a duty to the public to ensure its vehicles were operated in a safe manner by drivers that did not pose a threat to the public. The evidence MacKenzie sought to admit went squarely to her causes of action for negligent hiring, training, supervision, and entrustment, as well as the imposition of punitive damages, and therefore was admissible.

CONCLUSION

For the reasons set forth herein, the Appellant/Respondent respectfully requests that this Court reverse the jury's verdict and remand for a new trial.

Respectfully submitted,

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August 6, 2019

Greenville, SC

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CERTIFICATE OF COUNSEL

Counsel for Appellant/Respondent Isabelle MacKenzie certifies that the Final Brief served and filed herewith complies with Rule 211(b), SCACR.

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