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

APPELLANTS' FINAL BRIEF OF RESPONDENTS/APPELLANTS
(Cross-Appeal)

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STATEMENT OF ISSUES ON APPEAL

1. DID THE CIRCUIT COURT ERR IN ALLOWING THE PRIOR DRIVING HISTORY OF CHARLES BRANDON BARR TO BE ADMITTED INTO EVIDENCE TO PROVE APPELLANT'S CLAIMS FOR NEGLIGENT HIRING, TRAINING, SUPERVISION, AND ENTRUSTMENT AS A BASIS TO IMPOSE PUNITIVE DAMAGES AGAINST C&B LOGGING, LLC?

STATEMENT OF THE CASE

This matter arises out of a logging truck accident that occurred on April 23, 2016 in Florence County, South Carolina. Plaintiff filed a Summons and Complaint in the Florence County Court of Common Pleas against Brandon Barr, individually and as an employee/agent of C&B Logging, LLC, and C&B Logging, LLC ("Respondents/Appellants" or "Defendants") on August 4, 2016, CA No.: 2016-CP-21-1831. Plaintiff alleged causes of action for negligence against Mr. Barr and negligence, negligent hiring, training, supervision, and entrustment against C&B Logging, LLC. Plaintiff also prayed for punitive damages. Defendants filed an Answer on August 26, 2016, denying the allegations set forth in the Complaint. Defendants also asserted the affirmative defense of comparative negligence.

The case was tried on April 23, 2018 before the Honorable D. Craig Brown. The Honorable Alex Kinlaw was also present. On April 26, 2018, the jury issued a verdict finding that Brandon Barr was sixty (60%) percent at fault and C&B Logging, LLC was forty (40%) percent at fault.(See Verdict Form) The jury awarded Respondent/Appellant $179, 678.49 in actual damages. The jury declined to award punitive damages.

Plaintiff filed a Motion for New Trial Nisi Additur or in the Alternative, New Trial Absolute on May 8, 2018 and subsequently withdrew this Motion on May 8, 2018 after missing the filing deadline as set forth by Judge Brown on April 26th at the close of trial (Supp R. p. 2, line 16 to p. 3, line 3).

On May 29, 2018, Plaintiff filed her Notice of Appeal. Defendants filed their notice of cross-appeal on June 1, 2018, and an amended notice of cross-appeal on June 7, 2018.

STANDARD OF REVIEW

We ask that only to the extent this Court reverse the Trial Court, should they review this cross-appeal.

In an action at law, on appeal of a case tried by a jury, the jurisdiction of the appellate court extends merely to the correction of errors of law, and a factual finding by the jury will not be disturbed unless a review of the record discloses there is no evidence which reasonably supports the jury's findings. Erickson v. Jones Street Publishers, L.L.C., 368 S.C. 444, 464, 629 S.E.2d 653, 663–64 (2006); R & G. Const. Inc., v. Lowcountry Reg'l Transp. Auth., 343 S.C. 424, 431, 540 S.E.2d 113, 117 (Ct.App.2000) cert. dismissed (July 22, 2002) rehearing denied (Aug 21, 2002). Townes Assocs., Ltd. v. City of Greenville, 266 S.C. 81, 85, 221 S.E.2d 773, 775 (1976).

When reviewing a motion for directed verdict or JNOV, an appellate court must employ the same standard as the trial court. Law v. S.C. Dep't of Corr., 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); Proctor v. Dep't of Health and Envtl. Control, 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct.App.2006) (citing Elam v. S.C. Dep't of Transp., 361 S.C. 9, 27–28, 602 S.E.2d 772, 782 (2004)); The Huffines Co., L.L.C. v. Lockhart, 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct.App.2005)

On appeal from an order denying a directed verdict, an appellate court views the evidence and all reasonable inferences in a light most favorable to the non-moving party. Swinton Creek Nursery v. Edisto Farm Credit, 334 S.C. 469, 476, 514 S.E.2d 126, 130 (1999); Mullinax v. Brown Amusement, 326 S.C. 453, 456, 485 S.E.2d 103, 105 (Ct.App.1997) aff'd 333 S.C. 89, 508 S.E.2d 848 (1998). "The appellate court must determine whether a verdict for the opposing party would be reasonably possible under the facts as liberally construed in his favor." Jones v. General Electric Co., 331 S.C. 351, 356, 503 S.E.2d 173, 176 (Ct.App.1998).

This Court must reverse the trial court's ruling on a directed verdict motion only if no evidence exists to support the ruling, or if the decision was controlled by an error of law. Pye v. Estate of Fox, 369 S.C. 555, 563, 633 S.E.2d 505, 509 (2006); McMillan v. Oconee Mem'l Hosp., Inc., 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006); Clark v. S.C. Dep't of Pub. Safety, 362 S.C. 377, 382–83, 608 S.E.2d 573, 576 (2005); Swinton Creek Nursery, 334 S.C. at 477, 514 S.E.2d at 130; Welch v. Epstein, 342 S.C. 279, 300, 536 S.E.2d 408, 418 (Ct.App.2000). 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. Erickson, 368 S.C. at 463, 629 S.E.2d at 663.

STATEMENT OF THE FACTS

On the evening of April 23, 2016, Brandon Barr was operating a C&B logging truck northbound on Pamplico Highway (SC-51) when he pulled over to address a low tire on his trailer. (R. p. 46, line 7-p. 47, line 3). Due to construction barrels along the highway for impending changes to the roadway and a ditch on the right, he pulled over to his left hand side, in front of a trailer park entrance closest to a northbound curve to the left. (R. p. 48, lines 3-18; p. 49, lines 16-21; p. 65, line 21–p. 66, line 16; p. 76, lines 12-15). Unable to obtain the assistance desired he began to pull back onto the highway to continue northbound. He maintained that no traffic was visible in either direction as he began to cross the southbound the lane. (R. p. 50, lines 18-25). Numerous witnesses confirmed that southbound traffic rounded a dark, "blind curve" to the right as they approached the trailer park, with a yellow curve sign beforehand. (R. p. 64, lines 4-7; p. 69, line 17; p. 64, line 18-p. 65, line 4). While at least a portion of the logging trailer was still crossing the southbound lane, a pickup truck driven by a third-party rounded the southbound curve and struck the front axle on the trailer's driver side. (R. 51, lines 6-9; p. 52, line 23-p. 53, line 4).

Barr believed that his trailer would've fully cleared the southbound land in another five seconds; at some point soon thereafter Appellant rounded the corner on her motorcycle. (R. p. 46, line 15–p. 47, line 3). The responding Trooper was notified of the incident around 10:30 p.m. (R. p. 55, lines 23-25) and recalled that, per his notes from his accident investigation, Appellant informed him she had laid her bike down to avoid the collision and there was no collision between the tractor-trailer and the motorcycle. (R. p. 57, line 15–p. 58, line 21; p. 59, lines 3-5). At trial, Appellant recalled seeing "trees sideways," attempting to avoid the "trees" and then laying down in the mud. (R. p. 29, lines 2-18; p. 30, lines 11-13; p. 31, line 2–p. 32, line 4). Barr denied Appellant struck the trailer. (R. p. 54, lines 4-5). Joshua Ryan, an alleged independent witness traveling behind Appellant, provided testimony that Appellant swerved to avoid both of the trucks involved in the initial accident, leaving the roadway into the grass, likely slipping in the mud. (R. p. 66, lines 15-16; p. 67, line 22–p. 68, line 15; p. 70, lines 6-19). While the Trooper claimed the speed limit was 55 at the time and Appellant told him she was traveling at the speed limit, Mr. Ryan believed the speed limit was 50 -55 mph, but that all three vehicles were traveling together in a line at 50 to 55 mph, though he may've tapped his brakes when he saw the caution sign. (R. p. 63, line 16–p. 65, line 2; p. 65, lines 12-18; p. 71, line 6–p. 72, line 3)

The accident was within a mile or two of Appellant's home. Appellant's husband and daughter visited the scene together and Appellant assured her daughter at the scene she was OK (R. p. 73, lines 14-21; p. 74, lines 16-21; p. 75, lines 11-13). Appellant's accident was written on a separate accident report and did not even mention Barr since the Trooper knew of no contact between the vehicles (R. p. 19, lines 14-19; p. 20, lines 13-17; p. 58, line 22–p. 59, line 8; p. 78, line 25–p. 79, line 2).

Soon after the accident all the trees and bushes contributing to the blind curve were removed, the road has since been widened, the entrance to the trailer park blocked with Jersey barriers, and the speed limit reduced to 45 mph. (R. p. 56, lines 15-18; p. 76, line 8–p. 78, line 1).

The Trooper noted his satisfaction from his investigation that there was no evidence of alcohol or drug use involved. (R. p. 60, lines 10-12). In addition, he had the DOT/State Transport police respond and agreed he had no knowledge of any issue regarding lighting on the logging truck, the load being overextended or any safety issue with regard to the logging truck and trailer. (R. p. 61, line 13–p. 62, line 8).

ARGUMENT

I. THERE IS NO EVIDENCE TO SUPPORT PLAINTIFF'S CAUSE OF ACTION FOR NEGLIGENT HIRING, TRAINING, AND SUPERVISION

a. *South Carolina does not recognize negligent hiring, training, and supervision when the employee is acting within the course and scope of his employment.*

South Carolina recognizes the independent tort of negligent hiring, training, and supervision against an employer under certain limited circumstances. See James v. Kelly Trucking Co., 661 S.E.2d 329 (S.C. 2008). Plaintiff has failed to put forward evidence sufficient to establish the requisite elements under the appropriate test and therefore Defendants are entitled to directed verdict.

It is undisputed Brandon Barr was acting within the course and scope of his employment at all times relevant in this lawsuit (R. p. 37, line 8-10). The Restatement (Second) of Torts § 317 test set forth in James v. Kelly Trucking is therefore inapplicable to these circumstances. *See* Restatement (Second) of Torts § 317, cmt. a ("The rule states in this Section is applicable only when the servant is acting outside the scope of his employment."); see also Colleton v. Charleston

Water Sys., 225 F.Supp.3d 362, 372–373 (D.S.C. 2016).[1] Insofar as South Carolina has only recognized a negligent hiring, supervision, and training cause of action under the limited circumstances of Restatement (Second) of Torts § 317, Plaintiff's cause of action fails as a matter of law.

"The appropriate standard for negligent hiring, training, or supervision by an employer of an employee or agent under circumstances not involving an employee acting outside his or her course of employment is Restatement (Second) of Torts § 213. See Colleton, 225 F.Supp.3d at 372–373; see also Restatement (Second) of Torts § 317 cmt. a. Our research fails to reveal any binding authority wherein a South Carolina appellate court has adopted this test, however, and accordingly Respondents/Appellants contend it has not yet been recognized in South Carolina as a viable cause of action against an employer. Insofar as this is not a viable theory of liability recognized under South Carolina law, Respondents/Appellants are entitled to judgment in its favor as a matter of law with respect to the negligent hiring and retention cause of action. Mackenzie presented no expert testimony in support of their negligent entrustment or negligent hiring, training, and supervision causes of action. These issues fall outside common knowledge and are not within the scope of a layperson's knowledge and therefore expert testimony is required. Having failed to present any such expert evidence, these causes of action fail as a matter of law and directed verdict should have been granted.

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[1] Defendants acknowledge that the facts in James v. Kelly Trucking involved allegations that the employee was negligent while engaged in the course and scope of his employment. However, in Kelly Trucking the Supreme Court of South Carolina did not squarely address whether the tort of negligent hiring, training, and supervision could apply under such circumstances, even acknowledging Comment a Restatement section 317 supports such a distinction between cases involving conduct within or outside the scope of the employee's work for the employer. *See* Kelly Trucking, 661 S.E.2d at n.1.

Commercial truck driver hiring, training, and supervision is a specific area of expertise which requires extensive knowledge of the federal hiring, training, and safety regulations in order to fully judge whether a party has complied with the necessary procedures. There are hundreds of pages of statutes and regulations governing the hiring of a truck driver. Mackenzie was unable to point to a single violation of any of these statutes. A layperson has no knowledge of these specialized regulations. Despite this, Mackenzie has failed to provide any expert to review C&B Logging's hiring, training, and supervision procedures and/or policies and to determine if they comply with the industry standards with respect to Barr. Without an expert in this highly specialized area, there is no way a jury can determine whether C&B Logging breached any applicable standard of care under the circumstances of this case. Based upon the lack of expert testimony, Mackenzie has failed as a matter of law to assert a viable claim for negligent entrustment and negligent hiring, training, and supervision.

Mackenzie cannot be allowed to have both sides of the argument. In one breath, Mackenzie would have you believe that to operate a logging truck similarly to that involved in this accident, a driver needs to exercise a higher standard of care but in the second breath, that alleged higher standard of care is the same as that need to operate a standard passenger vehicle. Mackenzie cannot be allowed to assert the law in that way which fits them best. The Court must act fairly. In a case involving a portrayed elevated standard of care (e.g. the hiring of a truck driver to operate a logging truck, the standard of care is not and cannot be that of common standard of care) an expert is required in instances such as this one to determine the applicable standard of care.

CONCLUSION

For the foregoing reasons, Appellants pray that this Court reverse the finding of the trial court and grant directed verdict in favor of Appellant as to the negligent hiring, training, retention and entrustment claims.

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Certificate of Counsel

Counsel for Respondents/Appellants C&B Logging and Charles Brandon Barr certifies that the Final Briefs served and filed herewith comply with Rule 211(b), SCACR.

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