IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2017-002520

Maurice Dawkins ..... Appellant,

v.

James A. Sell ..... Respondent,

APPELLANT'S FINAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. DID THE LOWER COURT ERR IN DENYING DAWKINS' MOTIONS FOR DIRECTED VERDICT AND JNOV ON SELL'S AFFIRMATIVE DEFENSE OF INTERVENING AND SUPERSEDING NEGLIGENCE WHEN SELL FILED A CROSS-CLAIM AND ALLEGED HE WAS "DIRECTLY AND PROXIMATELY" INJURED BY OWENS' CONDUCT, THEREBY ADMITTING OWENS' CONDUCT WAS FORESEEABLE?

II. DID THE LOWER COURT ERR IN DENYING DAWKINS' MOTIONS FOR DIRECTED VERDICT AND JNOV ON THE ISSUE OF SELL'S NEGLIGENCE WHEN HE ADMITTED RESPONSIBILITY FOR OVERTURNING THE TRUCK THAT BLOCKED BOTH SOUTHBOUND LANES AND HE FAILED TO PUT OUT FLARES OR OTHER WARNING DEVICES AS REQUIRED BY SOUTH CAROLINA LAW?

VI. DID THE LOWER COURT ERR IN DENYING DAWKINS' MOTION FOR NEW TRIAL ON THE BASIS THAT SELL'S COUNSEL SHOULD NOT HAVE BEEN PERMITTED TO PUBLISH DAWKINS' INTERROGATORY RESPONSE IDENTIFYING A TRUCKING EXPERT WHEN THE ISSUE SURROUNDING OWENS AND PIERCE NATIONAL'S NEGLIGENCE WAS NOT RELEVANT TO SELL'S NEGLIGENCE?

VII. DID THE LOWER COURT ERR IN CHARGING THE JURY ON INTERVENING AND SUPERSEDING NEGLIGENCE WHEN SELL ALLEGED OWENS' ACTIONS WERE FORESEEABLE IN HIS CROSS-CLAIM?

V. DID THE LOWER COURT ABUSE ITS DISCRETION IN DENYING DAWKINS' MOTION FOR NEW TRIAL ON THE BASIS THAT SELL EXCEEDED THE BOUNDS OF THE EMPTY CHAIR DEFENSE?

STATEMENT OF THE CASE

This appeal arises from a series of events that occurred in the early morning hours of August 21, 2010, on Interstate 95 ("I-95") near Yemassee, South Carolina. Respondent, James Sell ("Sell") was helping his son's family move from Columbus, Ohio, to Savannah, Georgia, and was driving a Budget Rental truck ("Truck") when he lost control and overturned the Truck, blocking both Southbound lanes of I-95. Appellant, Maurice Dawkins ("Dawkins"), and the Sparkman family stopped to help Sell and his twelve-year-old grandson out of the Truck. After Sell and his grandson were out of the Truck, a tractor-trailer driven by Dennis Owens ("Owens") and owned by Pierce National, Inc., ("Pierce National") collided with the Truck, injuring Dawkins, Sell, and several members of the Sparkman family.

Dawkins filed his Amended Summons and Complaint with the Hampton County Court of Common Pleas on July 1, 2011, against Sell, Owens, and Pierce National. (R. pp. 60-63) Dawkins alleged that Sell was negligent in the following particulars:

a) In failing to keep a proper lookout;
b) In failing to use the degree of care and caution that a reasonable prudent person would have used under the circumstances that existed;
c) In failing to keep the vehicle under proper control;
d) In driving too fast for conditions then and there existing; and
e) In causing an accident that left a vehicle extending into a lane of travel, which resulted in motorists stopping to render assistance, and contributed to Plaintiff's injuries

(R. p. 61, ¶ 11).

On August 3, 2011, Sell filed an Answer and asserted a Cross-Claim against Owens and Pierce National. (R. pp. 50-57). The Answer generally denied the allegations and asserted affirmative defenses. (R. pp. 50-57). The Cross-Claim alleged that "as ***a direct and proximate result*** of the acts complained of (committed by Owens and Pierce National) in Paragraph #34

(sic) above, the Defendant, Sell suffered, and continues to suffer, damages . . . ." (R. p. 56, ¶ 33) (emphasis added).

Following a period of discovery, Dawkins resolved his claims against Owens and Pierce National.[1] The case was tried in the Hampton County Court of Common Pleas before the Honorable Roger M. Young, Sr. on October 9-12, 2017. During the trial Dawkins moved for a directed verdict on the issues of Sell's intervening negligence affirmative defense based on the allegations in his cross-claim that Owens negligence "directly and proximately" caused his injuries and on the issue of Sell's negligence for overturning the Truck and failing to put out flares or warning signs as required by South Carolina law. The lower court denied Dawkins' directed verdict motions and subsequently charged the jury on intervening negligence. The jury returned a defense verdict. (R. p. 9).

On October 23, 2017, Dawkins filed a Motion for Judgment Notwithstanding the Verdict and For New Trial pursuant to Rules 50(b), 52(b), 59, SCRCP, on several grounds including the failure of the lower court to grant a directed verdict on the issues of intervening negligence and Sell's negligence, in addition to several grounds for a new trial. (R. pp. 23-26). In an Order filed November 20, 2017, the lower court denied Dawkins' motion. (R. pp. 1-8). Dawkins timely filed his Notice of Appeal on December 8, 2017. (R. pp. 630-631).

FACTS

I. SELL'S TRIP FROM COLUMBUS, OHIO, TO YEMASSEE, SOUTH CAROLINA

On August 18, 2010, Sell rented a Budget Rental truck in Columbus, Ohio to help his son, Eric, and his family move. (R. p. 300). The Truck was rented in Sell's name. (R. p. 301).

[1] The claims of Dawkins, Sell, Kristen Starnes Sparkman, Josh Sparkman, and Ted Sparkman against Owens and Pierce National were resolved out of the available liability insurance coverage for Pierce National.

Sell had never driven a truck that big. (R. p. 301; 579; 580). When he got the truck, Sell noticed it had a tendency to wander as there was some play in the steering wheel. (R. p. 301). He thought the ability of the Truck to wander was normal and that he needed to be careful when he drove the Truck. (R. p. 301). Sell did not go back to Budget and tell the employees that he felt the Truck presented a hazard. (R. p. 302).

Sell had numerous health issues at that time. (R. pp. 302-303). He took Tramadol, Cymbalta, Voltaren, and had Lidoderm patches on August 19, 2010. (R. pp. 303-304). On July 30, 2009, Sell had a functional capacity exam where he reported a history of falling two times in the prior six months and had a decreased ability to focus due to his medications. (R. p. 305). At that time the longest he could sit for any eight-hour period was four hours. (R. p. 305).

On August 19, 2010, Sell helped his son load the Truck. (R. pp. 305-306). Some of the items loaded included a piano, washing machine and dryer, and boxes. (R. p. 306). Loading of the Truck ended around 7:00 or 8:00 in the evening. (R. p. 307). Sell went to bed that night around 9:30 or 10:00 pm and awoke the following morning – Friday – around 7:30 or 8:00 am in Ontario, Ohio. (R. p. 307). Ontario is about six or eight miles from Crestline where Sell's son lived. (R. p. 308). Crestline is approximately sixty miles north of Columbus. (R. p. 308). When he got to Eric's house that morning, Sell helped finish packing the Truck. (R. p. 308). Sell left Eric's house in the Truck around 11:30 am or 12:00 pm in Crestline on August 20th. (R. p. 308).

Sell drove the Truck for about four hours to Charleston, West Virginia, where the alternator went out in his son's vehicle. (R. p. 309). The Sell family was stuck in Charleston for about two hours. (R. p. 309). Eric did most of the work in replacing the alternator but Sell helped. (R. p. 309). After getting the alternator fixed, Sell left Charleston around 5:30 that evening. (R. p. 310). Other than stopping for fuel or to go to the bathroom, Sell drove

continuously except for two twenty-to-thirty-minute rest breaks. (R. p. 311). Sell intended to drive straight through to Savannah, his destination, and never contemplated stopping or pulling over to spend the night. (R. p. 321).

II. SELL'S LOSING CONTROL AND OVERTURNING THE TRUCK

Sell got to Yemassee on I-95 around 3:50 am, and his twelve-year-old grandson was asleep in the passenger seat of the Truck. (R. p. 151; 312). It was raining fairly hard. (R. p. 312). Sell was in the right-hand lane of I-95 and, while he was driving South, he felt his right front tire "drop" into the emergency lane. (R. pp. 312-313). Sell tried to get the Budget Truck under control but it fishtailed and overturned. (R. p. 313). The Budget Truck came to rest on its drivers' side blocking both travel lanes. (R. p. 167; 210; 313). Oncoming traffic traveling South would first see the bottom of the truck as the headlights were facing the right shoulder and taillights were pointed to the median. (R. pp. 149-150; 160; 211-212; 313).

III. THE SPARKMANS ALMOST HITTING THE OVERTURNED TRUCK AND STOPPING TO HELP

Della and Ted Sparkman, along with their son, Josh, and his then-fiancé, Kristen Starnes, were traveling South on I-95 heading to Florida for a cruise when Sell overturned his Truck. (R. p. 142). Josh described the conditions as a steady rain. (R. p. 143). Kristen testified that it was "very hard to see" and that the overturned Truck blocking both Southbound lanes was a "brick wall" that they almost hit themselves. (R. p. 156; 159). The Sparkmans were the first ones on the scene. (R. p. 159). Della was driving and after hitting the brakes to avoid colliding with Sell's Truck, she stopped about 100-150 feet past the Truck. (R. pp. 144-146). Josh, Kristen, and Ted ran back to help get Sell and his grandson out of the Truck. (R. p. 146).

IV. DAWKINS STOPS TO HELP

On August 21, 2010, Dawkins was headed to Miami to visit a friend and her husband. (R. p. 208). Dawkins was born and raised in Kingston, Jamaica. (R. p. 197). After he completed the equivalent of high school in Jamaica, Dawkins worked in law enforcement. (R. pp. 199-200). In 1989, he moved to the United States and eventually became a United States citizen. (R. p. 201). He worked as a driver for Boston Coach in Boston for a period of time while also working as an undercover agent assisting the federal government infiltrate gangs and drug dealers. (R. pp. 202-204). After retiring from law enforcement, Dawkins moved to South Carolina in 2003 and started a landscaping business. (R. p. 203).

Dawkins left Columbia around 2:00 am on August 21 to avoid traffic. (R. p. 209). Around the I-26, I-95 interchange it started raining. (R. p. 209). Dawkins was behind Sell and saw the Truck swerve, swerve back, and flip on its side before coming to rest blocking both Southbound lanes. (R. p. 209). Dawkins chose to stop and help as it looked like a bad wreck. (R. pp. 209-210). Dawkins went around the Truck and went down on the left side of the road to park and put on his hazard lights. (R. pp. 209-210).

V. SELL'S FAILURE TO PUT OUT FLARES OR OTHER WARNING DEVICES

After getting out of the Truck, Sell was bleeding, looked scared, and appeared as if he was going to pass out. (R. p. 149; 163). Dawkins described it as a "daze." (R. p. 213). Sell admitted he was fatigued to some degree and accepted responsibility[2] for overturning the Truck that blocked both Southbound lanes. (R. pp. 314-317). Sell admitted to Lance Corporal Derrick Rush with the South Carolina Highway Patrol that he had been on the road for a long time and had trouble controlling the Truck before it overturned. (R. pp. 135-136).

[2] Although not getting injured in the initial overturning of the Truck, Sell's grandson made a claim against Sell that was subsequently resolved. (R. p. 316).

Sell's Truck contained a US DOT number that required certain safety equipment and warning devices. (R. p. 133; 579; 580). It is illegal to stop and block lanes of an interstate. (R. pp. 132-135; 138). Sell did not put out any cones or reflective devices after overturning the Truck as required by South Carolina law. (R. p. 240; 318-319).

Anywhere from five to ten minutes after Sell overturned his Truck, a tractor-trailer driven by Owens collided with the Truck. At the time of this collision, there was no warning device on the North side of the Budget Truck. The collision drove the Budget Truck into Dawkins' truck (R. p. 576) and caused injuries to Dawkins, Sell, Kristen Starnes Sparkman, Josh Sparkman, and Ted Sparkman. Dawkins does not remember the impact and only remembers waking up in the hospital. (R. p. 214).

VI. DAWKINS' INJURIES AND DAMAGES

Dawkins underwent three surgeries on his right heel. (R. p. 183). Dr. Leland Stoddard from Beaufort testified that Dawkins' injuries are permanent and of such a nature that he will only be able to be on his foot for about an hour before he will need to be non-weightbearing due to swelling. (R. pp. 184-185). In addition to the weight bearing issues, Dawkins also sustained permanent nerve damage and has discoloration near his ankle and lower leg. (R. pp. 185-186; 562; 563).

Al Moses, a lawyer from Columbia, described Dawkins' lawn care abilities as some of the best he's seen before these events. (R. p. 191). Prior to August 21, 2010, Dawkins would arrive at Mr. and Mrs. Moses' house in the summer and work all afternoon until a job was finished. (R. p. 191). Following the events of August 21, 2010, however, Dawkins was not the same person. (R. p. 191). In addition to landscape work, Dawkins also did handyman work. (R. p. 191). Since August 21, 2010, Dawkins has only been able to work a couple of hours at a time.

(R. p. 192). Mrs. Moses, prior to her passing, would drive Maurice to Jacksonville for medical appointments and even loaned him money while he could not work. (R. pp. 194-195).

STANDARD OF REVIEW

A motion for judgment notwithstanding the verdict (JNOV) is a renewal of a directed verdict motion. Wright v. Craft, 372 S.C. 1, 18, 640 S.E.2d 486, 495 (Ct. App. 2006). In ruling on a directed verdict motion or JNOV motions, the trial court must view the evidence and all inferences reasonably drawn therefrom in the light most favorable to the nonmoving party. Id. at 18, 640 S.E.2d at 496. However, when the evidence yields but one reasonable inference, a directed verdict in favor of the moving party is proper. R&G Const., Inc. v. Lowcountry Regional Transp. Authority, 343 S.C. 424, 431, 540 S.E.2d 113, 117 (Ct. App. 2000). In ruling on a directed verdict motion, the trial court is concerned only with the existence or non-existence of evidence. Id. "The appellate court will reverse the trial court's ruling on a directed verdict motion only when there is no evidence to support the ruling or when the ruling is controlled by an error of law." Estate of Carr ex rel. Bolton v. Circle S Enter., Inc., 379 S.C. 31, 39, 664 S.E.2d 83, 86 (Ct. App. 2008).

ARGUMENT

I. THE LOWER COURT ERRED IN DENYING DAWKINS' MOTIONS FOR DIRECTED VERDICT AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO SELL'S INTERVENING NEGLIGENCE AFFIRMATIVE DEFENSE

Sell asserted an affirmative defense of intervening negligence alleging Owens' conduct of hitting the Truck Sell overturned was an intervening and superseding cause of Dawkins' injuries that broke any causal chain to Sell. The lower court erred in denying Dawkins' motions as to this defense because Sell alleged in his cross-claim that Owens' conduct was foreseeable.

The conduct cannot be foreseeable as it relates to Sell but unforeseeable and thus intervening as it relates to Dawkins.

The evidence presented at trial, including the cross-claim filed by Sell, is susceptible of one conclusion: the actions of Owens were foreseeable and Sell breached numerous duties resulting in Dawkins' injuries and damages. The only issue for the jury should have been proximate cause and damages. Instead, despite filing a cross-claim that alleged Owens' negligence "directly and proximately" caused Sell's damages, he was allowed to argue Owens' actions were unforeseeable. (R. pp. 506-507).

The lower court committed reversible error in failing to grant Dawkins' motions for directed verdict and JNOV on the issue of intervening negligence.[3] "A third party's acts of negligence do not break the causal chain if the acts are foreseeable." Small v. Pioneer Mach. Inc., 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct. App. 1997). "For an intervening force to be a superseding cause that relieves an actor from liability, the intervening cause must be a cause that could not have been reasonably foreseen or anticipated." Id. It is foreseeable that someone would stop and help another individual involved in an accident. See S.C. Code Ann. § 15-1-310 (Good Samaritan statute). Further, "[t]he danger of leaving a vehicle standing on the traveled portion of a highway is well known." Gause v. Smithers, 403 S.C. 140, 150-51, 742 S.E.2d 644, 650 (2013) (quotation marks omitted) ("It [i]s reasonably foreseeable that by remaining in a lane of traffic, another car could crash into the back of the police cruiser that pulled him over. We therefore disagree with Son that Smithers' actions broke the chain of causation . . . .").

The only testimony in this case, even when viewed in a light most favorable to Sell as the non-moving party, is that Owens' actions were foreseeable. Sell's Answer and Counterclaim

[3] The lower court also charged the jury on intervening negligence which is addressed below.

filed August 3, 2011, alleged that he was injured "as ***a direct and proximate result***" of Owens' actions. (R. p. 56, ¶ 33) (emphasis added). For Owens to be liable to Sell, his actions must be foreseeable. Sell and Dawkins were standing near each other on the morning of August 21, 2010. Sell cannot on the one hand allege that Owens' actions are foreseeable on his cross-claim while at the same time contending that Owens' actions are unforeseeable in defense of Dawkins' claims. "A negligent act or omission is a proximate cause of injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." Hurd v. Williamsburg Cty., 353 S.C. 596, 612, 579 S.E.2d 136, 144 (Ct. App. 2003), aff'd, 363 S.C. 421, 611 S.E.2d 488 (2005).

"Parties are generally bound by their pleadings and are precluded from advancing arguments or submitting evidence contrary to those assertions." Elrod v. All, 243 S.C. 425, 436, 134 S.E.2d 410, 416 (1964) ("[T]he general rule [is] that the parties to an action are judicially concluded and bound by such unless withdrawn, altered or stricken by amendment or otherwise. The allegations, statements or admissions contained in a pleading are conclusive as against the pleader. It follows that a party cannot subsequently take a position contradictory of, or inconsistent with, his pleadings and the facts which are admitted by the pleadings are to be taken as true against the pleader for the purpose of the action. Evidence contradicting such pleadings is inadmissible.")." see also Johnson v. Alexander, 413 S.C. 196, 202, 775 S.E.2d 697, 700 (2015).

The South Carolina Supreme Court addressed the issue of intervening negligence on nearly identical facts in Matthews v. Porter, 239 S.C. 620, 124 S.E.2d 321 (1962). Matthews holds that another individual (Owens in this case) is not an intervening superseding cause so as to exculpate Sell from liability. Id. In Matthews, Grover Porter crossed the center line and collided with a vehicle driven by Isaac Singletary. Id. at 623, 124 S.E.2d at 322. The vehicles

came to rest on US Highway 76, and Porter's vehicle was blocking the eastbound lane. Id. Jacqueline Matthews was riding in a vehicle driven by her husband on US Highway 76 and came upon the collision. Id. Mrs. Matthews got out of her vehicle and offered her assistance to a physician that arrived on the scene. Id. Mrs. Matthews was standing by the physician when a vehicle driven by Lewis McKnight struck another vehicle and crushed Mrs. Matthews between Porter and McKnight's vehicles. Id.

Matthews' complaint alleged Porter was negligent in "permitting his automobile to block the highway so that others could not safely pass, and in failing to warn approaching vehicles that the highway was so blocked." Id. at 623, 124 S.E.2d at 323. During trial Porter moved for a directed verdict on three grounds:

> (1) That there is no evidence from which the jury can infer that the appellant [Porter] was negligent in the first collision nor is there any evidence to show that he was negligent in the second collision; (2) That there was no evidence that any negligence of the appellant [Porter] in the first collision was the proximate cause of the second collision whereby the respondent [Matthews] received her injuries; and (3) That the only inference to be drawn is that the negligence of Lewis McKnight ***intervened and was the sole cause*** of respondent's [Matthews] injuries.

Id. at 624-25, 124 S.E.2d at 323 (emphasis added).

The trial court denied the motion for direct verdict and, after a verdict in Matthews' favor, Porter moved for JNOV and later appealed the denial of his motions. Id. at 625. The Supreme Court noted that in order to "exculpate a negligent defendant, the intervening cause must be one which breaks the sequence or causal connection between the defendant's negligence and the injury alleged." Id. at 628, 124 S.E.2d at 325. After analyzing the evidence[4], the Supreme Court held that the trial did not commit error in refusing the motions for nonsuit, directed verdict, and JNOV: "We do not find any merit in the appellant's contention that the

[4]In Matthews, McKnight testified that the night was dark, foggy, and a drizzling rain was falling – similar to the evidence in this case. Id. at 628, 124 S.E.2d at 325.

testimony shows that the chain of causation was broken by the negligent conduct on the part of Lewis McKnight, nor can we say as a matter of law that the negligence of the appellant was insulated by the acts of McKnight." Id. at 632, 124 S.E.2d at 327. The same conclusion is warranted in this case.

Based on Sell's own admission that Owens' actions were foreseeable and South Carolina law that it is foreseeable when someone leaves a vehicle on a traveled portion of a highway, the lower court committed reversable error in denying Dawkins' directed verdict and JNOV motions on this ground. The verdict should be reversed on this ground alone.

II. THE LOWER COURT ERRED IN DENYING DAWKINS' MOTIONS FOR DIRECTED VERDICT AND JNOV WHEN SELL OVERTURNED THE TRUCK BLOCKING BOTH SOUTHBOUND LANES AND ACCEPTED RESPONSIBILTY

Despite Sell overturning the Truck and blocking both Southbound lanes, the lower court nonetheless denied Dawkins' motions for directed verdict and JNOV on the issue of Sell's negligence. The sole issue before the jury should have been proximate cause and damages.

This Court recently reversed the denial of direct verdict and JNOV motions on the issue of negligence on similar facts. Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). Fettler involved a rear end collision on an interstate on ramp. Id. at 465, 722 S.E.2d at 28. At trial, Gentner testified his vehicle was about ten car lengths behind the Fettler vehicle. Id. Ms. Fettler testified that before her husband could proceed down the on ramp he had to yield at a yield sign to avoid an oncoming car. Id. While at the yield sign, the Fettlers were rear-ended by Gentner. Id. Gentner testified that he saw no reason for the Fettlers to stop at the yield sign as there was no vehicle in front of them. Id.

At the close of evidence, Fettler made a directed verdict on the issue of Gentner's negligence which Gentner opposed on the basis that Fettler did not have the right to stop his car

in the road. Id. The lower court denied the motion and the jury returned a verdict for Gentner. Id. at 466, 722 S.E.2d at 29. Fettler moved for JNOV after trial contending the evidence only allowed a reasonable inference in favor of Fettler on the issues of negligence and proximate cause. Id. The lower court denied Fettler's JNOV motion. Id.

On appeal this Court noted that both Gentner and Gentner's wife admitted their failure to keep a lookout after the Fettlers reached the yield sign. Id. at 467, 722 S.E.2d at 30. Gentner argued that the evidence supported an inference that Fettler's husband caused or contributed to the collision by unnecessarily stopping at the yield sign. Id. 468, 722 S.E.2d at 30. In reversing the lower court's denial of Fettler's directed verdict and JNOV motions, the court noted "Gentner's position that the Fettlers did not need to stop at the yield sign does not create an inference of negligence on Fettler's husband's part, it merely stands as a personal opinion from someone who did not have his eyes focused on his lane of travel." Id. at 469, 722 S.E.2d at 30.

Here, the evidence only supports an inference that Sell failed to maintain proper control of the Truck. As a result of his negligence in losing control, it fishtailed and overturned blocking both Southbound lanes of I-95 in the early hours of August 21, 2010. The Truck came to rest so that oncoming traffic would first see the bottom of the Truck essentially a "brick wall." (R. p. 159).

It is well established that a motorist on South Carolina's roads, such as Sell, has an obligation to keep his vehicle under proper control. S.C. Code Ann. §56-5-1520. Additionally, it is unlawful for vehicles to travel under forty-five (45) miles per hour on an interstate highway or to stop on the interstate in non-emergency situations. (R. pp. 132-133).

When Sell's negligence resulted in blocking both Southbound lanes, he had a statutory obligation to put out warning cones, flares, or reflectors given the size of the Truck. (R. pp. 133-

134); see also S.C. Code Ann. §§ 56-5-5060; 56-5-5080; 56-5-5090. Hughes v. W. Carolina Reg'l Sewer Auth., 386 S.C. 641, 689 S.E.2d 638 (Ct. App. 2010) mandates that a motor truck the size of which Sell was driving be equipped with flares or other warning device. Sell was specifically asked about flares or reflective signs and he denied putting any out as required by South Carolina law:

> Q. After the accident you didn't put out any flares or reflective signs to warn on coming - -
>
> A. No, I did not.
>
> Q. - - traffic?
>
> A. No, I did not.

(R. p. 318, lines 15-19).[5] While Sell attempted to testify that he could not get back to the truck, section 56-5-5090 mandates that warning devices be employed. S.C. Code Ann. 56-5-5090 ("the driver of such vehicle ***shall display*** the following warning devices upon the highway during the time the vehicle ***is so disabled on the highway*** . . . ." (emphasis added).

The testimony here is only susceptible of the inference that Sell was negligent in at least two respects. First, in failing to maintain control of the Truck that blocked both Southbound lanes that resulted in serious injuries to five individuals, including Dawkins. Second, in failing to put out cones or reflective as required by section 56-5-5090 to warn other motorists of a hazard. Similar to this Court's holding in Fettler, Sell cannot disregard what the law requires and what he failed to do. The lower court erred in denying Dawkins' motion for directed verdict and JNOV on the issue of Sell's negligence. The practical impact of the lower court's denial of the directed verdict and JNOV motions is that there is no consequence for failing to do what South Carolina law requires. The verdict should be reversed on this ground alone.

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[5] Sell was further asked about flares and reflective signs. (R. pp. 336-337).

III. THE LOWER COURT ABUSED ITS DISCRETION AND COMMITTED REVERSIBLE ERROR IN ALLOWING SELL'S COUNSEL TO PUBLISH INTERROGATORY RESPONSES THAT IDENTIFIED A TRUCKING EXPERT

Despite settling with Owens and Pierce National, from which Sell would have been entitled to a set-off, the trial court abused its discretion and committed reversible error in allowing Sell's counsel to publish Dawkins' interrogatory responses that identified Dave Dorrity as a trucking expert to offer opinions regarding Owens and Pierce National. The lower court also allowed Sell to cross-examine Dawkins on the Complaint that named Owens and Pierce National as defendants despite Dawkins' objections. (R. pp. 90-94). The issues regarding Owens and Pierce National as defendants permeated the trial. Dawkins moved *in limine* to exclude on several grounds related to Owens and Pierce National: (1) lawsuit filed against and settlement from Pierce National and Dennis Owens; (2) testimony, argument, or evidence that the actions of Dennis Owens were unforeseeable; and (3) any traffic citation issued to Dennis Owens. (R. pp. 613-614, ¶¶ 1-2; 4). Dawkins sought to exclude these items as Pierce National and Owens were no longer defendants and Sell was going to claim credit for the portion of their liability insurance policy Dawkins received.

Prior to the publication of Owens's testimony, Dawkins' objections were taken up with the Court. (R. pp. 341-348; 618-619). These objections centered on Owens driving in the days leading up to the collision on August 21, 2010. Dawkins also pointed out that this related to testimony Sell sought to later elicit through his trucking expert, John Pinckney. (R. p. 341). Dawkins objected on the grounds that anything predating August 21 was irrelevant and would confuse the issues as it relates to someone no longer a party to the action. (R. p. 342). The lower court ruled against Dawkins. (R. pp. 344-348). Following Owens's testimony, Sell presented testimony from John Pinckney as an expert to testify regarding motor carrier safety and

compliance. (R. p. 384). At the conclusion of Pinckney's cross-examination, Sell sought to publish Dawkins' interrogatory response that identified Dave Dorrity as an expert in the field of transportation safety. (R. pp. 446-448). After a sidebar, Dawkins put on the record his objection to the publication of his interrogatory response. (R. pp. 449-450). Dawkins noted that there was a difference in an empty chair and a defendant. (R. p. 450). Based on the lower court's ruling, Dawkins sought to have the jury told that he sued Pierce National and Owens, settled with them, and the amount he received out of the liability policy. (R. p. 450). Dawkins also objected during Sell's closing argument about Dorrity. (R. p. 517).

Following the trial's conclusion, Dawkins moved for a new trial on the ground that the lower court committed reversible error and abused its discretion in allowing Sell to publish Dawkins' interrogatory responses that identified a non-party and cross-examine Dawkins with the Complaint. (R. pp. 23-26). The lower court denied Dawkins' motion on the basis of Rule 33(d), SCRCP, and the Supreme Court's holding in Lucht v. Youngblood, 266 S.C. 127, 221 S.E.2d 854 (1976).

Rule 33(d) of the South Carolina Rules of Civil Procedure provides that "answers may be used to the ***extent permitted by the rules of evidence***." (emphasis added). The retaining of a transportation safety expert that offered opinions regarding Owens and Pierce National's conduct was not relevant to the issues surrounding Sell's negligence. Rule 402, SCRE. As a result, Rule 33(d), SCRCP, is inapplicable as it had no relation to the issues in this case.

Lucht involved the attempted publication of pleadings, not interrogatory responses and is therefore distinguishable and not controlling here as to the interrogatory response. In Lucht, Youngblood contended the trial court erred in prohibiting him from cross examining the plaintiff on his earlier pleadings. Id. at 134, 221 S.E.2d at 857. Lucht proceeded to trial on a second

amended complaint that alleged a Volkswagen was driving in its proper lane and it collided with a Mustang that crossed the double yellow line. Id. An earlier pleading alleged the Volkswagen crossed the double yellow line. Id. The complaint was amended after the driver of the Volkswagen was released by a covenant not to sue. Id. at 134, 221 S.E.2d at 857-58. The trial judge prohibited the cross examination because he felt if questioned about the prior pleading the jury would have necessarily been informed that another defendant had been released. Id. at 134-35, 221 S.E.2d at 858. On appeal, the Supreme Court noted that the "trial judge was rightfully concerned that if the defendants were examined on the prior pleadings, the existence of the covenants and its details would spread before the jury. Obviously, this would be confusing to the jury and it might easily become emersed in the merits of the liability of the defendant released by the covenant." Id. at 135, 221 S.E.2d at 858.

The publication of Dawkins' interrogatory responses identifying an expert that offered opinions on a settling non-party is not governed by Lucht. On the other hand, Lucht does not apply to permit cross-examination of Dawkins as Dawkins was not taking inconsistent positions to which the holding in Lucht relates. Instead, Dawkins pled that they were jointly liable and acknowledged at trial that Sell would be entitled to a set-off for the money paid by Pierce National's liability insurance policy.

The lower court also relied on Holmes v. Black River Elec. Co-op., Inc., 274 S.C. 252, 260-61, 262 S.E.2d 875, 879 (1980) for the proposition that a party can reference experts who were retained but did not testify. (R. p. 6). As with Lucht, the lower court's reliance on Holmes is misplaced. During closing argument, Holmes' counsel made reference to the failure of Black River Co-op to call two expert witnesses it had retained to testify at trial. Id. at 261, 262 S.E.2d at 879. Although it is not clear from the opinion, it appears Black River and Holmes were the

only two parties. Id. Holmes is not controlling here as the opinions and testimony from Dorrity related to Owens and Pierce National's conduct, which was irrelevant and not on trial in this case. Had Dawkins retained an expert to offer testimony against Sell and he or she was not called during the trial then Holmes would be controlling, and Sell could argue a negative inference.

The lower court committed reversible error and abused its discretion in allowing Sell's counsel to publish interrogatory responses that related to a non-party. The lower court should be reversed and a new trial ordered on this ground alone.

IV. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN CHARGING THE JURY ON INTERVENING NEGLIGENCE AND IN DENYING DAWKINS' MOTION FOR NEW TRIAL ON THIS GROUND

Despite Sell alleging in his cross-claim that Owens' actions were foreseeable, the lower court nonetheless charged the jury on intervening and superseding negligence.[6] As argued above Dawkins was entitled to a directed verdict and the jury should not have been charged on this issue. (R. p. 539). A new trial is warranted on this basis alone.

"An appellate court will not reverse the trial court's decision regarding jury instructions unless the trial court committed an abuse of discretion." Berberich v. Jack, 392 S.C. 285, 709 S.E.2d 607, 611 (2011). "An abuse of discretion occurs when the trial court's ruling is based on an error of law or is not supported by the evidence." Id.

The lower court's decision to charge intervening negligence was based on an error of law as Dawkins' directed verdict motion should have been granted and was also not supported by the evidence. Dawkins moved *in limine* to prevent Sell, based on his cross-claim, from arguing that

[6] The lower court held it was not inconsistent to allege Owens' actions were foreseeable in the cross-claim but it was inconsistent to file a complaint that alleged both Sell and Pierce National/Owens were jointly liable. Compare discussion regarding cross-claim (R. pp. 71-75) with discussion regarding complaint (R. pp. 87-89; 90-95).

Owens' actions were unforeseeable but the lower court denied Dawkins' motion. (R. p. 613, ¶ 2; 71-75). The trial court charged the jury on the issue of intervening negligence to which Dawkins objected. (R. p. 539; 554).

This Court in Fettler v. Gentner, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012) – discussed above – addressed a prejudicial jury charge where the lower court should have granted a directed verdict. After reversing the lower court's denial of Fettler's directed verdict and JNOV motions, this Court addressed a prejudicial jury charge. Id. at 469, 722 S.E.2d at 30. "An erroneous jury instruction will not result in reversal unless it causes prejudice to the appealing party." Id. at 470, 722 S.E.2d at 31. This Court held that the "issue of Gentner's negligence should have been decided as a matter of law, the irrelevant and inapplicable principles of negligence had the strong possibility of confusing the jury and affecting the outcome of the trial." Id.

Similarly, here, the issue of intervening negligence should have been decided as a matter of law. Charging the jury on intervening negligence likely confused the jury and prejudiced Dawkins as the issues of intervening negligence were unrelated to this action. "A jury charge consisting of irrelevant and inapplicable principles may confuse the jury and constitutes reversible error where the jury's confusion affects the outcome of the trial." Id. (quoting Cole v. Raut, 378 S.C. 398, 404, 663 S.E.2d 30, 33 (2008)).

The lower court abused its discretion by charging the jury on intervening negligence. This prejudiced Dawkins, and a new trial is warranted. Since the issues are interrelated, Dawkins incorporates all arguments made above regarding the lower court's denial of his directed verdict and JNOV motions on the issue of intervening negligence.

V. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN ALLOWING SELL TO EXCEED THE BOUNDS OF THE EMPTY CHAIR DEFENSE

The lower court allowed Sell to exceed the bounds of the empty chair defense by trying the conduct of Owens and Pierce National throughout the trial. While South Carolina law permits a defendant to point the finger and claim that someone else is solely responsible for the plaintiff's damages, such defense is not boundless. As set forth above, the issues surrounding Owens and Pierce National's conduct permeated the trial despite Dawkins' objections to the contrary. Many of the issues surrounding Owens and Pierce National were irrelevant to the main issue at trial – whether Sell was negligent and whether his negligence proximately caused Dawkins' damages. It is overreaching for Sell to try the settling defendants – Owens and Pierce National – while at the same time wanting a set-off for any money paid by them. This results in a windfall for Sell.

The South Carolina Supreme Court addressed the issue of the empty chair defense in Smith v. Tiffany, 419 S.C. 548, 799 S.E.2d 479 (2017). Smith arose out of an automobile collision. Id. at 553, 799 S.E.2d at 482. Tiffany's tractor trailer became disabled and was parked along the shoulder of a US Highway adjacent to the exit of a gas station. Id. Mizzell had stopped at the gas station and as he attempted to exit his view of oncoming traffic was obstructed by Tiffany's tractor trailer. Id. As Mizzell pulled into the road, his vehicle collided with Smith's vehicle. Id. Mizzell's liability carrier tendered its limits to Smith in exchange for a covenant not to execute. Id. Smith filed suit against Tiffany and his employer, alleging his injuries were proximately caused by Tiffany's negligent positioning. Id. Tiffany sought to add Mizzell as an indispensable party so he would be on the verdict form. Id.

On appeal, the Supreme Court addressed whether the trial court erred in granting summary judgment in favor of Mizzell. Id. at 557, 799 S.E.2d at 484. The Court noted the codification of the so-called empty chair defense in the South Carolina Joint Contribution

Among Tortfeasors Act – S.C. Code Ann. § 15-38-10, et seq. – "a critical feature of the statute is the codification of the empty chair defense – a defendant 'retain[s] the right to assert another potential tortfeasor, whether a party or not, contributed to the alleged injury or damages' – which necessarily contemplates lawsuits in which an allegedly culpable person or entity is not a party to the litigation." Id.

The ability to assert another potential tortfeasor is culpable is not boundless and the non-settling defendant cannot expand the scope of the case and make evidence relevant by the fact another tortfeasor settled. Id. at 558, 799 S.E.2d at 485 ("For example, in Riley v. Ford Motor Co., we noted that a nonsettling defendant may not '***fashion [] and ultimately extract[] a benefit from the decisions of those who do [settle]***.'") (quoting Riley v. Ford Motor Co., 414 S.C. 185, 197, 777 S.E.2d 824, 831 (2015)) (emphasis added). There is no incentive to settle if a plaintiff still has to present or rebut evidence against the settling defendant even though they are no longer a party and present at trial. Id. at 557, 799 S.E.2d at 484 ("Rather, the legislature was attempting to strike a fair balance for all involved—plaintiffs and defendants—***and to do so in a way that promotes and fosters settlements***.") (emphasis added).

By allowing Sell to exceed the bounds of the empty chair defense, the lower court enabled Sell to fashion and extract a benefit from the fact Pierce National and Owens were not defendants. In this case, Dawkins tried to narrow the issues related to Sell's negligence and whether he proximately caused Dawkins' damages. Given that Sell gets a set-off for any amount Dawkins received from Pierce National's liability insurance policy, the issues surrounding Owens and Pierce National were irrelevant. Dawkins moved *in limine* on numerous grounds related to Owens and Pierce National. (R. pp. 613-617). However, after the lower court ruled against Dawkins some of these grounds, Dawkins sought to be honest with the jury by telling

them Pierce National and Owens were previously defendants, how much Dawkins received from the division of the liability insurance policy, and that Sell would get a credit for that amount. (R. pp. 87-89; 90-95). The Court denied Dawkins' request. (R. pp. 90-95).

Instead, Sell elicited testimony that Pierce National and Owens were defendants and the lower court allowed Sell to publish interrogatory responses identifying a trucking expert that was not offering opinions related to Sell. This undoubtedly left the jury with the belief that Dawkins had been fully compensated by Pierce National and Owens. Throughout Sell's closing argument, he repeatedly referred to Owens and Pierce National as the "white elephant in the room." (R. p. 511; 518). By trying the conduct of Owens and Pierce National – both non-parties – Sell exceeded the bounds of the empty chair defense. This greatly prejudiced Dawkins by not being allowed to explain how much Dawkins received and that Sell would receive a credit for that amount. The lower court committed reversible error and abused its discretion in denying Dawkins' motion for new trial on this ground. The lower court should be reversed on this ground alone.

CONCLUSION

Sell admitted in his cross-claim that the actions of Owens and Pierce National were foreseeable as his injuries were "directly and proximately" caused by Owens' conduct. Nonetheless, the lower court denied Dawkins' motions for directed verdict and JNOV on Sell's intervening negligence affirmative defense. The lower court also charged the jury on intervening negligence. Sell admitted losing control of the Truck and blocking both Southbound lanes of I-95, along with failing to put out flares or other warning devices. Despite multiple allegations of negligence and failure to comply with South Carolina law, the lower court denied Dawkins' motions for directed verdict and JNOV on the issue of Sell's negligence.

Although settling with Owens and Pierce National, to which Sell would have been entitled to a credit, the lower court committed reversible error by allowing Sell's counsel to publish interrogatory responses that identified an expert that offered opinions on a non-party. Lastly, the lower court allowed Sell to exceed the bounds of the empty chair defense. For any one of these independent grounds, the lower court should be reversed and a new trial granted.

Respectfully submitted,

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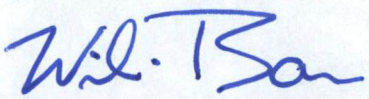
November 28, 2018
Hampton, South Carolina

BY: 

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IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2017-002520

Maurice Dawkins ..... Appellant,

v.

James A. Sell ..... Respondent,

CERTIFICATE OF COUNSEL

The Undersigned hereby certifies that the Final Brief complies with Rule 211(b), SCACR.

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November 28, 2018
Hampton, South Carolina

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