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 REPLY BRIEF

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I. IT IS INCONGRUOUS FOR SELL TO ALLEGE OWENS' CONDUCT WAS FORESEEABLE BUT ASSERT AN INTERVENING NEGLIGENCE DEFENSE THAT REQUIRES UNFORESEEABILITY

South Carolina law provides that "[f]or 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***." Small v. Pioneer Mach. Inc., 329 S.C. 448, 467, 494 S.E.2d 835, 844 (Ct. App. 1997). By unequivocally stating in his cross-claim that his damages were a "direct and proximate result" of the Owens and Pierce National's conduct Sell concedes Owens' conduct was foreseeable and thus not an intervening cause. (R. p. 31, ¶ 33). The lower court committed reversible error in denying Dawkins' Motions for Directed Verdict and for Judgment Notwithstanding the Verdict on Sell's intervening negligence affirmative defense when Sell alleged Owens' actions were foreseeable.

Both Sell's negligence cross-claim and his intervening negligence affirmative defense are based on the foreseeability of another driver hitting an overturned vehicle in the roadway. In his own negligence cross-claim to recover damages for himself, Sell says it is foreseeable. However, as to his affirmative defense to avoid liability to Dawkins, Sell says it is not foreseeable. Sell cannot have it both ways. By taking the advantageous position for himself that it is foreseeable, he is necessarily precluded from arguing to the contrary when it is not advantageous. In addition, his affirmative defense that he could not foresee the dangers of leaving a vehicle in the traveled portion of the roadway is contrary to South Carolina law. See Gause v. Smithers, 403 S.C. 140, 150-51, 742 S.E.2d 644, 650 (2013) (quotation marks omitted) ("The danger of leaving a vehicle standing on the traveled portion of a highway is well known.").

Despite Sell's arguments to the contrary, these are incongruous positions and the lower court should be reversed for denying Dawkins' Motion for Directed Verdict and Judgment Notwithstanding the Verdict on Sell's Intervening Negligence Affirmative Defense. Dawkins incorporates all arguments made in section I of his Brief. (App. Br. pp. 7-11).

II. THE LOWER COURT INCORRECTLY CHARGED THE JURY REGARDING INTERVENING NEGLIGENCE

In addition to denying Dawkins' directed verdict and JNOV motions, the lower court nonetheless charged the jury on intervening negligence despite Sell alleging Owens' conduct was foreseeable. As set forth above, for an intervening event to be a superseding cause the conduct must be unforeseeable, which is not the case here. Sell asserted an intervening/superseding negligence affirmative defense in his Answer and Cross-Claim. (R. p. 30, ¶¶ 20-22). Sell has the burden of proving the affirmative defense. Cole v. S.C. Elec. & Gas, Inc., 355 S.C. 183, 195, 584 S.E.2d 405, 412 (Ct. App. 2003), aff'd as modified, 362 S.C. 445, 608 S.E.2d 859 (2005) ("When a defendant interposes an affirmative defense, he becomes as to that matter the actor in the suit, and the burden of proof rests upon him to establish his affirmative defense by the preponderance of the evidence."). "Ordinarily, a trial judge has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence." Brown v. Smalls, 325 S.C. 547, 555, 481 S.E.2d 444, 448 (Ct. App. 1997). By charging the jury on intervening negligence when Sell conceded Owens conduct was foreseeable, the lower court committed reversible error. The lower court should be reversed on this ground alone. Dawkins incorporates all arguments made in section IV of his Brief. (App. Br. pp. 17-18).

III. THE LOWER COURT COMMITTED REVERSIBLE ERROR IN DENYING DAWKINS' MOTION FOR DIRECTED VERDICT AND JUDGMENT NOTWITHSTANDING THE VERDICT ON THE ISSUE OF SELL'S NEGLIGENCE

On the drive from near Columbus, Ohio, Sell was awake for the twenty-hours prior to the accident with the exception of two twenty-to-thirty minute rest breaks. (R. p. 311). Sell lost control of the Truck, blocked both Southbound lanes of Interstate 95 at approximately 3:50 a.m. in the rain, and did not put out warning devices required by South Carolina law despite the vehicle being positioned such that the bottom of the Truck faced oncoming traffic. (R. pp. 149-150; 160; 211-212; 313). Despite Sell's clear negligence, the lower court denied Dawkins' motions for directed verdict and JNOV on the issues of duty and breach. The lower court should have ruled as a matter of law on Sell's negligence and the sole issues for the jury's determination should have been proximate cause and damages.

Dawkins states that Sell was negligent in two areas – failing to maintain control of his Truck that came to rest blocking both Southbound lanes at 3:50 a.m. and failing to put out warning devices required by South Carolina law for the type of Truck Sell was driving. (App. Br. p. 11-13). The undisputed evidence is that Sell was in such bad shape that he lost control of the truck and blocked both Southbound lanes. That he arguably may have been unable to put out warning devices does not relieve him of the statutory obligation to do so.

The failure to put out warning devices is causative[1] of Dawkins' injuries. The lower court's denial of Dawkins' Motion for directed verdict and JNOV on the issue of Sell's negligence should be reversed. Dawkins incorporates all arguments made in section II of his Brief. (App. Br. pp. 11-13).

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[1] Sell incorrectly quotes Fairchild v. S.C. Dept. of Transp., 398 S.C. 90, 100, 727 S.E.2d 407, 412 (2012) for the proposition that "only a 'causative violation' of an applicable statute constitutes actionable negligence." (Resp. Br. p. 20). The Supreme Court's decision in Fairchild states that the causative violation of an applicable statute constitutes negligence per se and may support reckless or willful conduct warranting submission of punitive damages to the jury. Id.

IV. DAWKINS OBJECTED THROUGHOUT THE TRIAL REGARDING THE SETTLEMENT WITH OWENS AND PIERCE NATIONAL AND ASKED THE COURT TO TELL THE JURY ABOUT THE SETTLEMENT

Sell's sole argument on the issue of the empty chair defense is that Dawkins did not make a contemporaneous objection to the evidence. However, the record is replete with objections regarding the issues surrounding Owens and Pierce National. Dawkins' Motion *in Limine* sought to exclude testimony on several grounds related to Owens and Pierce National. (R. pp. 613-614, ¶¶ 1-2; 4; 65-67; 87-88). Dawkins again brought up the issues surrounding Owens and Pierce National prior to opening statements. (R. pp. 90-95). Dawkins submitted objections to Sell's deposition designation for Owens regarding the days leading up to the collision. (R. pp. 341-347). Dawkins raised an objection when Sell sought to publish his interrogatory response that identified Dave Dorrity as a transportation safety expert retained to offer opinions for a party that had previously settled. (R. pp. 446-450). The Supreme Court in Allegro, Inc. v. Scully, 418 S.C. 24, 33, 791 S.E.2d 140, 145 (2016) made clear that repeated objections are not required once the trial judge's position is clear:

> Preservation rules are designed to provide an adequate platform for appellate review by ensuring the trial court has had the opportunity to rule on an issue prior to this Court considering the matter. ***The utility of these rules would be grievously undermined were we to construe them to require futile additional argument after the trial judge has made his position clear.***

Id. at 33, 791 S.E.2d at 145 (emphasis added).

Following Dawkins' objections to the publication of the interrogatory response the lower court ruled "[w]ell, I'm going to be consistent and rule against you ***again***. I'm either ***consistently right or consistently wrong***, but that's the way it is." (R. p. 450, lines 12-15) (emphasis added). Based on the lower court's clear comments, it cannot be credibly argued that multiple objections were not made.

By allowing Sell to try the conduct of Owens and Pierce National through an intervening negligence defense while at the same time claiming a set-off, the Court allowed Sell to exceed the bounds of the empty chair defense. If Dawkins is forced to try the conduct of Owens and Pierce National in a case where Sell is the remaining defendant then there is no incentive to settle with Owens and Pierce National. Smith v. Tiffany, 419 S.C. 548, 558, 799 S.E.2d 479, 485 (2017) (("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). The lower court should be reversed on this ground. Dawkins incorporates all arguments in section V of his Brief. (App. Br. pp. 18-21).

V. A TRANSPORTATION SAFETY EXPERT THAT WAS RETAINED AND OFFERED OPINIONS ABOUT OWENS' AND PIERCE NATIONAL'S CONDUCT IS NOT RELEVANT TO SELL'S NEGLIGENCE AND AS SUCH DAWKINS' INTERROGATORY RESPONSE SHOULD NOT HAVE BEEN PUBLISHED

The issues regarding Owens' negligence and culpability were not relevant to the issues in this action because Sell claimed a set-off. The Court nonetheless permitted Sell to publish Dawkins' interrogatory response that listed a trucking expert that pertained only to Owens and Pierce National. When Sell attempted to publish the interrogatory responses, Dawkins brought the matter up to the Court and asked to approach. (R. pp. 446-448). Once the jury was discharged, Dawkins placed his objection "on the record again" to the publication of the interrogatory response identifying Dave Dorrity as a transportation safety expert. (R. pp. 449-450). Sell incorrectly states that this issue is "not preserved for review because a contemporaneous objection was not raised at trial." (Resp. Br. p. 24).

Sell relies on Rule 33(d), SCRCP, for the authorization to publish Dawkins' interrogatory answer identifying Dorrity as an expert. However, Rule 33(d) specifically limits publication of interrogatory answers "***to the extent permitted by the rules of evidence.***" (emphasis added). A transportation safety expert retained to provide opinions solely to Owens and Pierce National was not relevant to issues surrounding Sell's negligence. Rule 402, SCRE. The lower court should be reversed on this ground alone. Dawkins incorporates all arguments made in section III of his Brief. (App. Br. pp. 14-17).

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November 28, 2018
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CERTIFICATE OF COUNSEL

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

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