THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No: 2008-CP-22-00466

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc and Edgar Rivera,

Petitioners ,

APPENDIX

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The South Carolina Court of Appeals

Hazel Jeisel Rivera, Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc., and Edgar Rivera, Appellants.

Appellate Case No. 2010-168831

ORDER

After careful consideration of the petitions for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petitions for rehearing are denied.

Paul E. Short, Jr. J.

J.

J.

Columbia, South Carolina

cc:
Brandon A. Smith
John Dwight Hudson
Lawrence Sidney Connor, IV
Benjamin H. Culbertson

FILED
March 5, 2013

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Hazel Jeisel Rivera, Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc., and Edgar Rivera, Appellants.

Appellate Case No. 2010-168831

Appeal From Georgetown County
Benjamin H. Culbertson, Circuit Court Judge

Opinion No. 5055
Heard September 11, 2012 – Filed November 28, 2012

AFFIRMED

J. Dwight Hudson, of Hudson Law Offices, of Myrtle Beach, for Appellants Warren Jared Newton, Newton's Farm, and J&J Logging, Inc.

Brandon A. Smith, of Turner Padget Graham & Laney, P.A., of Florence, for Appellant Edgar Rivera.

Lawrence Sidney Connor, IV, of Kelaher, Connell & Connor, P.C., of Surfside Beach, for Respondent.

SHORT, J.: Warren Jared Newton, Newton's Farm, and J & J Logging, Inc. (collectively, the Newton defendants) and Edgar Rivera appeal the trial court's grant of Jeisel Rivera's new trial motion after the jury returned a verdict in favor of all defendants in this automobile accident case. We affirm.

FACTS

Jeisel and Edgar are siblings. On the night of the accident, Edgar received a telephone call indicating their father had been mugged and was injured. Edgar tried to conceal the call from his sister to avoid upsetting her, but Jeisel overheard and insisted on accompanying Edgar to check on their father. Edgar was eighteen years old, but was not a licensed driver. They got into a car owned by an acquaintance and were followed by a second car driven by a friend, Miguel Fernandez.

At the same time the events were unfolding at the Rivera residence, Warren Newton and his brother were preparing to move a heavy piece of logging equipment across a T-intersection at Pennyroyal Road in Georgetown County, South Carolina. Warren waited ten minutes for traffic to clear. Using a tractor trailer, he pulled straight across, blocking both lanes of the road and beginning to make a three-point turn. He was backing up to straighten the vehicle as Edgar and his companions approached. Edgar did not see the trailer in time to stop, and a collision occurred. Jeisel was ejected from the vehicle and suffered significant injuries.

Jeisel sued the Newton defendants and her brother. At trial, Jeisel testified she insisted that her brother take her to check on their father, and she did not think he could have done anything to avoid the accident. She also testified she was trying to reach her mother on her cell phone while they were driving, and she did not see the truck in time to warn Edgar. Edgar testified he may have been going slightly over the fifty-five miles-per-hour speed limit, and he did not see any warning signs about trucks entering the road as he approached the tractor trailer. He also testified he was familiar with this road and had driven on it before.

Thomas Onions testified as an expert in the plaintiff's case. In his opinion, the headlights of the tractor trailer made it appear as though a car was coming down the road. He testified the lights would have temporarily blinded Edgar, and he would not have been able to see the trailer in time to avoid the accident. Onions

stated the Newton brothers could have set up flares or reflective triangles to warn oncoming traffic of their presence, and they created a very dangerous condition in making this maneuver at night on a poorly lit road. He also stated Edgar may have been traveling faster than fifty-five miles per hour, but it was impossible to tell from the information provided. At the conclusion of Onions' testimony, the Newton defendants' attorney read into the record the summation portion of Onions' report, which stated:

> It's my opinion that the careless and negligent manner in which Warren, Warren Newton, undertook to move his truck and trailer across the roadway on the night of the accident was the most significant causal factor to the crash event. It is further my opinion that Edgar Rivera also contributed to this accident by failing to slow his vehicle appropriately and continuing to drive into an area visually obstructed by nighttime glare and poor lighting.

Trooper William Surratt responded to the accident scene and testified that according to his diagram of the scene, the tractor trailer's headlights would have been shining in the direction of oncoming traffic. He also stated he did not see warning signs on the road approaching the accident, and no skid marks were at the scene. Surratt testified Edgar did not have his driver's license at the scene.

At the conclusion of Jeisel's case, Edgar moved for a directed verdict based on Jeisel's alleged failure to produce any evidence of his negligence. The court concluded Edgar had testified he was speeding, and he did not see the tractor trailer or warning signs, which could have indicated he had failed to keep a proper lookout. The trial court denied the motion.

Warren Newton testified the tractor trailer had reflective tape on the side and between the tractor and the trailer, there were more than fifty lights, six of which were blinking at the time of the accident. He stated the truck headlights were angled away from the road, facing into the woods, when Edgar approached. He indicated he saw the cars approaching and estimated their speed at sixty-five to seventy miles per hour. Warren testified he flashed his lights, but the cars never slowed down. He further stated there were reflective signs approaching the intersection indicating trucks entered the highway. Warren acknowledged he and his brother did not use flashlights or reflective triangles that were available to them

to signal oncoming traffic, and they could have waited until morning to move the truck, an activity he estimated caused them to block the roadway for approximately twenty-five to thirty seconds. Joel Newton testified he was following the tractor trailer in a pick-up truck and had his headlights and emergency flashers on. He testified the tractor trailer's headlights were pointing toward the woods.

Timothy Ward, a witness who lived nearby and approached the scene soon after the accident happened, testified the headlights of the truck were pointed into the woods at about a forty-five-degree angle to the road. He further testified a couple of cars approached from both directions, but they were able to stop and turn around. Ward did not remember seeing lights on the trailer.

Charles Dickinson, an expert for the Newton defendants, opined that Edgar should have seen the tractor trailer if he had been paying attention and not speeding at the time of the accident. According to Dickinson, there was sufficient time, based on his information and his attempt to recreate the conditions the night the accident occurred, for Edgar to see the truck's headlights, readjust his vision, and stop the car before hitting the trailer.

The parties made several motions before the jury was charged. Jeisel moved to strike the Newton defendants' contributory negligence defense. The trial court granted this motion. The trial court also granted Jeisel's request not to charge the jury with unavoidable accident. However, over Jeisel's objection, the trial court allowed the verdict form to go to the jury with the option to find in favor of both defendants. The trial court found that even though Jeisel was not contributorily negligent and the accident was not unavoidable, the jury could find she did not meet her burden of proof in proving one or both defendants were negligent.

The jury deliberated and returned a verdict in favor of the defendants. The trial court granted Jeisel's new trial motion, stating, "The only reasonable inference from the evidence presented at the trial of this case is that one or more of the defendants were at fault in causing the accident that injured the plaintiff." The court further concluded: "[N]o evidence was presented that showed the plaintiff at fault. Therefore, I find and conclude that the court erred in not granting the plaintiff's motion for directed verdict as to liability and in instructing the jury that it could return a verdict in favor of all defendants. *See Howard v. Roberson*, 376 S.C. 143, 654 S.E.2d 877 [(Ct. App. 2007)]." Edgar and the Newton defendants appealed.

LAW/ANALYSIS

I. Jeisel's Alleged Negligence

The Newton defendants argue numerous alleged errors regarding Jeisel's own negligence, which we combine to address. The Newton defendants argue the trial court erred in the following: (1) granting a new trial because the jury could have imputed Edgar's negligence to Jeisel by virtue of her being the older and only licensed occupant of the vehicle; (2) excluding evidence of Jeisel's failure to keep a proper lookout; (3) failing to charge the jury that a passenger has a duty to exercise due care for his or her own safety; and (4) granting a new trial when Jeisel's own negligence contributed to her injuries. We disagree.

The admission or exclusion of evidence is within the sound discretion of the trial court, and its decision will not be disturbed on appeal absent an abuse of discretion. *Fields v. Reg'l Med. Ctr. Orangeburg*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). The trial court is required to charge only principles of law that apply to the issues raised in the pleadings and developed by the evidence at trial. *Clark v. Cantrell,* 339 S.C. 369, 389, 529 S.E.2d 528, 539 (2000). "Furthermore, the trial court is required to charge only the current and correct law of South Carolina." *Id.* (citation omitted).

The Newton defendants contend numerous facts could have led the jury to infer Jeisel was negligent. For instance, the Newton defendants argue a reasonable inference arises that Jeisel was not wearing her seatbelt because she was ejected through the windshield of the car. Also, they argue an inference of her negligence could have been made based on her decision to ride with Edgar, an unlicensed driver. Additionally, the fact that Jeisel was trying to reach her mother on her cell phone could have inferred Jeisel was negligent as a passenger. Finally, the Newton defendants argue the jury could have imputed Edgar's negligence to Jeisel.

First, the Newton defendants failed to preserve their argument that the trial court erred in granting a new trial because the jury could have imputed Edgar's negligence to Jeisel by failing to raise this issue to the trial court. *See Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) (stating an appellant's argument must be sufficiently clear to allow the trial court to understand it and rule upon it).

As to the remainder of their arguments regarding Jeisel's own negligence, we find no error. First, no evidence was presented of Jeisel's negligence. Although the issue of a plaintiff's own comparative negligence is ordinarily a question of fact for the jury, where the evidence presented yields only one conclusion concerning liability, the trial court may determine the issue as a matter of law. *Bloom v. Ravoira*, 339 S.C. 417, 422, 529 S.E.2d 710, 713 (2000) (explaining comparative negligence is ordinarily a question of fact for the jury); *Fairchild v. S.C. Dep't of Transp.*, 385 S.C. 344, 353, 683 S.E.2d 818, 823 (Ct. App. 2009) ("When evidence presented at trial yields only one conclusion concerning liability, the trial court may properly grant a motion for directed verdict."), *aff'd*, 398 S.C. 90, 727 S.E.2d 407 (2012).

As to the inferential evidence of Jeisel's failure to wear a seatbelt, a violation of the mandatory seatbelt law "is not negligence per se or contributory negligence, and is not admissible as evidence in a civil action." S.C. Code Ann. § 56-5-6540(C) (Supp. 2011); *see Clark v. Cantrell*, 332 S.C. 433, 451, 504 S.E.2d 605, 614-15 (Ct. App. 1998) (holding indirect evidence that plaintiff/decedent was not wearing a seatbelt was not inadmissible, but the court correctly instructed the jury it should not consider the seatbelt evidence in its deliberations), *aff'd as modified by* 339 S.C. 369, 529 S.E.2d 528 (2000); *Keaton v. Pearson*, 292 S.C. 579, 580, 358 S.E.2d 141, 141 (1987) (holding that in the absence of an affirmative statutory duty, the failure to use a seat belt does not constitute contributory negligence). Further, we find Jeisel's actions as a passenger are not, as a matter of law, sufficient to reverse the trial court's grant of a new trial. *See Thompson v. Michael*, 315 S.C. at 271, 433 S.E.2d at 854 ("In the absence of any fact or circumstance indicating the driver is *incompetent or careless*, an occupant of a vehicle is not required to anticipate negligence on the part of the driver."); *Funderburk v. Powell*, 181 S.C. 412, 421, 187 S.E. 742, 749 (1936) ("The standard of care to be observed and exercised by the occupant is of course ordinary care under the circumstances. It cannot be said, however, that in every case and under all circumstances it is the duty of an occupant of a motor vehicle to use his senses in order to discover approaching vehicles or other dangers, or that his failure to do so would be negligence.").

After a review of the record, we find no error in the trial court's rulings regarding Jeisel's own negligence.

II. Denial of Directed Verdict in Favor of Edgar

Edgar argues the trial court erred in denying his motion for directed verdict. We disagree. The evidence suggested that either Edgar, the Newton defendants, or both were negligent. Edgar admitted he was speeding, and the evidence illustrates he was potentially distracted by concern about his father's well-being. Although Jeisel testified she did not know how her brother could have avoided the accident, her expert indicated Edgar's speed and failure to slow down when confronted with glare contributed to the accident. Finally, the Newton defendants' expert testified the accident was due to Edgar's speed and failure to keep a proper lookout, and Warren Newton testified he estimated Edgar's speed between sixty-five and seventy miles per hour.

In considering a motion for directed verdict, the trial court is required to "view the evidence and the inferences that reasonably can be drawn therefrom in the light most favorable to the party opposing the motions and to deny the motions where either the evidence yields more than one inference or its inference is in doubt." *Strange v. S.C. Dep't of Highways & Pub. Transp.*, 314 S.C. 427, 429-30, 445 S.E.2d 439, 440 (1994) (citation omitted). The trial court should not be concerned with the credibility or weight of evidence, only with its existence or nonexistence. *N. Am. Rescue Prods., Inc. v. Richardson*, 396 S.C. 124, 131, 720 S.E.2d 53, 57 (Ct. App. 2011). An appellate court reviewing a trial judge's denial of a motion for directed verdict will reverse only when no evidence exists to support the ruling or when the ruling is governed by an error of law. *Austin v. Stokes–Craven Holding Corp.*, 387 S.C. 22, 42, 691 S.E.2d 135, 145 (2010).

In this case, there was evidence Edgar was speeding. Viewing the evidence in the light most favorable to Jeisel, we find no error in the trial court's denial of Edgar's motion for a directed verdict.

III. Grant of Jeisel's New Trial Motion

Edgar and the Newton defendants argue the trial court erred in granting Jeisel's motion for new trial. The Newton defendants also argue the trial court erred in finding the only reasonable inference to be drawn from the evidence was that one or more of the defendants were at fault. The Newton defendants finally argue Jeisel failed to meet her burden of proof in establishing any of the defendants were negligent. We disagree.

We previously discussed the evidence of Edgar's negligence in affirming the trial court's denial of his motion for directed verdict. We also find there was evidence the Newton defendants were negligent. The Newton defendants had to wait ten minutes before traffic cleared before maneuvering the tractor trailer diagonally across the road, completely blocking both lanes and preventing traffic from proceeding in either lane. Furthermore, Jeisel's expert testified the Newton defendants caused a dangerous condition by moving the equipment late at night with the knowledge that their presence in the intersection would be approximately twenty-five to thirty seconds. They did not use a flagman or flashlight to warn oncoming traffic or put out reflective triangles, which were available to them. We find no error by the trial court in granting the motion for a new trial.

Edgar additionally argues the trial court erred in granting the new trial because the court based its decision on its failure to grant Jeisel's directed verdict motion as to liability. He contends the new trial motion was made on the law, not the facts as contemplated by the thirteenth juror doctrine. We need not determine if the court erred in concluding it should have granted Jeisel's motion for directed verdict as to liability, because we find it was based on the facts, and it was within the trial court's discretion.

"The grant or denial of a new trial motion rests within the trial court's discretion, and its decision will not be disturbed on appeal unless the court's findings are wholly unsupported by the evidence or its conclusions are controlled by error of law." *Winters v. Fiddie*, 394 S.C. 629, 638, 716 S.E.2d 316, 321 (Ct. App. 2011) (citations omitted). "In South Carolina, a trial judge may grant a new trial following a jury verdict under the Thirteenth Juror doctrine. The doctrine entitles the judge to sit, in essence, as the thirteenth juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts." *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009) (internal quotation marks and citations omitted). This court's review of a trial court's grant of a new trial is limited to consideration of whether evidence exists to support the trial court's order. *Id.* As long as there is conflicting evidence, the trial court's grant of a new trial will not be disturbed. *Id.* at 597-98, 681 S.E.2d at 883.

Under the thirteenth juror doctrine, the trial court may grant a new trial based on its view of the facts. *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). Our supreme court discussed the thirteenth juror doctrine in *Folkens*:

> This Court has had an opportunity to reconsider the thirteenth juror doctrine on several occasions. Each time we have refused to abolish the doctrine. We have also refused to require trial judges to explain the reasons for the ruling. The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict. This ruling has also been termed granting a new trial upon the facts. The effect is the same as if the jury failed to reach a verdict. The judge as the thirteenth juror "hangs" the jury. When a jury fails to reach a verdict, a new trial is ordered. Neither judge nor the jury is required to give reasons for this outcome. Similarly, because the result of the "thirteenth juror" vote by the judge is a new trial rather than an adjustment to the verdict, no purpose would be served by requiring the trial judge to make factual findings.

Id. (internal citation omitted).

At this stage of a trial, the court may weigh the evidence even though it is not permitted to do so in considering a directed verdict motion. *See Buxton v. Thompson Dental Co.*, 307 S.C. 523, 528, 415 S.E.2d 844, 848 (Ct. App. 1992) (affirming the trial court's grant of a new trial motion after its denial of a directed verdict motion), *overruled on other grounds by Boone v. Goodwin*, 314 S.C. 374, 444 S.E.2d 524 (1994). "The granting of a new trial upon the facts is not the equivalent of granting a directed verdict." *McEntire v. Mooregard Exterminating Servs., Inc.*, 353 S.C. 629, 632, 578 S.E.2d 746, 748 (Ct. App. 2003) (citation omitted). We find the trial court's refusal to grant a directed verdict was not necessarily inconsistent with the grant of a new trial. *See RFT Mgmt. Co., L.L.C. v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 334, __ S.E.2d __ (2012) ("The question of whether the evidence is legally sufficient to sustain a verdict, a question of law, is distinguishable from the question of whether a fair preponderance of the evidence supports a verdict, which is a matter involving the exercise of discretion.").

We find the trial court's grant of a new trial *was* based on its view of the facts, evidenced in its finding that the only reasonable inference from the evidence was "that one or more of the defendants were at fault in causing the accident that injured the plaintiff." The court also found no evidence showed Jeisel was at fault. Furthermore, we need not address whether the trial court erred in finding it should have granted Jeisel's motion for a directed verdict because we find the trial court granted the new trial on the facts, and its decision was not wholly unsupported by the evidence. *See Trivelas v. S.C. Dep't of Transp.*, 357 S.C. 545, 552, 593 S.E.2d 504, 508 (Ct. App. 2004) (affirming the grant of a new trial under the thirteenth juror doctrine after viewing the trial court's order as a whole, coupled with the court's statements); *Burton v. York Cnty. Sheriff's Dep't*, 358 S.C. 339, 355-56, 594 S.E.2d 888, 897 (Ct. App. 2004) (reading the trial court's order as a whole in finding the reasons for the court's order were "amply clear"); *Youmans ex rel. Elmore v. S.C. Dep't of Transp.*, 380 S.C. 263, 272, 670 S.E.2d 1, 5 (Ct. App. 2008) ("When an order granting a new trial is before this Court, our review is limited to the consideration of whether evidence exists to support the trial court's order.").

We likewise find no error in the trial court's citation to *Howard v. Roberson*, 376 S.C. 143, 147-48, 654 S.E.2d 877, 879 (Ct. App. 2007), in which this court affirmed the trial court's grant of a motion for directed verdict in favor of a passenger against two drivers. This court stated: "The evidence presented at trial yielded only one conclusion—that the negligence of at least one driver, if not both, resulted in the accident causing [the plaintiff's] injuries." *Id.* at 151, 656 S.E.2d at 881. In this case, we need not determine if the trial court erred in finding it should have granted Jeisel directed verdict because the learned judge did not err in granting a new trial based on the facts. Therefore, we find no prejudicial error in its citation to *Howard*.

Finally, without citation to legal authority in his initial brief, Edgar argues there was sufficient evidence of the negligence of an unnamed party such as the State of South Carolina or Georgetown County to support the jury's verdict. This issue is deemed abandoned. *See State v. Howard,* 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) (finding an issue is deemed abandoned and will not be considered on appeal if the argument is raised in a brief but not supported by authority); *see also McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) (stating an issue may not be raised for the first time in a reply brief).

CONCLUSION

For the foregoing reasons, the trial court's order granting a new trial is

AFFIRMED.

LOCKEMY, J., concurs.

KONDUROS, J., concurs in part and dissents in part.

KONDUROS, J., concurring in part and dissenting in part: I agree with the majority's analysis in sections I and II. However, I must respectfully dissent as to the trial court's grant of Jiesel's new trial motion. The trial court granted a new trial based on its failure to direct a verdict in Jiesel's favor as to the liability of one or both defendants. Because this was the basis of the order, as evidenced by its language and reliance on *Howard v. Roberson*, 376 S.C. 143, 654 S.E.2d 877 (Ct. App. 2007), I believe the analysis as to whether the denial of directed verdict was appropriate is essential to the new trial question.

On that point, I believe the trial court correctly denied Jeisel's motion, because the jury could have found she failed to meet her burden of proof as to the negligence of both defendants. Jeisel testified she did not believe Edgar could have done anything to avoid the accident, and the parties presented conflicting testimony regarding the direction the tractor-trailer's headlights were shining and how well the truck and area were lit the night of the accident. *See Moore v. Levitre*, 294 S.C. 453, 453-54, 365 S.E.2d 730, 730 (1988) (stating in deciding a directed verdict motion, the trial court must view the evidence and its inferences in the light most favorable to the opposing party and should deny the motion if the evidence yields more than one inference or if its inferences are in doubt).

Because I believe the trial court's grant of a new trial was based on an erroneous change of heart with respect to the directed verdict motion, I would reverse the trial court's grant of a new trial and reinstate the jury's verdict.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No: 2008-CP-22-00466
Published Opinion No. 5055
Filed November 28, 2012

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc and Edgar Rivera,

Appellants,

PETITION FOR REHEARING ON BEHALF OF PETITIONERS WARREN JARED NEWTON, NEWTON'S FARM, J&J LOGGING, INC ("NEWTON DEFENDANTS")

TO: THE HONORABLE JUDGES OF THE COURT OF APPEALS:

Appellants, Warren Jared Newton, Newton's Farm, and J&J Logging, Inc. (Hereinafter, collectively referenced as the "Newton Defendants") petition this Court for rehearing pursuant to Rule 219 and/or Rule 221 SCACR on the ground that the Court overlooked or misapprehended the following points:

1. **The Court's Opinion holds that the Newton Defendants were arguing in this appeal that the jury could have imputed co-Defendant Rivera's negligence to the Plaintiff. The Newton Defendants did not raise that argument, per se, but rather raised two (2) other issues or theories: (1) That the Plaintiff's testimony released or waived her claims against the co-Defendant; and/or (2) That the Plaintiff and co-Defendant were engaged in a joint enterprise such that the act of one was the act of both.**

As to waiver, the jury could have construed the Plaintiff's testimony as releasing her brother/driver, co-Defendant Rivera, from liability. The jury's defense verdict was a finding in favor of the Newton Defendants, and it also affirmed the Plaintiff's release of her brother, whom the jury could otherwise have held liable. Testimony established that (1) Defendant Rivera was admittedly speeding on the night of this accident **(R.p.171, l.12 - p. 173, l.12)**; and (2) Neither Defendant Rivera nor the Plaintiff (who was talking on a cell phone at the time) saw the Newton's tractor-trailer; and (3) Newton, Newton's expert and independent witness Ward testified that the tractor trailer was well-lit and visible and that several other vehicles had approached, saw the tractor trailer and turned around. **(R.p.299, l.25 - p. 348, l.14); and (R.p.263, l. 5-11; p. 368, l 7-24)** and **(R.p.290, l.11- 22; p. 406, l.14-p. 321 l.4)**

Despite Defendant Rivera's admission of speeding and the tractor trailer being well lit and visible to other approaching vehicles being operated more carefully, the Plaintiff testified that although she sued her brother, she did not believe her brother (co-Defendant Rivera) did anything wrong. (R.p.221, l.8 - p.222, l.2) The Plaintiff's testimony waived or released her claims against co-Defendant Rivera. That being the case, if the jury determined that the Newton Defendants were not negligent or that the Plaintiff didn't meet her burden of proving that the Newton Defendants were negligent, the jury would also have returned a defense verdict as to

co-Defendant Rivera based upon the Plaintiff's own waiver or release. **(Newton Defendants' Final Brief, page 22.)**

As to joint enterprise, to establish the doctrine, there must be a common purpose or community of interest between the driver and the passenger and the passenger must have the equal right to control the management of the vehicle. Pruitt v. Bowers, 330 SC 483, 499 SE2d 2500 (Ct. App. 1998) If there is conflicting evidence, such as in this case, then joint venture or joint enterprise is a jury issue. Ray v. Simon, 245 SC 346, 140 SE2d 575 (1965) The test is whether the driver is the agent of the passenger and whether the passenger therefore had some control over the automobile. *Id* The theory has been held to be a jury issue where the passenger's daughter was driving the family car to take a group of people to a church service. *Id*

In this case the Newton Defendants pled contributory-comparative negligence. **(See: R.p.15-23)** The co-Defendant and the Plaintiff were engaged in a joint enterprise or mission in that they were coming to the rescue of their father. Respondent/Plaintiff and her brother got a call that their Father had been mugged and they, with another car following, left to go to his aide. **(R.p.171, l.11 - p. 173, l.2)** So there was a joint enterprise or mission and additionally, the Plaintiff, who was a licensed driver, was chargeable with supervising and controlling the operation of this vehicle by the unlicensed driver, her younger brother, co-Defendant/co-Appellant Rivera . **(R.p.171, l. 11-p. 173 l. 2; p. 86, l. 3-4; p. 166, l. 5-6; p. 294, l.12-16; p. 165 l.24- p. 166, l.1; p. 171, l.2- p. 173, l.12)** Therefore, the Plaintiff was also chargeable with Edgar Rivera's negligence per the principals of joint enterprise.

2. **The Court's Opinion holds that the Newton Defendants failed to preserve their argument about imputed negligence because it was not raised to the trial court.** As noted above in #1, supra, the Newton Defendants contended that the Plaintiff waived her claims

against co-Defendant Rivera, and then the jury found in favor of the Newton Defendants and affirmed Plaintiff's waiver of her claims against Rivera. This argument was raised to the trial court. **(R.p.121; R.p.133)** The Newton Defendants' argument about joint enterprise was not raised by name but it was raised by concept and specification. The Newton Defendants' Motion for Reconsideration **(R.p.132)** specifically addressed the Plaintiff's duty – and, under these facts – her heightened duty to observe/monitor the driving of her brother, the co-Defendant. A party is not required to use the exact name of a doctrine (like joint enterprise) in order to preserve the issue for appellate review. The issues must have simply been raised with sufficient clarity for the trial judge to have a reasonable understanding and a reasonable opportunity to address them. Herron v. Century BMW, 395 SC 461, 719 SE2d 640 (2011). The Newton Defendants'/Appellants raised these and numerous other issues in a Motion for Reconsideration **(R.p. 130-135)** which the trial court chose to address via a Form Order. **(R.p.8)**

3. **The Court holds that no evidence was presented of the Plaintiff/Respondent's negligence and that absent circumstances indicating the driver is incompetent or careless that a passenger is not required to anticipate the driver's negligence. The Court holds that therefore the Plaintiff's comparative negligence was for the court rather than the jury. Bloom v. Ravoira, 339 SC 417, 4232, 529 SE2d 710, 713 (2000); Thompson v. Michael, 315 SC 268, 433 SE2d 853 (1993).** This misapprehends or overlooks that the facts show that the co-Defendant was younger and less mature, he was unlicensed, he would be driving at night, and he would be driving in a state of high anxiety because he'd been summoned by a call that their father had been injured in a fight. As a result of the circumstances, co-Defendant refused to allow the Plaintiff to ride in the car on this occasion but she took the keys, waited by the car while co-Defendant changed his shirt and made sure that he had to take her. **(R.p.171, l.11 - p. 173, l.12; R.p.166, l.3-4; R.p.211, l.1 - 6; p.493; R.p.165, l.24 - p. 166, l.1)** The Plaintiff knew her

brother, the co-defendant, was in a hurry to get to her father and knew of his youth and unlicensed status, yet given all the circumstances, the Plaintiff didn't buckle her seatbelt and spent the ride talking on a cell phone instead of being properly attentive to her incompetent or careless brother. **(R.p.217, l.3-8; R.p.219, l.18 - p. 220, l.6; (R.p.266, l.13-20)**

4. **Per Thompson v. Michael, 315 SC 268, 433 SE2d 853 (1993) under the facts of this case as related in #3, supra, the Plaintiff had a duty to warn and if the warning was not heeded to demand the car be stopped and she be let out.** Whether a warning should have been given was for the jury to decide. A passenger has a duty to use ordinary care and to employ her senses of sight, hearing and perception to protect herself and it is for the jury to determine whether co-Defendant was operating the vehicle in such a careless manner that the danger was or should have been reasonably apparent to the Plaintiff such that her failure to exercise due care contributed to her injuries – all within the meaning of Stone v. Barnes, 248 SC 28, 148 SE2d 738 (1966).

5. **As the dissent in the Court's Opinion notes, the trial court essentially granted the Plaintiff/Respondent's motion for a new trial because it found that it should have directed a verdict as to liability within the general meaning or province of Howard v. Roberson, 376 SC 143, 654 SE2d 877 (Ct. App. 2007).** This overlooks or misapprehends the existence of conflicting evidence as to liability including the position of the tractor trailer and its lights, the visibility of the tractor trailer, and the speed of the Rivera vehicle. The conflicting evidence includes the Plaintiff's testimony that the co-defendant did nothing wrong and could not have avoided the accident. The Court's duty at the directed verdict stage is to view the evidence and inferences to be made from it in the light most favorable to the parties opposing the motion for a directed verdict which must be denied if the evidence is susceptible of more than a single inference or if the inferences from the evidence are in doubt. Moore v. Levitre, 294 SC 453,

453-454, 365 SE2d 730 (1988).

6. **In a case where conflicting evidence mandates the denial of a directed verdict motion, as noted above, a Plaintiff, including a Plaintiff-passenger, has the burden of proof as to liability and a jury can find that the Plaintiff did not meet this burden of proof as to any or all drivers.** In this case, as the dissent notes, the trial court's grant of a new trial was based "on an erroneous change of heart with respect to the directed verdict motion and therefore this Court should reverse the grant of a new trial and reinstate the jury's verdict.

7. **The Howard v. Roberson case, *supra*, does not stand for the proposition that a passenger who files a civil lawsuit is automatically entitled to a jury verdict** and the Court in that case did not hold that passengers lack the burden of proving their case. The Trial Court erred as a matter of fact and law in holding otherwise and its grant of a new trial should therefore be reversed and the jury verdict reinstated and this Court should take the opportunity to address a passenger's burden of proof under facts such as those present in this case.

8. **The Court did not address the Newton Defendants'/Appellants' constitutional issues and concerns.** Having this case tried before a jury of their piers was a Constitutional right and any jury's verdict deserves due deference. Given the clear weight and consideration that this jury placed upon deliberations, the trial court was, as a matter of law, obligated to respect the verdict, confirm the due process afforded to the parties and allow the jury's verdict to stand.

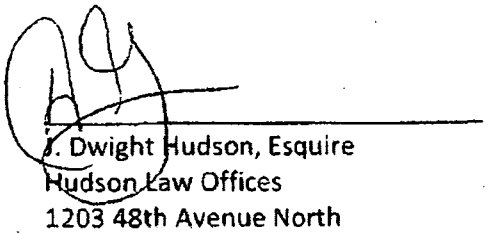
9. **The Court deemed abandoned the co-Defendant's contention that sufficient evidence of the negligence of unnamed parties, like the State or Georgetown County, existed to support the jury's verdict. The Court's Opinion held that contention to be abandoned because it was supposedly made "without citation to legal authority in his initial brief" and that such a point could not be made in a reply brief.** While this was addressed to co-Defendant, the

Newton Defendants'/Appellants note that the Court did not have issues with the unsupported facts alleged by the Plaintiff's brief, and in that context, at a minimum, this statement-holding raises the appearance of unequal treatment and/or inconsistency.

10. This Court should vacate the majority opinion and adopt the dissent written by Judge Konduras. The dissent goes to the heart of the issue which was largely unaddressed by the majority – that the grant of a new trial was motivated by the trial court's having second-guessed itself as to its failure to direct a verdict as to liability. However, as the dissent finds, a verdict should not have been directed as to liability.

WHEREFORE, Appellants Warren Jared Newton, Newton's Farm, and J&J Logging, Inc. move the Court to rehear the case.

Respectfully submitted,



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Dated: December 5, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No: 2008-CP-22-00466

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc, and Edgar Rivera,

Appellants,

PROOF OF SERVICE

I certify that I have served Appellants Newton, Newton's Farms & J&J's PETITION FOR REHEARING on each party who served a brief in this matter by depositing a copy of the same in the United States Mail, postage prepaid addressed to their respective attorney(s) of record at the addresses noted below on **December 6, 2012** as follows:

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Dated: December 6, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No.: 2008-CP-22-00466
Published Opinion No. 5055
Filed November 28, 2012

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm,
J&J Logging, Inc. and Edgar Rivera,

Appellants.

PETITION FOR REHEARING AND SUPPORTING MEMORANDUM ON BEHALF OF PETITIONER EDGAR RIVERA

Appellant Edgar Rivera petitions this Court for rehearing pursuant to Rules 219, 221 and/or 240 of the SCACR on the following grounds:

1. **The dissent reached the proper conclusion.**

The dissent correctly agreed with the original decision of the Trial Court in finding that the jury be allowed to find in favor of both defendants. The Respondent's testimony about the actions of this Appellant and the other conflicting testimony undoubtedly led the jury to conclude that the plaintiff had failed to carry her necessary burden of proof.[1] The dissent accurately noted the integrity of the verdict form and the error in the Trial Court overturning the jury's decision.

For all of these reasons, the Court should vacate the majority and adopt this dissent. Specifically though, the jury's verdict was clearly proper as it pertains to *this* Appellant.

2. The Court misapprehended the classification of the Motion and Order for a New Trial.

The Court reviewed the Motion and Order for a New Trial as one made on the facts. As noted in Appellant Edgar Rivera's Final Brief, the Motion and Order were based on the purported legal error of the Trial Court's denial of Respondent's earlier directed verdict motion. Most importantly though, the Trial Court based its granting of a new trial for the Respondent on the legal error that allowed the jury to consider the case against Appellant Edgar Rivera. [Appellant Edgar Rivera's Final Brief, page 11-15]. This resulted in the actual Motion and Order for a New Trial on the Law.

The lack of anything more than a mere scintilla of evidence of negligence presented against this Appellant during the Respondent's case-in-chief should have resulted in a directed verdict in favor of Appellant Edgar Rivera. *Hancock v. Mid-South Management Co., Inc,* 381 S.C. 326, 330-331, 673 S.E.2d 801, 802-803 (2009). This Appellant made a proper directed verdict motion at the conclusion of the Respondent's case-in-chief based on: (1) the Respondent's own denial of any negligence on the part of this Appellant; (2) the Respondent's

[1] Appellant Edgar Rivera set forth this elementary requirement that the plaintiff carry her burden of proof by a preponderance of the evidence in order to prevail on a negligence claim. [Appellant Edgar Rivera's Final Brief, page 11].

expert accident reconstructionist's denial of any negligence on the part of this Appellant; and (3) the lack of any other evidence to support a valid claim against this Appellant. [R. p. 226, l. 355; R. pp. 227-239]. Appellant Edgar Rivera expressed to the Court that his own testimony regarding his potential speed slightly in excess of the speed limit was insufficient to show "even a minimal showing of negligence on his part." [Appellant Edgar Rivera's Final Brief, page p. 14].

In relying on *Howard v. Roberson*, 376 S.C. 143, 148-149, 654 S.E.2d 877 (Ct. App. 2007), the Respondent confirmed the legal basis for the Motion and Subsequent Order. As noted in Appellant Rivera's Final Brief, *Howard* dealt with a directed verdict motion. When reviewing as a Motion and subsequent Order for a New Trial on the Law, the Court should have used the same standard of review as a ruling on a directed verdict motion or a judgment notwithstanding the verdict (JNOV) under SCRCP 50(b). Under this standard, the Court would have found legal error in granting a new trial to Respondent for the same reasons. However, the Court applied the more stringent appellate standard of review.

3. **The Court overlooked the fact that Appellant Rivera preserved the argument that ample evidence existed to support the negligence of an unnamed tortfeasor.**

The Court cites *State v. Howard*, 384 S.C. 212, 217, 682 S.E.2d 42, 45 (Ct. App. 2009) in finding that "without citation to legal authority in his initial brief," Appellant Edgar Rivera abandoned his argument that there was sufficient evidence of the negligence of an unnamed party to support the jury's verdict. Appellant Edgar Rivera simply directed the Court to the fact that the jury's verdict could have easily been supported by the evidence of negligence of unnamed defendants, such as Georgetown County and the State of South Carolina. [Appellant Edgar Rivera's Final Brief, page p. 15-19]. Not only did the jury hear evidence of the lack of

adequate lighting [R. p. 162, lines 6-8, p. 220, lines 2-7], the lack of warning signs [R. p. 170, lines 7-18, p. 175, line 25 – p. 176, line 2] and an improperly-designed intersection that implicates tortfeasors other than the named defendants, Appellant Edgar Rivera also argued this point to the jury in his closing argument. [R. p. 360, lines 1-17, p. 361, line23 – p. 362, line 2, p. 363, lines 1-4].

State v. Howard mentions the above-referenced abandonment rule in passing. For further delineation on this rule, Appellant Edgar Rivera would refer the Court to *Glasscock, Inc. v. U.S. Fidelity and Guaranty Co.*, 348 S.C. 76, 557 S.E.2d 689 (Ct. App. 2001). In *Glasscock*, this Court found that "short, conclusory statements" without supporting authority fail to preserve an issue on appeal. The Court in *Glasscock* determined that the argument in support of the issue was so brief and conclusory to be deemed abandoned. Appellant Edgar Rivera presented a lengthy argument supporting his contention of negligence of an unnamed tortfeasor. [Appellant Edgar Rivera's Final Brief, page p. 15-19]. The basic nature of this argument did not require supporting authority. However, this Appellant did reference the general standard for sufficiency of evidence to support a verdict. [Appellant Edgar Rivera's Final Brief, page 7-9]. The negligence of an unnamed tortfeasor is a logical extension in support of the argument that the evidence, or lack thereof, supported the jury's verdict, specifically as it pertained to Appellant Edgar Rivera. This Appellant directed the Court's attention to alternative negligence theories and evidence thereof in a subsection of the argument entitled "The Trial Court erred in granting a new trial to Hazel Rivera since the decision was either based on an error of law and/or wholly unsupported by the evidence." *Id* at p. 17-19. Throughout this greater argument structure, Appellant Edgar Rivera effectively conveyed ample supporting authority. *Id.*

The evidence of the negligence of another tortfeasor certainly supports the jury's finding. In granting the Motion for a New Trial, the Trial Court disregarded this evidence. The Trial Court ordered a new trial based on the tenet referenced in *Howard v. Roberson* that a trial court can grant a directed verdict motion "[w]hen evidence presented at trial yields only one conclusion concerning liability..." [R. pp. 5-6]. This evidence of the negligence of an unnamed tortfeasor yielded more than one conclusion as to the liability. In other words, the evidence allowed the jury to find negligence on the part of an entity other than the named defendants.

The Court also cites *McClurg v. Deaton*, 395 S.C. 85, 87 n.2, 716 S.E.2d 887, 888 n.2 (2011) for the proposition that an issue may not be first raised in a reply brief. The reference to this case law was apparently made in error, as the Court acknowledges that Appellant Edgar Rivera raised this issue in his initial brief.

WHEREFORE, Appellant Edgar Rivera moves this Court for a hearing on these matters and the case.

Respectfully submitted,

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December 13, 2012

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No.: 2008-CP-22-00466
Published Opinion No. 5055
Filed November 28, 2012

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm,
J&J Logging, Inc. and Edgar Rivera,

Appellants.

PROOF OF SERVICE

I certify that I have served Appellant Edgar Rivera's PETITION FOR REHEARING AND SUPPORTING MEMORANDUM on each party who served a brief in this matter by depositing a copy of the same in the United States Mail, postage prepaid addressed to their respective attorney(s) of record at the addresses noted below on **December 13, 2012** as follows:

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December 13, 2012

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010168831
Published Opinion No. 5055
Filed November 28, 2012

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm,
J & J Logging, Inc., and Edgar Rivera,

Appellants,

RESPONDENT'S RETURN TO
PETITION FOR REHEARING

The Respondent Rivera hereby submits her Return to Appellants' Petition for Rehearing.

1. **The Court properly construed the Defendants' argument concerning negligence.**

The Defendants are simply raising the same arguments again in a somewhat convoluted fashion. The Court quite clearly and correctly concluded that the trial court was correct in granting a new trial. The Defendants' argument concerning waiver has been made and rejected by the Court. The Newton Defendants make the assertion once again that the Plaintiff somehow released her brother from liability by her testimony and that this release or waiver somehow

inures to the benefit of the Newton Co-Defendants.

A release from liability must be specific and in writing and for consideration. The Plaintiff speaks very little English and had to testify in court through an interpreter. She was not looking at the speed that her brother was going. Her brother, Mr. Rivera, testified himself that he was exceeding the speed limit. This testimony alone is sufficient to overcome any supposed waiver on the Plaintiff's part.

The Newton Appellants once again make the argument that the Plaintiff as a passenger should have been charged with supervising or controlling the operation of the vehicle. This is nothing more than repetition of the prior argument which the court heard and rejected.

2. **The Court properly held that the Newton Defendants failed to preserve their argument about imputed negligence.**

The Newton Defendants attempt to restate the arguments that were made to the Trial Court to comply with the Court's rules. Their attempted restatement, however, falls short of giving the Trial Court adequate notice of their argument to be able to make a ruling on joint enterprise. Under any set of facts, however, the Trial Court dismissed all such arguments and was certainly within its authority to do so.

3. **The Court correctly held that there was no evidence of any negligence on the Plaintiff's part and that this was a matter for the Court to decide.**

Appellant's arguments in this regard are simply a restatement of the argument made both at the motion for a new trial and to the Appellate Court. The Appellant has raised no new matter and certainly nothing that would question the Court's sound reasoning that the Plaintiff as a passenger in the vehicle was not comparatively negligent.

4. **The Appellate Court correctly concluded that the Plaintiff had no duty to warn**

under the circumstances of this case.

Once again, the Appellant has made no new arguments here.

5. **The Appellate Court was correct in its affirmation of the new Trial Order.**

Once again, the Appellant makes an attempt to rehash the arguments that have already been made. The Appellants have raised no new matter.

6. **The Appellate Court correctly ruled on all issues concerning burden of proof and no new matter is raised in this objection.**

7. **This Court correctly construed Howard v. Roberson, *supra*, and no new matter has been raised.**

8. **The Court did in fact address all issues properly raised on this appeal and Paragraph No. 8 brings up no new facts or additional matters for the Court to consider.**

9. **The Appellate Court correctly addressed the Defendants' argument of the potential liability for unnamed parties and no new matter has been raised here.**

10. **This Court should not vacate the majority opinion and should not adopt the dissent because the Court's decision was rightly determined in affirming the Trial Court's grant of a new trial.**

In addition to the arguments stated above, the essence of this case is that a Spanish speaking young lady from Honduras was unfortunate enough to be riding as a passenger in a vehicle being operated by her brother on a dark road in Georgetown County when a large tractor trailer truck owned and operated by the Newton family, lifelong residents of Georgetown County, pulled out at night and blocked the roadway with no warning. Her vehicle hit the trailer broadside. She is lucky not to have been decapitated. She was ejected from the vehicle through the windshield suffering severe injuries. The Trial Judge gave the jury the option on the verdict

form of finding for both Defendants. The twelve (12) person non-Hispanic jury from Georgetown County chose this option. The facts of the case are clearly against this absurd result. The Trial Court recognized this and rightfully granted a new trial. What is truly amazing is that the insurance carriers for both Defendants would apparently rather pay their lawyers to argue this case for years than to provide just compensation for this young Hispanic girl. The whole case is a rather sad commentary.

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January 7, 2013

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2010168831

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm,
J & J Logging, Inc., and Edgar Rivera,

Appellants,

PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of Kelaher, Connell & Connor, P.C., attorneys for the Respondent Hazel Jeisel River, and that he has served a copy of the RESPONDENT'S RETURN TO PETITION FOR REHEARING on counsel listed below this 7 day of January, 2013.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No: 2008-CP-22-00466
Published Opinion No. 5055
Filed November 28, 2012

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc and Edgar Rivera,

Appellants,

REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR REHEARING BY PETITIONERS WARREN JARED NEWTON, NEWTON'S FARM, J&J LOGGING, INC ("NEWTON DEFENDANTS")

TO: THE HONORABLE JUDGES OF THE COURT OF APPEALS:

Appellants, Warren Jared Newton, Newton's Farm, and J&J Logging, Inc. (Hereinafter, collectively referenced as the "Newton Defendants") would Reply herein to Respondent's Return to the Newton Defendants' Petition for Rehearing and show unto this Honorable Court as follows:

- The Newton Defendants hereby incorporate by reference their Petition for Rehearing as fully as though the same were repeated verbatim herein.
- All grounds/arguments/allegations contained in the Newton Defendants' Petition for Rehearing are affirmed and are re-alleged in response to the Respondent's Return to the same.
- To the extent the same are not conflicting; all grounds/arguments/allegations contained in the Rivera Defendant/Appellant's Petition for Rehearing are also incorporated herein.

1. **The Respondent's Return incorrectly and inaccurately contends that the Newton Defendants' Petition for Rehearing "raised the same arguments again" as to imputed negligence, waiver, release, and this particular passenger/appellant's duty to supervise/control the operation of the Rivera vehicle under these facts.**

On the contrary, the Newton Defendants' Petition for Rehearing responded specifically to the Court's Opinion, including the dissent by Judge Konduras, and it contended that this Court should vacate the majority opinion and adopt the dissent written by Judge Konduras.

Specifically, the Newton Defendants contend that the majority Opinion erred in considering the testimonial waiver claim as only alleging imputed negligence. Because it found, incorrectly, that these issues were not raised to the trial court, **(R.p. 121, 132, 133, 130-135)** the majority did not consider either imputed negligence or waiver. Therefore, the majority did not consider the impact on the jury verdict of plaintiff/respondent Ms. Rivera's testimonial waiver/release of her brother, the co-Defendant.

Judge Konduras' dissent considers at least some of these issues and finds that the trial court should be reversed and the jury verdict sustained.

2. The Respondent's Return incorrectly agrees with the majority that the Newton Defendants imputed negligence argument was not preserved, it does so without distinguishing between the waiver and imputed negligence arguments, and it then states that "the Trial Court dismissed all such arguments and was certainly within its authority to do so.

While the Newton Defendants contend that all claims of waiver/release/negligence (comparative-contributory, including imputed) were properly made and preserved, those claims are differentiated. The imputed negligence/joint enterprise argument was made without specific reference to the doctrine, via allegations of negligence **(R.p.15-23)** and evidence/testimony at trial. **(R.p.171 l. 11-p.173, l. 2; p. 86, l.3-4; p.166, l.5-6; p. 294, l. 12-16; p. 165, l. 24-p.166 l. 1; p. 171 l. 2-p.173, l. 12)**

The Newton Defendants' argument that the Plaintiff waived her claim against co-Defendant or released it was made and raised to the trial court by way of a Motion for Reconsideration. **(R.p.130-135)**.

However, the Respondent's Return specifically addresses only the claims regarding imputed negligence and as to those, Respondent admits these were raised to and addressed by the trial court. As to imputed negligence, Respondent's Return states: **"the Trial Court dismissed all such arguments and was certainly within its authority to do so.**

3. The Respondent's Return agrees with the majority's incorrect holding that no evidence was presented of Jeisel's negligence. Like the majority, the Respondent fails to consider that under these facts, Jeisel was on notice that her brother, the co-Defendant, was incompetent or careless.

Jeisel was an older, licensed driver who knew that her younger brother was unlicensed, driving at night, and rushing to reach their father who had been involved and injured in a fight. **(R.p.171, l.11 - p. 173, l.12; R.p.166, l.3-4; R.p.211, l.1 - 6; p.493; R.p.165, l.24 - p. 166, l.1)** The

majority cites Thompson v. Michael, 315 S.C. at 271, 433 S.E.2d at 854 as standing for the proposition that IN THE ABSENCE OF any fact or circumstance indicated that the driver is incompetent or careless, a vehicle passenger isn't required to anticipate a driver's negligence. In this case, the facts and evidence, at a minimum, raise a jury issue as to the Plaintiff's negligence, sufficient to withstand a Motion for a Directed Verdict. This further supports Judge Kondurases' dissent finding that the trial court erred in granting a new trial based on its failure to grant the directed verdict motion.

4 – 9. Respondent's Return to #s 4-10 of the Newton Defendant's Petition is generally to the effect that the Petition does not "raise any new matter."

The Newton Defendants' Petition for Rehearing could not have properly raised new matter or material. The purpose of the Petition for Rehearing was to show that material raised by the briefs and argument and documented by the Record was misapprehended by the majority opinion. The Petition for Rehearing could not have properly raised new matter or arguments.

10. The Respondent's Return is incorrect in summarily dismissing the import of the dissent by Judge Konduras. As Judge Konduras stated, the trial court granted a new trial because it found it should have granted a Directed Verdict.

However, as Judge Konduras noted, at the directed verdict stage the trial court was required to view all evidence and inferences most favorably to the parties opposing the motion. Moore v. Levitre, 294 SC 453, 453-454, 365 SE2d 730, 730 (1988) In that light, enough evidence existed for this jury to have found that the Plaintiff failed to meet her burden of proof and to support the jury's defense verdict, making it an error of law for the trial judge to have granted a new trial on the bases for which it was granted in this case.

The Respondent's Return does not appear to address the arguments made by Edgar

Rivera in his Petition for Rehearing – *which is incorporated herein by reference, except to such extent that the same may conflict herewith.* This argument was also made by the Newton Defendants in their Petition for Rehearing. This includes allegations that the accident could have been caused by an unnamed party in the design of the intersection, lighting in the area and lack of adequate warning signs, which the majority incorrectly determined was not preserved. It was presented in testimony and argued to the jury at closing by Rivera's lawyer. **(R.p.360, lines 1-17; p. 361, l 23; p. 362, l. 2 p. 363, l. 1-4)** This argument was also preserved by the Newton Defendant's Motion for Reconsideration, made after the grant of a new trial. That Motion for Reconsideration specifically incorporated both Defendants' Briefs/Memoranda opposing the Respondent-Plaintiff's Motion for a New Trial. **(R. p. 134, p. 130-135; p. 119-123)**

The Respondent concludes the Return by raising the clear implication that what motivated this verdict was racial animus by a "twelve (12) person non-Hispanic jury from Georgetown County." Respondent's conclusion even manages to IMPROPERLY raise the issue of insurance – which alone justifies the Return being struck.

If there were any basis for Respondent's contentions about the jury's verdict being motivated by racism, then jury deliberations would have concluded very quickly, with little to no evidence of the jury having seriously considered the facts and the law. Instead, this jury spent approximately a week listening to the arguments, testimony and charges and deliberated for roughly eight (8) hours. **(R.p.389, l.1-2; p.403, l.24-p. 405, l.12; p.406, l.16- p 407, l 4; quote at p. 407, l.1-4)** During deliberations, the jury made the following requests: (1) for Trooper Surratt's testimony to be read back to them (which was done); (2) for a complete definition of the term intersection as it applied to this intersection on the night of this accident (the court re-read its charge as to right of way, favored and un-favored highways, and the right of way changing to the traveler on the un-favored road after entering when no traffic is approaching

so as to constitute an immediate hazard); and (3) a copy of the judge's full charge or that it be read again (the full charge was sent to the jury). **(R.p.389, l.1-2; p.389, l.1-8; p.393, l.5-10; p..393, l.22- p. 394, l.21; p.397, l.21-23; p.397, l.21-p 402, l.21)** The facts show that this jury took a lot of time and closely considered the evidence and the law. The only one focused on racial bias appears to be Respondent's counsel.

As Judge Konduras' dissent points out, the trial judge essentially granted a New Trial because he felt, after the fact, that he should have granted the directed verdict motion. However, granting that motion in this case would have been an error of law, because there was conflicting evidence, to wit; (1) the plaintiff's testimony that she didn't believe her brother did anything to cause the accident **(R.p.221, l.8 - p.222, l.2)**; (2) conflicting testimony and evidence about whether the Newton truck's headlights were pointed towards the wood or the highway at the time of the crash; **(R.p.258, l. 3 - p 260, l. 9; R.p.262, l.10- p.265, l. 9; p. 272, l.3-25; p.293, l.7-13; p. 362, l. 2-7; p. 364, l. 8- p. 370, l. 13; p.173, l. 5 - p. 174, l.11; p.176, l.6 - p. 178, l.24; p.176, l.17 - p. 177, l.12)**; (3) conflicting evidence about lighting in the area and whether Rivera had enough warning by flashers, posted signs and illumination that he should have slowed his vehicle, which was admittedly speeding; **(R.p.333, l.25 - p. 334, l.25; p.335, l.1 -12; p.219, l.18 - p. 220, l.6; p.176, l.17 - p. 177, l.12; p.258, l. 3 - p 260, l. 9; p.259, l. 20-22; p. 260, l.1-5 and l. 6-13; p.290, l.11- 22; p. 406, l.14-p. 321 l.4)** Again, the conflicting evidence includes the plaintiff's testimony that she didn't believe her brother did anything wrong, which conflicted with the fact that she sued him and conflicted with some of the foregoing evidence and the fact that other cars approached, saw the Newton tractor-trailer and turned around. **(R.p.263, l. 5-11; p. 368, l 7-24)**

Based upon the foregoing, as stated, denial of the directed verdict would have been an error, and given all of the conflicting evidence, changes in testimony, and the plaintiff's own testimony, there were real issues about whether the Plaintiff's case would or could meet the

requisite burden of proof – as Judge Konduras also points out in the dissent.

Because it would have been an error of law to grant the directed verdict motion in this case, granting a new trial based in any part on the judge's belief that he should have granted the directed verdict is an error of law, justifying reversal of the grant of a new trial and reinstatement of the verdict rendered by this hard-working jury that deliberated at length and returned three (3) times during deliberation with questions and requests.

WHEREFORE, Appellants Warren Jared Newton, Newton's Farm, and J&J Logging, Inc. in Reply to the Return of the Respondent, reiterate their request and motion that the Court rehear the case.

Respectfully submitted,

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Dated: January 23, 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No: 2008-CP-22-00466

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm, J&J Logging, Inc, and Edgar Rivera,

Appellants,

PROOF OF SERVICE

I certify that I have served Appellants Newton, Newton's Farms & J&J's REPLY TO RESPONDENT'S RETURN TO THE PETITION FOR REHEARING on each party who served a brief in this matter by depositing a copy of the same in the United States Mail, postage prepaid

addressed to their respective attorney(s) of record at the addresses noted below on **January 23, 2013** as follows:

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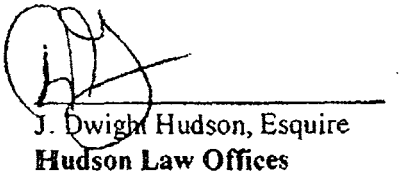

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Dated: January 23, 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No.: 2008-CP-22-00466
Published Opinion No. 5055
Filed November 28, 2012

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm,
J&J Logging, Inc. and Edgar Rivera,

Appellants.

APPELLANT EDGAR RIVERA'S REPLY TO RESPONDENT'S RETURN TO APPELLANTS' PETITIONS FOR REHEARING AND SUPPORTING MEMORANDUMS

Appellant Edgar Rivera ("Rivera") replies to Respondent's Return to Appellants' Petitions for Rehearings and Supporting Memorandum. As with Respondent's case at trial, Motion for a New Trial and Reply to Appellants' Briefs, Respondent focuses almost

entirely on her case against the Newton Appellants. Rivera previously noted that the Respondent, herself, testified that this Appellant had no liability for the subject accident. The Respondent focused virtually her entire case and her appellate submissions of the liability of the Newton Appellants. Respondent's Return, as it could pertain to Rivera, does no more than simply reiterate that two of the three members of the Court of Appeal's panel found correctly and that the dissent found incorrectly. Respondent does not expound on any argument in response to Rivera's Petition for Rehearing. As such, the undersigned is limited in any specific reply to her Return.

Rivera properly raised arguments as to why this Court erred in upholding the Trial Court's granting of the Respondent's initial Motion for New Trial. This Appellant would again contend that the dissent reached the correct conclusion. The dissent accurately noted that the Respondent clearly failed to carry her burden of proof against the original defendants at trial. This failure to carry her burden of proof is most evident as it relates to Respondent's claim against Rivera. In that regard, this Appellant has repeatedly distinguished the facts of this case from cases such as *Howard v. Roberson*, 376 S.C. 143, 148-149, 654 S.E.2d 877 (Ct. App. 2007). *Howard* involved a factual scenario in which the evidence in the record allowed for a finding that at least one of the defendants had to be found to have breached a duty of care to the Plaintiff. Here, in addition to the fact that Respondent failed to carry her necessary burden of proof against Rivera in her case-in-chief, this Appellant submitted ample evidence of the potential negligence of an unnamed tortfeasor. As a result, the trial court should have granted Rivera's directed verdict motion after the Respondent's case-in-chief. Even if Respondent's case against Rivera

could have proceeded to the jury's deliberation, the jury's verdict in favor of Rivera should not have been disturbed for the reasons set forth herein.

Rivera additionally takes issue with Respondent's insinuation that the Georgetown County jury based its verdict on ethnic or racial prejudices. The ethnic make-up of the jury is not known and is not relevant. Again, this is especially true as it relates to the Respondent's case against Rivera, the Respondent's brother, *who is of the same ethnic and racial background.*

Finally, Rivera objects to Respondent's improper swipe at Rivera's insurance carrier. Respondent clearly included this language in an attempt to play to perceived prejudices against insurance companies. The Respondent's position is irrelevant, as it is not related to the issues on appeal and is not in response to anything submitted in any appellate filings. Rivera is confident that this Court cannot be moved by such tactics.

WHEREFORE, Appellant Edgar Rivera again moves this Court for a hearing on his Petition for Rehearing.

Respectfully submitted,

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January 24, 2013

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

The Honorable Benjamin H. Culbertson

Case No.: 2008-CP-22-00466
Published Opinion No. 5055
Filed November 28, 2012

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm,
J&J Logging, Inc. and Edgar Rivera,

Appellants.

PROOF OF SERVICE

I certify that I have served Appellant Edgar Rivera's REPLY TO RESPONDENT'S RETURN TO APPELLANTS' PETITIONS FOR REHEARING AND SUPPORTING MEMORANDUM on each party who served a brief in this matter by depositing a copy of the same in the United States Mail, postage prepaid addressed to their respective attorney(s) of record at the addresses noted below on **January 24, 2013** as follows:

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January 24, 2013