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. 08-CP-22-00466

Hazel Jeisel Rivera,..... Respondent,

v.

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

FINAL BRIEF OF APPELLANT EDGAR RIVERA

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I. DID THE TRIAL COURT ERR IN GRANTING A NEW TRIAL ON THE LAW TO HAZEL RIVERA WHEN THE DECISION WAS EITHER BASED ON AN ERROR OF LAW AND/OR WHOLLY UNSUPPORTED BY THE EVIDENCE?

STATEMENT OF THE CASE

I. Procedural History

Respondent Hazel Jeisel Rivera ("Hazel Rivera"), the original plaintiff, filed this case alleging in her complaint that the Appellants injured her by negligently causing an automobile accident on August 29, 2005. [R. pp. 12-14] Appellants Warren Jared Newton, Newton's Farm, J & J Logging, Inc. ("the Newtons") [1] and Appellant Edgar Rivera ("Edgar Rivera") were the original defendants. *Id.* The original defendants asserted defenses of sole negligence of another in their respective answers. [R. pp.15-28].

The case was tried by a jury during the week of March 15, 2010. At trial, the Respondent maintained that Edgar Rivera had not acted negligently and that her injuries were caused by the sole negligence of the Newtons. [R. p. 221, line 4- p. 222, line 1]. The Appellants presented evidence establishing a reasonable jury's conclusion that an unnamed party breached a duty to Hazel Rivera. [R. p. 162, lines 14-19, p. 175, line 12 – p. 176, line 24, p. 216, lines 18-20, p. 220, lines 2-6].

Edgar Rivera made timely motions for directed verdict at the end of the plaintiff's case-in-chief and the end of the evidence, respectively. [R. p. 226, p. 355]. The Trial Court entertained Edgar Rivera's argument that Hazel Rivera failed to make even a minimal showing of negligence against him before ultimately denying this motion. [R. pp. 227-239]. Specifically, the Trial Court

[1] Despite the fact that there were actually four defendants, the Trial Court classified defendants Warren Jared Newton, J&J Logging, Inc. and Newton's Farm as one defendant for purposes of the Verdict Form. [R. p. 382, lines 3-4].

found that the possibility that Edgar Rivera had been traveling two or three miles per hour over the posted speed limit was sufficient to deny his directed verdict motion. [R. p. 239, lines 3-23]. However, Hazel Rivera failed to introduce any testimony supporting causation between Edgar Rivera's possible speed and any alleged negligence on his part.

Immediately prior to the jury's deliberation, Hazel Rivera made a motion as to the liability of "at least one of these Defendants."[2] [R. pp. 366-368]. However, she failed to make a directed verdict motion specific to either Edgar Rivera or the Newtons prior to the jury's deliberations and her subsequent post-trial Motion for a New Trial. [R. p. 102].

The Trial Court submitted a Verdict Form to the jury allowing them to find against the Newtons, Edgar Rivera, both original defendants or in favor of both original defendants.[3] [R. p. 382, lines 1-12]. During the course of the deliberations, the jury requested the testimony of the investigating South Carolina Highway Patrol trooper to be replayed. [R. pp. 389-391]. In addition, the jury asked to be hear part of the Trial Court's jury charge again. [R. p. 393, line 24 – p. 394, line 21]. The jury deliberated further before returning a verdict in favor of the defendants. [R. p. 407, lines 1-4].

The original defendants presented memorandums in support of their positions as to Hazel Rivera's post-trial motion. [R. pp. 123-127; pp. 119-121]. In addition to a responsive memorandum, Edgar Rivera moved that the jury's

[2] Respondent never actually used the term "directed verdict" or referenced SCRCP 50 when making this motion.

[3] Pursuant to S.C. Code Ann. § 15-38-15, the trial court was prepared to allow subsequent arguments with regard to percentages of negligence among the defendants had the jury found against multiple defendants. [R. pp. 356-359].

verdict be upheld as to him, as the evidence overwhelmingly supported, at a minimum, the jury's finding in his favor. [R. pp. 123-127]. The Trial Court granted Hazel Rivera a new trial as to her claims against both the Newtons and Edgar Rivera based on the finding that it had erred in response to her directed verdict motion. [R. pp. 5-6].

After the Newtons and Edgar Rivera filed Notices of Appeal, the Respondent filed a Motion to Dismiss the appeals of the Newtons and Edgar Rivera on August 12, 2010. Hazel Rivera argued that the Order Granting Motion for New Trial was based on factual issues and, therefore, not immediately appealable. The Appellants filed Returns to this Motion to Dismiss, establishing the appealability of Order. This Court found the Order to be appealable in an Order dated December 7, 2010.

II. Statement of the Facts

This action arose out of an automobile accident that occurred after dark on the evening of August 29, 2005. [R. p. 162, line 8, p. 189, lines 9-10, p. 214, line 13]. Hazel Rivera, a passenger in a vehicle being driven by her brother, Edgar Rivera, claimed injuries from the collision with the Newtons' vehicle.[4] [R. pp. 12-14]. While attempting to negotiate a wide left turn, the trailer portion of the Newtons' 18-wheeler, completely stopped, straddled both lanes of narrow Pennyroyal Road in rural Georgetown County at the time of the impact. [R. p. 189, lines 12-13, p. 214, line 18 – p. 215, line 8, p. 296, lines 7-15, pp. 432-433].[5]

[4] Warren Jared Newton was the operator of the Newtons' tractor-trailer at the time of the subject accident. [R. p. 252, line 5].

[5] In fact, Joel Newton testified that Warren Jared Newton was preparing to begin the process of backing to complete the three-point left turn when the accident occurred. [R. p. 271, lines 11-14, p. 296, lines 12-15].

Edgar Rivera and his sister approached in the only westbound lane of Pennyroyal Road and impacted the left side of the Newtons' vehicle. [R. p. 160, line 23, p. 189, lines 19-21, p. 214, line 16- p. 215, line 20, p. 296, lines 23-24, pp. 432-433]. Both Hazel Rivera and Edgar Rivera testified that they were unable to perceive the Newtons' trailer until only milliseconds before the collision. [R. p. 178, lines 4-6, p. 214, lines 18-19, p. 215, lines 5-8]. They explained that this was due to the combination of the blinding headlights of the Newtons' vehicle, the lack of adequate lighting in the area and the lack of adequate safety actions taken by the Newtons. [R. p. 176, lines 6-15, p. 188, line 23 – p. 189, line 14, p. 214, lines 13-19, p. 215, lines 5-7]. Another vehicle traveling directly behind Hazel Rivera and Edgar Rivera missed Edgar Rivera's vehicle but also struck the trailer portion of the Newtons' vehicle. [R. p. 189, line 23- p. 190, line 1].

Hazel Rivera presented testimony from an expert accident reconstructionist that supported her contention and Edgar Rivera's contention that Edgar Rivera would not have been able to perceive the Newtons' trailer until it would have been too late to brake. [R. pp. 194-202, pp. 204-206]. The other witnesses called by Hazel Rivera included: herself, Edgar Rivera, the investigating South Carolina Highway Patrol trooper and several treating medical professionals. [R. pp. 142-144]. Hazel Rivera specifically stated that Edgar Rivera had not acted negligently in causing her claimed damages and that he had acted reasonably under the circumstances. [R. p. 221, lines 4-7, p. 221, line 25 – p. 222, line 2]. The Newtons also introduced the testimony of an accident

reconstructionist. This expert witness testified that Edgar Rivera should have been able to perceive the Newtons' vehicle as it straddled the roadway at night. [R. p. 333, lines 10-16, p. 334, lines 23-25].

Witness testimony differed as to the presence of temporary signs warning of the presence of trucks entering the roadway. However, Edgar Rivera testified that he was familiar with the area and had never seen large trucks exiting the adjacent woods onto the Pennyroyal Road after dark. [R. p. 173, lines 22-25, p. 189, lines 15-18].

ARGUMENT

I. 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.

(1) The Trial Court Granted a New Trial on the Law by Reversing a Denial of the Respondent's Directed Verdict Motion

The grounds for Hazel Rivera's new trial motion and the resulting language utilized by the Trial Court establishes that Hazel Rivera moved for and received a new trial on the law.

(A) Appellate Standard of Review

SCRCP 59(a) permits a party to move for a new trial "for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the State..." Obviously, the result of any properly-granted motion for a new trial is a new trial. SCRCP 59.

A directed verdict motion by the close of the evidence is required before the trial court can entertain a motion under SCRCP 59 for a new trial based on an argument that the evidence does not support the verdict, as this post-trial motion is based on questions of law. *Peay v. Ross,* 292 S.C. 535, 357 S.E.2d 482 (Ct.App. 1987). The question of whether the evidence presented by a party can support a verdict in the party's favor is a question of law. *McEntire v. Mooregard Exterminating Serv. Inc.*, 578 S.E.2d 746, 747, 353 S.C. 629, 632 (Ct.App. 2003). "In ruling on motions for directed verdict or judgment notwithstanding the verdict [JNOV], 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." *Creech v. South Carolina Wildlife and Marine Resources Dep't,* 328 S.C. 24, 29, 491 S.E.2d 571, 573 (1997). "When evidence presented at trial yields only one conclusion concerning liability, a trial court may properly grant a motion for directed verdict." *Howard v. Roberson*, 376 S.C. 143, 148-149, 654 S.E.2d 877 (Ct.App. 2007).

In essence, this motion for a new trial on the law becomes a renewal of a directed verdict motion. *McEntire* at 747-748, 632-633. As such, this type of new trial motion is subject to the same standard of review as a ruling on a directed verdict motion or a JNOV under SCRCP 50(b). In *Howard*, this Court provided a concise explanation of the appellate standard for a review for a directed verdict motion:

> [w]hen reviewing a trial court's ruling on a directed verdict, this court will reverse if no evidence supports the trial court's decision or the ruling is controlled by an error of law. *Law v. S.C. Dep't of Corr.,* 368 S.C. 424, 434-35, 629 S.E.2d 642, 648 (2006); *McMillan v. Oconee Mem'l Hosp., Inc.,* 367 S.C. 559, 564, 626 S.E.2d 884, 886 (2006). The appellate court must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts as liberally construed in his or her favor. *Pye v. Estate of Fox,* 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006); *Erickson v. Jones St. Publishers, L.L.C.,* 368 S.C. 444, 463, 629 S.E.2d 653, 663 (2006). If the evidence as a whole is susceptible to more than one reasonable inference, a jury issue is created and the motion should be denied. *Proctor v. Dep't of Health and Envtl. Control,* 368 S.C. 279, 292, 628 S.E.2d 496, 503 (Ct.App. 2006). A motion for directed verdict goes to the entire case and may be granted only when the evidence raises no issue for the jury as to liability. *The Huffines Co., LLC v. Lockhart,* 365 S.C. 178, 187, 617 S.E.2d 125, 129 (Ct.App. 2005). When considering directed verdict motions, neither the trial court nor the appellate court has authority to decide credibility issues or to resolve conflicts in the testimony or evidence. *Wright v. Craft,* 372 S.C. 1, 19, 640 S.E.2d 486, 496 (Ct.App. 2006) (citing *Erickson,* 368 S.C. at 463, 629 S.E.2d at 663).

Id. at 148-149, 877.

A motion for a new trial "on the law" is not to be confused with a motion for a new trial on the facts. The latter, often referred to as a motion for a new trial under the thirteenth juror doctrine, can be entertained without the party having made a timely directed verdict motion. *McEntire* at 746, 632-633. This type of new trial motion is made on the grounds that the verdict was contrary to the preponderance of the evidence. *Id.* Unlike a motion for directed verdict or JNOV, a motion for a new trial on the facts assumes the existence of sufficient evidence to warrant the case being sent to the jury but is based on the argument that the verdict is unreasonable or against the weight of the evidence. *Peay* at 537, 483-484; *McEntire* at 747-748, 632-633.

In an appeal of an order granting a new trial upon the facts, the appellant "bears the heavy burden of demonstrating to the court that it clearly appeared that the judge's exercise of discretion was controlled by a manifest error of law." *Todd v. Owen Indus. Prods., Inc.,* 315 S.C. 34, 36, 431 S.E.2d 596, 598 (Ct.App. 1993), *citing Gray v. Davis,* 247 S.C. 536, 148 S.E.2d 682 (1966). Regardless of the nature of the new trial order, a Trial Court's ruling will not be disturbed "unless his finding is wholly unsupported by the evidence, or the conclusion reached has been controlled by error of law." *South Carolina State Highway Dep't v. Clarkson,* 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976); *Folkens v. Hunt*, 300 S.C. 251, 387 S.E.2d 265 (1990).

(B) The Order Granted Respondent's Motion for a New Trial on the Law

The Trial Court's Order granted Hazel Rivera's motion for a new trial on the law. This Order being appealed states in part:

> "[t]he 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. Further, no evidence was presented that showed the plaintiff at fault. 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."

[R. pp. 5-6]. The Order is a response to Hazel Rivera's Motion for a New Trial, in which she references a directed verdict motion made at the "close of this case" and a new trial motion made "upon the return of a jury verdict for the Defendants."[6] [R. pp. 101-104].

By referencing a denial of her directed verdict motion, Hazel Rivera made, and the Trial Court granted, a new trial based on the law by finding legal error in the denial of that purported directed verdict motion. In other words, the Trial Court granted the post-trial motion based on the finding that the evidence did not support the verdict, a ground based on a question of law. Furthermore, the Order granting a new trial was precipitated by and, therefore, based on the Trial Court's error of law in not granting Edgar Rivera's directed verdict motion.

The Trial Court's grant of a new trial for the Respondent was based on at least one error of law. First, the ruling was in error at least with regard to Edgar Rivera because the jury should not have been allowed even to consider a verdict against him. Second, the evidence presented at trial clearly yielded more than

[6] The Respondent also cited confusion in the jury instructions that were specific to the Newtons' negligence. [R. pp. 101-104]. The Trial Court never ruled on this other ground.

just the Order's conclusion regarding liability. Finally, the subject Order was made in error since it was procedurally defective and wholly unsupported by the evidence. In fact, the overwhelming majority of the evidence supported a finding in favor of Edgar Rivera.

(2) <u>The Trial Court Erred in Denying Edgar Rivera's Initial Directed Verdict Motion</u>

Hazel Rivera's new trial motion and the Order are directly based on the legal error that allowed Hazel Rivera's claim against Edgar Rivera to survive beyond the plaintiff's case-in-chief. This Appellant continues to maintain that the Trial Court erred in not granting *Edgar Rivera's* directed verdict motion at the close of the plaintiff's case. Edgar Rivera made this motion after Hazel Rivera failed to establish or even allege negligence against him.

It is elementary that the plaintiff has the burden of proving by a preponderance of the evidence all elements of a negligence claim against any defendant. *Nelson v. Piggly Wiggly Central, Inc.*, 390 S.C. 382, 391, 701 S.E.2d 776, 780 (Ct.App. 2009); *Ardis v. Sessions*, 383 S.C. 528, 682 S.E.2d 249, 252 (2009). However, a party opposing a dispositive motion "may not rest on the mere allegations or denials of his pleading, but must set forth or point to specific facts showing that there is a genuine issue of material fact." *Dickert v. Metropolitan Life Ins. Co.*, 306 S.C. 311, 313, 411 S.E.2d 672, 673 (Ct.App. 1991); *Sweatt v. Norman*, 283 S.C. 443, 322 S.E.2d 478 (Ct.App. 1984). A plaintiff's failure to produce even a "scintilla of evidence" of negligence against a defendant would not allow the plaintiff to survive that defendant's directed verdict motion. *Hancock v. Mid-South Management Co., Inc.*, 381 S.C. 326, 330-331,

673 S.E.2d 801, 802-803 (2009); SCRCP 50. SCRCP 50(a) allows a defendant to make a directed verdict motion at the conclusion of the plaintiff's case when only questions of law exist. Stated differently, discretion to grant or deny a directed verdict motion at this point does not exist when no questions of fact exist.

Of course, the jury returned a verdict in favor of Edgar Rivera, making a renewal of the directed verdict motion through a SCRCP 50(b) JNOV illogical. Edgar Rivera did argue though in his Memorandum in Opposition to Plaintiff's Motion for New Trial that, in the alternative, the Trial Court erred in not granting a directed verdict in his favor at the end of the plaintiff's case. The Trial Court further erred by denying Edgar Rivera's post-trial request.

In support of this argument, this Appellant refers this Court to the plaintiff's case-in-chief, where Hazel Rivera specifically failed to carry her burden of proof against Edgar Rivera. At no point in her case were any allegations of negligence leveled against Edgar Rivera. In fact, Hazel Rivera specifically testified that Edgar Rivera acted reasonably and did not breach any duty to owed to her:

> Q: Okay, and had you been driving instead of Edgar, you wouldn't have done anything differently?
> A: No.
> ...
> Q: But you don't believe your brother did anything to cause this accident?
> A: No.

[R. p. 221, lines 11-13, line 25 - p. 222, line 2]. She repeatedly provided testimony establishing that Edgar Rivera did not act unreasonably under the circumstances. *Id.*

The remainder of the plaintiff's case-in-chief was also void of any allegations of negligent actions by Edgar Rivera. Through the investigating officer, Hazel Rivera introduced no testimony or other evidence that could have implicated Edgar Rivera in any liability toward the Respondent. Edgar Rivera testified consistently with Hazel Rivera in that he had not acted unreasonably under the circumstances. [R. p. 174, line 7 – p. 175, line 11, pp. 188-192]. These fact witnesses did detail the lack of adequate lighting and reflective materials on the side of the Newtons' trailer. [R. p. 189, lines 12-24, p. 214, lines 18-19, p. 215, lines 5-8]. When questioned as to the existence of reflective tape on the Newtons' trailer, Edgar Rivera responded, "[n]o, it didn't have anything." [R. p. 189, line 14]. The Newtons were also noted to have neglected to take any warning measures, including temporary flagmen, temporary warning lights, temporary flares or temporary signs, for approaching vehicles, such as Edgar Rivera's. [R. p. 175, line 25 – p.176, line 2, p. 189, lines 12-14, p. 203, lines 11-19, pp. 274-279]. Respondent's expert accident reconstructionist, Thomas Onions, also gave qualified testimony relieving Edgar Rivera of any breach of duty to Hazel Rivera:

> Q: Okay, Mr. Onions, based on your understanding of the undisputed testimony in the record, which I think you reviewed prior to giving your report prior your deposition, it's fair to say that Edgar did nothing unreasonable at the time?
> A: Not that I'm aware of.
> Q: Okay, and it's also fair to say that what he encountered was essentially a trap in the road, correct?
> A: Yes.

[R. p. 207, lines 7-15]. Other witnesses called by Hazel Rivera in her case-in-chief were her treating medical providers, who were unable to provide any testimony as to Edgar Rivera's alleged breach of duty.

Appellant may refer to Edgar Rivera's testimony that he was traveling two or three miles per hour above the posted speed limit.[7] [R. p. 175, lines 4-6]. This testimony alone is insufficient to establish even a minimal showing of negligence on his part. Without any evidence to substantiate Edgar Rivera's speed or actions as a contributing factor to the accident, the plaintiff failed to establish even an inference or scintilla of evidence that Edgar Rivera acted unreasonably under the circumstances, and directed verdict should have been granted for Edgar Rivera at the close of the *plaintiff's* case. The Newtons' subsequent presentation of evidence in their case-in-chief that may have established negligence on the part of Edgar Rivera is irrelevant when analyzing the appropriateness of the Trial Court's denial of Edgar Rivera's first directed verdict motion.

In that regard, any argument that Edgar Rivera was negligent *per se* for traveling slightly in excess of the speed limits fails. To recover in a case based on negligence *per se*, the plaintiff must establish that the defendant violated a relevant statute and that such violation was a proximate cause of the plaintiff's injury. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125, 558 S.E.2d 271 (Ct.App. 2001); *Howard v. South Carolina Dep't of Hwys.*, 343 S.C. 149, 538 S.E.2d 291 (Ct.App. 2000); *Hurst v. Sandy*, 329 S.C. 471, 494 S.E.2d 847

[7] Investigating officer C. William Surratt confirmed the speed limit in Edgar Rivera's direction to have been 55 miles per hour. [R. p. 162, lines 20-21]

(Ct.App. 1997); *Gulledge v. McLaughlin*, 328 S.C. 504, 492 S.E.2d 816 (Ct.App. 1997). Respondent did not base her case even partly on a negligence *per se*-based theory. Further, she did not request that the Trial Judge charge the jury as to negligence *per se*. Even if she had made such an argument, she still failed to demonstrate that a statutory violation on Edgar Rivera's part was the proximate cause of her injuries.

Hazel Rivera's refusal even to rest on the allegations in her complaint or produce even a scintilla of liability evidence against Edgar Rivera undoubtedly provided the basis for the jury's verdict in favor of Edgar Rivera. The jury obviously understood that the Respondent's failure to introduce any such evidence against Edgar Rivera required this finding. More importantly though, this should have resulted in a directed verdict in Edgar Rivera's favor at the end of the plaintiff's case-in-chief. By denying Edgar Rivera's motion at that point, the Trial Court committed legal error.

(3) Sufficient Evidence of the Negligence of an Unnamed Defendant Supported the Jury's Finding

This Order is further in error since a reasonable inference existed as to the negligence of an unnamed defendant. While it could be argued that the Respondent failed to establish negligence by the requisite standard against either original defendant, Edgar Rivera directs this Court to the record, which is replete with evidence concerning the intersection at the time of the accident. Lay and expert testimony, in addition to photographs, detailed the lack of lighting in the area, the unsuitability of the intersection's design for the turn being attempted by the Newtons and the adequacy of warning signage for the Riveras' direction of

travel. In turn, the jury was presented with an abundance of evidence for the negligence of an unnamed defendant, such as the State of South Carolina or Georgetown County in creating a defective intersection.[8]

Hazel Rivera and Officer Surratt both described the poor lighting in the area of the accident scene. [R. p. 162, lines 6-8, p. 220, lines 2-3]. Expert testimony from the Respondent's accident reconstructionist supported these accounts, "[w]ell, the road was for all intents and purposes a dark, unlighted road with the exception of one little church parking lot light." [R. p. 202, lines 5-7].

Other variables, such as the lack of temporary or permanent signage, combined with the evidence of insufficient lighting to provide the jury with a reasonable inference of a third party's negligence. Officer Surratt testified that no signs warning of logging trucks entering onto Pennyroyal Road were present in the four (4) miles leading up to the accident scene from Edgar Rivera's direction of travel. [R. p. 170, lines 7-18]. Edgar Rivera confirmed that he had not been made aware of the possibility of logging trucks entering the roadway by any type of signage. [R. p. 175, line 25 – p. 176, line 2]. A jury could have further concluded the narrow two (2) lanes of Pennyroyal Road at the intersection location to have been defectively designed. Taken as a whole, the evidence created an obvious question of fact as to the negligence of an entity or entities other than the named defendants.

In essence, the Trial Court, by ordering a new trial for the Appellant, directed a verdict against at least one of the original defendants. Nowhere is

[8] Officer Surratt testified that the location of the accident was a county-maintained road. [R. p. 168, line 24 – p. 169, line 2]

there any authority that would even authorize the Trial Court to direct a verdict against at least one of the defendants without actually naming the defendant or defendants against whom a verdict is directed. In essence, such a ruling would be improper as advisory in nature.

Moreover, any argument by Hazel Rivera that the original defendants' lack of summation arguments as to the negligence of a third party fails. Respondent made this argument during her original directed verdict motion. Edgar Rivera actually did make an argument as to the potential negligence of a third party during his closing argument that could have certainly led to a jury's reasonable conclusion that a third party breached a duty owed to Hazel Rivera:

> [w]e know he didn't see it because of the lighting, and I'm going to touch upon this a little bit later on, but I want you to ask yourselves when you go back there who were the only two people that have come in here to testify that can say definitively what the roadway, what the condition before they reached this hazard, the truck straddled across the roadway, what those conditions were, what the lighting was in that direction, not speculate about how it may have been, not speculate as to what they may have seen. The only two people that can testify definitively as to those conditions are Ms. Rivera and Edgar. They're the only two one- the only two people. Nobody else can tell you what they encountered. Now, the experts can speculate and try to give you as good a sense as they can and the Co-Defendant can tell you, "Well, the lighting, you know, we have trucks, we have lights on our trucks and there was a light over there...

[R. p. 360, lines 1-17].

> ...nothing wrong with making this turn, but maybe not at 10 o'clock at night, which we know is the time that it happened, and maybe with proper lighting, with proper signage trucks entering the roadway and proper lighting in the area, neither of which were available.

[R. p. 361, line 23 – p. 362, line 2].

> Those are the only two people that you heard any testimony about with regard to signs of trucks entering the roadway. They never testified that they were there when Mr. Rivera passed, passed along the S-curve and ran into the trailer, couldn't testify about that but they're the only ones that said those signs had been put up...if those signs were there why weren't there any photographs of it, why weren't there any photographs of those signs that night? Because I submit to you, ladies and gentlemen, they weren't there. The officer didn't see it, the officer who's trained to report what he sees didn't see them, and obviously Edgar never saw them.

[R. p. 363, lines 1-4].

These arguments made during closing summarized the previously-referenced evidence of an inherently dangerous roadway, by which the jury undoubtedly found that neither original defendant was negligent.

Even if the Appellants' closing arguments were void of assertions of the negligence of another specific party, the Respondent cannot support the significance of a "lack of assertion of negligence during summation" argument. Edgar Rivera and/or the Newtons could have even opted to waive the opportunity to make a closing argument without altering the evidence an unnamed party's negligence. Even had no closing argument been made placing blame on anyone other than Edgar Rivera's original co-defendant, a contention by the Respondent of the relevance of a lack of an argument during summation would be unfounded and serve only to distract from the issues at hand.

Again, Hazel Rivera had the burden of proving by a preponderance of the evidence the negligence of one or more of the original defendants. Based on the foregoing, it is more than reasonably plausible that the jury simply found that the plaintiff failed to carry this burden as to either original defendant. However, while giving the necessary deference to the jury's findings, it is obvious that the record

contains ample evidence of the negligence of a third party, one that could have been named as a defendant by Hazel Rivera. The jury's verdict only confirmed the reasonable possibility that a factual finding could have been made as to the lack of liability of either original defendant. As a result, even if Hazel Rivera's directed verdict motion as to the liability of at least one of the defendants could have been entertained, the Court correctly denied her original motion.

(4) Analysis under Standard of Review for New Trial on the Facts

Analyzing the Trial Court's remedial action under the more stringent standard for a new trial on the facts, the result is still improper, as the discretion that the Trial Judge attempted to use was controlled by the manifest errors of law outlined above. Furthermore, the Trial Court abused its discretion that it may have had since the evidence wholly unsupported a directed verdict as to at least one of the defendants, but especially as to Edgar Rivera. As previously-delineated, the overwhelming majority of evidence of liability was directed either at the Newtons or an unnamed defendant. Assuming *arguendo* that Edgar Rivera's initial directed verdict motion should not have succeeded, the original decision of the Trial Court to allow the option for the jury's to find in favor of both original defendants was overwhelmingly supported by the inferences against the negligence of the original defendants created not only by Hazel Rivera's case-in-chief, but also by the defense's evidence.

CONCLUSION

The Trial Court's remedial directed verdict was made in error for several reasons. Not only was no evidence presented against Edgar Rivera in Hazel Rivera's case-in-chief, but she categorically denied any wrong-doing on his part. The Trial Court erred by not ruling as a matter of law in the same manner that the jury ruled with regard to Hazel Rivera's failure to carry her burden of proof against Edgar Rivera. Also, since ample evidence established the potential negligence of an unnamed defendant, the Trial Court did not have the authority to resolve the factual dispute that this evidence created. At a minimum, the Trial Court's denial of Edgar Rivera's directed verdict motion should be reversed.

Accordingly, the Trial Court's granting of a new trial was improper. For these reasons, and based upon the foregoing authorities, this Court should reverse the Trial Court's Order Granting Motion for New Trial as to Edgar Rivera and reinstate the jury's verdict at least as to Edgar Rivera.

Respectfully Submitted,

Florence, South Carolina

July 12, 2011

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PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of Turner, Padget, Graham & Laney, P. A., attorneys for the Appellant Edgar Rivera and that he has served a copy of the Final Brief of Appellant Edgar Rivera on counsel listed below this 12th day of July 2011.

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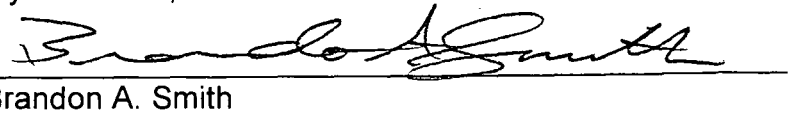

Brandon A. Smith

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. 08-CP-22-00466

Hazel Jeisel Rivera, ... **Respondent,**

v.

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

CERTIFICATE OF COUNSEL

The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

July 12, 2011

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EDGAR RIVERA

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Appellants,

FINAL BRIEF OF APPELLANTS: Warren Jared Newton, Newton's Farm *And* J&J Logging, Inc

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than supervising her brother She did all of the foregoing, although she was aware that her brother was a much younger and less experienced driver, she was a licensed driver and her brother was not, and it was nighttime and she and her brother were both in an emotional and volatile state. Based on the foregoing, the Plaintiff knew of facts and circumstances which legally required her to anticipate that co-Defendant Rivera would enter a sphere of danger, would omit to exercise proper care to observe the road and other vehicles, would fail to control the speed of the vehicle and would otherwise improperly increase the common risks of traffic; and

E. Based on the foregoing, the Plaintiff assumed the risk of this accident and/or breached her resultant duty arising from known and appreciated circumstances and failed to exercise the degree of vigilance required in the facts and circumstances of the case; and

F. By virtue of the Plaintiff's status as the older and only licensed occupant of the co-Defendant's vehicle, under the law of this state and the facts of this case, the Plaintiff was properly charged by the jury with the co-Defendant's negligence.

2 The Court erred as a matter of law and, to any extent the Order cites that evidence at trial did not show the Plaintiff at fault or cites that "the only reasonable inference" to be drawn was that one or more of the Defendants were at fault in causing the accident, the Order errs as a matter of law, is totally unsupported by the evidence and/or the conclusions reached are controlled by an error of law;

Because..... **31**

A. The Court erred in excluding evidence/testimony regarding the Plaintiff's being on the cell phone and otherwise failing to take due care of her own safety and in failing to keep a proper lookout;

B. The Court erred in striking portions of J&J's Answer pled the defenses of contributory/comparative negligence and assumption of the risk. As part and parcel of this defense, J&J pled and alleged that the Plaintiff/passenger's negligence/assumption of the risk was the sole proximate cause and/or the sole cause of this accident and that therefore the Plaintiff could not recover in the action.

C. The Court erred in failing to give certain jury instructions, including, but not limited to Plaintiff/passenger's duty of due care for her own safety; of her duty to keep a proper lookout so that she can caution the driver as to such matters as speed; and if the warning is disregarded to demand that the car be

stopped so that she can exit the vehicle; all as requested by J&J in the requested jury charge and as supported by South Carolina law, including Thompson v. Michael, 315 SC 268, 433 SE2d 853 (1993).

D. Since evidence and testimony was offered and erroneously excluded and/or was presented showing and supporting the reasonable inference that the Plaintiff was at fault as per the jury's verdict, it was an error for the Court to grant a new trial and/or for the Order to hold that no evidence was presented showing that the Plaintiff was at fault because such evidence was presented, such inferences could be made and were made by the jury from the evidence presented, and additional evidence and grounds were offered and improperly excluded.

STATEMENT OF ISSUES ON APPEAL

1. The Order Granting Motion For New Trial erred as a matter of fact and as a matter of law when it held that the "only reasonable inference" from the evidence presented at trial was that one or more of the Defendants were at fault in causing the accident that injured the Plaintiff because the evidence and testimony at trial supported a number of reasonable inferences and supported the jury verdict holding that Defendants Newton, Newton's Farm and J&J were not negligent and the Plaintiff's testimony waived her claim against her brother, co-Defendant Rivera. Further the Order erred as a matter of fact and/or law in that:

   A. The Plaintiff failed to meet her burden of proof as to the requisite elements of negligence, justifying the jury verdict for the Defendants; and

   B. The Order erred as a matter of law in citing to the decision of Howard v. Roberson, 376 S.C. 143, 656 S.E.2d 877 (S.C.App. 2007); and

   C. As a matter of law, the Plaintiff's negligence and her failure to exercise ordinary care for her own safety proximately caused or contributed to proximately causing her own injuries, barring her from recovery therefore; and

   D. Per her own testimony, the Plaintiff, was fully aware that her younger brother was an unlicensed driver, yet she insisted upon accompanying him to the scene where her father had been in a physical altercation. When her brother, co-Defendant Edgar Rivera, refused to allow her to go, the Plaintiff testified that she took the keys while her brother was changing clothes and walked to the car, refusing to give him the keys until he allowed her to accompany him and after he did so, she spent her time on her cell phone trying to reach her mother rather than supervising her brother She did all of the foregoing, although she was aware that her brother was a much younger and less experienced driver, she was a licensed driver and her brother was not, and it was nighttime and she and her brother were both in an emotional and volatile state. Based on the foregoing, the Plaintiff knew of facts and circumstances which legally required her to anticipate that co-Defendant Rivera would enter a sphere of danger, would omit to exercise proper care to observe the road and other vehicles, would fail

to control the speed of the vehicle and would otherwise improperly increase the common risks of traffic; and

E. Based on the foregoing, the Plaintiff assumed the risk of this accident and/or breached her resultant duty arising from known and appreciated circumstances and failed to exercise the degree of vigilance required in the facts and circumstances of the case; and

F. By virtue of the Plaintiff's status as the older and only licensed occupant of the co-Defendant's vehicle, under the law of this state and the facts of this case, the Plaintiff was properly charged by the jury with the co-Defendant's negligence.

2. The Court erred as a matter of law and, to any extent the Order cites that evidence at trial did not show the Plaintiff at fault or cites that "the only reasonable inference" to be drawn was that one or more of the Defendants were at fault in causing the accident, the Order errs as a matter of law, is totally unsupported by the evidence and/or the conclusions reached are controlled by an error of law, because:

A. The Court erred in excluding evidence/testimony regarding the Plaintiff's being on the cell phone and otherwise failing to take due care of her own safety and in failing to keep a proper lookout;

B. The Court erred in striking portions of J&J's Answer pled the defenses of contributory/comparative negligence and assumption of the risk. As part and parcel of this defense, J&J pled and alleged that the Plaintiff/passenger's negligence/assumption of the risk was the sole proximate cause and/or the sole cause of this accident and that therefore the Plaintiff could not recover in the action.

C. The Court erred in failing to give certain jury instructions, including, but not limited to Plaintiff/passenger's duty of due care for her own safety; of her duty to keep a proper lookout so that she can caution the driver as to such matters as speed; and if the warning is disregarded to demand that the car be stopped so that she can exit the vehicle; all as requested by J&J in the requested jury charge and as supported by South Carolina law, including Thompson v. Michael, 315 SC 268, 433 SE2d 853 (1993).

D. Since evidence and testimony was offered and erroneously excluded and/or was presented showing and supporting the reasonable inference that the Plaintiff was at fault as per the jury's verdict, it was an error for the Court to grant a new trial and/or for the Order to hold that no evidence was presented showing that the Plaintiff was at fault because such evidence was presented, such inferences could be made and were made by the jury from the evidence presented, and additional evidence and grounds were offered and improperly excluded.

STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on August 29, 2005 at the intersection of Pennyroyal Road and Stoney Brook Lane in Georgetown County, SC. The Plaintiff was a passenger in a 1997 Nissan being driven by her brother, co-Defendant Edgar Rivera, when that vehicle struck a tractor/trailer hauling a loader operated by Defendants Newton, J&J and Newton's Farms (Hereinafter, J&J). The Plaintiff filed a Complaint arising from the MVA on November 1, 2005, alleging negligence by all Defendants and seeking both actual and punitive damages. **(R.p.10-14)**

Defendant Rivera filed his Answer on December 15, 2005, generally denying the allegations of the Complaint and alleging the Sole Negligence of a Third Party, Unexpected Emergency and the Unconstitutionality of Punitive Damages. **(R.p.24-28)**

Defendants J&J filed an Answer on January 26, 2006, generally denying the allegations of the Complaint and alleging the Sole Negligence of co-Defendant Rivera, the Plaintiff's Contributory/Comparative Negligence/Assumption of the Risk (as a full defense) and the Plaintiff's Failure To Wear A Seatbelt as being the proximate cause of her injuries, all Rule 8 and 12 Defenses, Sudden Peril or Emergency, Unavoidable Accident, Lack of Causation of Injuries, Reservation of Right To Amend and a Punitive Damages Defense alleging the unconstitutionality of Punitive Damages. **(R.p.15-23)**

The case was called to trial on a prior occasion, on or about the week or term of August 24, 2009. At this time, by letter and Motion served 8/13/2009, the Plaintiff filed a Motion in Limine

seeking to exclude any evidence as to her status as a foreign national. **(R.p.29-31)** Various other motions were exchanged, and the Plaintiff's Motion to Amend was denied, the Defendant's Motion to Exclude the Plaintiff's Expert was originally granted. **(R.p.1)** The Plaintiff's subsequent Motion to Reconsider the Expert exclusion was denied and the Plaintiff made Motions to Exclude Defendant's use of a Driver's Manual and to Exclude Defendant's Use of additional Photographs and Signs. **(R.p.32-34)** Subsequently, the expert motions were resolved by way of a consent Order which revoked the prior Orders, allowed both parties to use experts and reserved other issues to the time of trial. **(R.p.2-4)**

The case came on for trial during the term or week of March 15-20, 2010 before Judge Benjamin H. Culbertson. At the commencement of Trial, the Court heard certain Pre Trial Motions. These included Motions By Plaintiff and the Co-Defendant to Exclude reference to their status as illegal immigrants. Another Motion was the Plaintiff's seeking to exclude mention that she wasn't wearing a seatbelt at the time of the accident. As to the seatbelt law, Defendant J&J agreed that use of the seatbelt would be excluded as direct evidence, but noted some information could be referenced by other witnesses and might be relevant as to the Plaintiff's medicals. The Court granted the Motion as to the immigration status unless those parties opened the door to such and subject to the Plaintiff's agreement to withdraw any claims for future medicals or future lost wages. The Court also ruled that there was to be no mention of the Plaintiff's violation of the seatbelt law. **(R.p.141, l. 3 - p 155, l. 17)**

At the close of the Plaintiff's case, all parties moved for a Directed Verdict. The Court eventually denied all motions, after giving some consideration to granting the Motion of Co-Defendant Rivera. **(R.p.225, l. 24 - p. 240, l. 13)** At the close of all evidence, the Plaintiff made a

Motion to Strike and/or for a Directed Verdict for the Plaintiff as to the defenses of Comparative Negligence and the Court granted the Motion. **(R.p.349, l. 24 - p. 353, l. 4)** Defendant J&J renewed its prior Motion for Directed Verdict(s) and the Court denied the same. **(R.p.353, l.14 - p. 355, l.12)** The Plaintiff waived punitive damages. **(See; Trial TS, p. 450, l. 15-19)** Defendant Rivera renewed his prior Motions for Directed Verdict(s) and the Court denied the same. **(R.p.355, l.20-24)**

As jury charges were being finalized, the Plaintiff moved that unavoidable accident be struck because there was no natural event involved in the MVA so it had to have been avoidable. The Court ruled that for an accident to meet the criteria of being potentially unavoidable it had to involve a "natural occurrence that is not attributable to any person or any Defendant that made the accident unavoidable, a tree, lightning strikes a tree and falls across the road or you have a landslide or something of that nature" and the Court struck unavoidable accident. **(R.p.364,l.3 - p366, l.13; quote at p.365, l.2-6)**

Defendant J&J objected and/or noted an exception to the following of their requests to charge not being charged: Nos. 3, 5, 24, 6, 10, 11, 12, 17 & 18. The omitted charges mainly involve control of vehicles, speed and the duty to observe speed, who has the right of way when entering from an intersection, who has the right of way once they've established position, and so forth as well as headlights and duties of drivers. J&J contended all of these should be charged and the Court ultimately agreed to take the request under advisement. **(R.p.355, l.12- 24)** Ultimately, the Court made some changes to the proposed charges that "somewhat" dealt with the Plaintiff and Defendant J&J's issues/objections/motions. **(R.p.369, l. 3 - p. 371, l.6)**

As to the verdict form, the Plaintiff objected to Number 4 on the form which allowed a defense verdict. The Plaintiff made a Motion that because the Court struck the defense of

unavoidable accident, and refused to charge that defense, which was pled by both defendants, that it had to hold at least one of the Defendants liable because if the accident could have been avoided at least one of the Defendants must be liable and #4 gave the jury a choice of returning with a defense verdict. The Court refused to change the verdict form **(R.p.366, l.20 - p.368, l.19)** In so holding, the Court stated as follows: " ... I have number four in there is because of the jury instruction that says, in the law that says the Plaintiff has to prove their case. I think you can have negligent Defendants, you can have a wreck that is not the product of an unavoidable accident, but you could also have a Plaintiff that just didn't prove their case for whatever reason, which would result in a verdict for the Defendants." **(R.p.367, l.6-13)**

The jury was charged and began deliberating at 3:10 pm on March 19, 2010. It sent out a note at 4 pm that said "transcript Officer Surratt." **(R.p.389, l.1-2)** From the note, the Judge determined that the jury wanted to hear the testimony of Trooper Surratt again and he called the jury out and had the full testimony replayed for the jury after calling the jury back and confirming with the foreperson that such was the jury's request.. **(R.p.389, l.1-8; p.393, l.5-10)**

At 5:40 pm on the jury sent out a question and a request. The first was a request for a complete definition of the term intersection as it applied to this intersection on the night of this accident. The Court's response was as follows:

> "In this case the right-of-way can best be defined as follows: the right-of-way is the legal right for a Defendant to travel in the direction in which he was traveling, whether that be the Defendant, Edgar Rivera, traveling down Pennyroyal Road or the Defendant, Warren Jared Newton, turning onto Pennyroyal Road. As I previously instructed you, travelers on favored and un-favored highways must use ordinary care in keeping a proper lookout for vehicles approaching an intersection. Therefore, the driver on the un-favored highway has a duty to stop and yield his

right-of-way to any vehicle approaching the intersection on the favored highway when that vehicle is so close that it would be an immediate hazard. On the other hand, the driver on the un-favored highway has a right to enter the intersection if there is no traffic approaching that is so near as to constitute an immediate hazard and it becomes the duty of those approaching the intersection on the favored highway to yield his right-of-way to the driver entering the favored highway." **(R.p.393, l.22- p. 394, l.21)**

Plaintiff's Attorney objected to the language and asked that the Court "clarify" the prior charge by adding criteria that the jury could consider time of day, lighting, etc. He wanted some language about "blocking" of the road even though counsel conceded that there is no statutory law on that and asked the Court to supplement with "common law" that J&J's truck didn't have the right to "stay out there" at night without warnings. The Court overruled Plaintiff's objection. **(R.p.395, l. 7 - p. 397, l.20)**

The second part was the jury's request for "A copy of or read again the Judge's reading to the jury before deliberations." **(R.p.397, l.21-23)** In response, the Court sent a copy of the full jury instructions or charge back to the jury but did so with a curative instruction that the charges must be considered as a whole. **(R.p.397, l.21- p 402, l.21)** At 7 pm the Court elected to halt deliberations and send the jury home for the night with strict instructions not to discuss the case, not to consult the internet and so forth. **(R.p.403, l.24- p. 405, l.12)**

The next morning, March 20, 2010, jury deliberations resumed at 10:08 a.m. At 2:32 pm on March 20, 2010, a verdict was reached and read into the record as follows "County of Georgetown, Hazel Jeisel Rivera versus Warren Jared Newton, J & J Logging, Inc., and Edgar Rivera, case

number 2008-CP-22-466, we, the jury, find in favor of the Defendants, foreperson Sarrah E. Grimes." **(R.p.406, l.16- p 407, l 4; quote at p. 407, l.1-4)**

Subsequently, the Plaintiff filed a Motion for a New Trial and Defendants filed Memoranda opposing the Motion **(R.p.101-102; p. 105-117; p. 119-122; p. 123-128)** By Order recorded on July 11, 2010, the Court granted a New Trial. **(R.p.5-6)**

Thereafter, on July 19, 2010, Defendant J&J filed and served a Motion To Alter/Amend/Reconsider Order and/or For Relief From Order and the Court denied the same by Form Order filed July 30, 2010. **(R.p.130-136; p. 8-9)**

The instant appeal followed.

STATEMENT OF THE FACTS

Jarred and Joel Newton are brothers who grew up on a farm in the Georgetown County community of Andrews, South Carolina. They were born to parents who were involved in the logging industry and they have worked in that field for most of their lives. **(R.p.241, l.2-17)** At the time of the instant accident, in August, 9 2005, they had a company known as J&J Logging which had just finished logging a tract off Pennyroyal Road and they had already started moving their equipment to their next tract, located off Highway 51 near Georgetown. **(R.p.246, l.14- p 247, l.6)** They had finished earlier and one of the contract trucks had just left and the brothers had already moved the cutter and one of the skidders. It was the evening, but the brothers had returned to pick up the loader. **(R.p.246, l.20-24)**

Working at night isn't unusual in the logging industry. Some loggers run crews 24 hours a day. Also, most in the area are delivering to International Paper and it stays crowded during the day but at night it's much cooler, traffic is less, and it's easier to get in and out of the IP mill quicker. **(R.p.242, l.25- p 241, 1.16)** Log trucks come in and out of the woods 24 hours a day and on the first day of trial and on the second, when he testified, Jared Newton (now working for C&C Express Trucking) had arisen at 2 a.m. and 2:30 a.m., respectively, to pick up a load of logs in Summerville and had driven them to IP. **(R.p.245, l.3- p 246, 1.3)** And it wasn't unusual for J&J to be moving this particular loader at night - they had done it before. **(R.p.247, l.13-20)**

On the evening of August 5th, 2005, they were off of Pennyroyal to pick up that last piece of equipment, the loader which they take into the woods to load logs into a log truck so that the truck can then haul them to their ultimate destination, such as a mill like International Paper. **(R.p.249, l.1-8; also for description of how a loader functions, see p.248, l.1-25)** were leaving out with Jared driving the tractor/trailer carrying the loader and Joel following in a pick up truck. **(See: Trial TS, p. 253, l 5-7)** They pulled up on Stoney Brook Lane to where it intersects with Pennyroyal Road and stopped to wait for traffic to clear which took a few minutes. Jared waited before all traffic cleared before pulling out because it takes a little longer - somewhere between 15 to 25 seconds - because it's like driving a pickup pulling a boat trailer. **(See: Trial TS, p. 253, l 5-16; p. 354, l 8-18)** At this point on Pennyroyal, a truck can't just pull out or it'll go into the ditch and J&J had already piled wood into the ditch for the longer contract trucks. **(See: Trial TS, p. 253, l 12-16)**

To pull out of Stoney Brook Lane and end up on Pennyroyal the truck had to perform the following maneuver - as described by Jared Newton while reviewing photographs for the jury:

A. .... So, we would hug the right-hand side of the road when you come out right here and kind of turn back to your right, drive down on this side over here, back the truck back up ---

Q Let's let these ladies see.

A Back the truck up and then get off the, get off the edge of the road, just make a, make a wide swing and the trailer will come right on out behind you.

Q All right, and about how long would this process take to get out generally with this maneuver?

A Twenty-five, 30 seconds, they don't take much longer than it does a car or a pickup with a boat.

Q All right.

A And you just back up that one time.

(R.p.254, l.24 - p 255, l.11)

After traffic cleared, Jared pulled straight across the road, pulled down into the ditch, cut the wheels, put it in reverse and was backing up to straighten up when the cars came around the curve. **(R.p.252, l.17-19)** Jared thought, "well, you know, they can see me, they'll stop. I pulled it, pulled it down in low. Soon as I started moving they never slowed down. They was still coming. So, I flickered the lights, nothing. I was still moving. I started to toot the horn and that's when they hit me. **(R.p.252, l.19-24)**

Jared Newton was confident that the oncoming car would see him and stop and it should have because the tractor and trailer were so well marked and well lighted and the area was lighted. The trailer had red and white reflective tape down the side. **(R.p.249, l. 8- p. 250, 1.2)** The trailer had 2/1 to 3 inch lights in the middle and at either end. **(R.p.249, l. 20- p. 250, 1.7)** Mr. Newton's tractor

also had a number of lights, as per the following testimony:

> They come with roof lights, they call them clearance lights. Most trucks have five, you know, two on either side and one in the middle, then your standard headlights, park lights, taillights. I like to add some to them. I had three on either side of the bottom of the bumper that light up when you blink along with the turn signal. They call them earrings, they hang off the bottom of the mirrors so they light up the side of the truck, you know, they look kind of good when you cut them on, plus four down the steps of the fuel tanks where you climb in the truck. The two in the middle would blink. There's a headache rack you have to have behind the cab just to get in the mill because if something happens, wood will squish you. You got to have one and I put four lights on either side of them. They light up, plus, your taillights and running lights on the back.
> Q All right, the evening at the time of this accident, how many lights on your tractor and/or trailer were blinking?
> A Two on either corner of the bumper, your two regular park lights beside the headlights was blinking, the two on the mirrors were blinking and then the two tail, two of taillights was blinking.
> Q All right.
> A Plus the ones on the trailer.
> Q Were all of them working that evening?
> A Yes, sir.
> Q All right
> A If they're not working, the DOT will shut you down.
> **(R.p.250, l.13- p. 251, l.14)**

Per the Plaintiff's attorney's cross-examination of Jared Newton, between the tractor and the trailer, there were 51 lights on the rig. **(R.p.289.1-p.289.9)**

Additionally, Joel was driving a pickup truck right behind the tractor trailer. It had running lights on top of the roof plus it had the headlights and hazard lights on. **(R.p.252, l.25 -p.253, l.6)** The J&J truck was pulling out from Stoney Brook Lane onto Pennyroyal Road, right across from Saint Michael's AME Church and there was a light on a pole in the churchyard that also illuminated the area. **(R.p.253, l.10- p. 255, l. 25)** The light from the Church provided a light source illuminating the tractor/trailer as though it were in a typical parking lot, per expert testimony from

J&J's expert mechanical engineer/accident reconstructionist, Mike Dickinson. **(R.p.319, l.16- p. 320, l.23)** Dickinson conducted field tests in the area at the time of night of the accident and discovered that the Church light provided enough illumination to allow him to stand at the edge of the roadway, near the position of the tractor/trailer, and it provided enough light at night for him to be able to read deposition transcripts. **(R.p.313, l.14- p. 321, l.4)**

There were also warning signs posted by J&J to warn approaching traffic, like the cars heading straight for the tractor/trailer on the night of this accident. **(R.p.256, l.1-8; p. 258, l. 12-23)** These were signs bearing the advisory warning to traffic "Trucks Entering Highway" and they were posted in both directions of travel. The signs are reflective and the letters and border light up as a car's lights pass over them. **(R.p.268, l.11- p. 269, l.11)**

Yet on August 9, 2005 Jared Newton was already in the midst of the turning maneuver with the tractor/trailer extended across the well-lit truck in the well-lit roadway. When Jared Newton saw them, the cars were "nose to tail" in the left lane coming around the curve and then entering the 950 foot straight section of roadway approaching Newton's truck. **(R.p.258, l. 7- p. 259, l. 9; p. 328, l. 6-9; p. 313, l.5-8)** Usually cars approaching during this part of the maneuver would slow down to allow the J&J tractor trailer the additional 10 seconds necessary to straighten up in its lane of the roadway, but not the cars approaching on August 9th of 2005. **(R.p.259, l.14-17)** Nothing blocked the lead car's view and the truck's headlights weren't pointing straight at the car in any manner that might impede the driver's vision - the truck's headlights were pointing towards the woods, near an area between trees and the setback because the truck hadn't yet straightened up in the lane which would have been when the headlights were pointing straight down the road and the truck was on Pennyroyal, away from the intersection, heading towards the Sampit/Andrews area. **(R.p.258, l. 3 -**

p 260, l. 9) Jared Newton flashing the lights at the cars speeding towards his rig at a rate of 65 to 70 miles per hour and he started sounding the horn, but then the cars hit the trailer. **(R.p.259, l. 20-22; p. 260, l.1-5 and l. 6-13)**

By the time Jared Newton could get out of his truck to check on the occupants of the two cars that hit his trailer the occupants of the second car were climbing out and either they helped co-Defendant Rivera, the driver of the first car, out or he got out on his own. The Plaintiff was the passenger in the first car and she was the only person ejected from the vehicle, having been ejected through the front windshield of the car. **(R.p.266, l.13-20)**

According to Jared Newton and neighbor Terry Ward, who heard the accident and was the first person to arrive on the scene, after the accident, before EMS or the police arrived, several other cars approached the scene, saw the tractor/trailer, and turned around but none struck the rig. **(R.p.263, l. 5-11; p. 368, l 7-24)** Terry Ward, like J&J's expert Mike Dickinson, testified that the area was well lighted and Mr. Ward says that "pretty much you could see down the road a good little ways." **(R.p.290, l.11- 22; p. 406, l.14-p. 321 l.4)**

Why then did the Rivera car strike the tractor trailer? The highway patrolman, Trooper Surratt, never saw the truck lights illuminated because paramedics asked Newton to turn off the truck for fear of a gas leak or explosion while they were treating the Plaintiff. **(R.p.262, l. 10- p. 265, l. 9)** The Trooper's diagram on the accident report show the truck lights pointed straight down the road in the direction from which the Rivera vehicle came, but that diagram was wrong and the Trooper never saw the truck lights illuminated until the scene was being broken down and the truck had been moved. **(R.p.262, l.10- p.265, l. 9; p. 272, l.3-25)** The Trooper didn't see the truck lights turned on while the truck was in its original position after the accident, but the independent witness, Terry

Ward saw the position of the truck lights. Mr. Ward testified that the truck lights were, as Mr. Newton said, pointing towards the woods. And Mr. Ward lived right across from the Church, had lived there for years, was familiar with the area and knew none of the parties involved in the accident. **(R.p.293, l.7- 13; p. 362, l. 2-7; p. 364, l. 8- p. 370, l. 13)**

The Plaintiff's theory was that the truck lights blinded co-Defendant Rivera so that he couldn't see the tractor trailer. However, as just noted, the testimony of the truck driver and the independent witness is that the truck lights were shining into the woods. **(See: foregoing paragraph)** J&J's expert's testimony at trial and his report, confirmed by his visit to the scene at the same time of night, is that Edgar Rivera should have been able to see the tractor/trailer in plenty of time. **(R.p.299, l.25 - p. 348, l.14)** Mr. Dickinson's opinion is that Rivera caused the accident because he failed to reduce his speed despite " the presence of a number of visual clues that such a reduction in speed would be prudent" with some of these clues being the nature of the road itself - its very narrow - the presence of residences, plant entrances, a Church and warning signs from J&J. **(R.p.333, l.25 - p. 334, l.25)** Dickinson further testified as follows regarding the other driver, Edgar Rivera:

> As he approached the tractor trailer loader and pickup truck down there at the scene, as he got closer it became obvious that that vehicle wasn't moving if he'd been paying proper attention. The illumination provided by the various sources that we discussed, just the presence of a pickup truck with its flashers on and a tractor trailer with flashers on and the thing's not moving in the middle of the road, has got to put you on notice that you need to be slowing, you need to be doing something to get ready for whatever's coming because it's not obvious. It's not obvious what's out there, but that puts the burden on the driver to slow down enough that he doesn't get surprised when he gets to that spot.
> **(R.p.335, l.1 -12)**

Why then did Rivera's car hit the tractor/trailer? Well, shortly before the Riveras left their residence, they got a call telling them that their Father had been mugged and Edgar Rivera and his sister, with another car following, had left to go to him. **(R.p.171, l.11 - p. 173, l.12)** The Plaintiff said that she and her brother Edgar had been watching TV when Edgar got a call from their Uncle saying that their Father was unconscious. The Plaintiff said Edgar did not want to tell her about the call so she wouldn't be frightened but she'd overheard. While Edgar went to change his shirt the Plaintiff got the car keys and was outside beside the car with the keys, refusing to give the keys to Edgar unless he took her with him. The Plaintiff testified that she made sure that Edgar had to take her. **(R.p.213, l.1-25)**

Edgar Rivera was born on December 24, 1986 which would have made him 18 on 8/09/2005. **(R.p.166, l.3-4)** The Plaintiff was two (2) years older, having been born on August 30, 1984. **(R.p.211, l.1 - 6; p.493)** After the accident, one of the other car's occupants asked the independent witness, Mr. Ward, about him leaving to go and get the Plaintiff's driver's license from their house. Apparently, they wanted someone in the car to have a license before the Trooper arrived, but Mr. Ward told them it was best not to leave the scene. **(R.p.294, l.12 -16)** So the Plaintiff may have had a driver's license that wasn't with her, but Edgar Rivera was completely unlicensed. That resulted in no one in the Rivera car having a driver's license, per the Trooper's testimony. **(R.p.165, l.24 - p. 166, l.1)**

At the time of the accident, the Plaintiff was busy talking on a cell phone. Edgar testified that at the time of the accident his sister was trying to call his mother. **(R.p.179, l.24 - p.187, l. 23)** At trial the Plaintiff testified that she was trying to call her Mother on the cell but couldn't reach her because her mother's phone was busy. **(R.p.213, l.25 - p. 214, l.8)** However, the Plaintiff's trial testimony contradicted her deposition testimony, which was read into the record in trial. In her deposition, the Plaintiff claimed that she didn't see too much before the accident because she was on the phone talking with her mother. **(R.p.219, l.18 - p. 220, l.6)** By way of proffer after the Court

sustained an objection, testimony was offered that the Plaintiff was not wearing a seatbelt at the time of the accident. **(R.p.223, l.l-18)**

Edgar Rivera, who had only been in the US for three (3) years prior to this accident, testified that he was speeding, and driving between 57-58 miles per hour but that he doesn't normally speed because he doesn't want to be stopped. **(R.p.171, l.12 - p. 173, l.12)** He first testified that he saw nothing until impact. **(R.p.173, l. 5 - p. 174, l.11)** He then changed his testimony and says that he saw headlights but that his perception was that they were those of a car and that the car was not moving. **(R.p.176, l.6 - p. 178, l.24)** He testified that the headlights were pointed directly at him but didn't recall his deposition testimony that he saw the lights flashing. **(R.p.176, l.17 - p. 177, l.12)** Rivera testified that he did not believe he could have avoided the wreck. **(R.p.176, l.6 - p.178, l. 24)**

The Plaintiff testified on direct at trial that she doesn't remember the crash but only remembers seeing a dark shape and knowing they were going to crash and putting up her hand to protect her face. **(R.p.213, l.25 - p.214, l.8)** Her deposition testimony was read into the record wherein the Plaintiff testified that she only saw the trailer, that they took a curve and she couldn't observe it well but that she was on the cell phone with her mother at the time. **(R.p.219, l.18 - p. 220, l.6)**

So what actually did cause this accident? Why did the Rivera car run into the trailer? Perhaps the key lies in the Plaintiff's deposition testimony, which was read into the record at trial. She admitted that she and her brother were in a hurry to get to her Father. **(R.p.217, l.3-8)**

And what caused the jury to return a defense verdict if by Rivera's own testimony he was speeding and by both his and his sister's testimony neither saw the truck in mid turn across the highway, although the independent witness, Ward, and J&J's expert, Dickinson both testified that the area was well lit? Again, the key lies in the Plaintiff's testimony.

Q Okay, in fact, Edgar did nothing to cause this accident, correct?
A No.

Q Okay, and had you been driving instead of Edgar, you wouldn't have done anything differently?
A No.
Q Okay, and if I'm correct, you actually begged him to allow you to ride with him?
A I practically obligated him to.
Q Okay, and he relented?
A He didn't have any other way.
Q Not willingly?
A No.
Q Okay, and then you got into an accident and now you're suing him today?
A At first I didn't know, I didn't know that it was going to be like this, that I would be here suing my brother.
Q But you don't believe your brother did anything to cause the accident?
A No.
(R.p.221, l.8 - p.222, l.2)

The Plaintiff testified that she forced her way into Edgar's car on the night of this accident and that she does not believe her brother did anything wrong. Essentially, she waived her claim against Edgar. That being the case, if the jury determined that the Plaintiff didn't meet her burden of proving that J&J was negligent, it would also have returned a defense verdict as to Edgar based upon the Plaintiff's own testimonial waiver. Trooper Surratt testified that the J&J truck was entering Pennyroyal at a County-maintained road that qualified as an intersection in the State of South Carolina. **(R.p.168, l.24 - p.169, l.2)**

The Trial Judge charged the jury that it was the sole judge of the facts. **(R.p.372, l.7-13)** The Judge charged that the Plaintiff had the burden of proving her case by a preponderance of the evidence and that "..if the facts sought to be proved by the Plaintiff are more likely not true than true or that the facts supporting the Defendant's case are equally as true then the Plaintiff has failed to meet her burden of proof and you must return a verdict for the Defendants." **(R.p.374, l.14 - p. 373,**

l. 8) The Judge told the jury that they were to determine credibility. **(R.p.373, l.9 - 24)** The Judge charged the jury of the Plaintiff's burden of proving negligence and that the Plaintiff had to prove all the elements of negligence, as discussed below. **(R.p.374, l.24 - p.379, l.1)**

The Trial Judge also charged the following;

> The driver on the un-favored highway has a duty to stop and yield the right-of-way to any vehicle approaching the intersection on the favored highway so closely as to constitute an immediate hazard. However, the driver on the un-favored highway has the right to enter the intersection if there is no traffic approaching so near as to constitute an immediate hazard, and it becomes the duty of those approaching the intersection on the favored highway to yield the right-of-way to the driver entering the favored highway.
> **(R.p.375, l.22 - p. 376, l. 5)**

At 2:32 pm on March 20, 2010, a verdict was reached and read into the record as follows "County of Georgetown, Hazel Jeisel Rivera versus Warren Jared Newton, J & J Logging, Inc., and Edgar Rivera, case number 2008-CP-22-466, we, the jury, find in favor of the Defendants, foreperson Sarrah E. Grimes." **(R.p.406, l.16- p 407, l.4; quote at p 407, l.1-4)** The Trial Judge granted a New Trial based on the Thirteenth Juror Doctrine. J&J contends that the verdict of the jury who heard all the evidence and judged the facts and evaluated the credibility of witnesses was constitutionally proper and that this Court should reverse the grant of a new trial and reinstate the jury verdict.

STANDARD OF REVIEW

In dealing with the grant of a new trial by a Trial Judge based upon the Thirteenth Juror doctrine, the standard of review has been stated as follows: "The principle consistently applied in all of the cases has been that the decision by the trial judge will not be disturbed unless his finding is wholly unsupported by the evidence or the conclusion reached has been controlled by an error of law." South Carolina State Highway Department v. Clarkson, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976)

In this case, Defendant Newton, Newton's Farm and J&J (Hereinafter, "J&J") contend that the grant of a new trial was premised on both an error of fact and an error of law and that particularly because the new trial was granted based upon an error of law, this Court should reverse the lower Court and reinstate and affirm the jury verdict.

ARGUMENTS

1. *The Order Granting Motion For New Trial erred as a matter of fact and as a matter of law when it held that the "only reasonable inference" from the evidence presented at trial was that one or more of the Defendants were at fault in causing the accident that injured the Plaintiff because the evidence and testimony at trial supported a number of reasonable inferences and supported the jury verdict holding that Defendants Newton, Newton's Farm and J&J were not negligent and the Plaintiff's testimony waived her claim against her*

brother, co-Defendant Rivera. Further the Order erred as a matter of fact and/or law in that:

A. *The Plaintiff failed to meet her burden of proof as to the requisite elements of negligence, justifying the jury verdict for the Defendants; and*

B. *The Order erred as a matter of law in citing to the decision of Howard v. Roberson, 376 S.C. 143, 656 S.E.2d 877 (S.C.App. 2007); and*

C. *As a matter of law, the Plaintiff's negligence and her failure to exercise ordinary care for her own safety proximately caused or contributed to proximately causing her own injuries, barring her from recovery therefore; and*

D. *Per her own testimony, the Plaintiff, was fully aware that her younger brother was an unlicensed driver, yet she insisted upon accompanying him to the scene where her father had been in a physical altercation. When her brother, co-Defendant Edgar Rivera, refused to allow her to go, the Plaintiff testified that she took the keys while her brother was changing clothes and walked to the car, refusing to give him the keys until he allowed her to accompany him and after he did so, she spent her time on her cell phone trying to reach her mother rather than supervising her brother She did all of the foregoing, although she was aware that her brother was a much younger and less experienced driver, she was a licensed driver and her brother was not, and it was nighttime and she and her brother were both in an emotional and volatile state. Based on the foregoing, the Plaintiff knew of facts and circumstances which legally required her to anticipate that co-Defendant Rivera would enter a sphere of danger, would omit to exercise proper care to observe the road and other vehicles, would fail to control the speed of the vehicle and would otherwise improperly increase the common risks of traffic; and*

E. *Based on the foregoing, the Plaintiff assumed the risk of this accident and/or breached her resultant duty arising from known and appreciated circumstances and failed to exercise the degree of vigilance required in the facts and circumstances of the case; and*

F. *By virtue of the Plaintiff's status as the older and only licensed occupant of the co-Defendant's vehicle, under the law of this state and the facts of this case, the Plaintiff was properly charged by the jury with the co-Defendant's negligence.*

To prove negligence, a plaintiff must prove the existence of the following elements: (1) a duty owed to the Plaintiff by the defendants; (2) that the defendants breached that duty; and (3) the

Plaintiff suffered damages proximately resulting from that breach of duty. Steinke v. SC Dpt of Labor, Licensing and Regulation, 336 SAC 373, 387, 520 SE2d 142, 149 (1999); Hurst v. East Coast Hockey League, 371 SC 33, 637 SE2d 560 (2006) "If a Plaintiff fails to prove any one of these elements, the action will fail." Vinson v. Hartley, 324 SC 389; 477 SE2d 715 (Ct.App. 1996)

For negligence to be actionable, it must be based upon the breach of a duty to do or to refrain from doing a particular act. Hodge v. Crafts-Farrow State Hosp., 286 SC 437, 334 SE2d 818 (1985) A breach of duty occurs when it is foreseeable that a particular act may likely injure a person to whom the duty is owed. Horne v. Beason, 285 SC 518, 331 SE2d 342 (1985) The damages allegedly sustained from the breach must be proved to have been proximately caused and causally connected to the breach of duty in order to justify a Plaintiff's recovery. Vinson v. Hartley, *id* Only if one neglects a duty which proximately causes injury to another will a recovery be warranted. Hodge v. Crafts-Farrow State Hospital, *id*

The Plaintiff must prove proximate cause. Rush v. Blanchard, 310 SC 375, 426 SE2d 802 (1993); Bramlette v. Charter Medical-Columbia, 302 SC 68; 393 SE2d 914 (1990) To prove proximate cause, one must prove both causation in fact and legal cause. Vinson v. Hartley, *id;* Oliver South Carolina Dep't of Hwys and Pub Transp., 309 SC 313, 422 SE2d 128 (1992) Causation in fact requires proof of foreseeability - that the injury is the natural and probable consequence of the act complained of. Vinson v. Hartley, *id* A Plaintiff proves legal cause by proving that her injuries were a natural and probable consequence of the Defendants' negligence. Greenville Memorial Auditorium v. Martin, 301 SC 242, 391 SE2d 546 (1990) Foreseeability doesn't require proof that the particular event was foreseeable, but it does require that the Plaintiff prove that the Defendant should have foreseen that his negligence would probably cause injury to someone. Vinson v.

Hartley, *id*

A negligent act or omission proximately causes an injury if, in a natural and continuous sequence of events, it produces the injury and without it the injury would not have happened and where the injury complained of is not reasonably foreseeable, there is no liability. Crolley v. Hutchins, 300 SC 355, 387 SE2d 716 (Ct.App. 1989) A Defendant is not charged with foreseeing the unpredictable or that which would not be expected as a natural and probable result of a negligent act. Woody v. South Carolina Power Co., 202 SC 73; 24 SE2d 121 (1943). Foreseeability must be judged from the perspective of the Defendant at the time of the act - not after the injury has occurred. Crolley, *id*

Proximate cause is the direct cause of an injury and negligence proximately causes an injury when without it the injury would not have occurred or could have been avoided. Hughes v. Children's Clinic, P.A., 269 SC 389, 237 SE2d 753 (1977) Issues regarding proximate cause may be shown by direct or by circumstantial evidence. Mahoffey v. Ahl, 264 SC 241; 214 SE2d 119 (1975)

In a negligence action, issues of negligence, contributory negligence and proximate cause are generally questions for the jury and if more than one reasonable inference can be drawn from the evidence, then the Trial Judge is required to submit the issues to the jury. Graham v. Whittaker, 282 SC 393; 321 SE2d 40 (1984)

It is not a determination of negligence that entitles a Plaintiff to a recovery or to a verdict in her favor - it is a determination of liability - which requires that the Plaintiff prove all elements of negligence. Hinds v. Elms, 358 SC 581; 595 SE2d 855 (2004)

The fact that the Plaintiff was a passenger does not absolve her of the duty to look out for her own safety and welfare. All passengers are charged with a duty to exercise such ordinary care for

their own safety and security as would an ordinarily prudent person under the same or similar circumstances and his failure to do so may defeat a recovery. In such cases, recovery is denied to the passenger for her own failure to use due care. Funderburke v. Powell, 181 SC 412; 187 SE 742 (1936). Whether or not a passenger has a duty to anticipate that a driver will be negligent depends on whether there are facts or circumstances showing that the driver is incompetent or careless. *Id* Regardless of whether the duty to anticipate a driver's negligence arises, all passengers have a duty to use her own senses of sight, hearing and perception to protect themselves under the circumstances. Funderburke v. Powell

Questions as to the negligence or recklessness of a passenger are ordinarily for determination by the jury. Benton v. Davis, 248 SC 402; 150 SE2d 235 (1966)

As part of this appeal, J&J also contends that the Plaintiff waived any right to recover for her brother's negligence by her own testimony. (See; Trial TS, p. 216, l. 8 - p. 217, l. 2) A passenger may be barred from recovery for injuries caused by the driver's reckless disregard of the passenger's safety if the passenger knows or has reason to know of the driver's misconduct and the danger it may cause and the passenger still chooses to expose herself to those dangers. Benton v. Davis

In this case, J&J has contended the following: (1) This MVA was caused by co-Defendant Rivera's negligence; (2) Defendant J&J was not negligent; and (3)The Plaintiff's injuries and damages were the result of either her brother's negligence or of her own negligence. As part of this appeal, J&J also contends that the Jury determined that the Plaintiff did not meet her burden of proof or it found that the accident was caused by Defendant Rivera and not by J&J and so it returned a defense verdict as to J&J and as to Rivera, the latter because the Plaintiff waived her right to claims against her brother. (See; Trial TS, p. 216, l. 8 - p. 217, l. 2)

The Court in this case granted the Plaintiff a New Trial based on the Thirteenth Juror Doctrine, citing as legal authority the case of Howard v. Roberson, 376 SC 143, 654 SE2d 877 (Ct.App. 2007) J&J contends that the instant case is clearly distinguishable from Howard and that under the facts and circumstances of this case, the Trial Court's citation of Howard constituted an error of law.

In Howard, a passenger injured in a MVA that occurred when one car went to pass another vehicle and collided with a car that was turning left. The Plaintiff was a passenger in the car trying to turn left. The case went to trial in an action filed against both drivers. At trial, the Plaintiff moved for a directed verdict as to liability against Roberson, but the Court directed a verdict finding that one or both of the Defendants was liable to the Plaintiff and that the jury's task was to decide whether both drivers were negligent and, if so, to determine percentages, or the jury could determine that only one or the other drivers were negligent. *Id* The jury held only Roberson at fault but awarded less than $8,000.00 in damages. The Trial Judge granted plaintiff's Motion for a new trial solely on damages pursuant to the thirteenth juror doctrine. On Appeal, the Court of Appeals held that the thirteenth juror doctrine was not the proper vehicle to grant a new trial nisi additur and it reversed the grant of a new trial and remanded the case to the trial court for a ruling on the nisi additur motion. *Id*

The present case is distinguishable from Howard for a number of reasons. First, in Howard, the Court of Appeals held that the evidence in that case was susceptible to only one inference - being that one of the drivers was responsible to the Plaintiff. The Court of Appeals did not toss out that a Plaintiff must prove her case and meet her burden of proof, and it did not confront facts where a jury could determine that a passenger's own negligence proximately caused her damages because the passenger had additional duties in the situation. In the present case, the passenger was the older and

licensed driver and co-Defendant Rivera was only 18, had only been in the US for 3 years and had no driver's license. Additionally, the Plaintiff in our case was aware that her brother would be in a great hurry to get to their father because of the mugging. Having such knowledge, how did the Plaintiff conduct herself? She didn't pay attention to the road, didn't keep a proper lookout - didn't keep any lookout really - she was distracted by her cell phone. This Plaintiff who knew or should have know that her younger, unlicensed brother would be driving very fast to get to their father.

It is of note that the lack of a seatbelt was testimony adduced by way of proffer outside the jury's hearing. **(R.p.223, l.l. 18)** J&J contends the testimony was admissible, but it also believes that based on the number of witnesses who testified that only the Plaintiff was ejected from the vehicle, that the jury drew the correct conclusion that the Plaintiff wasn't wearing a seatbelt. Combined with all the other factors noted above, the evidence in this case shows that there was an issue for the jury as to whether the Plaintiff met her burden of proof at all. Certainly, in the present case, there were real and great doubts as to J&J's negligence, all of which the jury resolved in J&J's favor. In the Howard decision, the Court held that the evidence in that case yielded only one conclusion - which made the directed verdict proper - and that was that one or both of the drivers were negligent and caused the Plaintiff's injuries. *Id*

In the present case, the Plaintiff's own testimony was one of the factors that differentiated this case from Howard. The Plaintiff waived a claim as to co-Defendant Rivera, or certainly the jury could so find. That being the case, the evidence as to J&J shows that it had begun a legal turn in an intersection and had established position before the Plaintiff's vehicle sped around the curve. Thus the evidence as to Rivera might have only been capable of one inference, but the evidence as to J&J was certainly capable of many - including the one the jury ultimately drew that J&J was not negligent

and/or that none of J&J's negligence proximately caused the Plaintiff's injuries.

Based upon all of the foregoing, The Order Granting Motion For New Trial erred as a matter of fact and as a matter of law and this Court should reverse the grant of a new trial and reinstate the jury verdict.

2. The Court erred as a matter of law and, to any extent the Order cites that evidence at trial did not show the Plaintiff at fault or cites that "the only reasonable inference" to be drawn was that one or more of the Defendants were at fault in causing the accident, the Order errs as a matter of law, is totally unsupported by the evidence and/or the conclusions reached are controlled by an error of law, because:

   A. The Court erred in excluding evidence/testimony regarding the Plaintiff's being on the cell phone and otherwise failing to take due care of her own safety and in failing to keep a proper lookout;

   B. The Court erred in striking portions of J&J's Answer pleaded the defenses of contributory/comparative negligence and assumption of the risk. As part and parcel of this defense, J&J pled and alleged that the Plaintiff/passenger's negligence/assumption of the risk was the sole proximate cause and/or the sole cause of this accident and that therefore the Plaintiff could not recover in the action.

   C. The Court erred in failing to give certain jury instructions, including, but not limited to Plaintiff/passenger's duty of due care for her own safety; of her duty to keep a proper lookout so that she can caution the driver as to such matters as speed; and if the warning is disregarded to demand that the car be stopped so that she can exit the vehicle; all as requested by J&J in the requested jury charge and as supported by South Carolina law, including Thompson v. Michael, 315 SC 268, 433 SE2d 853 (1993).

   D. Since evidence and testimony was offered and erroneously excluded and/or was presented showing and supporting the reasonable inference that the Plaintiff was at fault as per the jury's verdict, it was an error for the Court to grant a new trial and/or Order to hold that no evidence was presented showing that the Plaintiff was at fault because such evidence was presented, such inferences could be made and were made by the jury from the evidence presented, and additional evidence and grounds were offered and improperly excluded.

Defendants Newton, Newton and J&J (Hereinafter referenced as J&J) specifically pled the defenses of contributory/comparative negligence and assumption of the risk. As part and parcel of this defense, J&J pled and alleged that the Plaintiff/passenger's negligence/assumption of the risk was the sole proximate cause and/or the sole cause of this accident and that therefore the Plaintiff could not recover in the action.

In support of the defenses of contributory/comparative negligence and assumption of the risk, J&J pled that the Plaintiff knowingly chose to ride in a vehicle driven by an unlicensed and unqualified driver. Further, J&J submitted evidence that was erroneously excluded which showed that after choosing to ride in a vehicle driven by a person she knew to be unlicensed and unqualified, that the Plaintiff failed to pay proper attention, was on a cell phone, and was not properly observing/monitoring the driving of co-Defendant Rivera, which she had a duty to do under any circumstances and had a heightened duty to do when she knew the driver to be unlicensed and unqualified to operate the vehicle. **(See; Statement of Facts)**

Since evidence and testimony was offered and erroneously excluded and/or was presented showing and supporting the reasonable inference that the Plaintiff was at fault, it was an error of fact and/or law for the Court to grant a new trial and/or for the Order to hold that no evidence was presented showing that the Plaintiff was at fault. Further, the Court's decision/findings was/were wholly unsupported by the evidence and/or the conclusions reached by the Court are controlled by an error of law.

The Order's holding or finding that the Court erred in instructing the jury that it could return a verdict in favor of all Defendants since that instruction was proper under the law of the state and the facts of the case. **(R.p.5-6)**

The Order's error or the Trial Court's in not instructing the jury of the Plaintiff/passenger's duty of due care for her own safety; of her duty to keep a proper lookout so that she can caution the driver as to such matters as speed; and if the warning is disregarded to demand that the car be stopped so that she can exit the vehicle; all as requested by J&J in the requested jury charge and as supported by South Carolina law, including Thompson v. Michael, 315 SC 268, 433 SE2d 853 (1993).

The Trial Judge is required to charge the current and correct law. Brown v.. Smalls, 325 SC 547, 481 SE2d 444 (Ct.App 1997); McCourt v.Abernathy, 318 SC 301, 457 SE2d 603 (1995). A Trial Judge ordinarily has a duty to give a requested instruction that correctly states the law applicable to the issues and evidence. Brown v. Smalls, *supra;* Singletary v. SC Dpt. of Educ., 316 SC 153, 447 SE2d 231 (Ct.App.1994).

Under the facts of this case and the law governing those facts, the Trial Court correctly instructed the jury that it could return a verdict in favor of all Defendants and the Trial Court erred in not giving the requested instruction on the passenger's duty of care.

Should the Court affirm the Grant of a New Trial, which J&J contends would be improper and an error of fact and law as argued hereinabove, as an alternative appellate ground, J&J asks that this Court Order that the stricken defenses be reversed and that any new trial judge be bound to charge all law applicable to the case, including, but not limited to, the law as to the passenger's duty of care.

CONCLUSION:

"A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention." Vinson v. Jackson, 327 S.C. 290, 293 (S.C. 1997) This case was tried for a full week before a jury which spent approximately eight (8) hours deliberating before returning a verdict. J&J is aware that this Court has recently held that the brevity of jury deliberations alone does not constitute a reason to set aside a verdict and remand for a new trial. Curtis v. Blake, 2011 SC App. Lexis 21 (Ct.App.2011) It is not the length of deliberations that J&J advances as additional grounds to uphold the jury's verdict. Rather, it is that these deliberations were so clearly well-considered. The jury in this case returned twice with questions and requests and so seriously weighed and evaluated the issues that it asked for the Trooper's entire testimony to be replayed, which was done, and it then requested a copy of the Judge's jury charge to carry back into deliberations, which was also done. **(See: Statement of Facts; Statement of The Case)** Having this case tried before a jury of their piers was a Constitutional right of all the parties and any jury's verdict deserves due deference. Given the clear weight and consideration that this jury placed upon deliberations, this Court should respect the verdict, confirm the due process afforded to the parties and allow the jury's verdict to stand.

Particularly, in this case, where a Trial Judge correctly instructed and correctly charged the jury, this Court should not allow him to discard such a carefully considered jury verdict based upon an incorrect interpretation of a prior decision, Howard v. Roberson, *id* Whatever principles of law the Howard case stands for, it was surely not the intent of the Court of Appeals to reverse a substantial body of common law that requires that a plaintiff meet her burden of proof for negligence

by a preponderance of the evidence before she is entitled to a jury verdict.

All Plaintiffs must meet their burden of proof whether they were drivers or passengers and the Howard decision never held otherwise. This Plaintiff did not prove her case to this jury which carefully weighed and considered the evidence for hours. The verdict of the jury should stand and this Court should reverse the Trial Court's Order granting a new trial.

Respectfully submitted,

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Dated: July 5, 2011

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,

Appellants,

and

Edgar Rivera,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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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,

FINAL BRIEF OF RESPONDENT HAZEL JEISEL RIVERA

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STATEMENT OF THE CASE

I. Procedural History

Respondent (passenger) brought a Complaint against the Appellants alleging that their negligence caused an automobile wreck on or about August 29, 2005 resulting in personal injuries to Respondent. The case was tried by a jury during the week of March 15, 2010. Prior to the jury's deliberations, Respondent moved the court for an order holding that at least one of the Defendants had to be liable for the wreck. (R367)The Plaintiff based her motion on the case of Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (S.C.App. 2007), where the Court of Appeals had affirmed the finding of a directed verdict for the Plaintiff on the issue of liability, holding that "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 passenger's] injuries." 654 S.E.2d at 881. The Plaintiff also objected to the trial court's jury verdict form which provided the jury with the option of returning a defense verdict for both Defendants. (R356, 366-368). The jury returned a verdict in favor of both Defendants.

The Plaintiff made a timely motion for a new trial. (R101) This motion for a new trial was granted by the Trial Judge. (RS)

II. Statement of the Facts

On August 29, 2005, the Plaintiff, Hazel Rivera, and her brother, Edgar Rivera, were travelling west on Pennyroyal Road in Georgetown County. (R172, 189) Edgar was driving the vehicle and Hazel was a passenger in the front passenger seat. (R173, 214) Edgar and Hazel had received news that their father had been injured and they were travelling on Pennyroyal Road to see their father. (R172, 214)

On that same evening, the J & J Logging Defendants had been attempting to remove logging equipment from a logging site on Pennyroyal Road. (R252) The speed limit is 55 m.p.h. (R162, 174). The Defendants testified that they had put out signs warning of trucks entering the highway. (R256, 268) One of the pieces of equipment is known as a Prentice Log Loader. The Prentice Log Loader is attached to a standard ten wheel tractor truck by a fifth wheel assembly. (R248) The Log Loader is mounted to a trailer which is approximately 38 to 40 feet long and black in color. (See photograph at R505) Sometime after dark and approaching 10:00 at night (R197, 313) the Defendants drove the tractor with the Prentice Log Loader out onto Pennyroyal Road from a dirt road side street. The dirt road formed a T-Intersection at Pennyroyal Road. (R168-69) There were ditches on both sides of the dirt side road. From previous experience, the Defendants knew that they would have to pull the tractor rig out across Pennyroyal Road onto the other side of the road and then back it up in order not to cause the rear wheels of the trailer to become bogged down in the ditch. (R252) The Defendants were aware that pulling out onto the main road under these conditions would take approximately 25 to 30 seconds. (R255, 276-79) The Defendants had no one in a position to warn oncoming traffic, although they had done so in similar situations in the past. (R274-76)

The Defendants had to wait 10 minutes for traffic to pass by. (R297) The Defendant driver then pulled the tractor trailer rig out across Pennyroyal Road so that the cab was off of the opposite shoulder pointing in an easterly direction and the trailer was across the road at a 45° angle. (R161, 432, 434) The lights of the cab were pointed in the general direction of oncoming traffic. (R167, 432, 434) Joel Newton testified that turning left onto Pennyroyal

Road at night with a log loader was inherently dangerous. (R298) In this position, the black trailer rig was completely blocking both lanes of travel. (R434) The Defendant driver then put the truck in reverse and began to back the truck up in order to avoid putting the rear wheels of the trailer into the ditch. (R252) After he had backed the truck up several feet, he then put the tractor in low gear and began to pull forward again. (R252) He saw the Rivera vehicle coming toward him traveling in a westerly direction on Pennyroyal Road. (R252) He testified that he blinked his lights and attempted to blow the horn. (R252) He further testified that it was his opinion that the Rivera vehicle was going 65 to 70 m.p.h. (R263-64) The area was well-lit. (R253-54; 290, 295-96; 316-21) He also testified that there was another vehicle very close behind the Rivera vehicle. (R258)

Edgar Rivera "couldn't see anything until the impact." (R174) Edgar said he was travelling "between 57 and 58 miles" per hour. (R175) The Plaintiff testified that they were in a hurry to check on their father who had been injured. (R217) Edgar did not see any signs warning of trucks entering the highway. (R176) He thought the truck headlights were an oncoming vehicle. (R176) He did not see the lights flash on and off. (R177) According to Edgar, there was no one with a flashlight, no flares, no lighting on the trailer and no visible reflective material on the trailer. (R177-78; 281-82) The truck headlights blocked his view of the trailer which was across the road. (R189)

Plaintiff's expert, Thomas Onions, testified that the logging truck straddling the roadway at night presented a dangerous situation for oncoming traffic. (R201-202) The situation could have been made less dangerous with a flagman, a flashlight, flares, or reflective triangles, but none of these were present. (R202).

When the Plaintiff's vehicle struck the trailer, the Plaintiff was ejected through the windshield. (R215, 220) Her body hit the trailer and she bounced backwards into the ditch on the side of Pennyroyal Road. (R267) The Plaintiff sustained severe injuries (R215, 216, 437-54). She incurred over $60,000 in medical bills. (R186, 455-92)

ARGUMENT

I. The Trial Court did not err in granting a new trial to the Plaintiff.

(A) Standard of Review

It is well settled in South Carolina that an Order granting a new trial based upon questions of fact or upon both questions of law and fact, will not be reviewed by the Appellate Court unless there has been an abuse of discretion in granting the new trial. The South Carolina State Highway Department v. Clarkson, 226 S.E.2d 696 (1976). In South Carolina, a Trial Judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. Lane v. Gilbert Construction Company, Ltd., 383 S.C. 590, 681 S.E.2d 879, 883 (S.C. 2009). "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." (citations omitted) Id. "As the thirteenth juror, the Trial Judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." Id.

(B) The Trial Court did not abuse its discretion in granting a new trial.

In its Order granting the Motion for a new trial, the Trial Court stated, "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. Further, no evidence was presented that showed the Plaintiff at fault." (R6)

The trial court did not abuse its discretion in granting a new trial. As the court stated, the only reasonable inference is that at least one, if not both, of the Defendants, were negligent and at fault in causing this wreck. The Trial Court found that there was no reasonable inference of any negligence on the part of the Plaintiff, especially since she was

merely a passenger. The court likewise did not find any credible evidence that any nonparty could have been at fault, despite the arguments made by Respondent Rivera.

The Trial Court found this case to be very similar to the case of Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (S.C. App 2007). In Howard, the South Carolina Court of Appeals affirmed the finding of a directed verdict for the Plaintiff on the issue of liability holding that "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 [passenger's] injuries. The trial court did not err in granting a direct verdict on the issue of liability." 654 S.E.2d at 881.

In the Howard case, a following vehicle attempted to pass the front vehicle on a two-lane highway. The front vehicle turned left in its path, resulting in a collision which injured the Plaintiff who was a passenger in the left turning vehicle. The trial court found that there was evidence of negligence on the part of one or both of the Defendants. The trial court instructed the jury that they could find against one or both of the Defendants. The trial court did not give the jury the option of finding in favor of both Defendants. The Appeals Court affirmed the trial court's rationale that both drivers owed a duty to the Plaintiff who was simply a passenger. The only reasonable reference to be drawn from the facts presented was that at least one of the drivers had to be negligent in order for the collision to have occurred.

Likewise, in the present case, the Plaintiff was merely a passenger in one of the vehicles involved in the collision. The court properly struck the Defendant's allegations of comparative and contributory negligence as to the Plaintiff since she was merely a passenger. (R352-53) The court further properly agreed not to charge the jury on the defense of "unavoidable accident." (R364-66) Therefore, since the Plaintiff was not at fault and the

accident was avoidable, the only reasonable inference is that the wreck was caused by the negligence of one or both of the Defendants.

(C) Overwhelming evidence of negligence.

The record in this case is filled with evidence of the negligence of the two Defendants. As to the Defendant Edgar Rivera, there was evidence which showed the following:

1. That he was travelling in excess of the speed limit;

2. That he was in a hurry to determine the extent of his father's injuries;

3. That he was an inexperienced driver, driving this particular vehicle for the first time;

4. That he failed to slow down when he saw the headlights of the truck;

5. That he failed to observe and heed signs which warned of trucks entering the highway;

6. That he failed to see the reflective tape on the side of the log loader;

7. That he failed to observe and heed the warning of Defendant Warren Jared Newton as he blinked the truck's headlights and blew the truck's horn;

8. That he failed to see the trailer across the road, even though there was an abundance of light in the area.

Likewise, the record is filled with evidence of the negligence of the Newton Defendants, including but not limited to, the following:

1. In pulling a tractor trailer truck rig out onto a dimly lit country road when they knew that it would take 25 to 30 seconds to pull the truck out and to back it up in order to be in a position to move down the highway;

2. In pulling a tractor trailer truck rig out onto the highway when they knew the trailer to the rig would be completely blocking both lanes for approximately 25 to 30 seconds before they could maneuver the truck into a position to travel down the highway;

3. In failing to post flagmen on either side of the tractor trailer rig when they knew it would take 25 to 30 seconds before the rig would no longer be blocking both lanes;

4. In failing to place any reflective triangular warning signs on the roadway;

5. In failing to place any flairs along the highway;

6. In failing to contact authorities to obtain assistance from the Sheriff's Department in illuminating the area and providing warnings when they knew they would be pulling a dangerous rig into the highway at night;

7. In pulling a dark tractor trailer truck into the highway knowing that it would block the highway for 25 to 30 seconds when they could easily have waited until daylight to perform this function under less dangerous conditions; and

8. In otherwise failing to warn oncoming motorists of a dangerous condition which they had created.

The only reasonable inference from the evidence submitted at trial is that one or both of the Defendants was at fault in causing this wreck.

(D Similar Cases.

Several South Carolina cases support the finding by the Trial Court. The case of Emory v. Piedmont Chemical Company, 242 F.Supp. 344 (D.S.C. 1965), is somewhat similar. In Emory a tractor trailer entered the highway across the southbound lanes. Because the tractor trailer was old and lacking in power, the driver stopped across the southbound lanes waiting on traffic to pass in the northbound lanes. While he was waiting for traffic to pass, a vehicle being operated in the southbound lanes collided with his truck causing serious injuries to the passenger. The passenger struck the windshield and suffered numerous cuts and lacerations on her face requiring over 200 stitches. The case was heard by District Judge Simons without a jury. Judge Simons ruled that the collision was not the result of the sole

negligence of the Plaintiff's driver and that there was no contributory negligence on the passenger's part. The court further ruled that the driver of the truck was negligent per se in violating traffic laws and awarded the Plaintiff what, at that time, was a substantial sum of money for actual damages. The facts of that case which make it particularly instructive are as follows:

1. The Plaintiff was a passenger in an oncoming vehicle which was accused of speeding;

2. The truck driver knew that because of the condition of his vehicle he would not have enough power to accelerate into the northbound lanes without waiting on oncoming traffic;

3. The driver of the truck knew that he would have to stop and completely block the southbound lanes prior to pulling into the northbound lanes thus creating a hazard for oncoming traffic in the southbound lanes.

4. The wreck in Emory occurred at 2:00 p.m. in broad daylight making it much less dangerous than the facts of our case, which occurred at night.

Another South Carolina case which is instructive is Davenport v. U.S., 241 F.Supp. 320 (D.S.C. 1965). That case was brought under the Federal Tort Claims Act. The Plaintiff was a passenger in a vehicle traveling on the highway. An Army truck entered the highway from a serveant highway. Although a military flagman was present to warn traffic of the oncoming truck, he failed to do so. The court stated that "the truck made a sweeping left turn and immediately before the collision, the front wheels of the truck were in the left ditch of Highway S-36-58 and the rear of the truck was diagonally across the highway." Although not

stated in the opinion, it would appear that the truck was not able to negotiate the left turn because the front wheels were in the ditch.

Once again, although this case is not squarely on point, it is similar or instructive in the following respects:

1. The wreck in Davenport occurred at approximately 6:30 in the evening in August, indicating that it was still daylight.

2. The front wheels of the truck ended up in the left ditch prior to the collision, indicating that the truck was stopped at the time of the collision.

3. The Plaintiff in Davenport was a passenger with no contributory negligence.

4. The court found that because the truck was blocking the highway, a duty arose to provide adequate warning to other motorists.

Other cases involving stopped vehicles include Suber v. Smith, 134 S.E.2d 404 (S.C. 1964), stating that an operator of a vehicle has "a right to assume that other vehicles would not obstruct the highway unlawfully." 134 S.E.2d at 408; Gray v. Barnes, 137 S.E.2d 594 (S.C. 1946), upholding a verdict against a truck driver whose truck was partially blocking a roadway at night with his lights shining into oncoming traffic, stating that "the situation was a veritable trap for other traffic." 137 S.E.2d at 598; and Deese v. Williams 118 S.E.2d 330 (S.C. 1961), where the court stated, "the blocking of the highway by the truck gave rise to the duty to provide adequate warning and the discharge of this duty was directly connected with the operation of the truck." 188 S.E.2d at 333. Also instructive is the North Carolina case of Ponder v. National Convoy and Trucking Co., 173 S.E. 336 (N.C. 1934), quoted with approval by the South Carolina Supreme Court in Montgomery v. National Convoy, 186 S.C.

167, 195 S.E. 247, 252 (S.C. 1938). In the Ponder case, the court stated that the Defendant was unable to move his truck and trailer because the wheels had become stuck in the soft shoulder off of the pavement. The court found that the Defendant "owed the duty to the Plaintiff and others approaching the obstruction in the highway, in automobiles or trucks, to exercise reasonable care to warn them of their peril. A failure to perform this duty was negligence." 173 S.E. at 338.

CONCLUSION

The only reasonable inference that can be drawn from the testimony, exhibits, and the facts of this case is that at least one of the two Defendants was at fault in proximately causing the wreck which led to the Plaintiff's injuries. The Trial Court did not err or abuse its discretion in granting a new trial.

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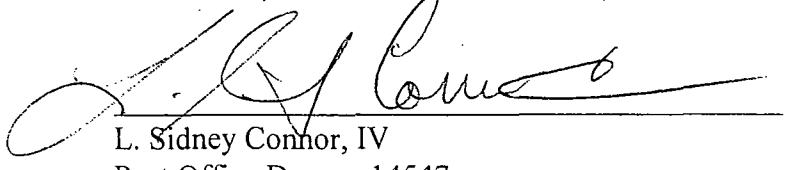

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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

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,

CERTIFICATE OF COUNSEL

The undersigned certifies that Respondent Hazel Jeisel Rivera's Final Brief complies with Rule 211(b), SCACR.

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Appellants,

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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 Final Brief on counsel listed below this 8th day of July, 2011.

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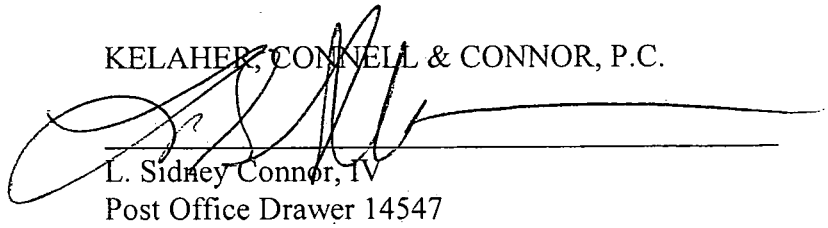

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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Benjamin H. Culbertson, Circuit Court Judge

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FINAL REPLY BRIEF OF APPELLANT EDGAR RIVERA

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ARGUMENT

The Trial Court erred in granting a new trial on the law to Hazel Rivera when the decision was either based on an error of law and/or wholly unsupported by the evidence.

(1) Respondent's Initial Brief contains a misleading description of the facts

In reply to Respondent's arguments, Appellant Edgar Rivera ("Edgar Rivera") would first reiterate arguments made by Appellant Warren Jared Newton, Newton's Farm, J & J Logging, Inc. ("the Newtons") regarding the Statement of the Case section of Respondent Hazel Jeisel Rivera's ("Hazel Rivera") Initial Brief. SCACR 208 provides that this portion of a party's Initial Brief must detail uncontested facts with references to the transcript. Respondent failed to substantiate the vast majority of her recitation of the procedural history and the relevant facts of her claim with any citations. Furthermore, her version of the subject automobile accident is self-serving and contains contested facts.

Most notably, her representation of the speed of Edgar Rivera's vehicle and the actions of Edgar Rivera and another driver are contrary to the evidence present in the record. Plaintiff erroneously claims that witness Warren Jared Newton testified that Edgar Rivera's vehicle was traveling "65 to 75 m.p.h." This witness actually testified that Edgar Rivera was traveling fifty-five (55) miles per hour. After Respondent's counsel attempted to lead this witness into placing Edgar Rivera's speed at faster than the applicable speed limit of 55 miles per hour, this witness responded "they was getting it, probably 65 to 70, somewhere

in there." [R. p. 258, line 16 – p. 259, line 5]. It should be noted though that he prefaced this response by stating "[i]t's just a guess..." [R. p. 259, line 2].

Respondent also asserts in her Initial Brief that neither Edgar Rivera nor another vehicle behind Edgar Rivera slowed or applied brakes prior to impacting the Newtons' trailer. The record from the Plaintiff's case is void of any evidence of Edgar Rivera's failure to brake. Also, the record also contains testimony of the other vehicle's braking and the reason for that braking:

> Q: Okay, so, Miguel had been going approximately 40 miles per hour when he impacted the trailer?
> A: No, he braked.
> Q: Okay, so, at the time he braked he was going 40 miles per hour?
> A: He avoided my car when he saw the lights. When he saw the crash, he was able to brake.

[R. p. 192, lines 2-8]. Unfortunately, Edgar Rivera was never presented with the warning brake lights of any other vehicle and was unable to avoid the accident.

Finally, Respondent argues that she based her post-trial motion on the case of *Howard v. Roberson*, 376 S.C. 143, 654 S.E.2d 877 (Ct.App.2007). However, Hazel Rivera's Motion for a New Trial did not reference this case. [Notice of Motion and Motion for a New Trial].

(2) <u>Sufficient Evidence of the Negligence of an Unnamed Defendant Supported the Jury's Finding</u>

Howard is easily distinguishable from this case. This Court reviewed that plaintiff's directed verdict motion and held, "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 Howard's injuries." In that case, the record was apparently void of any negligence of an unnamed defendant. As previously

delineated, this record is replete with evidence of the negligence of an unnamed defendant, such as the State of South Carolina or Georgetown County, in designing and implementing a dangerous intersection. As reflected by the jury's verdict, the evidence introduced at trial presented more than the conclusion of the negligence of at least one of the original defendants.

(3) The Trial Court's New Trial Order is based on the legal error in denying Edgar Rivera's original directed verdict motion

As this Appellant detailed in his Initial Brief, the Trial Court erred in denying his directed verdict motion at the end of Hazel Rivera's case since the record contained no questions of fact as to his liability at that point. SCRCP 50(a) allows a defendant to make a directed verdict motion "at the close of the evidence offered by an opponent" when no questions of fact exist. Edgar Rivera reiterates that Hazel Rivera failed to carry her burden of proof against him without any evidence of his liability at the conclusion of the plaintiff's case-in-chief.

Hazel Rivera argues that eight (8) separate points support a finding of negligence on the part of Edgar Rivera. However, any evidence supporting six (6) of those points is either irrelevant as to any negligence on the part of Edgar Rivera or was introduced after the close of the plaintiff's case. The fact that Edgar Rivera was driving his vehicle for the first time or that he failed to slow when he saw the Newtons' headlights in the opposite direction are immaterial to any alleged breach of duty on his part. Any evidence of the Respondent's final four (4) points were introduced after Edgar Rivera's initial directed verdict motion and, as a result, should not be considered by this Court when analyzing the Trial

Court's denial of this motion. Finally, there is no evidence in the record that would support a labeling of Edgar Rivera as an inexperienced driver.

As to evidence that Edgar Rivera was "in a hurry to determine the extent of his father's injuries" or travelling in excess of the speed limit, such points do not establish even a scintilla of evidence of Edgar Rivera's alleged negligence. Respondent is unable to substantiate an argument that, taken alone, Edgar Rivera's speed of two or three miles per hour over the speed limit was unreasonable under the circumstances. Taken in conjunction with the adamant testimonies of Hazel Rivera, her expert accident reconstructionist and Edgar Rivera that Edgar Rivera did not breach any duty to Hazel Rivera, her claim against Edgar Rivera failed at the end of her case without any additional evidence to support a negligence claim against him.

The remainder of Hazel Rivera's Initial Brief is directed at the negligence of the Newtons. In fact, all other cases cited by Respondent deal with the negligence of similar tractor trailer operators that became stopped across a highway and were subsequently involved in a motor vehicle accident. Respondent focuses this Court's attention on the Newtons' negligence, just as she did at trial. As a result, the evidence in the record and the Respondent's Initial Brief overwhelmingly support Edgar Rivera's initial directed verdict motion, as well as the jury's verdict.

CONCLUSION

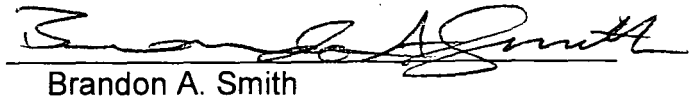
Factual misrepresentations cause Respondent's Initial Brief to be defective. More importantly, the Respondent's Initial Brief fails to persuade that the Trial Court's remedial directed verdict was not made in error. First, Hazel Rivera's case-in-chief included no evidence against Edgar Rivera. She and her witnesses categorically denied any wrong-doing on his part. As such, the Trial Court committed legal error by not granting Edgar Rivera's directed verdict motion at the conclusion of Hazel Rivera's case-in-chief. Second, since ample evidence established the potential negligence of an unnamed defendant, the Trial Court erred in granting Hazel Rivera's Motion for a New Trial.

For these and all the foregoing reasons, this Court should reverse the Trial Court's Order and direct the Trial Court either to grant Edgar Rivera's original directed verdict motion or reinstate the jury's verdict at least with regard to Edgar Rivera.

Respectfully Submitted,

Florence, South Carolina
July 12, 2011

TURNER, PADGET, GRAHAM & LANEY, P.A.

By: 

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GEORGETOWN COUNTY
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Benjamin H. Culbertson, Circuit Court Judge

Case No. 08-CP-22-00466

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v.

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

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The undersigned certifies that he is employed with the law firm of Turner, Padget, Graham & Laney, P. A., attorneys for the Appellant Edgar Rivera and that he has served a copy of the Final Reply Brief of Appellant Edgar Rivera on counsel listed below this 12th day of July 2011.

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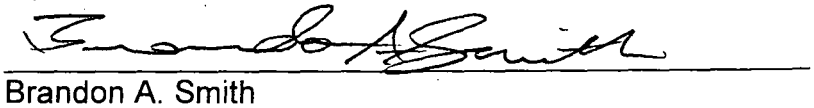

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THE STATE OF SOUTH CAROLINA
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The undersigned certified that this Final Reply Brief complies with Rule 211(b), SCACR.

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FINAL *REPLY* BRIEF OF APPELLANTS: Warren Jared Newton, Newton's Farm *And* J&J Logging, Inc

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I. Reply to Respondent's Statement of Procedural History:

The Respondent notes that at the close of the case she made a motion based on Howard v. Roberson, 376 SC 143, 654 SE2d 877 (SC App 2007) asking that the Court strike #4 on the verdict form, which would allow a defense verdict, and that the Court hold that at least one of the Appellants was liable. (See: Respondent's Brief, p. 2, "Procedural History.") It is of note that the Respondent's motion was to the effect that since the Court struck the affirmative defense of Unavoidable Accident, that this accident could have been avoided and that meant that one of the Appellants had to be responsible. **(R.p.366, l.20- p.368, l.19)**

Respondent based this erroneous argument on a misunderstanding of the Court's holding in Howard v. Roberson. That decision did not eradicate one of the foundational principals of our civil justice system - that a Plaintiff must prove her case. The Trial Court's ruling refusing to change the verdict form and denying the Respondent's motion seeking to hold at least one of the Appellants/Defendants liable. In making that ruling, the Court stated that "I think you can have negligent Defendants, you can have a wreck that is not the product of an unavoidable accident, but you could also have a Plaintiff that just didn't prove their case for whatever reason, which would result in a verdict for the Defendants." **(R.p.367, l.6-13)**

The Trial Court's ruling during the trial declining to direct a verdict as to liability and sending back a verdict form that allowed a defense verdict, was in keeping with the evidence in the case and the law in this State which requires that all Plaintiffs - whether they were drivers or passengers- must prove their case. After extensive deliberations that included a jury's request to hear or view the

Trooper's testimony again and for a copy of the Judge's Jury charge (both of which were done) the jury that heard this case returned a defense verdict, indicating that the Respondent had not proved her case and/or that the jury found Respondent's driver responsible but Respondent had essentially testified and waived a verdict as to the Co-Defendant/Co-Appellant, Respondent's brother. **(R.p.406, l.16-p. 407, l. 4; p. 221, l. 8-p. 222, l.2)**

In granting this Motion for a New Trial, the Court incorrectly ruled that no evidence at trial showed the Respondent/Plaintiff at fault in causing the accident so one of the Appellants/Defendants had to be at fault and erroneously cited Howard v. Roberson. **(R.p.6)** J&J contends that the Court's trial rulings were correct and that in this case on this record the jury could have returned a defense verdict. Therefore, J&J contends the Grant of a New Trial should be reversed.

II. Reply to Respondent's Statement of The Facts:

The Respondent's Statement of The Facts consists entirely of a summary of the Respondent's opinion of the facts, unsupported by a single reference to the testimony or evidence. The unsubstantiated matter includes a number of statements about what the Defendants (Appellants) knew or did not know, contains unsupported contentions about what is "normal" and fails to include how well lighted the subject area was or how well lighted the J&J tractor trailer was (as cross examination at trial by the Plaintiff/Respondent pointed out, the tractor/trailer contained over 51 lights). **(See; Respondent's Brief - Statement of the Case- Statement of The Facts; and R.p.289.1, l.25- p. 289.9, l.21; and p. 319, l.16-p. 320, l.23)**

The South Carolina Rules of Appellate Procedure provide as follows:

> **4) References to Record.** The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the

> salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript. In the initial briefs, these references should be to the page and line number of the transcript prepared by the court reporter or by the page of the material to be referenced; e.g., Answer p. 7, Motion for Judgment p. 2, Transcript p. 231. Intelligible abbreviations may be used. After the Record on Appeal is prepared, these references shall be revised as provided by Rule 211(b)(1).
> **Rule 208(b)(4), SCACR**

Virtually none of the facts alleged in the Respondent's Statement of Facts, or those referenced in Respondent's "Argument" is supported by references to the transcript, pleadings, orders exhibits or other materials as required by appellate practice and Rule 208(b)(4), SCACR. J&J contends that the to the extent facts alleged are not supported, they can not properly be considered and J&J further contends that because the Respondent failed to properly support the facts alleged, that she has not met her burden in this appeal.

It is a time consuming endeavor to prepare a proper Statement of Facts supported by citations to the testimony, pleadings or evidence, but Appellant J&J made an effort to do so in compliance with the Rules. Appellate briefs would be much simpler for the parties if they could summarize matters based simply upon their own recollection, but that would be improper under the Rules and would be decidedly unpersuasive to a Court seeking to enter a correct ruling based upon the law and the facts.

Based upon the law of this state, upon appellate practice generally and upon Rule 208(b)(4) specifically, J&J contends that this Court should not consider any unsupported facts and asks that the Court therefore hold that Respondent has not met her burden relative to upholding the Trial Court's Order and/or showing that it should stand and J&J therefore asks the Court to reverse the Trial

Court's grant of a new trial and to reinstate the jury verdict.

III. REPLY TO RESPONDENT'S ARGUMENT

I. The Trial Court erred in granting a new trial and in reversing a verdict by a jury that heard testimony for the better part of a week and then spent over eight (8) hours deliberating and weighing evidence so carefully that it during deliberations it returned to listen to the Trooper's testimony, which was replayed, and requested a full copy of the Court's Charge.

A. Standard of Review:

Respondent's brief misstates the applicable Standard of Review. The correct standard of review is that "The principle consistently applied in all of the cases has been that the decision by the trial judge will not be disturbed unless his finding is wholly unsupported by the evidence or the conclusion reached has been controlled by an error of law." South Carolina State Highway Department v. Clarkson, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976)

In this case, "J&J" contends that the grant of a new trial was an abuse of discretion, but it was also wholly unsupported by the evidence and was controlled by an error of law and that this Court should reverse the lower Court and reinstate and affirm the jury verdict.

B. The Trial Court abused its discretion, erred a matter of law, and entered a ruling wholly unsupported by the facts in granting a New Trial.

The grant of a new trial erred as a matter of fact and law in holding that the "only reasonable inference" from the evidence at trial was that one or more of the Defendants/Appellants were at fault in causing the instant accident. **(R.p.5-6l)** The Trial Court further erred in the grant of a new trial by finding that there was no evidence of negligence by the Plaintiff and the Court incorrectly struck the

affirmative defenses alleging the Plaintiff's negligence. **(R.p.5-6)**

In this case, the Plaintiff/Respondent knew that her brother, co-Defendant Rivera, was two years younger, had no driver's license, and had very little US driving experience as he had only been in the country for three (3) years before this accident. **(R.p.166, l. 3-4; p.294, l.12-16; p.165, l.24- p. 166, l.1; p. 171, l.2- p.173 l.12)** Further, the Plaintiff/Respondent knew that her brother, the young and inexperienced UNLICENSED driver, was upset because he'd gotten a phone call that he needed to go and see about their father who had been mugged. **(R.p.171, l.11-p.173, l. 2; p. 166, l.3-4;p. 294, l.12-16; p. 165 l.24- p. 166, l. 1; p. 171, l. 2- p. 173, l. 12)** The Plaintiff/Respondent got the car keys while her brother was changing clothes and waited for him outside the car to make him take her on this urgent errand. **(R.p.213, l.1-25)**

Despite all of the foregoing, which should have alerted the Plaintiff/Respondent to take every precaution for her own safety and to carefully monitor and supervised her younger and unlicensed brother, the Plaintiff spent the ride talking on a cell phone and didn't even buckle her seatbelt, so that she was the only one ejected from the vehicle. **(R.p.179, l. 24- p. 187, l. 23; p. 213, l.25- p. 220, l. 8)** All of this evidence shows that the Plaintiff was negligent and J&J contends that the Judge should not have struck its affirmative defenses, but contends that despite the defenses having been struck, the evidence was of record and the Jury could have used it in returning a defense verdict, which essentially meant that the jury determined that the Respondent/Plaintiff had not met her burden of proving that liability for the accident and responsibility for the Plaintiff's injuries rested upon J&J or the Defendants.

Moreover, the foregoing facts which are indicative of the Plaintiff/Respondent's negligence, differentiate this case from Howard v. Roberson. The Howard v. Roberson case does not stand for

the proposition that a passenger who files a civil lawsuit has some extraordinary status that automatically entitles her 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.

C. The Respondent's brief cites **no supported** evidence of negligence and the trial record contains ample to overwhelming evidence from which a jury could have and did hold that J&J was not negligent.

The Respondent's brief contains a section captioned "Overwhelming evidence of negligence" which, like the Statement of Facts, cites no testimony or evidence supporting what is merely a summary more appropriate for a Complaint than an appellate brief. This section is replete with allegations about what J&J knew or didn't know and what J&J did or didn't do and evidence and testimony at trial cited and supported in J&J's brief refutes and negates these contentions.

J&J incorporates herein by way of additional response its initial brief and particularly the "Statement of Facts" from J&J's previously filed Initial Brief.

Based upon the law of this state, upon appellate practice generally and upon Rule 208(b)(4) specifically, J&J asks that this Court not consider any unsupported facts and/or that it hold that the Respondent's failure to properly support any facts alleged constituted a failure to prove her contentions in this appeal and that the Court therefore reverse the Trial Court and reinstate the jury verdict.

D. Respondent cites a number of older cases that are not "similar" to this case, includes a number of District or Trial Court Federal cases, and references North Carolina law, and most of which does not constitute precedent as to this case or this Court

Respondent cites a number of cases which she contends are "similar" to this case and support

the Trial Court's ruling. However, none of the cases cited by Respondent have similar facts and most of them are either Federal District or Trial Court cases - which presumably are cited as samples of what various lower Courts have done or are North Carolina cases, which would not be precedent or binding authority in any event.

One such case cited is a federal case out of the Greenville area of South Carolina. Although Respondent contends it is "similar" and notes that in it the Federal Trial Judge found that Plaintiff/Passenger not to be contributorily negligent and awarded Judgment against the driver of a tractor trailer. Emory v. Piedmont Chemical Company, 242 F.Supp 344 (D.S.C. 1965) In actuality, the Emory case is only similar in that it involves a tractor trailer which had to extend across some portion of a highway to make a turn. The decision involved a tractor trailer driver whose trial testimony admitted that he should have seen the Plaintiff's approaching vehicle and that he had only looked one way before pulling across the highway when he could have entered the highway by a method that didn't block both lanes. *Id* Further, there was no testimony about the Plaintiff having been in a position such that she was chargeable with supervising a younger and unlicensed driver but failed to do so, which is the case in the instant matter before the Court in this appeal. **(R.p.171, l.11- p. 173 l. 2; p. 166, l. 3-4; p. 294, l.12-16; p. 165, l.24- p. 166, l.1; p. 171, l.2- p. 173; l.12)**

The Respondent cites another District Court case involving an army truck collision that injured the Plaintiff passenger and contends that it is "instructive." Davenport v. U.S., 241 F.Supp. 320 (D.S.C. 1965) The case is similar only in that it involved a truck entering a highway. It is not at all instructive because it involved a US Army truck driver who disregarded a stop sign and entered the dominant highway in front of the Plaintiff's vehicle after an Army flagman waved the truck through the intersection. *Id*

The Suber v. Smith decision also cited by the Plaintiff is completely dissimilar from the instant matter in that it involved a car that had been left stopped and standing partly in the highway while its occupants got out to relieve themselves in the woods. Suber v. Smith, 243 SC 458, 134 SE2d 404 (1964). The Gray v. Barnes case involves a stopped vehicle - or rather, it involves two (2) stopped vehicles which completely blocked a highway. Gray v. Barnes, 244 SC 454, 137 SE2d 594 (1964). In Gray v. Barnes, an unlighted pickup truck pulling an unlighted stake body truck by means of a tow chain encountered a problem when the trucks ran together and "hung up" their bumpers. The trucks were extended across most or all of one lane when the driver of a tractor trailer approaching from the other direction stopped in the road to assist the trucks. A vehicle in which the Plaintiff was a passenger came along and struck the right rear of the unlighted stake body truck and then ran head on into the lighted tractor trailer. The Court found that the vehicles - at least the tractor trailer - had a duty to get off of the highway before stopping and the Plaintiff's driver testified that he may have been blinded by lights from the tractor trailer, but regardless he had not seen the unlighted pick up or the unlighted stake body trucks until he was immediately upon them. *Id* These trucks were not crossing or turning on the highway, as in the case before the Court, **(R.p.254, l. 24- p 255, l. 11)** the trucks in Gray v. Barnes were all stopped upon and blocking the highway.

However, an argument raised (but denied under the facts) in the Gray v. Barnes case cited by Respondent is applicable to this case and are additional grounds upon which the jury verdict should be sustained; to wit, the Respondent/passenger's joint enterprise. As to Joint Enterprise, the general rule is that when two or more people unite in the "joint prosecution of a common purpose" and each has express or implied authority to act for all in controlling the means and agencies used to execute the common purpose, the negligence of one in the "management thereof" will be imputed to all. *Id*

Under circumstances where the rule applies, each is the agent of the other and each is the principal of the other, bringing into play the precepts of agency law. *Id,* quoting, Funderburk v. Powell, 181 SC 412, 187 SE 742 (1936)

The rule as to joint enterprise has been stated as follows;

> In order to constitute a joint enterprise so that the negligence of the driver of an automobile may be imputed to an occupant of the car, it is generally held that there must be a common purpose and a community of interest in the object of the enterprise and an equal right to direct and control the conduct of each other with respect thereto. In other words, the passenger, as well as the driver, must be entitled to a voice in the control and direction of the vehicle. There must be a community in the object and purpose of the undertaking and an equal right to direct and govern the movements and conduct of each other in respect thereof. Each must have the control of the means or agencies employed to prosecute the common purpose.
> *Id* at p. 464; quoting Padgett v. Southern Ry Co., 219 SC 353, 65 SE2d 297 (1951)

In the present case, the Respondent/Plaintiff and her brother got a call that their Father had been mugged and they, with another car following, had left to go to him **(R.p.171, l.11 - p. 173, l.2)** The Plaintiff under these facts was chargeable with supervising and controlling the younger and unlicensed driver, 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, under these facts, the Plaintiff was chargeable with Edgar Rivera's negligence per the principals of joint enterprise.

Respondent cites another case where the SC Supreme Court held that if vehicles block a highway they have a duty to provide adequate warning. Deese v. Williams, 237 SC 569, 118 SE2d 330 (1961) In that case, drivers were dealing with snowy conditions and a truck performing highway maintenance was standing on the eastern side of a highway and a car was standing almost

exactly opposite it on the west side, effectively blocking the entire highway. In the present case, there was a J&J tractor trailer lawfully making a turn onto a highway in an area where they HAD WARNED MOTORISTS by erecting reflective signs in both directions that light up as a car's lights pass over them warning traffic about "trucks entering highway" ahead. **(R.p.494-500; R.p.258, l.7 - p 259, l. 9; p 328, l.6-9; p. 313, l.5-8)**

Similarly, in the North Carolina case cited, which was quoted in a South Carolina decision, a truck stuck partly in the highway and partly in the soft shoulder of the road was held to have been negligent for failing to warn approaching motorists. Pender v. The National Convoy and Trucking Company, 206 NC 266, 171 SE 336 (1934); Here the J&J tractor trailer was lawfully making a turn onto a highway in an area where they HAD WARNED MOTORISTS by erecting reflective signs in both directions that light up as a car's lights pass over them warning traffic about "trucks entering highway" ahead. **(R.p.494-500; R.p.258, l.7 - p 259, l. 9; p 328, l.6-9; p. 313, l.5-8)**

While the North Carolina Pender v. The National Convoy and Trucking Company case cited by Respondent is inapposite to the present facts, another NC case that cited the Pender decision held that if a driver is blinded by lights of an oncoming car such that he could not see the required distance ahead that it is the driver's duty first to slow down and then, if he still could not see, to stop. Beck v. Carlton C. Hooks, 218 NC 105, 10 SE2d 608 (1940) A South Carolina decision reaches a similar holding in a case where a driver was blinded by dust kicked up by a street sweeper continued driving ahead and collided with the street sweeper. The driver sued the street sweeper and the SC Supreme Court held that the driver was guilty of recklessness and contributory negligence for making no effort to reduce his speed despite the impediment to his vision. Ledford v. RG Foster and Company, 252 SC 546, 167 SE2d 575 (1969)

IV. REPLY TO RESPONDENT'S CONCLUSION

Respondent's conclusion contends that "the only reasonable inference to be drawn from the testimony, exhibits and the facts of this case is that one of the two Defendants was at fault in proximately causing the wreck which led to the Plaintiff's injuries." **(See; Respondent's Initial Brief, Conclusion, p.12)** Appellant J&J, for all of the reasons stated above, and for all those stated in its Initial Brief, disagrees and disputes the foregoing. The Respondent's brief cites no principles of law which justify the grant of a new trial in this case, and even if it did cite any such principles of law, which is denied, it cites nor supports such law with any SUPPORTED OR CITED facts or evidence from the record of this case.

The jury in this case heard evidence and testimony for approximately a week and deliberated for around eight (8) hours, returning to hear the Trooper's entire testimony and requesting and receiving a full copy of the jury charges. **(See: Statement of Facts and Statement of The Case From Appellant J&J's Initial Brief, Incorporated Herein By Reference)**. After this intense consideration of the facts and issues, the jury returned with a verdict for both Defendants. That meant that the Plaintiff/Respondent did not meet her burden of proving her case at trial. As noted in the foregoing paragraph, the Respondent/Plaintiff's Brief to this Court contains virtually no citations to the facts or evidence, and merely recites generalizations more appropriate to a Complaint than an appellate brief. Therefore, J&J contends that the Respondent/Plaintiff also did not meet her burden of proof to this Court.

For all of the reasons stated herein and for all of those stated in Appellant J&J's Initial Brief,

J&J contends that the Trial Court erred in setting aside the jury's verdict by granting a new Trial, and that the grant of a new trial was wholly unsupported by the evidence was controlled by errors of law. "A jury verdict should be upheld when it is possible to do so and carry into effect the jury's clear intention," Vinson v. Jackson, 327 SC 290, 491 SE2d 249 (1997) In the present case, the jury's clear intention was that it did not find J&J liable for this accident or the Respondent/Plaintiff's alleged injuries and it is not only possible, but is entirely proper and appropriate for the jury's verdict to be carried into effect.

This Court should reverse the grant of a new trial and reinstate the jury's verdict.

Respectfully submitted,

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Dated: July 5, 2011

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,

Appellants,

and

Edgar Rivera,

Respondent.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Reply Brief complies with Rule 211(b), SCACR.

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