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Apr 14 2021

SC Court of Appeals

STATE OF SOUTH CAROLINA

IN THE COURT OF APPEALS

Appeal from Berkeley County
Court of Common Pleas

Case No. 2017-CP-08-02153
Appellate Case No. 2020-000757

DORETTA MCHUGH,

Appellant,

v.

JOHN DOE,

Respondent.

APPELLANT'S INITIAL REPLY BRIEF AND DESIGNATION OF MATTER

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ARGUMENT IN REPLY

Points of Clarification:

1. Respondent's assertion, that Plaintiff's prior fall from motorcycle was offered to show a pre-existing condition [Respondent's Brief, p. 6], is false.

Rule 404(b) SCRE provides "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible to show motive, identity, the existence of a common scheme or plan, the absence of mistake or accident, or intent."

Defendant repeatedly referred to evidence of a prior act, Plaintiff's fall from his motorcycle at a safety class, in order to show Plaintiff's actions at the time of the collision were the same. Defendant never offered any of Rule 404(b)'s exceptions, rather played on the notion that the prior act was also evidence of a pre-existing injury or condition. However, it is not until halfway through the trial, and spoken by the Court, that anyone used the term "pre-existing condition." [Tr. 184:4]. This is because the Defendant never intended to present evidence of a pre-existing condition. We know that, prior to hearing the Court discuss it, Defendant never contemplated arguing a pre-existing condition because, among other things, it is absent from the operative Answer [ROA ____].

It is further apparent that Defendant's strategy was to weave lack of experience alongside the thread of prior similar conduct as shown in its closing argument. "Now, as you heard from today the Plaintiff himself, brand new driver of a motorcycle. And not just this motorcycle, not just the Ducati Café Sports Racer. He was new to driving motorcycles all together. All together. He had a beginner's permit." [Tr. 275:11-16].

Then, Defendant argues in closing that the Plaintiff had headaches prior to the collision at hand because, “six weeks before [the hit-and-run] he is turning and braking and making a maneuver on the bike and flies off and hits his head.” [Tr. 283:7-9]. Plaintiff objected that this was a statement involving facts not in evidence, and the Court properly sustained the objection. However, it is shown by these statements that the prior headaches were only mentioned so that Defendant could mischaracterize Plaintiff’s prior fall in a prejudicial manner. Defendant’s desire to reiterate the circumstances of the prior fall is so strong that he cannot discuss Plaintiff’s headaches without also mentioning that Plaintiff previously fell from his motorcycle. [Tr. 284:1-7]. “So that’s a damage that you need to consider as to how that happened . . .” [Tr. 284:8-9].

The Plaintiff’s testimony regarding headaches could have been presented to the jury without ever mentioning the prior motorcycle fall. However, the Defendant repeatedly brought up the Plaintiff’s prior fall in an effort to convince the jury that the Plaintiff must therefore be responsible for the wreck at issue. Based on the jury’s verdict that the Defendant was not responsible for causing the wreck, these statements were well-received. These statements should have been excluded by the Court on Plaintiff’s timely motion, and the failure to exclude this testimony is reversible error.

CONCLUSION

WHEREFORE, Plaintiff respectfully requests that this Court vacate the verdict below and order a new trial on the merits.

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CERTIFICATE OF SERVICE

I, Daniel C. Boles, attorney for the Appellant do hereby certify that on April 14, 2021, I served a copy of Appellant's Initial Reply Brief on counsel for Respondent, via U.S. Mail, first class, postage prepaid to the following address:

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