

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

**RECEIVED**

APR 15 2013

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

**S.C. Supreme Court**

The Honorable Benjamin H. Culbertson

---

Case No: 2008-CP-22-00466

---

Hazel Jeisel Rivera,

Respondent,

v.

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

Petitioners.

---

**PETITIONERS' REPLY TO RESPONDENT'S  
RETURN TO PETITION FOR WRIT  
OF CERTIORARI**

---

***TO: THE HONORABLE CHIEF JUSTICE & ASSOCIATE JUSTICES  
OF THE SUPREME COURT OF SOUTH CAROLINA***

Petitioners, Warren Jared Newton, Newton's Farm and J&J Logging, Inc., respectfully reply to Respondent Hazel Jeisel Rivera's return to their petition asking that the Court issue a writ of

certiorari by which to review the decision of the South Carolina Court of Appeals.

**REPLY TO RESPONDENT'S STATEMENT OF THE CASE AND  
STATEMENT OF THE FACTS**

In reply to Respondents' Statement of The Case and Statement of Facts, Petitioners Newton incorporate by reference and re-affirm the Statement of The Case and Statement of Facts contained in their Petition for Writ of Certiorari which is of record with the Court.

Further, Petitioners note that Respondent's "Procedural History" emphasizes the impact of Howard v. Roberson, 376 SC 143, 654 SE2d 877 (Ct App 2007) upon the grant of a new trial in this case made based upon the law rather than the facts. The Respondent's argument that at least one of the drivers had to be held liable shows that counsel and the court considered that the Respondent/passenger's burden of proof was not a factor in the liability equation after the Howard v. Roberson decision. All of which highlights the urgency of this court granting this Petition.

As to Respondent's "Statement Of the Facts," Petitioners point out that the Respondent's description of their "travelling on Pennyroyal Road to see their father" mischaracterizes the facts. This was not a casual journey - Mr. Rivera had been mugged and both the Respondent and Edgar Rivera, the driver of her vehicle, were in a tearing hurry on the evening of August 29, 2005 as Edgar sped along Pennyroyal Road, speeding around the fairly sharp curve that preceded the straightaway where this accident occurred. Unlicensed driver Edgar Rivera testified that he was speeding, although he usually did not speed because he did not want to be stopped.

Respondent's description of the maneuvering of this tractor trailer makes it sound like an invitation to disaster when, in actuality, loggers frequently work at night. This was an area lighted

well enough to allow a deposition to be read at night and the tractor trailer being moved was illuminated with 51 lights and reflective tape. There were also reflective warning signs posted that the Rivera's passed without seeing (according to their testimony) as they sped around the curve and rushed to the aide of their father. The Newton's expert could see well enough at night at the spot where the tractor trailer was maneuvering to read a deposition. However, the Rivera's failed to observe the lit-up, reflective-tape bearing tractor-trailer even in the well lighted area near the Church parking lot.

The Rivera's claim that they were blinded by the headlights of the tractor trailer, which they claim were pointed into oncoming traffic. The accident report shows them that way but the investigating officer testified that he never saw the lights illuminated before the truck was moved. The Newtons and an independent witness, the neighbor who heard the crash from his home and was the first on the scene, testified that the lights of the log truck were pointed towards the woods.

Several other cars saw the log truck in the road after the accident and before EMS or Police arrived. Those cars turned around - but they were likely not in the grips of a blind rage borne of their father having been mugged and injured.

**REPLY TO RESPONDENT'S ARGUMENT WHICH INCORRECTLY  
CONTENDS THAT THE NEW TRIAL WAS GRANTED  
PER THE THIRTEENTH JUROR DOCTRINE**

In reply to this argument, Petitioners Newton incorporate by reference and re-affirm their first argument relative to the Court of Appeals error in not reaching the directed verdict issue since that issue was the basis for the trial court's erroneous change of heart and grant of the new trial, made

upon the basis of the Court of Appeals decision in Howard v. Roberson, *id.* which Petitioners also contend was controlled by an error of law.

The Respondent claims that the trial judge granted this new trial based upon the thirteenth juror doctrine although the Respondent's Return admits that the motion for a directed verdict was based upon Howard v. Roberson. As Judge Konduras' dissent notes, it would have been an error of law for the trial court to have granted the directed verdict, so it was an error of law for the trial court to grant a new trial based upon a change of heart belief that it should have directed a verdict.

Even under the standard of review as stated in Howard v. Roberson, the trial court would have committed an error of law in directing a verdict because in that case the standard was given as follows:

When 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. An 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. 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. 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. 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.

Howard v. Roberson at p. 149

In this case, as Petitioners' Petition notes, and as recounted by Judge Konduras' dissent, there were a number of conflicts in the evidence or testimony which made the case one for the jury, which also had to weigh issues of credibility and the ultimate issue of whether the Respondent met her burden of proof.

The Respondent has cited three (3) US District Court decisions as supporting the decision in

this case. The District Court decisions are those made at the level of the trial court in this case and therefore were not subject to the standard of review by which this Court proceeds. Further, all of those cases were at the trial court level and did not involve the grant of a new trial but were decisions of a trial judge based on cases tried **without a jury**. Petitioner contends that there are substantial differences between the cited cases and this case based upon the facts as well, but the foregoing procedural and due process differences render the cited cases substantially different from the case presently before this Court.

Since the cited District Court cases bring no support to Respondent's position, it appears that again, this case rests upon Howard v. Roberson and under the standard of review given in Howard v. Roberson, the conflicting evidence in the present case would not have supported the grant of a directed verdict. Therefore, Petitioner asks that this Court grant the Writ of Certiorari which Petitioner believes will ultimately compel this Court to reverse the decision of the Court of Appeals and the trial court and reinstate the jury's well-reasoned verdict in this case.

**REPLY TO RESPONDENT'S ARGUMENT WHICH INCORRECTLY  
CONTENDS THAT THE COURT OF APPEALS PROPERELY UPHELD THE TRIAL  
COURT'S RELIANCE UPON HOWARD V. ROBERSON**

The Respondent claims that the trial judge in this case - at the new trial stage - found that the only reasonable inference from the evidence was that one of the two Defendants was at fault and that the Plaintiff was not negligent. Therefore, Respondent says, Howard v. Roberson (and, presumably, the Court of Appeals decision in this case) do not shift the burden of proof to the Defendants.

One of the problems with this argument is, as noted above, there are direct conflicts in the

evidence - some of which Judge Konduras noted in her dissent; i.e. - as to the lighting in the area, the angle of the headlights on Petitioners' tractor trailer and Edgar Rivera's responsibility in view of Respondent's testimony that she did not hold him responsible (which directly conflicted with her pleadings in this action). Because of the conflicts in the evidence and the need to weigh the credibility of the parties/witnesses accordingly, this case was one for the jury. In removing it from the jury - or, in this case, in erasing the substantial work done and the verdict rendered by the jury - the trial judge erases the Respondent/Plaintiff's burden of proof and/or shifts it to the Defendants, including Petitioners Newton.

In the Howard v. Roberson scenario - affirmed and applied by the Court of Appeals in this case, the trial judge does not render a directed verdict as to the liability of either or both defendants. Rather, he renders an alternative verdict saying that - someone is liable to the Respondent/Plaintiff and it is either one or both of the drivers - Petitioners/Defendants Newton or co-defendant Edgar Rivera. In determining that "someone is liable" to the Respondent/Plaintiff, the trial judge erases the part of the Plaintiff's burden of proof encompassing the risk of not persuading the jury [see: Grier v. Cornelius, 247 SC 521, 148 SE2d 338 (1966)] And in determining that "the someone" could be one or both of the defendants, the trial judge shifts that burden of persuasion to the defendants, essentially instructing them to compete with each other.

This Court has held that "the burden to prove his case is always on the plaintiff, whether the defendant introduces evidence or not." *Id at p. 533-534, 344* Therefore, Petitioner asks that this Court grant the Writ of Certiorari which Petitioner believes will ultimately compel this Court to reverse the decision of the Court of Appeals and the trial court and reinstate the jury's well-reasoned verdict in this case.

## CONCLUSION

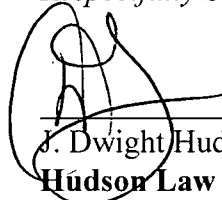
For all of the foregoing reasons, Petitioners Newton ask that this Court grant the Writ of Certiorari. The trial judge in this case granted a new trial based on his failure to grant a directed verdict when, as a matter of law, conflicts in the evidence and the need for credibility determinations rendered this case one for the jury.

Moreover, the issue of a passenger/plaintiff's burden of proof was fundamentally altered by the Court of Appeals in Howard v. Roberson, a case and decision affirmed, upheld and possibly extended by the Court of Appeals decision in this case. As Judge Konduras noted in her dissent, this jury found that the Respondent/Plaintiff did not meet her burden of proof as to the contested issues of fact.

The Plaintiff in a lawsuit must always bear the burden of proving her case. That concept lies at the very core of our system of justice and is inherent in the due process and fair trial rights guaranteed to all parties, including these Petitioners. All parties, including passengers, must meet their burden of proof. In holding otherwise, the Court of Appeals has fundamentally changed the playing field and rendered a decision that conflicts with this Courts holding in Grier v. Cornelius, *supra*.

The issues in this case go to the heart of our jury trial system and they do not appear to have been addressed by this Court which should have the final word in such constitutionally important matters. Therefore, Petitioners ask that this Court grant their Petition and issue the Writ of Certiorari.

*Respectfully Submitted,*

A handwritten signature in black ink, appearing to read "J. Hudson", is written over a horizontal line. The signature is enclosed within a hand-drawn circle.

J. Dwight Hudson, Esquire

**Hudson Law Offices**

1203 48th Avenue North

Suite 111

Myrtle Beach, SC 29577

(843) 692-9889

T: (843) 692-9889

F: (843) 692-9190

E: [Hudsonlaw@hudsonlawoffice.com](mailto:Hudsonlaw@hudsonlawoffice.com)

Date:

THE STATE OF SOUTH CAROLINA  
IN THE COURT OF APPEALS

---

APPEAL FROM GEORGETOWN COUNTY  
Court of Common Pleas

The Honorable Benjamin H. Culbertson

---

Case No: 2008-CP-22-00466

---

Hazel Jeisel Rivera,

Respondent,

v.

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

Appellants,

---

**PROOF OF SERVICE**

---

I certify that I have served PETITIONERS' REPLY TO RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI on each party who served a brief in this matter by depositing a copy of the same in the United States Mail, postage prepaid addressed to their respective attorney(s) of record at the addresses noted below on **April 11, 2013** as follows:

**RECEIVED**

APR 15 2013

**S.C. Supreme Court**

L. Sidney Connor IV Esq.  
Kelaher, Connell & Connor  
PO Drawer 14547  
Surfside Beach, SC 29587-4547  
*Attorney for Hazel Jeisel Rivera*

Brandon A. Smith Esq.  
King, Love & Smith, LLC  
PO Box 1764  
Florence, SC 29503  
*Attorney for Edgar Rivera*



J. Dwight Hudson, Esquire

**Hudson Law Offices**

1203 48th Avenue North

Suite 111

Myrtle Beach, SC 29577

(843) 692-9889

T: (843) 692-9889

F: (843) 692-9190

E: [Hudsonlaw@hudsonlawoffice.com](mailto:Hudsonlaw@hudsonlawoffice.com)

*Attorney For Petitioners Newton,  
Newton's Farms, J&J Logging, Inc.*

Dated: April 11, 2013