THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM OCONEE COUNTY
Court of Common Pleas

Alexander S. Macaulay, Circuit Court Judge

Case No. 2012-212693

Ernest L. Cobb and Nancy Cobb ..... Respondents,

Dan M. Lafoy ..... Appellant.

REPLY BRIEF OF APPELLANT

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Respondents (hereinafter "Plaintiffs") argue that the Trial Court did not commit reversible error by striking the defense of sudden incapacity raised by the Appellant (hereinafter "Defendant") and refusing to charge the jury on said defense because Defendant did not meet its burden to create a question of fact for the jury. Defendant wholly agrees with Plaintiff's reliance on Collins v. Frasier, 378 S.C. 249, 662 S.E.2d 464 (Ct. App. 2008) to the extent they allege it holds that a party's own self-serving statement is insufficient to create a jury question as to sudden incapacity. However, Plaintiffs purport to excerpt a more onerous rule from *Collins* than the decision provides.

A. *Collins* does not require a diagnosis of the cause of the incapacitation.

Collins stops short of the demanding standard Plaintiffs advocate. Specifically, Plaintiffs claim *Collins* "holds that...there must be credible and competent medical testimony or evidence of an underlying physical or medical condition which could cause a loss of consciousness to remove the defense from the realm of conjecture into the field of permissible inference." (Respondents' Br., p. 6.) Simply put, nowhere in the text of *Collins* can any such rule be found. All *Collins* mandates is that a party cannot rely on his own self-serving statements in support of a sudden incapacity defense. Though *Collins* did involve a factual scenario where doctors were able to identify a possible root cause of the loss of consciousness, the case does not dictate that evidence of such is required in order to create a jury question as to sudden incapacity. Accordingly, Plaintiffs' argument that Defendant's defense of sudden incapacity "was not corroborated by any scientific evidence or supported by expert medical evidence of an underlying

problem or condition" purports to impose a burden of proof that simply does not exist under South Carolina law.

Moreover, there have been a number of cases in other jurisdictions where courts have found a question of fact for a jury as to sudden incapacity without the need for expert medical testimony identifying the cause of the loss of consciousness. See e.g., McLean v. Chicago G. W. R. Co., 3 Ill. App.2d 235, 121 N.E.2d 337 (1954)(where witnesses described the driver as being slumped over the steering wheel at the time the vehicle lost control); Soule v. Grimshaw, 266 Mich. 117, 253 N.W. 237 (1934) (recognizing that the claim of sudden incapacity was easily made but very hard—and sometimes impossible—to rebut, the court held that the issues of whether the driver suffered from sudden incapacity or was negligent were questions for the jury); Pagano v. Magic Chef, Inc., 181 F.Supp. 145 (E.D. Pa. 1960)(driver's testimony as to loss of consciousness, along with police officer's testimony that as driver regained consciousness he stated that he blacked out, and physician's testimony that driver told him he fainted were sufficient to justify the jury's defense verdict); Caron v. Guiliano, 26 Conn. Super. 44, 211 A.2d 705 (1965)(in a case involving driver's testimony as to loss of consciousness, it was the jury's function to determine the credibility of witnesses and determine whether the driver was stricken by sudden incapacity).

As further set forth in Appellant's Initial Brief, there were at least three indicators of loss of consciousness that were in no way related to Defendant's own statements: (1) no evidence that Defendant applied his brakes prior to impact;[1] (2) Defendant suffered

[1] In Frechette v. Welch, 621 F.2d 11 (1st Cir. 1980), the Court—applying New Hampshire Law—recognized the lack of brake marks as evidence supporting a defense of sudden incapacity.

from a bloody stool; and (3) Defendant suffered from orthostatic hypotension. In their Initial Brief, Plaintiffs merely gloss over the fact that independent witnesses testified to these facts. Plaintiffs even go so far as to claim—with no explanation for how they reached this far-fetched conclusion—that Officer Sample's testimony as to the lack of skid marks was "wholly based or founded upon Mr. Lafoy's self-serving statement."

B. Dr. Hanke's testimony was sufficient to satisfy *Collins*.

Likewise, Defendant's bloody stool and orthostatic hypotension were examples of objective and independently verified evidence in no way based on any statement of the Defendant. Moreover, Dr. Hanke testified that the onset of bloody stool was not something that could have been caused by the accident. (Trial Tr. 161:14-18; Hanke Dep. 15:12-14.) The testimony of Dr. Hanke was that both these medical conditions could be indicative of loss of consciousness. (See Trial Tr. 161:14-18; Hanke Dep. 11:4-12, 12:22-24, 17:24-18:4.)

> Q: ...Would [defecation] be consistent with someone who had lost consciousness?
>
> A: Typically, yes. We -- you know, one thing that we -- a question that we always ask when someone passes out is if they urinated on themselves or stooled themselves and, you know, that can demonstrate to us that they've had anything from a stroke to a seizure to, you know, a syncopal episode from some other type of neurologic problem.

(Hanke Dep. 11:4-12.) Additionally, Dr. Hanke testified that

> [she] would feel very confident in saying that the syncopal episode occurred before the accident, given his surrounding circumstances being the acute illness, the bloody diarrhea. And then later noted in the record by the nursing staff was the fact that he did have a significant drop in his blood pressure...what's called orthostatic hypotension which can result from dehydration, which it can also be a contributor to syncopal episodes.

(Trial Tr. 161:14-18; Hanke Dep. 17:19-18:4.) As such, there was clear, independent evidence supporting Defendant's sudden incapacity defense sufficient to put the matter before the jury for factual determination. See Collins, 378 S.C. at 251, 662 S.E.2d at 465 (in order to create a jury question as to sudden, unforeseeable incapacitation, the defendant need only present evidence "which remove[s] his sudden, unforeseeable incapacity defense from the realm of conjecture into the field of permissible inference.") Neither the presence of blood in Defendant's stool or the fluctuations in blood pressure were "wholly based or founded upon Mr. Lafoy's self-serving statement" as Plaintiffs allege, but rather constitute objective and independent evidence supporting the defense of sudden incapacity. In addition, Defendant was discharged from the hospital with a diagnosis of "vasovagal syncope episode." (Trial Tr. 161:14-18; Hanke Dep. 19:25-20:2.)

The Trial Court's striking of the defense and failure to charge the jury was clear and reversible error.

C. Plaintiffs did not make a motion for directed verdict as to liability.

Plaintiffs state that "Plaintiff's [*sic*] attorney made a motion for a directed verdict on the issue of liability as to all causes of action," but the motion was limited to striking the defense of sudden incapacity and did not extend to a motion for directed verdict on liability. (See Trial Tr. 165:14, *et seq.*) Further, if such a motion was made—which is denied—it was not ruled upon by the Trial Court. Accordingly, the case was presented to the jury for determination of liability as well as damages, and the Plaintiffs have not filed a cross appeal from that determination.

D. The Thirteenth Juror Order was contaminated with an error of law.

Additionally and as further set forth in Appellant's Initial Brief, the striking of Defendant's sudden incapacity defense and failure to charge on the same formed the basis for the Trial Court's application of the "Thirteenth Juror" doctrine upon a finding that "the evidence [did] not justify the verdict." (Hearing Tr. 15:15-17, 16:10-12.) Had the jury been charged on sudden incapacity, loss of consciousness and/or unavoidable accident, there would have been absolutely no basis for the grant of a new trial absolute as there certainly would have been evidence upon which the jury could have returned a defense verdict. Accordingly, the grant of a new trial was controlled by an error of law and the Trial Court should be reversed.

CONCLUSION

Although Plaintiffs repeatedly attempt to create a burden of proof for sudden incapacity that simply does not exist under the applicable laws and authorities, the *Collins* case makes clear that a defendant need only present evidence "which remove[s] his sudden, unforeseeable incapacity defense from the realm of conjecture into the field of permissible inference." As there was sufficient independent evidence that could support a finding of loss of consciousness and sudden incapacity, the Trial Court should not have granted the directed verdict as to Defendant's defense and should have charged the jury on the same. It was this error of the Trial Court that led to the granting of the new trial based on the thirteenth juror doctrine. Therefore, this honorable Court should reverse the decision of the Trial Court granting a new trial absolute and reinstate the jury's verdict for the Defendant. In the alternative, this Court should reverse the Trial

Court's striking of the sudden incapacity defense and remand the case to the Trial Court for further proceedings based on the Motion for New Trial.

Respectfully submitted,

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