IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HAMPTON COUNTY
Court of Common Pleas

Roger M. Young, Sr., Circuit Court Judge

Case No.: 2017-002520

Maurice Dawkins ……..…….. Appellant,

v.

James A. Sell …… Respondent.

APPELLANT'S PETITION FOR REHEARING

Pursuant to Rule 221(a) of the South Carolina Appellate Court Rules, Appellant moves the Court for Rehearing and/or to Alter its Published Opinion number 5857 of September 1, 2021, which affirms the lower court's denial of his motions for a directed verdict, a judgment notwithstanding the verdict, and a new trial. Appellant believes the Court has overlooked certain points for each issue raised in his appeal.

As an initial matter, in its Opinion the Court found that there was a reasonable inference from the evidence that co-defendant Dennis Owens' negligence was not foreseeable as a matter of law, rendering the lower court's decision to deny Appellant's motions for a directed verdict or JNOV on Respondent's intervening and superseding negligence defense appropriate. However, in narrowly focusing on the factual issues of whether the entire highway was blocked, as well as evidence of Owens' own negligence, the Court's analysis ignores the totality of evidence, which

indicates that the only reasonable inference that can be drawn from Respondent's failure to deploy cones or reflective devices after overturning his vehicle in the middle of the night would be that it created a foreseeably dangerous and unsafe hazard in the roadway. While the Court is required to view the evidence in the light most favorable to Respondent, it is not permitted to ignore evidence in a piecemeal fashion to create an inference favorable to him. And as the evidence shows, Respondent's conduct jeopardized the safety of all involved in the aftermath of his accident, including Appellant.

In reaching its decision, the Court places a microscope on (1) Owens' pre-accident conduct and (2) whether the initial accident blocked the entire roadway, while failing to account for the simple question of whether the most natural and probable consequence of Respondent's conduct would be the collision of another vehicle with his previously wrecked moving truck, which was blocking both southbound travel lanes. As noted by the Court, for an intervening force to be a superseding cause, it ***must*** be a cause that ***could not*** have been reasonably foreseen or anticipated. *Stephens v. CSX Transp., Inc.*, 415 S.C. 182, 205, 781, S.E.2d 534, 546 (2015). Thus, while factual issues such as Owens' fatigue, his driving speed, or violations of federal regulations are relevant to Owens' own negligence, the proper issue for the Court's consideration was whether there was any evidence in the record supporting an inference that Owens' intervening force was entirely unpredictable. Evidence that vehicles could have used the emergency lane to avoid Respondent's obstruction, or that Respondent believed he was driving slowly, falls far short of this mark. Instead, the evidence of Respondent's negligence and the surrounding circumstances leaves only one inference: not only were Owens' actions probable given the totality of circumstances, it was highly likely that another vehicle would collide with

Respondent's disabled vehicle, which was blocking both lanes of traffic, in the absence of flares, warning cones, or reflective devices.

Owens collided with Respondent's overturned vehicle around 4 a.m. in a rainstorm. (R. pp. 151, 312). Respondent's vehicle was blocking both travel lanes. (R. pp. 167, 210, 313). The vehicle came to a rest at right angles to the roadway, with its taillights and headlights both pointed away from oncoming traffic, obscuring the obstacle. (R. pp. 149-50, 160, 211-12, 313). Respondent did not put out any cones or reflective devices after overturning the truck as required by South Carolina law.[1] (R. p. 240, 318-19). Under these circumstances, the only reasonable inference is that it is foreseeable that an oncoming tractor-trailer would be unable to avoid Respondent's vehicle in the roadway. The law does not require one to foresee the exact particulars of the negligent conduct of the secondary wrongdoer leading to the accident, as the Court requires here; instead, the law only requires one to foresee that which is predictable or could be expected to happen in a situation. *Gibson v. Gross*, 280 S.C. 194, 197, 311 S.E.2d 736, 739 (Ct. App. 1983). Since, even in the light most favorable to Respondent, the only inference from the evidence is that the collision that injured Appellant was foreseeable, the lower court

[1] In its Opinion the Court concludes that the issue of whether Respondent's violation of S.C. Code Ann. § 56-5-5090 is not preserved for review, as "[a]t the close of evidence, Dawkins only argued he should be given a directed verdict 'on the issue that [Sell] breached a duty in overturning the truck, blocking both southbound lanes in the rain at night,' and he did not argue that the court should direct a verdict on the issue of negligence because Sell failed to set out warning devices." However, Appellant did raise to the lower court that Respondent violated numerous statutes during directed verdict motions, which would have included the argument that Respondent violated section 56-5-5090. (R. pp. 348-50, 544). Appellant raised the argument of whether a directed verdict was appropriate on the issue of negligence per se under section 56-5-5090 to the lower court during directed verdict motions, preserving the argument for review.

erred in denying Appellant's motions for directed verdict or JNOV on Respondent's intervening and superseding negligence defense.[2]

Second, the Opinion incorrectly finds that there is a reasonable inference that Respondent was not negligent, affirming the lower court's decision to deny Appellant's motions for directed verdict or JNOV on the issue of Respondent's negligence. During direct examination, Respondent admitted that he lost control of the truck. (R. p. 313). He subsequently admitted four times that he accepted responsibility for overturning the truck. (R. pp. 316-17, 322). The only reasonable inference from the evidence is that Respondent was negligent in creating the accident which obstructed the roadway and led to Appellant's injuries.

The Court focuses on Respondent's testimony that he drove slowly, that the truck was swaying because the steering wheel was loose, and that he stopped to rest at intervals as evidence creating a reasonable inference that Respondent was not negligent. The Court contrasts these facts with those in *Fettler v. Gentner*, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012), and concludes that they create a reasonable inference that Respondent was not negligent, as "Sell did not make any concession similar to Gentner's admission that he removed his eyes from the road." However, Respondent accepted responsibility for both overturning the truck ***and*** blocking both southbound lanes of traffic. (R. p. 316). Respondent admitted that he allowed the truck to drift off the roadway until it dropped into a safety lane, then overcorrected when steering back onto the roadway, which caused the truck to fishtail and overturn. (R. pp. 328-329). Respondent also admitted he was fatigued and had been driving for close to 20 hours. (R. pp. 314-15). Finally, Respondent admitted he was on Tramadol, a prescription opiate and narcotic, at the time

[2] Additionally, Respondent has alleged in his Answer and Counterclaim that Owens' actions were foreseeable. (R. p. 56). The Court erroneously concluded that Respondent did not assert that Owens' actions were foreseeable in his Answer and Counterclaim.

of the accident. (R. p. 321). Additionally, there is undisputed evidence in the record that Respondent failed to use warning devices after the accident in violation of section 56-5-5090.[3] Thus, there were concessions similar to that from *Gentner*.

Regardless, the testimony relied on by the Court to create an inference that Respondent was not negligent is either of insignificant evidentiary value or actually creates an inference that Respondent was negligent. Respondent admits that he was driving "slowly" in comparison to how he would operate a car, then admits that he was operating the moving truck at 60 miles per hour, at 4:00 a.m., during a fairly heavy rain, in a truck with a loose steering mechanism. (R. pp. 151, 311-12, 327-28, 382). And to the contrary of the Court's view of the evidence, if anything, Respondent's admission that he only stopped twice to rest during a 20-hour driving interval creates an inference that Respondent was engaging in negligent conduct. (R. p. 327). Just because Respondent unilaterally declared that he did not believe that he engaged in specific examples of negligent behavior does not consequently create a reasonable inference that he was not negligent. Since there is no evidence in the record creating a reasonable inference that Respondent was not negligent, Appellant's motions for a directed verdict or JNOV on the issue of Respondent's negligence should have been granted by the lower court.

Next, the Opinion contains an error as to whether the lower court abused its discretion in charging the jury on intervening negligence. Since the evidence, even in the light most favorable to Respondent, does not support a reasonable inference that the intervening actions of Owens were unforeseeable, charging the jury on intervening negligence confused the jury and constitutes reversible error. *See Fettler*, 396 S.C. at 470, 722 S.E.2d at 31 ("Because we find the issue of Gentner's negligence should have been resolved by a directed verdict in Fettler's favor,

[3] Proving negligence per se establishes both duty and breach. *Seals by Causey v. Winburn*, 314 S.C. 416, 418, 445 S.E.2d 94, 96 (Ct. App. 1994).

we also find there was no evidence in the record to support a charge of negligence to the jury."); *Clark v. Cantrell*, 339 S.C. 369, 390, 529 S.E.2d 528, 539 (2000) ("When instructing the jury, the trial court is required to charge only principles of law . . . developed by the evidence in support of those issues.").

Fourth, in its Opinion the Court found that the lower court did not abuse its discretion in allowing Respondent to publish an answer to an interrogatory identifying a nonparty, Pierce National and Owens, with whom Appellant had previously settled. The Court conflates the relevance of a transportation safety expert's opinions with the relevance of Appellant's retention of the expert as documented in his interrogatory answer. The Court notes that answers to interrogatories can be used in trials to the extent permitted by the rules of evidence, then goes on to further state that Appellant's answer identifying the expert was relevant because it demonstrated that Appellant believed Owens was negligent. However, the interrogatory answer does not provide the expert's opinions as to Owens negligence, and merely provides that Appellant retained an expert to testify regarding Owens' operation of his truck and compliance with regulations.

Thus, the answer is only relevant as to Appellant's identification of a nonparty, Owens, as a defendant, and his selection of an expert witness as to that defendant. The fact of Appellant's identification of an expert witness has no evidentiary value in itself, as it does not increase or decrease the likelihood that Owens was negligent, and is therefore irrelevant to any of Respondent's defenses, including Owens' negligence. Since the rules of evidence do not permit the admission of Appellant's answer, the lower court abused its discretion in allowing its publication to the jury. For the same reasons, the publication is not cumulative with evidence

offered by Respondent's expert that Owens violated federal laws, as Appellant's identification of an expert witness is not probative of whether Owens actually violated any federal laws.

Finally, the Opinion finds that Respondent did not exceed the bounds of the empty chair defense in repeatedly and irrelevantly referring to Owens and Pierce National as co-defendants. For the same reasons that the lower court erred in denying Appellant's motions for a directed verdict or JNOV on the issue of Owens' intervening negligence, the negligence of Owens and Pierce National were irrelevant to the primary issue of Respondent's negligence at trial, as no reasonable inference could be drawn from the evidence that Owens' acts were not foreseeable. It follows that Respondent should not have been permitted to shift the focus of the issues at trial from himself to Owens. However, that is exactly what happened when the lower court permitted Respondent to elicit testimony that Owens and Pierce National were co-defendants, to publish Appellant's interrogatory responses, and to refer to Owens and Pierce throughout closing arguments as "white elephants". Additionally, Appellant was unfairly prejudiced by Respondent's utilization of the defense in that it created the appearance that Appellant had already been fully compensated for his injuries and was seeking a windfall. The lower court could have ameliorated the potential for an unfair result by permitting Appellant to elicit testimony as to the settlement between Appellant, Pierce National, and Owens, and the credit Respondent would receive for that amount, but the lower court refused to do so.

CONCLUSION

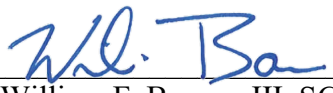
The findings of this Opinion will unfairly permit defendants to always shift the blame for their own negligence to nonparties based solely upon a defendant's own opinion that his acts were not negligent. This offends the policy considerations underlying the South Carolina Joint Contribution Among Tortfeasors Act and will disadvantage both settling defendants and

plaintiffs alike. For these and all other reasons previously put forth by Appellant, the Court should rehear this case.

Respectfully submitted,

PETERS, MURDAUGH, PARKER, ELTZROTH & DETRICK, P.A.

September 30, 2021
Hampton, South Carolina

BY: 

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-v-

James A. Sell, ……...…….……..……...…….……..…..…Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing ***Appellant's Petition for Rehearing*** has this date been emailed to the following counsel of record:

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Re: Maurice Dawkins v. James A. Sell
Appellate Case No.: 2017-002520

Dear Ms. Kitchings:

Please find enclosed for filing, Appellant's Petition for Rehearing in the above-referenced case. By copy of this letter, our firm's check in the amount of $50.00 will go out in today's mail for the filing fee.

If you have any questions, please let us know.

With kind regards, I am

Sincerely,

William F. Barnes, III

WFB/mcd
Enclosures as stated

cc: E. Mitchell Griffith, Esquire (Via Email Only)
Kelly Dean, Esquire (Via Email Only)