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SC Court of Appeals

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

Appellate Case No. 2017-002520

Maurice Dawkins.....Appellant,

v.

James A. Sell.....Respondent.

RESPONDENT’S RETURN TO APPELLANT’S PETITION FOR REHEARING

Pursuant to Rules 221(a) and 240(e) of the South Carolina Appellate Court Rules, Respondent James A. Sell (“Sell”) hereby submits his return to Appellant’s Petition for Rehearing.

In Opinion No. 5857, (SC. Ct. App. Filed Sept. 1, 2021)(Shearouse Adv. Sh. No. 30 at 124-138 (“the Opinion”), this Court affirmed the trial court’s rulings in the underlying jury trial. Respondent seeks rehearing of all issues on appeal. Because the Court’s ruling on these issues was correct and well-reasoned, Respondent respectfully requests the Court deny Appellant’s Petition for Rehearing.

ARGUMENT

Appellant’s first argument for rehearing is that the Court improperly found that there was a reasonable inference from the evidence that co-defendant Dennis Owens’ negligence was not foreseeable as a matter of law. The Court engaged in a thoughtful analysis of *Matthews v. Porter*,

239 S.C. 620, 124 S.E.2d 321 (1962) and *Gibson v. Gross*, 280 S.C. 184, 311 S.E.2d 736 (Ct. App. 1983). A key distinction between the two cases was whether the initial collision had made the roadway impassable, or whether it had merely created a “condition of affairs” such that the second motorist’s negligence intervened and caused the injury. In *Gibson*, there was no evidence that the second collision had occurred because the highway was blocked or because of a failure to warn. When the Court applied *Gibson* to the instant case, it properly concluded that, when viewed in the light most favorable to Sell, the facts presented a reasonable inference that Owens’ negligence was not foreseeable as a matter of law and Sell’s negligence merely created a condition of affairs. The Court referenced the testimony that other vehicles were able to use the emergency lane to safely avoid the Moving Truck, and the copious evidence of tortious conduct on the part of Owens – not scanning the road for obstacles, traveling too fast for weather conditions, overdriving his headlights, and driving while fatigued, all of which were referenced in the Opinion. Additionally, Owens never testified that he was unable to avoid the Moving Truck or attributed his collision with the Moving Truck to some fault of Sell. Therefore, there were facts that established that the overturned Moving Truck merely created a roadblock, but not an impassable one, and this roadblock was an obstacle that a motorist exercising reasonable care could have avoided. It is the *conduct* of Owens that is the proper focus of the foreseeability analysis, not simply whether a second accident is in the realm of possibility.

That said, the Appellant refers to *Stephens v. CSX Transp. Inc.*, 415 S.C. 182, 781 S.E.2d 534 (2015)¹, and appears to argue that the Court must instead examine whether simply the result was foreseeable – that another vehicle would collide with the Respondent’s disabled vehicle. This

¹ This is the only case relied upon by the Appellant on this issue, other than *Gibson v. Gross*, 280 S.C. 194, 311 S.E.2d 736 (Ct. App. 1983).

is an incorrect reading of *Stephens* and South Carolina law on foreseeability. In *Stephens*, an injured party brought a negligence action against a railroad and the South Carolina Department of Transportation (“SCDOT”) for traumatic brain injury when a train collided with an automobile. The basic allegations against the railroad were that it was negligent in failing to sound the train’s horn far enough in advance of the railroad crossing and failing to remove trees that obstructed the automobile driver’s view of the railroad track. As to SCDOT, the petitioner alleged that it failed to properly inspect the railroad crossing and installed the stop sign and stop line at improper locations. The jury returned a verdict in favor of the railroad and SCDOT. On appeal, the petitioner asserted that the trial judge erred in charging the law of intervening or superseding cause because any negligence against the automobile driver was foreseeable as a matter of law and it was foreseeable that a motorist might not stop at the stop line at the crossing because the stop line was improperly placed too close to the railroad track. The South Carolina Supreme Court rejected this argument and reasoned:

We find Petitioner’s argument to be without merit as evidence was presented that any negligence on the part of [the motorist] was not limited to the issue of the stop line. Rather, there was evidence that even though [the motorist] stopped at the line, she failed to yield, failed to exercise due care, and admitted to consuming alcohol and prescription medication prior to driving her vehicle. Any of these actions on the part of [the motorist], none of which was reasonably foreseeable, could have served as the intervening cause of the accident. See *Bishop v. Dep’t of Mental Health*, 331 S.C. 79, 89, 502, S.E.2d, 78, 83 (1998)(“The test by which the negligent conduct of the original wrongdoer is to be insulated as a matter of law by the independent negligent conduct of another is whether the intervening act and the injury resulting therefrom are of such character that the author of the primary negligence should have reasonably foreseen and anticipated them in the light of the attendant circumstances.”). *Stephens*, at 204-205.

In sum, it was proper for the Court to examine the conduct of Owens to determine whether there was a reasonable inference from the evidence that Owens’ negligence was not foreseeable. In

doing so, the Court properly concluded that such inference exists based on the evidence presented in this case.

Next, the Appellant argues that the Court incorrectly found that there is reasonable inference that Sell was not negligent, although he accepted responsibility for overturning the Moving Truck. The Court correctly found the instant case distinguishable from *Fettler v. Gentner*, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012), and properly concluded that admitting responsibility was not the same as admitting to a breach of the duty of care, or, as in *Fettler*, admitting to negligent conduct such as taking his eyes off his lane of travel while continuing to approach the other vehicle. The Court walked through an analysis of the facts that distinguish the instant case from *Fettler*, and properly concluded that these facts created a reasonable inference that Respondent was not negligent. Therefore, it properly affirmed the lower court's decision to deny the Appellant's motions for directed verdict or JNOV on the issue of Respondent's negligence.

The Appellant also argues that the Opinion contains an error as to whether the lower court abused its discretion in charging the jury on intervening negligence. The Court correctly affirmed the trial court's denial of the Appellant's directed verdict and JNOV motions on the grounds that a reasonable inference exists that the intervening actions of Owens were unforeseeable, and, because such inference exists, it was proper for the trial court to charge the jury on intervening negligence.

The Appellant's fourth argument is regarding the publication of the interrogatory identifying the trucking expert that Dawkins previously intended to use against Pierce National and Owens. As the Court aptly pointed out, Rule 33(d) of the South Carolina Rules of Civil Procedure specifically permits publishing the answers to Interrogatories at trial, to the extent permitted by the rules of evidence. Dawkins' retainer of a transportation safety expert who was

prepared to offer opinions regarding Owens and Pierce National was relevant to the issue of intervening negligence. See Rule 401, SCRE (“‘relevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence”). The answer did not just identify the expert, it also set forth a brief description of the expert’s expected testimony. (R. p. 448). It is proper argument to call attention to a party’s failure to call an expert witness it had retained to testify at trial. *Holmes v. Black River Elec. Co-op., Inc.*, 274 S.C. 252, 260–61, 262 S.E.2d 875, 879 (1980). A jury is permitted to draw any inferences warranted by the party’s failure to call its own witness. *Holmes*, 274 S.C. at 260–61 (citing *State v. Hammond*, 270 S.C. 347, 242 S.E.2d 411 (1978)). The Court therefore properly concluded that the trial court did not abuse its discretion in admitting the answer.

Lastly, the Appellant argues that the Opinion erroneously finds that the Respondent did not exceed the bounds of the empty chair defense. In S.C. Code Ann. § 15-38-15, the legislature took steps to protect nonsettling defendants by codifying a nonsettling defendant’s right to present an empty chair defense. *Smith v. Tiffany*, 419 S.C. 548, 557, 799 S.E.2d 479, 484 (2017). Under subsection (D) of the Act, “a defendant shall retain the right to assert that another potential tortfeasor, whether or not a party, contributed to the alleged injury or damages and/or may be liable for any or all of the damages alleged by any other party.” Importantly, the statute does not set forth any restrictions to the empty chair defense and Appellant has not cited any case law to support the assertion that there are indeed “bounds” to the defense. As thoroughly discussed in the Court’s opinion, and above, the evidence that Sell offered of Pierce National’s and Owens’ negligence was relevant because it related to Sell’s affirmative defense of intervening and superseding negligence for which he had the burden of proof. By asserting that another party is liable, Sell did not extract

a benefit from Pierce National's settlement; rather, he simply presented a defense contemplated and codified by the legislature. The Appellant continues to argue that Appellant was unfairly prejudiced by Respondent's utilization of the defense and should have been allowed to elicit testimony as to the settlement between Appellant, Pierce National, and Owens, but has not cited any authority to extend the present law beyond *Lucht v. Youngblood*, which specifically stated that evidence of the amount should not be presented to the jury. *Lucht v. Youngblood*, 266 S.C. 127, 134, 221 S.E.2d 854, 858 (1976).

CONCLUSION

In sum, no reason exists for the Court to rehear or reconsider its Opinion, and the Respondent requests that the Court deny the Petition for Rehearing. The Court did not overlook or misapprehend any point of law or of the record, and its conclusions and findings fully comport with the precedent relied upon to reach those conclusions.

Respectfully submitted,

s/ *E. Mitchell Griffith*

E. Mitchell Griffith (SC Bar #2287)
Kelly D. Dean (SC Bar #75372)
GRIFFITH, FREEMAN & LIIPFERT, LLC
600 Monson Street
P.O. Drawer 570
Beaufort, SC 29901
Phone: (843) 521-4242
Email: mgriffith@griffithfreeman.com
Email: kdean@griffithfreeman.com

Attorneys for Respondents

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Beaufort, South Carolina

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CERTIFICATE OF SERVICE

I certify that on October 14, 2021, I served *Respondent's Return to Appellant's Petition for Rehearing* by depositing it in the United States Mail with postage prepaid and addressed as follows:

William F. Barnes, III
Peters, Murdaugh, Parker, Eltzroth & Detrick, PA
PO Box 457
Hampton, SC 29924

s/ *E. Mitchell Griffith*

E. Mitchell Griffith (SC Bar #2287)
Kelly D. Dean (SC Bar #75372)
GRIFFITH, FREEMAN & LIIPFERT, LLC
600 Monson Street
P.O. Drawer 570
Beaufort, SC 29901
Phone: (843) 521-4242
Email: mgriffith@griffithfreeman.com
Email: kdean@griffithfreeman.com

Attorneys for Respondent

October 14, 2021
Beaufort, South Carolina