

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Michael G. Nettles, Circuit Court Judge

Civil Action No. 2009-CP-07-04592
Appellate Case No. 2012-206486

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Jeffrey Johnson and Kristina Johnson..... Respondents,

v.

Beaufort County..... Appellant.

BRIEF OF APPELLANT

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Statement of Issue on Appeal

- I. Did the circuit court err in denying Appellant's motions for a directed verdict and post-trial motions, when the evidence presented by the Respondents failed to include any act of negligence by the Appellant?

Statement of the Case

On September 29, 2002, Respondents Jeffrey and Kristina Johnson filed this action in the Court of Common Pleas for Beaufort County asserting a cause of action for negligence against Appellant Beaufort County. (R. p. 3.) The Complaint alleges that Beaufort County is responsible for damage to their house that resulted from an impact between a Beaufort County dump truck and the house. The Appellant answered on November 18, 2009, denying liability and asserting affirmative defenses. (R. pp. 5–7.) The Appellant filed an amended answer on November 30, 2011, repeating its denials and affirmative defenses and adding its defense that the incident is the result of an unavoidable accident. (R. pp. 11–13.) Following discovery, trial was held in Beaufort County Court of Common Pleas on October 3 and 4, 2011.

The Appellant timely moved the trial court for a directed verdict, at the close of the Respondent's case in chief (R. p. 91, line 21) and again at

the close of the evidence. (R. pp. 121–22.) The trial court denied both motions and sent the case to the jury. (R. p. 95, lines 16–18; p. 123, lines 15–17.) The jury returned a verdict for the Respondents in the amount of \$58,023.00. (R. p. 139, lines 10–13.) Immediately following discharge of the jurors, the Appellant moved for judgment notwithstanding the verdict and for a new trial, (R. p. 141, lines 3–6), both of which the trial court denied. (R. p. 142, lines 19–25.) The trial court entered judgment on October 6, 2011, (R. p. 1), and the Appellant received written notice of the entry of judgment on October 10, 2011. The Appellant timely filed a motion to alter or amend on October 18, 2011, (R. pp. 156–57), and a memorandum of law in support of its motion on November 29, 2011. (R. pp. 158–63.) The trial court heard argument from the parties on November 29, 2011, and although the trial court declined to alter or amend its prior rulings, the Appellant did not receive written notice of the trial court’s order. On January 10, 2012, the Appellant filed and served the Notice of Appeal.

Statement of the Facts

On April 15, 2009, Jason Powell, a truck driver employed by Beaufort County, drove a large dump truck on Parris Island Gateway, in Beaufort, South Carolina. (R. pp. 45–46.) Mr. Powell had no medical history of

seizures, blackouts or any other physical condition that might affect his ability to drive a motor vehicle. (R. p. 56, lines 17–21; p. 61, lines 14–20.) He recalls leaving Lands End, on Lady’s Island, en route to the Public Works’ office and vehicle storage area. He remembers that he stopped for a red light, the light turning green and driving forward. (R. p. 46, lines 6–22; p. 60, lines 4–13.)

Mr. Powell drove normally away from the traffic light and remained in his proper lane of travel on Parris Island Gateway. When he approached a group of recently constructed homes in the Picket Fences subdivision, inexplicably the truck left the right side of Parris Island Gateway and traveled in a straight line over the curb, across the sidewalk, along the right-of-way, up a grade, over a berm, across a backyard, through a wooden porch and into the side of the Appellants’ new house. Mr. Powell recalls nothing between leaving the traffic light and the time he was removed from the truck and placed in the care of emergency medical personnel. (R. p. 46, lines 6–22; p. 60, lines 4–13.)

Within a week of the accident, Jason Powell was seen and evaluated by Norman Bettle, M.D., board-certified in neurology and neurophysiology, (R. p. 98), who conducted a neurological exam, a cardiovascular exam and an electroencephalogram (EEG). (R. pp. 146–47.) The EEG “showed

frequent epileptiform discharges emanating from the right anterior temporal head region.” (R. pp. 146–47.) Dr. Bettle diagnosed Jason Powell as having suffered a seizure that led to loss of consciousness, the loss of ability to maneuver the vehicle, and which led to the motor vehicle accident. (R. p. 103, lines 5–8.)

Dr. Bettle testified, to a reasonable degree of medical certainty, that the most probable cause of the medical event that occurred on April 15, 2009, to Jason Powell was a seizure, an epileptic seizure. (R. p. 102, lines 16–23.) Dr. Bettle testified, to a reasonable degree of medical certainty, most probably, that Jason Powell could not have foreseen the medical event itself and would not have foreseen that he would have an event while driving. (R. p. 103, lines 10–17.)

There are no witnesses to the event. The Respondents were out of state at the time of the accident. The cost to repair the Respondents’ home was \$58,023.00.

Argument

When considering a directed verdict motion, the trial court must view the evidence and the inferences that can be drawn from that evidence in the light most favorable to the nonmoving party. *Jones v. Lott*, 387 S.C. 339,

345 (2010). This Court will reverse the trial court's rulings on a motion for directed verdict only where there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Hinkle v. National Cas. Ins. Co.*, 354 S.C. 92, 96 (2003).

I. The Circuit Court erred in denying the motions for a directed verdict because the Respondents presented no evidence of negligence by the Appellant.

The Respondents, plaintiffs below, had the burden of proving each element of negligence. Because they presented no such evidence, the trial court should have directed a verdict for the Appellant at the close of the Respondents' case in chief. His decision to deny the motion was error.

To establish a cause of action in negligence, the Respondents must have proven three elements: (1) a duty of care owed by Appellant to them; (2) breach of that duty by a negligent act or omission; and (3) damage proximately resulting from the breach of duty. *Bloom v. Ravoir*, 339 S.C. 417, 422 (2000). The Respondents failed to satisfy two of the three requirements. Their case provided no evidence of any breach by the Appellant. Without a breach, there can be no damages proximately caused by negligence.

There is no dispute that Jason Powell drove Appellant's dump truck

on the public highways on April 15, 2009. (R. p. 46, line 7.) The Respondents theorize that while driving Jason Powell was distracted by his cell phone which caused him to leave the highway and hit their house. (R. p. 58, lines 9–11.) The Respondents adduced not one bit of evidence to support that theory.

The Respondents called South Carolina Department of Public Safety Trooper Justin Trotter as a witness. Trooper Trotter testified on direct examination that he found a cell phone inside the truck. (R. p. 39, lines 20–23.) There was no testimony that the phone was in use or active in any way at the time of the accident or immediately prior to the accident. The trooper testified that it is not unusual during collisions for items to fly around inside a vehicle. (R. p. 42, lines 13–15.) He also testified that he placed no importance on the presence of the cell phone. (R. p. 42, lines 16–18.) He did not look at the phone, did not open up to see if was active, did not check to see if anyone was on the other end and did nothing further to investigate whether the phone played any role in the accident. (R. p. 43, lines 4–8.)

Jason Powell categorically denied using his cell phone. (R. p. 58, lines 20–22.)

The entirety of evidence with regard to the Respondents' theory consists of the assertion of the theory itself. Trooper Trotter admitted that he

had no evidence that Mr. Powell used the cell phone at or near the time of the incident and, in fact, placed no importance at all on the presence of the cell phone in the vehicle.

The only evidence in the case disproves Respondents' theory:

Q. Jason, let's get right to it. Were you using your cell phone at the time of the accident:

A. No, sir.

(R. p. 58, lines 20–22.) The Respondents had no witness to testify and no evidence to support their theory. Indeed, they adduced nothing other than their belief that Jason Powell used his cell phone. This was true at the close of their case and remained so throughout the Appellant's case. The trial court erroneously considered the mere presence of the cell phone in the cab of the truck as a scintilla of evidence. (R. p. 93, lines 18–22.) In opposition to the Appellant's motion for a directed verdict, the Respondents argued "a world of information." (R. p. 94, lines 17–18.) Information does not equate to evidence. More importantly in this case, information that a cell phone was present on the floor of the truck following a violent collision presents not even a scintilla of evidence that the phone was in use or played any role at all in this incident.

It is uncontroverted that Jason Powell drove Appellant's dump truck on April 15, 2009. Neither is there a dispute that the dump truck ended up in

the Respondents' living room. What is missing is any connection between the two events. Negligence is not actionable unless it proximately causes the plaintiff's damage. Proximate cause is the direct cause of an injury. *Trivelas v. South Carolina Dep't of Transp.*, 348 S.C. 125 (Ct. App. 2001).

The only testimony as to proximate cause came from Dr. Norman Bettel. Dr. Bettel is a medical doctor, board certified in neurology and in clinical neurophysiology. (R. p. 98, lines 15–16.) He completed a fellowship in clinical neurophysiology and epilepsy. He is trained and skilled at performing and interpreting EEGs. Following a complete evaluation of Jason Powell, including a family history, (R. p. 113, lines 1–2), that included no positive family history for neurological or psychiatric disorders, (R. p. 113, lines 13–14, 19), Dr. Bettel determined that Mr. Powell had not experienced a seizure or similar episode prior to April 15, 2009. (R. p. 101, lines 14–23.) The doctor found no head injury or other problem prior to the incident, (R. pp. 101–02), no indication that Mr. Powell consumed any medication or other substance prior to the incident, (R. p. 102, lines 3–7), and no knowledge or indication of a chronic problem of any kind prior to April 15, 2009. Based upon his training, examination of the patient and the testing performed, Dr. Bettel testified that Jason Powell suffered a medical event on April 15, 2009, “a seizure, an epileptic seizure.” (R. p. 102, line

23). Dr. Bettel testified further, “The seizure led to a loss of consciousness, or at least loss of the ability to maneuver the vehicle, and led to the motor vehicle accident.” (R. p. 103, lines 6–8.)

A negligence theory imposes the burden on a plaintiff of demonstrating that the defendant failed to exercise due care in some respect. *Branham v. Ford Motor Co.*, 390 S.C. 203, 210 (2010). Liability is determined according to fault. *Id.* The Respondents did not meet their burden at trial, and the trial court erred by denying Appellant’s motions for a directed verdict.

No inference of negligence arises from the mere fact of injury. *Covington v. Atlantic Coast Line Railway Co.*, 158 S.C. 194 (1930), cert. denied, 282 U.S. 858 (1930). The Respondents had the burden of proving each element of negligence. Their burden cannot be met by relying on the theory that the thing speaks for itself or that the very fact of injury indicates a failure to exercise reasonable care. *King v. J. C. Penney Co.*, 238 S.C. 336 (1961); *Gilland v. Peter’s Dry Cleaning Co.*, 195 S.C. 417 (1940).

Appellant is not required to present evidence to refute the Respondent’s theory or allegations; “he may elect to put the plaintiff to strict proof of all the elements of his cause of action.” *Snow v. Columbia*, 305 S.C. 544, 555 (Ct. App. 1991). That is exactly the case before the Court.

Jeffrey and Kristina Johnson clearly suffered an injury. But, the mere fact of an injury is not evidence of negligence. *Watson v. Ford Motor Co.*, 389 S.C. 434, 452–53 (2010). South Carolina does not permit the doctrine of *res ipsa loquitur*. *Id.* The Respondents offered no evidence as to causation or even foreseeable negligence. There was a total lack of any evidence to support the only theory put forward by the Respondents. To the contrary, the physical evidence flies in the face of that theory. The tracks of the truck ran straight from the roadway, over the curb, across the sidewalk, along the grassy right-of-way all the way to the house, none of which is consistent with using a cell phone.

Respondents may not rely solely on the fact that an accident occurred to prove their case under a negligence theory. *Snow, supra*; *Watson, supra*. Thus, in the absence of any evidence in the record to support a liability claim, the jury impermissibly speculated as to the cause of the accident. Such a verdict cannot stand.

Res ipsa loquitur is the only basis upon which the Plaintiffs might possibly recover and, therefore, the Appellant was entitled to a directed verdict.

Respondents contend that the evidence of a truck leaving the highway and striking a house is circumstantial evidence of negligence sufficient to

allow a jury to consider the issue. That is not the law. When circumstantial evidence is relied upon to establish negligence and liability, a plaintiff must show such circumstances as would justify the inference that the injuries were due to a negligent act on the part of the defendant; the matter may not be left to mere conjecture or speculation. *Legette v. Smith*, 265 S.C. 573, 577 (1975).

The Honorable Ralph King Anderson Jr., in his South Carolina Request to Charge, § 20-2, stated, “The touchstone of proximate cause in South Carolina is foreseeability. That is, foreseeability of some damage from a negligent act or omission is a prerequisite to its being a proximate cause of the damage for which recovery is sought.” The section goes on to state, “Foreseeability is not determined from hindsight, but rather from the defendant’s perspective at the time of the complained of act.” *See Hubbard v. Taylor*, 339 S.C. 582, 529 S.E.2d 549 (Ct. App. 2000) (legal cause is proved if defendant should have foreseen that his negligence would probably cause injury to someone).

Dr. Bettie testified that Jason Powell could not have foreseen the emergency that directly led to this incident. There is no evidence to the contrary. The law requires only reasonable foresight. *Stone v. Bethea*, 251 S.C. 157, 161 (1968). When, as here, the injury complained of is not

reasonably foreseeable, in the exercise of due care, there is no liability. *Id.* Liability cannot rest on mere possibilities. *Young v. Tide Craft, Inc.*, 270 S.C. 453, 463 (1978). Beaufort County cannot be charged with that which is unpredictable or that which could not be expected to happen. Where the cause of the plaintiff's damage may be as reasonably attributed to an act for which the defendant is not liable as to one for which he is liable, the plaintiff has failed to carry the burden of establishing that his damage was the proximate result of the defendant's negligence. *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79 (1998); *Koester v. Carolina Rental Ctr., Inc.*, 313 S.C. 490 (1994); *Trivelas v. South Carolina Dep't of Transp.*, *supra*.

Stated in terms of the case presented to the jury in Beaufort County, the Johnsons had the burden of demonstrating that the damage to their house was proximately caused by the Jason Powell's negligence, that Mr. Powell committed an act or an omission which he should have foreseen would cause harm. Not only is there no evidence, direct or circumstantial, to carry that burden, there is medical evidence quite to the contrary. The Respondents introduced the testimony of William L. Brannon, Jr., M.D., who took issue with Dr. Bettel. What Dr. Brannon did not testify was that Jason Powell did not suffer an epileptic seizure. He limited his opinion to the fact that he

could not tell what caused Mr. Powell to leave the roadway. He testified that he was not able to rely on the EEG.

Dr. Brannon attempted to undermine the reliability of Dr. Bettle's testing, but he offered no alternate explanation of the incident. There was absolutely no evidence to contradict Dr. Bettle's opinion that this accident was unforeseeable and directly caused by a sudden medical emergency. Negligence requires foreseeability. This incident was not foreseeable. Any decision by the jurors resulted from *res ipsa loquitur*, which is specifically rejected in South Carolina law, or by sheer speculation. Neither is permissible. *Jones v. Sun Pub. Co.*, 278 S.C. 12, 19–20 (1982).

The truck hit the house. Something must have gone wrong. It was not the Johnsons' fault. Therefore, they should recover. That is not the law. There is no support for this verdict and it cannot be allowed to stand.

Conclusion

The Appellant respectfully urges the Court to reverse the trial court, based upon a total lack of evidence to support any verdict in this matter.

[SIGNATURE PAGE FOLLOWS]

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March 19, 2013
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In the Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Michael G. Nettles, Circuit Court Judge

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SC Court of Appeals

Jeffrey Johnson and Kristina Johnson Respondents,

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Beaufort County Appellant.

CERTIFICATE OF COUNSEL

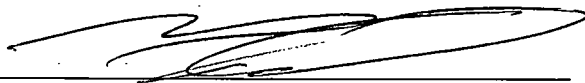
I certify that the Brief of Appellant and Reply Brief of Appellant comply with Rule 211(b), SCACR. In addition to those changes provided in Rule 211(b), I changed the font size and formatting in the Initial Brief to match the font size and formatting in the Initial Reply Brief. These changes were made for the sole purpose of uniformity, and no substantive changes were made to the briefs. I consulted with L. Darby Plexico III, counsel for the Respondents, and there was no objection to these changes.

I also certify that the Brief of Appellant, Reply Brief of Appellant, and

Record on Appeal comply with the South Carolina Supreme Court's Order dated August 13, 2007, regarding personal data identifiers and other sensitive information in appellate court filings.

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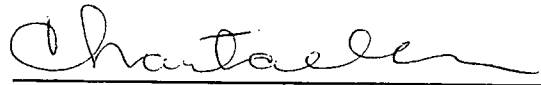
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I certify that I am a legal assistant at Griffith, Sadler & Sharp, P.A., and on March 26, 2013, I placed a copy of the *Record on Appeal, Brief of Appellant, Reply Brief of Appellant*, and *Certificate of Counsel* in the US Mail, with first-class postage prepaid, and addressed as follows:

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