THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2009-CP-07-4592

Appellate Case No. 2012-206486

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

v.

Beaufort County,.....Appellant.

BRIEF OF RESPONDENTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in denying the defendant's motions for directed verdict and submitting this case to the jury to determine the sole issue of whether this motor vehicle accident was caused by the defendant's employee's negligence in not keeping a proper lookout, losing control of a county dump truck, leaving the roadway, and striking the plaintiffs' home, or whether it was an unavoidable event resulting from the employee's alleged epileptic seizure?

STATEMENT OF THE CASE

On September 29, 2009, respondents/plaintiffs Jeffrey and Kristina Johnson brought this action for negligence against appellant/defendant Beaufort County for property damage to the plaintiffs' home arising out of an automobile accident that occurred on April 15, 2009 wherein an employee of the defendant, Jason Powell [Powell], drove a county dump truck into the side of plaintiffs' home. The defendant's answer raised a general denial to the allegations in the complaint as well as several affirmative defenses. The plaintiffs filed an amended complaint dated September 2, 2010 that added a cause of action for negligent entrustment against the defendant. The defendant filed an amended answer on November 30, 2011 that added a defense alleging that the plaintiffs' damages resulted from an unavoidable accident.

The jury trial in this matter was held in Beaufort County on October 3 and 4, 2011. The defendant moved for a directed verdict after the plaintiffs rested their case on the grounds that the plaintiffs had not provided any evidence that Powell was negligent in the accident. The defendant argued that the evidence simply showed the Powell suffered from an unexplained blackout. The trial court determined that, at the very least, the evidence showing that Powell lost control of the vehicle, left the roadway, struck the plaintiffs' house, and had a cell phone that was found on the floorboard of the passenger side of the dump truck after the accident created a reasonable inference of Powell's

negligence, and, therefore, a question of fact for the jury on the issues of negligence and proximate cause. (R. pp. 91-95).

The defendant moved for a directed verdict again after it rested its case on the same grounds asserted earlier that the only evidence presented in the entire case showed that the accident was unavoidable and was caused by Powell's epileptic seizure. The plaintiffs' argued that Dr. Norman Bettle's diagnosis and testimony regarding Powell's alleged seizure and epilepsy was flawed and refuted by their expert in neurology, Dr. William H. Brannon, Jr. The plaintiffs' used Dr. Brannon to explain why Dr. Bettle's diagnosis and testimony were incorrect. The trial court determined that a question of fact existed from this competing medical testimony and denied defendant's motion for directed verdict a second time. (R. pp. 121-23).

The jury rendered a verdict for the plaintiffs on the negligence cause of action in the stipulated amount of damages of $58,023.00. (R. p. 139). The defendant moved for judgment notwithstanding the verdict at the end of the trial on the same basis of its prior motions for directed verdict. The plaintiffs argued that it was undisputed that the defendant's dump truck left the roadway, lost control, and collided with the plaintiffs' house. The plaintiffs presented evidence to explain why the accident was caused by Powell's negligence and not an epileptic seizure. Powell's cell phone was out of his belt holster and on the floor of the dump truck after the accident, which was circumstantial evidence that could allow the jury to reasonably conclude that the cell phone had to be out of the holster and in use during the accident. The plaintiffs brought forth medical evidence through Dr. Brannon to show that Powell did not have any form of epileptic seizure. Additionally, Powell did not receive the treatment ordered by Dr. Bettle, and

Powell was back driving a vehicle days after the accident. The trial court agreed with the plaintiffs and denied the defendant's motion for judgment notwithstanding the verdict. (R. pp. 141-43).

The trial court entered judgment for the plaintiffs on October 6, 2011. The defendant filed a motion to alter or amend the judgment on October 18, 2011. The trial court held a hearing on this motion on November 29, 2011. The trial court denied the defendant's motion. The defendant filed and served its notice of appeal on January 10, 2012.

FACTS

Powell was called as a witness in the plaintiffs' case in chief. Powell admitted that he ran the dump truck off the roadway, through the hedge, and into the plaintiffs' living room. (R. p. 45). He said he traveled 1 ½ - 2 miles from the stoplight where he claimed he had his last memory before the accident to the plaintiffs' house. He went around several curves during that stretch of roadway. (R. p. 46). Powell would have traveled 4 – 5 minutes from the stop light at the Bi-Lo where he claims to have had his last memory to the accident site. The nearest hospital to the plaintiffs' home was approximately 15 minutes away. Therefore, Powell claimed that he was passed out for the entire 20 minutes time period between the stop light at the Bi-Lo and the ambulance arriving on the scene to attend to him after the accident. Powell asserted that he had no recollection at all during that 20 minute timeframe. (R. p. 52).

Powell admitted that he had a cell phone with him in the dump truck at the time of the accident. (R. p. 46). Powell was wearing a belt holster for the cell phone. He

claimed the cell phone was in his holster when he was not using it. The holster had a magnetic clasp on it. (R. p. 47).

The defendant did not permit Powell to use his cell phone while he was in the dump truck. (R. p. 51). Powell acknowledged that he would have been fired if he was caught by the defendant using his cell phone in the dump truck. (R. pp. 51-52). The use of a cell phone in the defendant's dump truck was a violation of one of the defendant's safety regulations. Powell admitted that he did not want to lose his job as a result of this accident. (R. p. 52).

South Carolina Highway Patrol Trooper Justin J. Trotter [Trooper Trotter] was called as a witness by the plaintiffs. Trooper Trotter was the investigating officer for this accident. He went inside the defendant's dump truck after the accident. He found a cell phone on the floorboard of the passenger side of the truck. (R. p. 39). The cell phone was not in any cell phone holster. (R. p. 40). Trooper Trotter could not state for certain whether Powell was or was not using the cell phone at the time of the accident. He estimated that the dump truck traveled 100 – 150 feet from the edge of the roadway to the side of the plaintiffs' house. (R. p. 41).

Powell testified at his deposition that his cell phone carrier at the time of the accident was Embarq. (R. p. 49). However, Powell claimed that he could not remember his cell phone number at his deposition. The defendant promised to provide the plaintiffs' with Powell's cell phone records. A subpoena was sent to Embarq for Powell's cell phone records. Powell acknowledged that Embarq responded to the subpoena by saying that they did not have any account or records for Powell. (R. p. 50). Powell admitted that he was unable to produce any cell phone records for the date of the

accident. (R. p. 51). He knew that plaintiffs' counsel was looking for his cell phone information after his deposition. Surprisingly, Powell admitted at trial that he intentionally misled plaintiffs' counsel in regards to his cell phone carrier and records. (R. p. 58).

Powell was confronted by the Superintendent of Public Works for the defendant, Malcolm E. Bellamy, Jr. [Bellamy], after the accident. Powell admitted that Bellamy told him that he did not believe him when Powell told Bellamy that he had passed out during the accident. (R. pp. 53-54). In fact, Powell admitted that Bellamy told him that he thought Powell was lying about passing out. (R. pp. 54-55). Bellamy was Powell's boss at the time of the accident. (R. p. 55).

Powell saw a neurologist, Dr. Norman Bettle, shortly after the accident. Dr. Bettle performed an EEG on Powell and diagnosed him with epilepsy. As a result of this diagnosis, Dr. Bettle scheduled Powell for a 3-month follow-up appointment in July 2009. However, Powell never returned for that 3-month follow-up, and he never saw Dr. Bettle again. (R. p. 55).

Dr. Bettle told Powell not to drive until he came back for the 3-month follow-up. However, Powell drove away from Dr. Bettle's office after the first appointment. In fact, Powell admitted that he has driven a vehicle every day for the past 2 ½ years since his first appointment with Dr. Bettle. (R. p. 56).

Powell was not taking any medication for any type of seizures at the time of the trial. Powell had not had any seizure during the 30 months after the accident up until the trial. He had never had a seizure before the accident. He did not have any family history of seizures. (R. p. 56).

The plaintiffs' called Dr. William L. Brannon, Jr. in order to refute the defendant's claim that Powell suffered from epilepsy and had a seizure during the accident. Dr. Brannon was qualified as an expert in the field of neurology without objection at trial. (R. p. 66).

Dr. Brannon is currently retired from the University of South Carolina School of Medicine. He taught there for 22 years. He then continued in the private practice for the University for 7 years. Dr. Brannon was in the navy for 20 years. He served in the academic portion of naval medicine. He was stationed for 17 years at the National Naval Medical Center in Bethesda, Maryland. While there he set up a training program for doctors who wanted to become neurologists. Part of this training program consisted of teaching studying neurologists how to read electroencephalograms [EEGs]. Dr. Brannon's naval doctor training program was a success, so the army, navy, and air force got together and asked him to set up a training program to train the technicians to do the EEGs. Dr. Brannon created this second training program for technicians. (R. p. 63).

Dr. Brannon served as the first chairman of the Department of Neurology for the uniformed services medical school in Washington, D.C. He had to design a teaching program for medical students, including the field of neurology. He also taught medical students at Georgetown University. He gave the students hands-on, clinical training in neurology. Dr. Brannon established the training program for medical students at the University of South Carolina as well. He also taught neurology to family practice doctors, psychiatrists, and internal medicine specialists. Dr. Brannon was serving as a practicing, clinical neurologist during this entire timeframe. (R. p. 64).

Dr. Brannon has done both teaching and practicing neurology in his career. He has also done some research in the fields of epilepsy, EEGs, stroke, and muscle disease. (R. p. 65). Dr. Brannon was certified as a clinical neurologist in 1969. He is board certified in neurology. He has extensive educational training in medicine and neurology. (R. pp. 65-66).

Dr. Brannon reviewed several items in formulating his opinions in this case. He evaluated Powell's medical records from Dr. Bettle, including Powell's EEG report and brain MRI. He analyzed Powell's medical records with Dr. Charles Shasis, a neurologist in Beaufort, South Carolina, including his EEG report for Powell. (R. p. 67). Finally, he reviewed the depositions of Dr. Bettle and Powell. (R. pp. 67-68).

Dr. Brannon outlined a couple of problems with the effectiveness of using EEGs in general as a diagnostic tool. First, most practicing neurologists do not have a trained EEG technician. Second, EEGs are not very effective as a diagnostic test because the artifacts are so frequent and common. (R. p. 73).

Dr. Brannon was very critical of the EEG that Dr. Bettle performed on Powell on April 16, 2009. He labeled the EEG as a "technical disaster." He noted that an EEG machine is an exquisitely sensitive instrument that amplifies brain waves 1,000,000 – 2,000,000 times. The EEG was riddled with what are called artifacts or outside interference. Dr. Brannon found 60-cycle electrical artifacts throughout the EEG. This particular level of artifact typically comes from interference from florescent lights. (R. p. 68). Dr. Brannon has seen many others sources of interference in EEGs, including the drip of an IV and swaying of the wires connecting the machine to the scalp. (R. p. 69).

He noted that an improper application of the electrodes could cause a 60-cycle electrical artifact. (R. p. 82).

Dr. Brannon opined that Dr. Bettle's EEG of Powell was technically inadequate and uninterpretable.[1] Dr. Brannon asserted that Dr. Bettle should have repeated the EEG immediately or the following day in order to get a technically satisfactory record. He testified that this EEG did not show anything other than 60-cylce electrical artifact. (R. p. 69). Dr. Brannon could not find any temporal spikes on the EEG. As a result, he opined that Dr. Bettle should have determined that the EEG was a technically inadequate recording instead of claiming that it showed temporal spikes for Powell. (R. p. 71).

Dr. Brannon asserted that Powell does not have epilepsy as diagnosed, albeit incorrectly, by Dr. Bettle. Epilepsy involves recurrent seizures. (R. p. 74). Dr. Brannon noted that the number of epileptic seizures suffered by people with epilepsy expand dramatically after their first seizure. (R. p. 84). He discussed the different types of epilepsy for the jury. (R. pp. 74-75). He again noted that he could find nothing in Powell's medical records that supports a diagnosis of epilepsy. (R. p. 75). Additionally, Dr. Brannon opined that it was highly, highly unlikely for a patient that had damage in the temporal lobe that was causing spikes on an EEG to go for a year without those spikes being repetitive and the patient not having another clinical event in the absence of medication. (R. pp. 75-76).

Dr. Brannon reviewed Powell's brain MRI that was done in April 2009. He noted that Dr. Bettle ordered a temporal lobe protocol for the MRI. This protocol puts the focus of the MRI on the temporal lobe, which is typical and proper for Powell's alleged

[1] *See* R. pp. 69-71, for further explanation on why the EEG was uninterpretable according to Dr. Brannon.

situation. (R. pp. 78-79). Dr. Bettle also asked for contrast enhancement for the MRI. The purpose of contrast enhancement is the help the MRI machine pick up areas of the brain that are very subtly abnormal and that would not be picked up on the routine imaging without contrast. The brain MRI for Powell did not discover any subtle abnormalities and was essentially normal. (R. p. 79).

Dr. Brannon also referenced Dr. Shasis' records for additional support of his opinions that Dr. Bettle's EEG was inadequate and uninterpretable and that Powell did not suffer a seizure in the accident. Powell saw Dr. Shasis on 2 occasions, first in April 2009, and then in August of the same year. Dr. Shasis did an EEG on Powell in his office. (R. p. 67). That EEG was normal. (R. pp. 67, 71). Powell was not taking any medication at the time of Dr. Shasis' EEG. Dr. Shasis also did a computerized tomogram of Powell's brain and cervical spine. (R. p. 67).

Dr. Brannon explained the significance of Powell's normal EEG with Dr. Shasis to the jury. Dr. Bettle claimed that his EEG showed right temporal lobe spikes, which are abnormal wave forms on the EEG. Dr. Brannon noted that if you accept that Dr. Bettle's EEG was accurate, and that Powell had right temporal lobe spikes, then those spikes will never go away and they will be there as long as the right temporal lobe is still working. However, Dr. Shasis' subsequent EEG was normal and did not show any spikes. Dr. Brannon testified that you must accept the normal record of Dr. Shasis' EEG over the artifact-laden record of Dr. Bettle's EEG. (R. p. 72). The subsequent normal EEG confirms the artifactual nature of the incorrect first EEG, and it shows that the second EEG really is normal. (R. pp. 72-73).

Dr. Brannon opined that Powell did not have a seizure that led to this accident or his misadventure in the dump truck. (R. p. 76). Dr. Brannon explained the different types of seizures to the jury. (R. pp. 76-78). He noted that Powell's claim that he "lost focus" does not mean he had a seizure. Dr. Brannon opined that it would be very highly unlikely that Powell could navigate a truck on a winding road accurately while having a seizure as Powell claimed leading up to the accident. Dr. Brannon also testified that almost all seizures last no more than 2 – 3 minutes, if that long. Therefore, the 20 minute spell claimed by Powell would almost never be a seizure. (R. pp. 78, 87-90).

In conclusion, Dr. Brannon testified that all of Powell's tests came back negative with the exception of Dr. Bettle's flawed EEG. (R. pp. 79-80). That EEG had too much interference or electrical artifacts to have any substantive use. Powell's subsequent EEG was completely normal. The standard in this situation with 2 competing EEGs is to throw out the abnormal one and give precedence to the normal one. Finally, Dr. Brannon reiterated that Powell did not have an epileptic seizure on the date of the accident. (R. pp. 80, 85-86).

The defendant called Bellamy as its first defense witness. Bellamy did not recall at trial whether he ever accused Powell of lying about passing out in the accident. Bellamy sent Powell for medical treatment after the accident. (Transcript, p. 144). Bellamy admitted that he was concerned for Powell's well-being after the accident because Powell was not following-up properly with his ordered medical treatment. (R. p. 97).

The defendant read Dr. Bettle's deposition into the record as their second defense witness. Dr. Bettle testified that the CT scan of Powell's head after the accident was

unremarkable. Dr. Bettle determined that Powell had a normal neurological and cardiovascular physical exam. (R. p. 99). Powell did not report any family history of neurological or psychiatric diseases or disorders. (R. p. 113). Dr. Bettle acknowledged that Powell's brain MRI done on April 23, 2009 was normal. This MRI looks for structural abnormalities that could have caused Powell to develop a seizure disorder. (R. p. 106). Dr. Bettle did not find any structural abnormalities in Powell's brain in the MRI. (R. p. 107).

Dr. Bettle never saw Powell again after the initial visit on April 21, 2009. (R. p. 101). He planned to have Powell come back in for a follow-up examination in 3 months after the first visit, but Powell never returned. (R. pp. 105, 112). Dr. Bettle told Powell not to drive for at least 3 months of being seizure free after the first visit. (R. pp. 111-12). He did not know if Powell had a seizure in the following 2 years. (R. p. 103).

Dr. Bettle admitted that his EEG of Powell had a number of artifacts or external interferences. (R. pp. 108-09). He acknowledged that these artifacts could have been caused by 60-hertz power, moving your eyes, rubbing your head, moving a limb, or even just blinking your eyes. (R. p. 109).

STANDARD OF REVIEW

When considering a directed verdict motion, the trial court is required to view the evidence and the inferences that can be drawn from that evidence in the light most favorable to the nonmoving party. Hinkle v. National Casualty Ins. Co., 354 S.C. 92, 96, 579 S.E.2d 616, 618 (2003). In deciding whether to grant or deny a directed verdict motion, the trial court is concerned only with the existence or nonexistence of evidence. Long v. Norris Assoc., Ltd., 342 S.C. 561, 538 S.E.2d 5 (Ct. App. 2000). Nonetheless, a

court cannot ignore facts unfavorable to that party and it must determine whether a verdict for the party opposing the motion would be reasonably possible under the facts. Hopson v. Clary, 321 S.C. 312, 314, 468 S.E.2d 305, 307 (Ct. App. 1996).

[When an] appeal comes before the Court on a claim of entitlement to a directed verdict/JNOV, we review the facts in the light most favorable to respondents. Hinkle, 354 S.C. at 94, 579 S.E.2d at 617, fn. 2. The appellate court must determine whether a verdict for a party opposing the motion would be reasonably possible under the facts as liberally construed in his favor. Erickson v. Jones St. Publishers, LLC, 368 S.C. 444, 462, 629 S.E.2d 653, 663 (2006). This Court will reverse the trial court's rulings on these motions only where there is **no** evidence to support the rulings or where the rulings are controlled by an error of law. Hinkle, 354 S.C. at 96, 579 S.E.2d at 618 (emphasis added). *See* Holtzscheiter v. Thompson Newspapers, Inc., 332 S.C. 502, 513, 506 S.E.2d 497, 503 (1998) (directed verdict on liability in civil case is properly denied when there is **any** evidence, direct or circumstantial, justifying submission of issue to jury) (emphasis added). Our inquiry then is whether there was any evidence, direct or circumstantial, from which a reasonable inference could be drawn that the defendant failed to exercise due care in the performance of any duty owed the plaintiff. Chaney v. Burgess, 246 S.C. 261, 265, 143 S.E.2d 521, 523 (1965).

ARGUMENT

I. THE TRIAL COURT PROPERLY DENIED DEFENDANT'S MOTIONS FOR DIRECTED VERDICT AND SUBMITTED THIS CASE TO THE JURY TO DETERMINE THE SOLE ISSUE OF WHETHER THIS MOTOR VEHICLE ACCIDENT WAS CAUSED BY DEFENDANT'S EMPLOYEE'S NEGLIGENCE IN NOT KEEPING A PROPER LOOKOUT, LOSING CONTROL OF A COUNTY DUMP TRUCK, LEAVING THE ROADWAY, AND STRIKING THE PLAINTIFFS' HOME, OR WHETHER IT WAS AN UNAVOIDABLE EVENT RESULTING FROM THE EMPLOYEE'S ALLEGED EPILEPTIC SEIZURE.

The plaintiffs asserted in their complaint that Powell was negligent by failing to keep a proper lookout, failing to keep his vehicle under proper control, failing to keep his vehicle on the roadway, failing to execute proper maneuvers to avoid a collision, and by striking the plaintiffs' house with the dump truck. (R. pp. 8-9). At trial, the plaintiffs argued that Powell lost control of the dump truck and left the roadway because he was not paying attention to the roadway, he was using his cell phone, or he had dropped his cell phone on the floorboard and he was trying to retrieve it just before the accident. (R. pp. 32, 126).

The defendant claimed that Powell had a sudden medical emergency in the form of an epileptic seizure that caused the accident. As a result of this medical emergency, the defendant claimed that Powell was not negligent and that the accident was unavoidable. Therefore, the parties agreed that the only issue[2] in the case was whether the accident was caused by Powell's negligence, or whether it was an unavoidable event resulting from Powell's sudden medical emergency in the form of an epileptic seizure. (R. p. 31).

[2] The parties stipulated at trial that the plaintiffs' damages totaled $58,023.

To prevail in an action for negligence, the plaintiff must prove the following three elements:

(1) a duty of care owed by defendant to plaintiff;
(2) defendant's breach of that duty by a negligent act or omission; and
(3) damages to plaintiff proximately resulting from the breach of duty.

Bloom v. Ravoira, 339 S.C. 417, 422, 529 S.E.2d 710, 712 (2000). To establish negligence the plaintiff must prove the defendant failed to exercise due care in some respect. Sunvillas Homeowners Assoc., Inc. v. Square D Co., 301 S.C. 330, 333, 391 S.E.2d 868, 870 (Ct. App. 1990). The focus is upon the action of the defendant. Sunvillas Homeowners Assoc., Inc., 301 S.C. at 333, 391 S.E.2d at 870. South Carolina does not recognize the rule of *res ipsa loquitor*.[3] Crider v. Interfinger Transportation Co., 248 S.C. 10, 148 S.E.2d 732 (1966).

In an action for negligence, the plaintiff must prove by direct or circumstantial evidence[4] that the defendant did not exercise reasonable care. Snow v. City of Columbia, 305 S.C. 544, 555, 409 S.E.2d 797, 803, fn. 7 (Ct. App. 1991). Direct evidence is the testimony of a person who asserts or claims to have actual knowledge of a fact, such as an eyewitness. Moriarty v. Garden Sanctuary Church of God, 341 S.C. 320, 337, 534 S.E.2d 672, 680 (2000). Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact. Moriarty, 341 S.C. at 337, 534 S.E.2d at 680.

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[3] In the situation to which *res ipsa loquitor* as a distinctive rule applies, there is no evidence, circumstantial or otherwise, at least none of sufficient probative value, to show negligence, apart from the postulate, which rests on common experience and not on specific circumstances of the instant case, that physical causes of the kind which produced the accident in question do not ordinarily exist in the absence of negligence, that is, in the absence of a breach of duty such as defendant owed plaintiff. Eickhoff v. Beard-Laney, Inc., 199 S.C. 500, 20 S.E.2d 153, 155 (1942).

[4] *Res ipsa loquitor* and circumstantial evidence have been distinguished upon the question whether the circumstances proved point merely to the physical cause of the occurrence, without having any tendency to indicate some fault of omission or commission upon the part of the defendant. Eickhoff, 199 S.C. 500, 20 S.E.2d at 155.

The law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial evidence. Id. Circumstantial and direct evidence may be equally valid and convincing in [a] civil action. Moriarty, 341 S.C. at 338, 534 S.E.2d at 681, fn. 6. The law does not require every fact and circumstance of negligence to be proved by direct and positive evidence or the testimony of eye witnesses. Childers v. Gas Lines, Inc., 248 S.C. 316, 322, 149 S.E.2d 761, 764 (1966). Proof of negligence may rest entirely on circumstances, and circumstantial evidence alone may authorize a finding of negligence. Childers, 248 S.C. at 322, 149 S.E.2d at 764. A well connected train of circumstances is as cogent of the existence of a fact as any array of direct evidence, and may outweigh opposing direct testimony. McCready v. Atlantic Coast Line Railroad Co., 212 S.C. 449, 455, 48 S.E.2d 193, 196 (1948).

In many instances facts can be proved only by circumstantial evidence. Eickhoff, 199 S.C. 500, 20 S.E.2d at 157. However, when circumstantial evidence is relied upon the plaintiff must show such circumstances as would justify the inference that the damages suffered were due to the negligent act of the defendant and the question may not be left to mere conjecture or speculation. Chaney, 246 S.C. at 266, 143 S.E.2d at 523. And in determining the sufficiency of circumstantial evidence, the facts and circumstances shown are to be reckoned with in the light of ordinary experience and such conclusions deduced therefore as common sense dictates. Id.

Negligence is a relative term to be decided upon the facts of each particular case and because its existence turns on the facts it is normally a question left to the jury; before it can be determined as a matter of law that one has not committed a negligent act the truth of all the credible evidence tending to sustain the claim of negligence must be

assumed and all favorable inferences of fact fairly deducible therefrom tending to establish negligence drawn. Mahaffey v. Ahl, 264 S.C. 241, 247-48, 214 S.E.2d 119, 122 (1975). The test of legal sufficiency is whether the evidence serves to prove a fact or permits an inference of fact that would enable an ordinarily intelligent mind to draw a rational conclusion therefrom in support of the right of the plaintiff to recover. Mahaffey, 264 S.C. at 248, 214 S.E.2d at 122. A driver's failure to keep a proper lookout and maintain his vehicle under proper control are normally questions to be resolved by the jury. Id.

Proximate cause requires proof of both causation in fact, and legal cause. Oliver v. S.C. Dept. of Highways and Public Transportation, 309 S.C. 313, 422 S.E.2d 128 (1992). Causation in fact is proved by establishing the injury would not have occurred "but for" the defendant's negligence. Oliver, 309 S.C. 313, 422 S.E.2d 128. Legal cause is proved by establishing foreseeability. Id. The standard by which foreseeability is determined is that of looking to the natural and probable consequences of the complained act. Young v. Tide Craft, Inc., 270 S.C. 453, 462, 242 S.E.2d 671, 675 (1978). Foreseeability is not determined from hindsight, but rather from the defendant's perspective at the time of the alleged breach. Greenville Memorial Auditorium v. Martin, 301 S.C. 242, 391 S.E.2d 546 (1990). It is not necessary for a plaintiff to demonstrate the defendant should have foreseen the particular event which occurred but merely that the defendant should have foreseen his or her negligence would probably cause injury to someone. Greenville Memorial Auditorium, 301 S.C. 242, 391 S.E.2d 546.

Negligence is not actionable unless it is the proximate cause of the plaintiff's injury. Hanselmann v. McCardle, 275 S.C. 46, 267 S.E.2d 531 (1980). The defendant's negligence does not have to be the sole proximate cause of the plaintiff's injury; instead, the plaintiff must prove the defendant's negligence was at least one of the proximate causes of the injury. Hughes v. Children's Clinic, P.A., 269 S.C. 389, 237 S.E.2d 753 (1977). Issues of negligence and proximate cause may be resolved by direct or circumstantial evidence. Mahaffey, 264 S.C. at 247, 214 S.E.2d at 122. In accord with the rule governing proof of negligence generally, proximate cause need not be established by the testimony of eyewitnesses, nor by direct or positive evidence, but may be proved by circumstantial evidence; it may be determined from the circumstances of the case. Hopkins v. Derst Baking Co., 221 S.C. 497, 502, 71 S.E.2d 407, 409 (1952).

As a general rule, the question of proximate cause is one of fact for the jury. Ballou v. Sigma Nu General Fraternity, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986). The trial judge's sole function regarding the issue is to inquire whether particular conclusions are the only reasonable inferences that can be drawn from the evidence. Trivelas v. S.C. Dept. of Transportation, 348 S.C. 125, 136, 558 S.E.2d 271, 276-77 (Ct. App. 2001). The question of proximate cause in motor vehicle accident cases is ordinarily for the jury, even where the evidence is undisputed, if different inferences may fairly be drawn therefrom. Trivelas, 348 S.C. at 137, 558 S.E.2d at 277. Where it is not plain that reasonable men could not reasonably find a causal relationship between the defendant's act and the injury, or a part of the injury, the court must leave it to the jury to find as a fact whether the defendant's conduct was a substantial factor in producing the injury, or part of the injury. Id. Only in rare or exceptional cases may the question of

proximate cause be decided as a matter of law. Ballou, 291 S.C. at 147, 352 S.E.2d at 493.

In the instant case, this Court cannot reverse the trial court's rulings on the defendant's motions for directed verdict since the defendant has not shown that there was **no** evidence to support the rulings or that the rulings were controlled by an error of law. The record shows that the trial court properly denied the defendant's motions for directed verdict on the issues of proximate cause and negligence. The plaintiffs presented sufficient evidence creating a reasonable inference of negligence on the part of the defendant's driver. They provided sufficient evidence at trial to prove that Powell's negligence was the proximate cause of this accident.

The plaintiffs showed more than there mere fact of damage to their property from the defendant's dump truck. They did not pitch their case and claim upon *res ipsa loquitor*; on the contrary, they presented various acts of negligence by the defendant that were the proximate cause of the plaintiffs' damages with the testimony of Trooper Trotter, Powell, Dr. Brannon, and Dr. Bettle. The evidence did not show, to the exclusion of all other reasonable inferences, that the accident was caused by Powell's seizure and not his negligence. Therefore, the trial court was correct to not hold that the defendant was not negligent as a matter of law.

The circumstances disclosed by the evidence, when analyzed in the light most favorable to the plaintiffs and when construed liberally in the plaintiffs' favor, are sufficient to support a reasonable and legitimate inference of negligence on the part of the defendant. Powell admitted that he lost control of the dump truck, left the roadway, and struck the plaintiffs' home. The facts of the accident would allow the jury to reasonably

conclude that Powell lost control of his vehicle and left the roadway because he was not keeping a proper lookout and/or he was not paying proper attention to the roadway while he was operating the dump truck.

Powell had a cell phone in the dump truck at the time of the accident. He claimed that the cell phone was in a belt holster with a magnetic closure. However, Trooper Trotter found the cell phone on the floorboard of the passenger side of the dump truck after the accident. The position of the cell phone on the floorboard of the defendant's dump truck and not in Powell's holster after the accident was circumstantial evidence that would allow the jury to reasonably conclude that Powell lost control of the vehicle and left the roadway because he was not keeping a proper lookout, he was not paying proper attention to the roadway, and/or he was using the cell phone in some manner during the accident.

Powell claimed that he simply blacked out while driving the dump truck and that is what caused him to leave the roadway and strike the plaintiffs' home. However, the plaintiffs presented sufficient evidence discrediting and disproving Powell's claim that a sudden medical emergency was the cause of an unavoidable accident. As an initial matter, the plaintiffs would point out that the jury was tasked with determining Powell's credibility as well as the believability of his version of events for the accident. We do not think that the jury [is] bound to accept [the defendant driver's] statement [about his actions in the accident], in view of all the facts, as being true. Shepherd v. U.S. Fidelity & Guaranty Co., 233 S.C. 536, 543, 106 S.E.2d 381, 384 (1958). The jury might find that he was mistaken, or that his memory was at fault. Shepherd, 233 S.C. at 543, 106 S.E.2d at 384.

The plaintiffs presented direct evidence that brought Powell's credibility into question. Powell admitted he intentionally misled plaintiffs' counsel in regards to his cell phone carrier and records from the date of the accident when Powell knew that counsel was trying to obtain those records for this case. The plaintiffs showed that Powell had a reason for lying about using his cell phone during the accident as he would have been fired from his job by the defendant for violating safety policy if he was caught using his cell phone in the dump truck. Powell's boss even thought he was lying about his claim that he simply passed out in the dump truck during the accident.

The plaintiffs presented a significant amount of medical testimony and evidence discrediting and disproving the defendant's claim that a sudden medical emergency was the cause of an unavoidable accident. Dr. Brannon opined that Powell did not have an epileptic seizure in this accident based upon his review of the physical evidence and facts of the accident. The plaintiffs showed that Powell's claims about the duration and characteristics of his alleged blackout were not consistent with an actual epileptic seizure. Dr. Brannon testified that Powell's alleged seizure would not have lasted for 20 minutes because most seizures last a maximum of 2-3 minutes. Dr. Brannon asserted that Powell would have been unable to drive the dump truck for 1 ½ - 2 miles on the roadway through a winding road with several curves if he was really having a seizure.

Additionally, the plaintiffs argued that common sense and our everyday experience tells you that it would have been nearly impossible for Powell to drive the dump truck for that distance and time in his alleged condition while successfully navigating several sharp curves in the roadway. (R. p. 127). The plaintiffs also noted

that common sense and our everyday experience proves that people do not pass out for the extremely long length of 20 minutes. (R. pp. 127-28).

The plaintiffs presented medical evidence and testimony that Powell did not really have a seizure and did not suffer from epilepsy at the time of the accident. Dr. Brannon was very critical of the EEG that Dr. Bettle performed on Powell and relied upon to diagnose Powell as having an epileptic seizure during accident. Dr. Brannon opined that Dr. Bettle's EEG of Powell was technically inadequate and uninterpretable. Dr. Brannon labeled the EEG as a "technical disaster." The EEG was riddled with artifacts or outside interference. Dr. Brannon found 60-cycle electrical artifacts throughout the EEG. This particular level of artifact typically comes from interference from florescent lights. Dr. Bettle even admitted that his EEG had a number of artifacts or external interferences. He acknowledged that these artifacts could have been caused by 60-hertz power, moving your eyes, rubbing your head, moving a limb, or even just blinking your eyes. Dr. Brannon testified that this EEG did not show anything other than 60-cylce electrical artifacts. Dr. Brannon could not find any temporal spikes on the EEG. As a result, he opined that Dr. Bettle should have determined that the EEG was a technically inadequate recording instead of claiming that it showed temporal spikes for Powell.

Dr. Brannon testified that Powell does not have epilepsy as diagnosed, albeit incorrectly, by Dr. Bettle. Epilepsy involves recurrent seizures. Dr. Brannon testified that he could find nothing in Powell's medical records that supports a diagnosis of epilepsy. Additionally, Dr. Brannon opined that it was highly, highly unlikely for a patient that had damage in the temporal lobe that was causing spikes on an EEG to go for

a year without those spikes being repetitive and the patient not having another clinical event in the absence of medication.

Dr. Brannon also referenced Dr. Shasis' records for additional support of his opinions that Dr. Bettle's EEG was inadequate and uninterpretable and that Powell did not suffer a seizure in the accident. Dr. Shasis' EEG on Powell, which was taken after Dr. Bettle's flawed EEG, was normal. Powell was not taking any medication at the time of Dr. Shasis' EEG. Dr. Brannon explained the significance of Powell's normal EEG with Dr. Shasis to the jury. Dr. Brannon noted that if you accept that Dr. Bettle's EEG was accurate, and that Powell had abnormal waves on his EEG in the form of right temporal lobe spikes, then those spikes will never go away and they will be there as long as the right temporal lobe is still working. However, Dr. Shasis' subsequent EEG was normal and did not show any spikes. Dr. Brannon testified that you must accept the normal record of Dr. Shasis' EEG over the artifact-laden record of Dr. Bettle's EEG. The subsequent normal EEG confirms the artifactual nature of the incorrect first EEG, and it shows that the second EEG really is normal.

In conclusion, Dr. Brannon testified that all of Powell's tests came back negative with the exception of Dr. Bettle's flawed EEG. That EEG had too much interference or electrical artifacts to have any substantive use. Powell's subsequent EEG was completely normal. The standard in this situation with 2 competing EEGs is to throw out the abnormal one and give precedence to the normal one. Finally, Dr. Brannon reiterated that Powell did not have an epileptic seizure on the date of the accident.

The plaintiffs also presented testimony from Dr. Bettle that tended to show that Powell did not have a seizure and did not suffer from epilepsy at the time of the accident.

Dr. Bettle testified that the CT scan of Powell's head was unremarkable. Dr. Bettle determined that Powell had a normal neurological and cardiovascular physical exam. Powell did not report any family history of neurological or psychiatric diseases or disorders. Dr. Bettle acknowledged that Powell's brain MRI was normal. He did not find any structural abnormalities in Powell's brain in the MRI. Dr. Brannon also reviewed Powell's brain MRI and agreed that it did not show any subtle abnormalities and was essentially normal.

The actions of Powell and the defendant after the accident also tended to disprove the defendant's theory that Powell had a seizure or had epilepsy at the time of the accident. Dr. Bettle planned to have Powell come back in for a follow-up examination in 3 months after the first visit. Dr. Bettle told Powell not to drive for at least 3 months of being seizure free after the first visit. However, Powell disregarded Dr. Bettle's instructions to return for a 3-month follow-up visit and to not drive until that time. Powell never returned to see Dr. Bettle. Powell has driven every day since this accident.

Powell's actions show that his claim about passing out in the accident may have been more about keeping his job than about telling the truth. Surprisingly, the defendant allowed Powell to resume driving a dump truck after the accident without Powell ever having much follow-up treatment for his potential epileptic condition. This decision by the defendant to allow Powell to drive again is particularly confounding since Powell would have been prone to repeat seizures from his condition.

Under these circumstances and in light of this evidence, the trial court did not err in denying the defendant's motions for directed verdict. Because these facts and inferences to be drawn from them were in dispute, the issue of the defendant's negligence

was for the jury. From these facts competing inferences might reasonable be drawn as to the defendant's failure to exercise due care in Powell driving its dump truck and as to the issue of proximate causation. Under these facts and circumstances, tested in the light of common experience, a reasonable inference could be drawn that the defendant's driver was negligent in not keeping a proper looking, not paying proper attention to the roadway, losing control of the dump truck, leaving the roadway, and/or using his cell phone, and that such negligence was the proximate cause of the dump truck colliding with the plaintiffs' home. The jury's conclusion of actionable negligence on the part of the defendant's driver was correctly bottomed on Powell's failure to use due care in causing the accident.

CONCLUSION

This Court cannot reverse the trial court's rulings on the defendant's motions for directed verdict since the defendant has not shown that there was **no** evidence to support the rulings or that the rulings were controlled by an error of law. Based on the foregoing facts and arguments, the jury verdict for the plaintiffs must be affirmed.

Respectfully submitted,

April 12, 2013

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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM BEAUFORT COUNTY
Court of Common Pleas

Michael G. Nettles, Circuit Court Judge

Case No. 2009-CP-07-4592
Appellate Case No. 2012-206486

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

v.

Beaufort County,.....Appellant.

CERTIFICATE OF COUNSEL

I certify that the Brief of Respondents complies with Rule 211(b), SCACR.

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PROOF OF SERVICE

I certify that I have served the Brief of Respondents on Beaufort County by depositing a copy of it in the United States Mail, postage prepaid, on April 12, 2013, addressed to its attorneys of record, Marshall H. Waldron, Jr. and Matthew D. Cavender, Griffith, Sadler & Sharp, P.A., 600 Monson Street, Beaufort, South Carolina 29901.

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