IN THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GEORGETOWN COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge

Case No. 2008-CP-22-00466

Hazel Jeisel Rivera,

Respondent,

v.

Warren Jared Newton, Newton's Farm,
J & J Logging, Inc. and Edgar Rivera,

Petitioners,

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

I. Procedural History

Respondent (passenger) brought a Complaint against the Appellants alleging that their negligence caused an automobile wreck on or about August 29, 2005 resulting in personal injuries to Respondent. The case was tried by a jury during the week of March 15, 2010. Prior to the jury's deliberations, Respondent moved the court for an order holding that at least one of the Defendants had to be liable for the wreck. (R367)The Plaintiff based her motion on the case of Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (S.C.App. 2007), where the Court of Appeals had affirmed the finding of a directed verdict for the Plaintiff on the issue of liability, holding that "the evidence presented at trial yielded only one conclusion – that the negligence of at least one driver, if not both, resulted in the accident causing [the passenger's] injuries." 654 S.E.2d at 881. The Plaintiff also objected to the trial court's jury verdict form which provided the jury with the option of returning a defense verdict for both Defendants. (R356, 366-368). The jury returned a verdict in favor of both Defendants.

The Plaintiff made a timely motion for a new trial. (R101) This motion for a new trial was granted by the Trial Judge. (RS)

II. Statement of the Facts

On August 29, 2005, the Plaintiff, Hazel Rivera, and her brother, Edgar Rivera, were travelling west on Pennyroyal Road in Georgetown County. (R172, 189) Edgar was driving the vehicle and Hazel was a passenger in the front passenger seat. (R173, 214) Edgar and Hazel had received news that their father had been injured and they were travelling on

Pennyroyal Road to see their father. (R172, 214)

On that same evening, the J & J Logging Defendants had been attempting to remove logging equipment from a logging site on Pennyroyal Road. (R252) The speed limit is 55 m.p.h. (R162, 174). The Defendants testified that they had put out signs warning of trucks entering the highway. (R256, 268) One of the pieces of equipment is known as a Prentice Log Loader. The Prentice Log Loader is attached to a standard ten wheel tractor truck by a fifth wheel assembly. (R248) The Log Loader is mounted to a trailer which is approximately 38 to 40 feet long and black in color. (See photograph at R505) Sometime after dark and approaching 10:00 at night (R197, 313) the Defendants drove the tractor with the Prentice Log Loader out onto Pennyroyal Road from a dirt road side street. The dirt road formed a T-Intersection at Pennyroyal Road. (R168-69) There were ditches on both sides of the dirt side road. From previous experience, the Defendants knew that they would have to pull the tractor rig out across Pennyroyal Road onto the other side of the road and then back it up in order not to cause the rear wheels of the trailer to become bogged down in the ditch. (R252) The Defendants were aware that pulling out onto the main road under these conditions would take approximately 25 to 30 seconds. (R255, 276-79) The Defendants had no one in a position to warn oncoming traffic, although they had done so in similar situations in the past. (R274-76)

The Defendants had to wait 10 minutes for traffic to pass by. (R297) The Defendant driver then pulled the tractor trailer rig out across Pennyroyal Road so that the cab was off of the opposite shoulder pointing in an easterly direction and the trailer was across the road at a 45° angle. (R161, 432, 434) The lights of the cab were pointed in the general direction of

oncoming traffic. (R167, 432, 434) Joel Newton testified that turning left onto Pennyroyal Road at night with a log loader was inherently dangerous. (R298) In this position, the black trailer rig was completely blocking both lanes of travel. (R434) The Defendant driver then put the truck in reverse and began to back the truck up in order to avoid putting the rear wheels of the trailer into the ditch. (R252) After he had backed the truck up several feet, he then put the tractor in low gear and began to pull forward again. (R252) He saw the Rivera vehicle coming toward him traveling in a westerly direction on Pennyroyal Road. (R252) He testified that he blinked his lights and attempted to blow the horn. (R252) He further testified that it was his opinion that the Rivera vehicle was going 65 to 70 m.p.h. (R263-64) The area was well-lit. (R253-54; 290, 295-96; 316-21) He also testified that there was another vehicle very close behind the Rivera vehicle. (R258)

Edgar Rivera "couldn't see anything until the impact." (R174) Edgar said he was travelling "between 57 and 58 miles" per hour. (R175) The Plaintiff testified that they were in a hurry to check on their father who had been injured. (R217) Edgar did not see any signs warning of trucks entering the highway. (R176) He thought the truck headlights were an oncoming vehicle. (R176) He did not see the lights flash on and off. (R177) According to Edgar, there was no one with a flashlight, no flares, no lighting on the trailer and no visible reflective material on the trailer. (R177-78; 281-82) The truck headlights blocked his view of the trailer which was across the road. (R189)

Plaintiff's expert, Thomas Onions, testified that the logging truck straddling the roadway at night presented a dangerous situation for oncoming traffic. (R201-202) The situation could have been made less dangerous with a flagman, a flashlight, flares, or

reflective triangles, but none of these were present. (R202).

When the Plaintiff's vehicle struck the trailer, the Plaintiff was ejected through the windshield. (R215, 220) Her body hit the trailer and she bounced backwards into the ditch on the side of Pennyroyal Road. (R267) The Plaintiff sustained severe injuries (R215, 216, 437-54). She incurred over $60,000 in medical bills. (R186, 455-92)

ARGUMENT

I. The Court of Appeals did not err regarding the Thirteenth Juror Doctrine.

(A) Standard of Review

It is well settled in South Carolina that an Order granting a new trial based upon questions of fact or upon both questions of law and fact, will not be reviewed by the Appellate Court unless there has been an abuse of discretion in granting the new trial. The South Carolina State Highway Department v. Clarkson, 226 S.E.2d 696 (1976). In South Carolina, a Trial Judge may grant a new trial following a jury verdict under the Thirteenth Juror Doctrine. Lane v. Gilbert Construction Company, Ltd., 383 S.C. 590, 681 S.E.2d 879, 883 (S.C. 2009). "The doctrine entitles the Judge to sit, in essence, as the Thirteenth Juror when he finds the evidence does not justify the verdict, and then to grant a new trial based solely upon the facts." (citations omitted) Id. "As the thirteenth juror, the Trial Judge can hang the jury by refusing to agree to the jury's otherwise unanimous verdict." Id.

(B) The Trial Court did not abuse its discretion in granting a new trial.

In its Order granting the Motion for a new trial, the Trial Court stated, "The only reasonable inference from the evidence presented at the trial of this case is that one or more of the Defendants were at fault in causing the accident that injured the Plaintiff. Further, no

evidence was presented that showed the Plaintiff at fault." (R6)

The trial court did not abuse its discretion in granting a new trial. As the court stated, the only reasonable inference is that at least one, if not both, of the Defendants, were negligent and at fault in causing this wreck. The Trial Court found that there was no reasonable inference of any negligence on the part of the Plaintiff, especially since she was merely a passenger. The court likewise did not find any credible evidence that any nonparty could have been at fault, despite the arguments made by Respondent Rivera.

The Trial Court found this case to be very similar to the case of Howard v. Roberson, 376 S.C. 143, 654 S.E.2d 877 (S.C. App 2007). In Howard, the South Carolina Court of Appeals affirmed the finding of a directed verdict for the Plaintiff on the issue of liability holding that "the evidence presented at trial yielded only one conclusion - that the negligence of at least one driver, if not both, resulted in the accident causing [passenger's] injuries. The trial court did not err in granting a direct verdict on the issue of liability." 654 S.E.2d at 881.

In the Howard case, a following vehicle attempted to pass the front vehicle on a two-lane highway. The front vehicle turned left in its path, resulting in a collision which injured the Plaintiff who was a passenger in the left turning vehicle. The trial court found that there was evidence of negligence on the part of one or both of the Defendants. The trial court instructed the jury that they could find against one or both of the Defendants. The trial court did not give the jury the option of finding in favor of both Defendants. The Appeals Court affirmed the trial court's rationale that both drivers owed a duty to the Plaintiff who was simply a passenger. The only reasonable reference to be drawn from the facts presented was that at least one of the drivers had to be negligent in order for the collision to have occurred.

Likewise, in the present case, the Plaintiff was merely a passenger in one of the vehicles involved in the collision. The court properly struck the Defendant's allegations of comparative and contributory negligence as to the Plaintiff since she was merely a passenger. (R352-53) The court further properly agreed not to charge the jury on the defense of "unavoidable accident." (R364-66) Therefore, since the Plaintiff was not at fault and the accident was avoidable, the only reasonable inference is that the wreck was caused by the negligence of one or both of the Defendants.

(C) Overwhelming evidence of negligence.

The record in this case is filled with evidence of the negligence of the two Defendants. As to the Defendant Edgar Rivera, there was evidence which showed the following:

1. That he was travelling in excess of the speed limit;

2. That he was in a hurry to determine the extent of his father's injuries;

3. That he was an inexperienced driver, driving this particular vehicle for the first time;

4. That he failed to slow down when he saw the headlights of the truck;

5. That he failed to observe and heed signs which warned of trucks entering the highway;

6. That he failed to see the reflective tape on the side of the log loader;

7. That he failed to observe and heed the warning of Defendant Warren Jared Newton as he blinked the truck's headlights and blew the truck's horn;

8. That he failed to see the trailer across the road, even though there was an abundance of light in the area.

Likewise, the record is filled with evidence of the negligence of the Newton Defendants, including but not limited to, the following:

1. In pulling a tractor trailer truck rig out onto a dimly lit country road when they knew that it would take 25 to 30 seconds to pull the truck out and to back it up in order to be in a position to move down the highway;

2. In pulling a tractor trailer truck rig out onto the highway when they knew the trailer to the rig would be completely blocking both lanes for approximately 25 to 30 seconds before they could maneuver the truck into a position to travel down the highway;

3. In failing to post flagmen on either side of the tractor trailer rig when they knew it would take 25 to 30 seconds before the rig would no longer be blocking both lanes;

4. In failing to place any reflective triangular warning signs on the roadway;

5. In failing to place any flairs along the highway;

6. In failing to contact authorities to obtain assistance from the Sheriff's Department in illuminating the area and providing warnings when they knew they would be pulling a dangerous rig into the highway at night;

7. In pulling a dark tractor trailer truck into the highway knowing that it would block the highway for 25 to 30 seconds when they could easily have waited until daylight to perform this function under less dangerous conditions; and

8. In otherwise failing to warn oncoming motorists of a dangerous condition which they had created.

The only reasonable inference from the evidence submitted at trial is that one or both of the Defendants was at fault in causing this wreck.

(D Similar Cases.

Several South Carolina cases support the finding by the Trial Court. The case of Emory v. Piedmont Chemical Company, 242 F.Supp. 344 (D.S.C. 1965), is somewhat similar. In Emory a tractor trailer entered the highway across the southbound lanes. Because

the tractor trailer was old and lacking in power, the driver stopped across the southbound lanes waiting on traffic to pass in the northbound lanes. While he was waiting for traffic to pass, a vehicle being operated in the southbound lanes collided with his truck causing serious injuries to the passenger. The passenger struck the windshield and suffered numerous cuts and lacerations on her face requiring over 200 stitches. The case was heard by District Judge Simons without a jury. Judge Simons ruled that the collision was not the result of the sole negligence of the Plaintiff's driver and that there was no contributory negligence on the passenger's part. The court further ruled that the driver of the truck was negligent per se in violating traffic laws and awarded the Plaintiff what, at that time, was a substantial sum of money for actual damages. The facts of that case which make it particularly instructive are as follows:

1. The Plaintiff was a passenger in an oncoming vehicle which was accused of speeding;

2. The truck driver knew that because of the condition of his vehicle he would not have enough power to accelerate into the northbound lanes without waiting on oncoming traffic;

3. The driver of the truck knew that he would have to stop and completely block the southbound lanes prior to pulling into the northbound lanes thus creating a hazard for oncoming traffic in the southbound lanes.

4. The wreck in Emory occurred at 2:00 p.m. in broad daylight making it much less dangerous than the facts of our case, which occurred at night.

Another South Carolina case which is instructive is Davenport v. U.S., 241 F.Supp. 320 (D.S.C. 1965). That case was brought under the Federal Tort Claims Act. The Plaintiff was a passenger in a vehicle traveling on the highway. An Army truck entered the highway from a serveant highway. Although a military flagman was present to warn traffic of the oncoming truck, he failed to do so. The court stated that "the truck made a sweeping left turn and immediately before the collision, the front wheels of the truck were in the left ditch of Highway S-36-58 and the rear of the truck was diagonally across the highway." Although not stated in the opinion, it would appear that the truck was not able to negotiate the left turn because the front wheels were in the ditch.

Once again, although this case is not squarely on point, it is similar or instructive in the following respects:

1. The wreck in Davenport occurred at approximately 6:30 in the evening in August, indicating that it was still daylight.

2. The front wheels of the truck ended up in the left ditch prior to the collision, indicating that the truck was stopped at the time of the collision.

3. The Plaintiff in Davenport was a passenger with no contributory negligence.

4. The court found that because the truck was blocking the highway, a duty arose to provide adequate warning to other motorists.

Other cases involving stopped vehicles include Suber v. Smith, 134 S.E.2d 404 (S.C. 1964), stating that an operator of a vehicle has "a right to assume that other vehicles would not obstruct the highway unlawfully." 134 S.E.2d at 408; Gray v. Barnes, 137 S.E.2d 594 (S.C. 1946), upholding a verdict against a truck driver whose truck was partially blocking a

roadway at night with his lights shining into oncoming traffic, stating that "the situation was a veritable trap for other traffic." 137 S.E.2d at 598; and Deese v. Williams 118 S.E.2d 330 (S.C. 1961), where the court stated, "the blocking of the highway by the truck gave rise to the duty to provide adequate warning and the discharge of this duty was directly connected with the operation of the truck." 188 S.E.2d at 333. Also instructive is the North Carolina case of Ponder v. National Convoy and Trucking Co., 173 S.E. 336 (N.C. 1934), quoted with approval by the South Carolina Supreme Court in Montgomery v. National Convoy, 186 S.C. 167, 195 S.E. 247, 252 (S.C. 1938). In the Ponder case, the court stated that the Defendant was unable to move his truck and trailer because the wheels had become stuck in the soft shoulder off of the pavement. The court found that the Defendant "owed the duty to the Plaintiff and others approaching the obstruction in the highway, in automobiles or trucks, to exercise reasonable care to warn them of their peril. A failure to perform this duty was negligence." 173 S.E. at 338.

II. The Court did not err in upholding the Trial Court's reliance upon Howard v. Roberson, 376 S.C. 143, 656 S.E.2d 877 (S.C. App. 2007).

The case of Howard v. Roberson does not shift the burden of proof to the Defendant as claimed in the Petitioner's Brief. The Trial Judge found that the only reasonable inference from the evidence was that one of the two Defendants was at fault and that the Plaintiff was not contributorily negligent. In making this determination, the Trial Court weighed the evidence but did not shift the burden of proof. The Plaintiff met her burden of proof that one or both of the Defendants was at fault causing the accident while the Plaintiff herself was not at fault.

CONCLUSION

The Appeals Court was correct in upholding the Trial Court's grant of a new trial. No new issues have been presented by this their Petition.

Respectfully submitted,

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April 29, 2013

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PROOF OF SERVICE

The undersigned certifies that he is employed with the law firm of Kelaher, Connell & Connor, P.C., attorneys for the Respondent Hazel Jeisel River, and that he has served a copy of the RESPONDENT'S RETURN TO PETITION FOR REHEARING on counsel listed below this 29th day of April, 2013.

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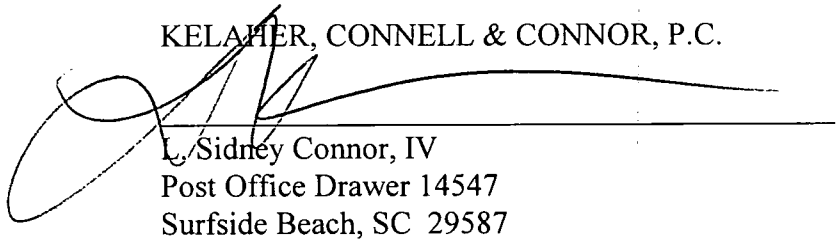

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