THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM ORANGEBURG COUNTY
Court of Common Pleas

George C. James, Jr., Circuit Court Judge

Case No.: 2006-CP-38-0486

Clarence Rutland, as Personal Representative of the Estate of Tiffanie Rutland, ...Petitioner,

v.

South Carolina Department of Transportation, ...Respondent.

Reply Brief of Petitioner

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STATEMENT OF THE CASE

Petitioner adopts and incorporates by reference the Statement of Case and Facts presented in his Initial Brief. The factual history discussed below is limited to reply to the issues raised in the Respondent SCDOT's Statement of the Case.[1]

SCDOT's Statement of the Case concludes that during the wrongful death trial from which this appeal stems there was *no* testimony or evidence of Tiffanie Rutland's conscious pain and suffering. Petitioner concedes that there was no *direct* testimony or evidence of conscious pain and suffering suffered by the Decedent Tiffanie Rutland. However, SCDOT's characterization of the purported absolute dearth of evidence is misleading because the nature of this wreck, the issues of damages, and the temporal questions of whether Tiffanie Rutland suffered conscious pain and suffering and mental and emotional distress prior to her death may be answered affirmatively by reference to inferences and circumstantial evidence in the record. Without dispute, the wreck that killed Tiffanie Rutland was not a simple, immediate "collision." Instead, this wreck was a series of events leading to the vehicle finally crashing into a ditch, with the weight of the Blazer coming to rest on the partially ejected body of the decedent. (See Statement of the Case of Petitioner's Initial Brief for full description of the "collision").

ARGUMENT

I. SCDOT'S ARGUMENTS CONCERNING THE LACK OF PROOF OF CONSCIOUS PAIN AND SUFFERING AND APPLICATION OF THE "PRE-IMPACT FEAR" DOCTRINE ARE UNAVAILING.

As addressed fully in Petitioner's Initial Brief, the Court of Appeals' opinion failed to adhere to and apply the "any evidence" standard applicable under the equitable

[1] Similarly, under the Argument section of this Reply Brief, Petitioner adopts and incorporates by reference those arguments raised in his Initial Brief. For the sake of brevity, Petitioner offers the arguments herein as a limited reply to those issues presented in the Respondent's Initial Brief.

reallocation arguments before it. While there was no *direct* evidence of conscious pain and suffering endured by the decedent Tiffanie Rutland, under the "any evidence" or "mere scintilla" standard, circumstantial evidence certainly exists to support the Petitioner's and settling defendant's allocation of proceeds to a survival action. Fundamental flaws exist within the SCDOT's arguments to support the Court of Appeals' opinion, and to these arguments Petitioner replies briefly in this section.

First, the SCDOT fails to acknowledge that circumstantial evidence is held on equal footing as direct evidence under the "any evidence" standard. Circumstantial evidence is proof of a chain of facts and circumstances indicating the existence of a fact; it is evidence which immediately establishes collateral facts from which the main fact may be inferred. Circumstantial evidence is based on inference and not personal knowledge or observation. State v. Salisbury, 343 S.C. 520, 541 S.E.2d 247 (2001). Circumstantial evidence does not actually establish the fact in question, but it asserts or describes something else from which the jury may reasonably infer the truth of the fact or at least reasonably infer an increase in the probability that the fact is true. Gastineau v. Murphy, 323 S.C. 168, 473 S.E.2d 819 (Ct. App. 1996), rev'd on other grounds, 331 S.C. 565, 503 S.E.2d 712 (1998). For circumstantial evidence to be sufficient to warrant a finding of fact, the circumstances must lead to the fact with reasonable certainty. The facts and circumstances should be considered in light of ordinary experience and common sense, and the existence of a fact cannot be based on speculation, surmise, or conjecture. Holland v. Georgia Hardwood Lumber Co., 214 S.C. 195, 51 S.E.2d 744 (1949). As South Carolina juries are routinely charged, the law makes absolutely no distinction between the weight or value to be given to either direct or circumstantial

evidence. As addressed fully in Petitioner's Initial Brief to this Court, based on the duration and nature of this wreck there is no doubt that a jury could be reasonably certain, based on their collective ordinary experience and common sense, that during the violent unfolding of this collision that Tiffanie was both injured and suffered mental and/or emotional anguish prior to her partial ejection and being crushed by the vehicle. The "any evidence" standard having been met, the equitable reallocation upheld by the Court of Appeals was therefore inappropriate.

Second, SCDOT's arguments concerning the application a "pre-impact fright" tag to mental suffering miss their mark. In South Carolina mental suffering, apprehension, shock, fright, emotional upset, humiliation, and anxiety may be properly considered as an element of damages. Boan v. Blackwell, 343 S.C. 498, 541 S.E.2d 242 (2001). It has been noted that appropriate damages in survival actions include those for medical, surgical, and hospital bills, conscious pain, suffering, *and mental distress of the deceased.* (emphasis added). Scott v. Porter, 340 S.C. 158, 530 S.E2d 389 (Ct. App. 2000). These are well-settled tenets of damages in South Carolina. Nevertheless, SCDOT asserts "slippery slope" arguments which fail to comprehend the limited circumstances where this element of damages has been found proper.

The Petitioner does not seek to create law that would allow parties to recover for emotional turmoil, mental distress, or pre-impact fear that is unaccompanied by physical injury. Based on the facts of this case, it strains logic to conclude that prior to her violent death Tiffanie Rutland did not experience fear, terror, emotional trauma and mental distress not only for her own life, but also that of her family. It likewise strains logic to conclude that prior to her death she was uninjured as this vehicle spun, hit a culvert,

became airborne, and finally landed in a ditch on her partially ejected body. As noted by the numerous jurisdictions who have allowed "pre-impact fear" in survival actions, this element of damages is simply a practical acknowledgement that in limited circumstance where evidence exists from which it is reasonable to conclude that the decedent was aware of imminent injury or death, that decedent has actual emotional or mental trauma. Such emotional trauma and mental distress, followed by the death of the decedent, is already a compensable element of damages under the South Carolina Survival Statute. Application of the label of "pre-impact fright" or fear is simply unnecessary. However, should this Court wish to address the denomination of such mental distress damages in terms of pre-impact fright, compelling authority exists from multiple jurisdictions which should persuade the Court to adopt the element of damages.

Evidence exists in the record which is sufficient to satisfy the "any evidence" standard to determine whether a viable survival cause of action existed. Though the evidence was circumstantial, and though it may have been "weak," it was sufficient. Therefore, the Court of Appeals erred in affirming the trial court's equitable reallocation of settlement proceeds. Moreover, the Court of Appeals' opinion reached beyond the question of whether there was evidence in the record to support the Petitioner's settlement allocations. The Court of Appeals created new law in South Carolina and affirmatively stated that "South Carolina does not recognize 'pre-impact fear' as a cause of action." This is a misstatement of the nature of "pre-impact fear," which would be an element of damages, and a misstatement which certainly needs clarification from this Court in the form of reversal.

II. SCDOT'S ARGUMENTS CONCERNING EQUITABLE REALLOCATION FAIL.

For the reasons stated in Petitioner's previous brief, the Court of Appeals' affirmation of the trial court's equitable reallocation of the settlement proceeds should be reversed. In this limited reply, your Petitioner seeks only to address the arguments by SCDOT under the "one injury" language of Ellis v. Oliver, 335, S.C. 106, 515 S.E.2d 268 (Ct. App. 1999); Vortex Sports & Entertainment, Inc. v. Ware, 378 S.C. 197, 662 S.E.2d 444 (Ct. App. 2008); and S.C. Code Ann. §15-38-50 (2005).

SCDOT's arguments for set-off under the "one injury" rule fails because that theory of set-off addressed in Ellis and Vortex are based upon a statute which does not apply to the SCDOT as a governmental entity or agency. Section 15-38-50 provides the basis for the "one injury" rule and that code section is part of the Uniform Contribution Among Tortfeasors Act, codified at 15-38-10, *et seq*. (2005). S.C. Code Ann. §15-38-65 clearly and unambiguously states that "[t]he Uniform Contribution Among Tortfeasors Act shall not apply to governmental entities." Thus, the "one injury" rule which SCDOT seeks to apply here is unavailable to it. Furthermore, Ellis' treatment of the set-off in that case was based on the 1998 predecessor version of S.C. Code Ann. Section 15-38-50. Thus, the "one injury" rule is a creation of statute and the concept does not apply in this case to the SCDOT, against which all claims are governed by the South Carolina Tort Claims Act.

CONCLUSION

For these reasons, as well as those addressed in the Petitioner's Initial Brief to this Court, the Court of Appeals' Opinion below should be reversed.

Respectfully submitted,

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