THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Diane Schafer Goodstein, Circuit Court Judge

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SC Court of Appeals

Civil Action No. 2010-CP-15-00894
Appellate Case No. 2012-212865

Jake Wright and Theresa Gadsden, as Personal Representatives of the Estate of Jacob Cleveland Wright, and Jake Wright and Theresa Gadsden, individually, ... Respondents,

v.

Colleton County Sheriff's Department, ... Appellant,

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BRIEF OF APPELLANT

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Statement of Issues on Appeal

I. Did the trial court err in denying the Appellant's motions for a directed verdict and judgment notwithstanding the verdict when the negligence, if any, of Deputy McCoy was not the proximate cause of the accident?

II. Did the trial court err in allowing the jury to decide if the Appellant was negligent in hiring Deputy McCoy when the Respondent presented no evidence that the Respondent violated the standard of conduct applicable to a sheriff?

III. Did the trial court err in permitting the jury to consider the testimony of the Respondents' expert witness when his testimony was not sufficiently reliable?

Statement of the Case

On August 31, 2011, Jake Wright and Theresa Gadsden filed this action individually and as Personal Representatives of the Estate of Jacob Cleveland Wright, their son, against the Colleton County Sheriff's Department (the "Department"). (R. p. 7.) The Complaint sought money damages for wrongful death, (R. pp. 8–9), and survival, (R. p. 10, ¶¶ 8–9), and asserted causes of action for negligence, (R. pp. 8–9), and negligent hiring and supervision, (R. pp. 10–12). On September 24, 2010, the Department answered, denying the allegations set forth in the complaint and asserting affirmative defenses. (R. pp. 13–16.) After the parties engaged in discovery, the case proceeded to a jury trial, which was held on March 5–9, 2012.

During their case in chief, the Respondents proposed to offer the testimony of Martin D. Schussel, a mechanical engineer, as an expert. The Department objected by a written motion *in limine*, (R. pp. 180–91), and pursued the issue at trial, (R. p. 73; p. 86, lines 15–16; pp. 105–06). The Respondents proffered the testimony of Mr. Schussel. (R. pp. 73–78.) At the close of his proffer testimony, the Department objected to him testifying as an expert. (R. p. 86, lines 15–16; pp. 91–92.) The trial court overruled the objection. (R. p. 91, lines 10–20; pp. 94–95.)

At the close of the Respondents' case in chief, the Appellant moved for a directed verdict. (R. pp. 119–22; pp. 124–25.) The Court denied the motion. (R. pp. 122–25.)

Following the defense presentation of evidence and after the Respondent rested finally, the Department again moved for a directed verdict. (R. p. 150, lines 13–23.) The Department also asked the trial court to direct a verdict on the issue of negligent hiring, based on the lack of any evidence that the Sheriff violated a standard applicable to law enforcement officers and supervisors. (R. p. 150, lines 20–25.) The trial court denied the motions. (R. p. 151, lines 2–3.)

The jury returned a verdict for the plaintiffs in the amount of $700,000 on the wrongful death claim. (R. p. 152, lines 4–5.) The jury awarded nothing on the survival claim. The trial court permitted the parties 10 days to file post-trial motions. (R. p. 153, lines 12–13, 20–21.)

On March 16, 2012, the Respondents filed post-trial motions. (R. pp. 206–11.) On March 22, 2012, the Department filed post-trial motions. (R. pp. 192–202.) The trial court filed orders on June 25, 2012, (R. p. 1), and June 26, 2012, (R. pp. 2–4). On June 27, 2012, the Appellant filed a motion to alter or amend the trial court's orders, (R. pp. 203–05), and the trial court denied the motion, with the exception of the request to reduce the verdict to

the statutory cap, in an Order filed August 8, 2012, (R. p. 5). The Department served its Notice of Appeal on August 28, 2012.

Statement of the Facts

On January 13, 2009, Rowena Wright, wife of Respondent Jake Wright, received a telephone call that a burglar alarm had been activated at her husband's church, Heavenly Baptist Church. (R. pp. 35–36.) Jake Wright and his two sons, Jacob Cleveland Wright and Timothy Wright, drove to the church. (R. p. 36, lines 4–6.)

Two Colleton County Sheriff's deputies, in separate cruisers, responded to the alarm. (R. p. 62, lines 14–18.) Deputy Scott McCoy received the dispatch when he was on Bell's Highway near I-95, on the far side of Walterboro. (R. p. 45, lines 7–9.) He activated his blue lights and siren, (R. p. 47, lines 18–20), drove through the city and turned onto Green Pond Highway, State Route 303, (R. pp. 46–47). Southbound on Green Pond Highway, he continued to utilize his lights and sirens. (R. pp. 49–50.) After he passed the Ritter Crossroads, he slowed to 70 to 80 MPH. (R. p. 52, lines 7–9.)

Deputy McCoy kept his lights and siren employed until approximately a mile or two from the site of the accident. (R. p. 50, lines 3–8.) Because he was responding to an activated burglar alarm, a call in progress, (R. p. 54, line 7), he turned off his lights and sirens, as he believed suspects could possibly still be at the location and he understood that the Sheriff's Policy

and Procedure allowed him to extinguish audible and visual signals at that point, (R. p. 56, lines 2–15; p. 62, lines 4–9).

Jake Wright and his sons arrived at the Heavenly Baptist Church, checked it out, and found nothing amiss. (R. pp. 30–31.) After waiting for a period of time, they got back in the truck and headed home, (R. p. 27, lines 17–19; pp. 30–31), driving north on Green Pond Highway. Mr. Wright's intention was to turn left off the Green Pond Highway at its intersection with Clover Hill Road to reach the family home. (R. p. 27, lines 17–19.) A map of the intersection is below:[1]

[1] It is proper for this Court to take judicial notice of the location of the State's roads. *See, e.g.*, *Elliott v. Sligh*, 233 S.C. 161, 167, 103 S.E.2d 923, 926–27 (1958) (taking judicial notice of location and population of cities and counties); *State v. Hammond*, 66 S.C. 219, 226–27, 44 S.E. 797, 800 (1903) ("Courts will take judicial notice of the division of the State into counties, their names, their locations with respect to each other, their population as shown by the United States census, the prominent geographical features of the county, the principal water courses and their nature and location, matters of common knowledge and experience in respect to science and the ordinary operation of the forces of nature.").

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SC 29446

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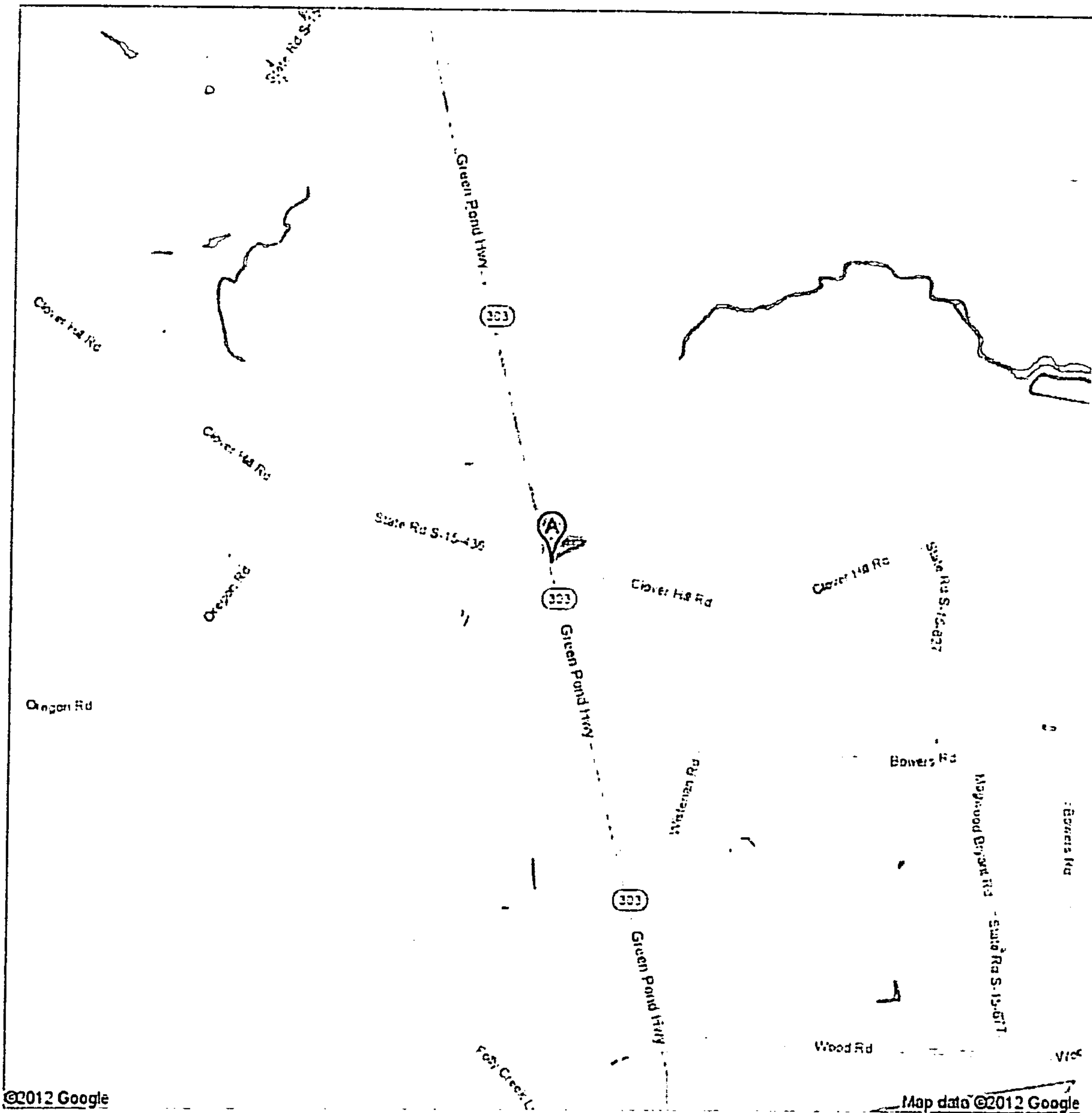

In order to respond to the scene of the activated alarm, Deputy McCoy had to travel through the intersection of Green Pond Highway and Clover Hill Road. (R. p. 50, lines 6–11.) He coasted up the hill toward the intersection. (R. p. 52, line 15.)

Deputy McCoy could see the headlights of Jake Wright's pickup truck coming from the opposite direction. (R. pp. 52–53.) Deputy McCoy saw that the truck appeared to be traveling slowly. (R. p. 71, lines 1–3.) Suddenly, the truck crossed the centerline, into the southbound lane, and turned directly in front of his cruiser. (R. p. 34, lines 10–11.) Jake Wright recalls seeing the lights of the oncoming cruiser, (R. p. 33, lines 13–18), turning in front of the lights, and the sudden impact, (R. p. 34, lines 10–11). He pulled into Deputy McCoy's lane 1.4 seconds prior to impact. (R. p. 132, lines 3–5.) The vehicles collided nearly head-on in Deputy McCoy's lane. (R. p. 144, lines 2–4.) Jake Wright was injured, (R. p. 29, lines 17–24), and his son, Jacob Cleveland Wright, died in the crash, (R. p. 72, lines 15–17).

Sergeant David W. Lee, South Carolina Coastal MAIT, came to the scene, investigated the accident, and supervised the accident reconstruction to ascertain the point of impact and the vehicle speeds prior to impact. (R. p. 142, lines 12–14; p. 143, line 25–p. 144, line 1.) He determined that the impact occurred in Deputy McCoy's lane of travel. (R. p. 144, lines 2–4.) The truck's speed at impact was 24 MPH. (R. p. 144, lines 23–24.) He determined the cruiser's speed to be in the low end of a 62 to 70 MPH range, and in no event greater than 70 MPH. (R. pp. 144–46.)

The Department's expert, Donald Roberts, evaluated the evidence and completed an accident reconstruction. (R. p. 126, lines 19–20.) He determined that the cruiser's speed at impact was in a range of 57 to 65 MPH. (R. p. 131, lines 20–23.)

The Respondents presented the testimony of Martin Schussel, over the Department's objection, (R. p. 86, lines 15–16; pp. 91–92; 94–95), who opined that the cruiser's speed at impact was 83 MPH, (R. p. 108, lines 20–21).

The speed limit was 55 MPH. (R. p. 112, lines 3–4; p. 137, lines 22–23; p. 147, lines 2–20.)

<u>Standard of Review</u>

> When reviewing the trial court's ruling on a motion for a directed verdict or a JNOV, this Court must apply the same standard as the trial court by viewing the evidence and all reasonable inferences in the light most favorable to the nonmoving party. The trial court must deny a motion for a directed verdict or JNOV if the evidence yields more than one reasonable inference or its inference is in doubt.

RFT Mgmt. Co. v. Tinsley & Adams, LLP, 399 S.C. 322, 331–32, 732 S.E.2d 166, 171 (2012) (citations omitted). However, the appellate court must reverse the trial court's ruling where there is no evidence to support the ruling or where the ruling is controlled by an error of law. *Jones v. Lott*, 387 S.C. 339, 345, 692 S.E.2d 900, 903 (2010).

<u>Argument</u>

I. The Department is entitled to judgment as a matter of law on the negligence cause of action because the negligence, if any, of Deputy McCoy was not the proximate cause of the accident.

"Negligence is not actionable unless it proximately causes the plaintiff's injuries." *Bailey v. Segars*, 346 S.C. 359, 366, 550 S.E.2d 910, 914 (Ct. App. 2001). "A negligent act or omission proximately causes an injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." *Id.*

In this case, neither driver was affected by sight distance or obstructed vision. Jake Wright testified that he saw Deputy McCoy's lights at least a quarter-mile away. (R. p. 28, lines 1–4, 9–10; p. 33, lines 2–18.) Deputy McCoy told the jury that he saw the lights of the pickup truck as it arrived at the intersection. (R. pp. 52–53.)

It is undisputed that Deputy McCoy remained in his lane of travel and that the collision occurred within that lane when Jake Wright turned left in front of Deputy McCoy. The Respondents' truck crossed the centerline and traveled directly into the path of Deputy McCoy, leaving the deputy only 1.4 seconds to react. The accident was unavoidable from the standpoint of Deputy McCoy, (R. p. 135, lines 18–24; p. 136, lines 1–2), even though he reacted in 1.2 seconds, faster than the average of 1.5 seconds, by attempting to brake and swerve away from the crash, (R. pp. 134–35). The Department's expert testified that even if Deputy McCoy had been traveling at 55 MPH, the speed limit, the accident was still unavoidable, since, at that speed, the cruiser would have T-boned the truck, making impact with the passenger door instead of colliding nearly head-on. (R. p. 137, lines 2–12.) There is no question that Deputy McCoy had the right of way and the right to occupy the lane in which he was traveling. Neither is there a dispute that the collision occurred within his lane of travel.

This case is an example of the classic trap, as described in *Odom v. Steigerwald*, 260 S.C. 422, 428, 196 S.E.2d 635, 638 (1973), *Blanding v. Hammell*, 267 S.C. 352, 356, 228 S.E.2d 271, 272 (1976), and *Horton v. Greyhound Corp.*, 241 S.C. 430, 438–39, 128 S.E.2d 776, 781 (1962). The holdings in those cases control the instant litigation.

In *Odom*, the plaintiff, Odom, drove his pick-up truck along Hudson Road in a southerly direction. *Odom*, 260 S.C. at 425, 196 S.E.2d at 636. Steigerwald proceeded easterly along St. Augustine Street, which makes a T-intersection with Hudson Road. *Id.* Hudson Road is the favored, or through, street. *Id.* Vehicular traffic entering Hudson Road from St. Augustine Street is required to honor a stop sign before entering Hudson Road. *Id.* Steigerwald attempted to enter Hudson Road from Odom's right. *Id.* The collision occurred after Steigerwald stopped at the stop sign, and then pulled out directly into Odom's lane. *Id.* The collision occurred in Odom's lane as the front of his pick-up truck struck the left front fender of Steigerwald's car. *Id.* Odom applied her brakes as hard as she could, but she was unable to stop before colliding. *Id.* Steigerwald's entire defense was based on the contention that Odom was traveling at an excessive rate of speed and that such speed was a proximate concurring cause of the collision. *Id.* at 426, 196 S.E.2d at 637.

The trial court denied Odom's motion for a directed verdict and declined to grant a motion for a new trial following a verdict for Steigerwald. *Id.* at 424, 196 S.E.2d at 636. The Supreme Court reversed, holding that in failing to grant the motion for a directed verdict and in failing to grant the motion for a new trial, the trial court erred. *Id.* at 428, 196 S.E.2d at 638. The Court held that "[i]t is without legal significance that speed was a contributing factor in placing the pick-up truck at a particular location on Hudson Road when the emergency arose, because the plaintiff had the legal right to occupy that portion of the street." *Id.* at 427, 196 S.E.2d at 637. The Court found it fundamental that before the negligence of a party will defeat the motion for a directed verdict, "it must be made to appear that such negligence contributed to the injury as a proximate cause." *Id.*

The Court ruled, as a matter of law, that Steigerwald's improper driving was a proximate cause of the collision and stated,

> [a]ssuming, without so deciding, that [Odom] was driving at an excessive rate of speed and was negligent, we think, as a matter of law, that such was not a contributing proximate cause. The real cause, the more immediate and efficient cause, was the improper driving conduct of young Steigerwald. By driving his car directly into the path of [Odom's] vehicle when [Odom] was obviously so close to the intersection, young Steigerwald created a trap from which [Odom] could not escape. The lower court should have granted the motion for a directed verdict . . . .

Id. at 428, 196 S.E.2d at 638. The same result must apply here.

In ruling that speed is without legal significance in placing the vehicle at a particular location on the road when the emergency arose, an important factor stressed by the *Odom* court was that the vehicle on the through street had the legal right to occupy that portion of the street. That is exactly the situation in this case. Deputy McCoy had the right of way and had the legal right to occupy the portion of the highway where the collision occurred. Jake Wright did not. His negligence in crossing the centerline and entering the lane of travel rightfully occupied by Deputy McCoy was the proximate cause of the accident.

The trial court should have applied *Odom* to the facts before it. Paraphrasing the holding in *Odom* and applying it to the facts of this case, the trial court should have held that, assuming that Deputy McCoy was driving at an excessive rate of speed and was negligent, such was not a contributing proximate cause, as a matter of law. The real cause, the more immediate and efficient cause, was the improper driving conduct of Jake Wright. By driving his truck directly into the path of the cruiser when the cruiser was obviously so close to the intersection, he created a trap from which Deputy McCoy could not escape. In *Odom*, the Supreme Court held that the lower court should have granted the motion for a directed verdict,

and this Court should hold the same. *Id.*

Blanding, decided several years after *Odom*, also mandates a directed verdict in favor of the Department. *Blanding* was a wrongful death action in which a collision occurred when the decedent attempted to cross over a four-lane highway from a private entrance to a retail store. *Blanding*, 267 S.C. at 355, 228 S.E.2d at 272. The decedent had a clear, unobstructed view in the direction of the defendant. *Id.* The decedent stopped before entering the highway, looked in the direction of the defendant's approaching vehicle and started across the road. *Id.* When the defendant had been about 500 feet from the site of the accident, he observed the decedent stopped and preparing to cross the highway. *Id.* Alerted to the potential threat, he continued on but changed to the inside lane. *Id.* When he saw the decedent's vehicle pull out, the defendant applied his brakes, but was not able to stop. *Id.* The cars collided, resulting in the death of the decedent and substantial damage to the cars. *Id.*

The defendant moved for a directed verdict, and the trial court granted the motion, concluding that the sole proximate cause of the accident was the negligence of the deceased. *Id.* at 355, 228 S.E.2d at 271–72. The plaintiff argued there was evidence that the defendant was negligent in speeding and in failing to keep a proper lookout. *Id.* at 355, 228 S.E.2d at 272. However,

the testimony showed that the decedent pulled directly in front of the defendant when the defendant was but 30 feet away. *Id.* at 356, 228 S.E.2d at 272.

The Supreme Court affirmed. *Id.* at 355, 228 S.E.2d at 272. The court, after citing *Odom*, held that

> [i]n the absence of circumstances alerting the defendant that deceased would recklessly enter the four lane highway from a private parking lot, the defendant could assume he would comply with the statute and exercise caution before entering the highway. Defendant knew the deceased had a clear, unobstructed view of approaching traffic. The defendant had seen him stop and defendant's actions thereafter in changing lanes, checking for traffic approaching an intersection, and not seeing the deceased's vehicle until he was 30 feet away was not evidence of a failure to maintain a proper lookout. As noted in *Guyton v. Guyton*, *supra*, "[a]n automobile may not be controlled by brakes or steering so as to avoid a hazard which becomes apparent for only a 'split second' before the point of impact is reached."

Id. (quoting *Guyton v. Guyton*, 244 S.C. 357, 361, 137 S.E.2d 273, 275 (1964)). The court further noted that

> [t]he trial judge granted defendant's motion for a directed verdict. He concluded the sole proximate cause of this accident was the negligence or contributory negligence on the part of the deceased (appellant). The lower court also held that if the defendant was negligent and his negligence was a concurring cause of the accident "certainly more than half the negligence would be on the part of the plaintiff." We agree that the cause of the accident was the sole negligence of the deceased and affirm the judgment.

Id. at 355, 228 S.E.2d at 271–72.

The facts in *Blanding* are very similar to the facts in this case. Deputy McCoy saw the pickup truck ahead and knew that it was possible the driver would turn left. He had his foot off the gas and was coasting, slowing down. Just as he reached the intersection, the pickup suddenly turned into his lane. With only 1.4 seconds to react, he was unable to avoid the impact. The collision occurred in Deputy McCoy's lane, injuring both drivers and causing severe damage to the vehicles. The result in this case must be the same as in *Blanding*.

Another case illustrative of the same concept is *Horton*. There, the decedent was killed in a head-on collision between a pickup truck, in which he was a passenger, and a Greyhound bus. *Horton*, 241 S.C. at 433, 128 S.E.2d at 778. The plaintiff brought a wrongful death suit against Greyhound and its bus driver. *Id.* The trial court directed a verdict for the defendants, *id.*, and the Supreme Court affirmed. *Id.* at 442, 128 S.E.2d at 783.

In *Horton*, the bus approached the scene of the collision from the north, and the truck approached from the south. *Id.* at 433, 128 S.E.2d at 778. The vehicles collided on a long, sharp curve. *Id.* The centerline of the highway was marked with double yellow lines to indicate no passing. *Id.* At about the apex of this curve, a secondary highway intersected from the

west, or to the right of traffic headed toward Darlington. *Id.* The collision, in which both occupants of the truck were killed, occurred in the intersection. *Id.* Three witnesses who saw the bus prior to and at the moment of impact estimated its speed to be 70 to 80 MPH. *Id.* at 434, 128 S.E.2d at 779. The bus driver testified that as he approached the intersection, at about 50 MPH, he saw a pickup or panel truck stopped in the north bound lane, giving a left turn signal. *Id.* at 435, 128 S.E.2d at 779. As he got closer, he saw a pickup come directly from behind the stopped truck and straight into the path of the bus. *Id.* He braked as hard as he could, but could not avoid the collision. *Id.*

The Supreme Court held that

> [t]he bus driver was required to operate the bus at a speed that was reasonable and prudent under the conditions and to drive at such a speed as to avoid colliding with any vehicle on the highway in compliance with legal requirements and the duty of all persons to use due care. However, he was not required to anticipate that the truck would suddenly turn into his lane of travel and to drive at such a speed as to avoid collision.

Id. at 439–40, 128 S.E.2d at 781–82 (citation omitted). The court noted that, even if the bus had been going the speed limit when the pickup pulled into the bus's lane, the vehicles were already at less than half the of the required stopping distance at that speed. *Id.* at 440, 128 S.E.2d at 782. According, the court held that "the excessive speed of the bus must be regarded as

coincidental rather than as causal. Its mere concurrence with the efficient cause of the collision does not impose liability on the defendants." *Id.* The court found that the plaintiff's evidence tended to establish that the speed of the bus was excessive, but the court found that excessive speed was insufficient to establish a causal connection between it and the occurrence of the collision. *Id.* at 440–41, 128 S.E.2d at 782. Thus, *Horton* also directly supports a directed verdict in favor of the Department.

The trial court based its decision to deny the Department's motion for directed verdict on *Flowers v. South Carolina State Highway Department*, 206 S.C. 454, 34 S.E.2d 769 (1945). (R. p. 120, lines 12–23; p. 123, lines 11–23.) *Flowers* is inapposite to the facts in this case.

In *Flowers*, on a dark night, a Highway Department truck was parked approximately 65 feet from the nearest street light. *Flowers*, 206 S.C. at 457, 34 S.E.2d at 770. The street light was in a thick tree, and there were a number of trees along the street that blocked the light and completely hid the truck. *Id.* The color of the truck was black, and the black asphalt contributed to the vision problem. *Id.* at 457, 34 S.E.2d at 771. On the rear of the truck was a spreader that protruded beyond the body about one foot on each side. *Id.* The driver of Flowers' car collided with the spreader. *Id.*

In affirming the verdict for Flowers, the Supreme Court held that

"[t]he driver of [Flowers'] car, although required to exercise ordinary care in keeping a proper lookout, had a right to assume, in the absence of any circumstances which would reasonably give notice to the contrary, that the street would not be partly blocked with vehicles in violation of the statutory law of the State." *Id.* at 458, 34 S.E.2d at 771. The court went on to state that "[e]very traveler on the highway, exercising due care himself, in the absence of any circumstances which reasonably should put him on notice to the contrary, is entitled to assume, and to act upon the assumption, that others using it in common with him will exercise reasonable care." *Id.* (quoting *Oakman v. Ogilvie*, 185 S.C. 118, 126, 193 S.E. 920, 923 (1937)).

This case has nothing to do with blocked vision or parked vehicles. To the contrary, each driver admitted he saw the other. If anything, the trial court should have read *Flowers* in favor of the Department because there, the driver was "exercising due care himself." *Id.* In contrast, Jake Wright was not exercising due care when he pulled directly into the path of Deputy McCoy's cruiser.

Odom, *Blanding*, and *Horton* control this case. Despite evidence from which the trial court could conclude that Deputy McCoy exceeded the speed limit, the trap created when Jake Wright suddenly drove into Deputy McCoy's lane, leaving him but 1.4 seconds to react, is determinative. This

Court should find that the denial of the Department's motion for directed verdict was in error and reverse.

II. The Department is entitled to judgment as a matter of law on the negligent hiring cause of action.

A. There can be no finding of negligent hiring because the negligence, if any, of Deputy McCoy was not the proximate cause of the accident.

In addition to the cause of action based upon negligence, the Respondents sought damages on a theory of negligent hiring. The Department urges the Court to follow the approach advocated by Justice Pleicones, and hold that without a finding of negligence by an employee, there can be no negligent hiring. *Sabb v. S.C. State Univ.*, 350 S.C. 416, 431–32, 567 S.E.2d 231, 239 (2002) (Pleicones, J., dissenting) (citing *Hays v. Patton-Tully Transp. Co.*, 844 F. Supp. 1221, 1223 (W.D. Tenn. 1993) (negligent supervision claim will lie only where supported by viable claim of tortious conduct by offending employee); *Mulhern v. City of Scottsdale*, 799 P.2d 15, 18 (Ariz. Ct. App. 1990) (in order for employer to be liable for negligent hiring, retention, or supervision, the employee must have committed an actionable tort); *Schoff v. Combined Ins. Co. of Am.*, 604 N.W.2d 43, 53 (Iowa 1999) (the torts of negligent hiring, supervision, or training must include as an element an underlying tort or wrongful act

committed by the employee); *Hogan v. Forsyth Country Club Co.*, 340 S.E.2d 116, 124 (N.C. Ct. App. 1986) (before employer can be held liable for negligently hiring or retaining an employee, plaintiff must prove that the offending employee committed a tortious act resulting in injury to plaintiff); *Gonzales v. Willis*, 995 S.W.2d 729, 739 (Tex. App. 1999) (plaintiff-employee's negligent hiring, retention, and supervision claims against employer failed where plaintiff-employee failed to show actions of offending employee amounted to an actionable tort); *Haverly v. Kaytec, Inc.*, 738 A.2d 86, 91 (Vt. 1999) (the tort of negligent supervision must include as an element an underlying tort or wrongful act committed by the employee)).

B. The Respondents presented no evidence that the Department violated the standard of care applicable to a sheriff in hiring Deputy McCoy.

In a cause of action alleging that a professional was negligent in the performance of his or her duties, the plaintiff must prove that the professional failed to conform to generally recognized and accepted practices in the profession, and if the plaintiff cannot meet this burden, then the professional cannot be found liable as a matter of law. *City of York v. Turner-Murphy Co.*, 317 S.C. 194, 196, 452 S.E.2d 615, 616–17 (Ct. App. 1994). The Respondents chose their defendant and their theories of

recovery. It was, therefore, incumbent upon them to prove every element of their theory.

In suing the Colleton County Sheriff for negligent hiring, they made claims that the Sheriff's decision in hiring Deputy McCoy was grossly negligent. There was no proof at trial, however, as to the standard governing the Sheriff, no proof that the Sheriff's actions breached any duty, and no proof that the Sheriff even owed a duty to the Respondents. The burden is on the plaintiff to show a duty of care was owed to him. *Tanner v. Florence County Treasurer*, 336 S.C. 552, 561, 521 S.E.2d 153, 158 (1999). The Respondents' failure to identify, meet, and satisfy their burden should have resulted in a directed verdict. The trial court's denial of Appellant's motion for a directed verdict constitutes reversible error.

"[P]ublic officials are not liable to individuals of the public for negligence in discharging their statutory obligations." *Platt v. CSX Transp., Inc.*, 388 S.C. 441, 446, 697 S.E.2d 575, 577 (2010). However, the Respondents allege that the Sheriff beached a duty owed to them under the common law by negligently hiring Deputy McCoy. The Sheriff testified about the procedures he followed in vetting potential deputies, and, in particular, Deputy McCoy. (R. pp. 37–42.) This was the only evidence presented on the issue. The Respondents offered no testimony as to the

requirements of a Sheriff in the hiring process. And no witness testified that the procedures employed by the Colleton County Sheriff were lacking or deficient in any regard. Without establishing the standard, and in the face of no evidence that the Sheriff departed from any standard, the Respondents' case fails.

Indeed, the cause of action against the Sheriff for negligent hiring could only be proved by the testimony of an expert. The Sheriff testified that his office checks an applicant's national criminal history, local criminal history, references, work records from previous employment, local judgments, and driving record. (R. pp. 23–24.) If, as part of their investigation, the staff finds things that would disqualify an applicant from employment, those applicants are turned away. (R. pp. 25–26.) Once an application hits the Sheriff's desk, his staff has fully checked the applicant, leaving the final decision to the Sheriff. (R. p. 37, lines 10–16.)

In Deputy McCoy's case, the Sheriff hired Deputy McCoy as a regular deputy, (R. p. 38, lines 13–15), only after Deputy McCoy had spent a period of time as a reserve deputy, (R. p. 38, lines 2–3). The Sheriff told the jury that his office runs a full criminal records check on the individual, civil records check, whatever is available. (R. p. 38, lines 22–23.) He testified that he has his staff check references, the driving record, the reputation of

the applicant, as far as getting along with other people, whether the applicant is involved in something either religiously or otherwise that might cause him not to perform his duty as required by law. (R. p. 39, lines 9–13.)

Importantly, the Respondents offered not one bit of testimony to establish the procedure that a law enforcement supervisor should utilize when screening and hiring police personnel. Nor did they offer any testimony critical of the process utilized by the Sheriff. Accordingly, the Respondents failed to establish the standard of performance. Without an established standard, there can be no proof that the Sheriff was negligent in hiring Deputy McCoy. But, even more to the point, the Respondents offered no testimony to say that the Sheriff's hiring was deficient. For these reasons, the trial court should have directed a verdict for the Department. The trial court's failure to do so was error.

Expert testimony is normally required in a professional negligence action to establish both the standard of care and the defendant's failure to conform to that standard. *Hatfield v. Van Epps*, 358 S.C. 185, 192, 594 S.E.2d 526, 529 (Ct. App. 2004). This is so not only in cases alleging medical negligence, but in all cases alleging that the defendant breached a professional duty. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact

in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE; *see also Gilliland v. Elmwood Props.*, 301 S.C. 295, 300–01, 391 S.E.2d 577, 580 (1990) (dealing with architects); *Shelton v. LS&K, Inc.*, 374 S.C. 294, 297, 648 S.E.2d 307, 309 (Ct. App. 2007) (holding that expert testimony is required to establish both the standard of care for design and construction of a parking lot, and deviation therefrom); *Folkens v. Hunt*, 290 S.C. 194, 200, 348 S.E.2d 839, 843 (Ct. App. 1986) (holding that a public accountant's standard of care and departure therefrom must be established by expert testimony).

South Carolina law is clear that where negligence is alleged, and the defendant is someone other than a member of the general public, expert testimony will usually be necessary to establish both the standard of care and the defendant's departure therefrom, unless the subject matter is within common knowledge and experience, so that no special learning is needed to evaluate the conduct of the defendant. *See Hoeffner v. Citadel*, 311 S.C. 361, 365, 429 S.E.2d 190, 192 (1993).

In this case, the Respondents fell short of their burden to demonstrate that the Sheriff was negligent in hiring Deputy McCoy, an easy requirement to satisfy. *Heyward v. Christmas*, 357 S.C. 202, 206–07, 593 S.E.2d 141,

143 (2004) (setting forth the elements of the case by calling a witness as an expert in law enforcement); *Summers v. County of Charleston*, No. 2:10-cv-3291-RMG, 2012 U.S. Dist. LEXIS 129212, at *7 (D.S.C. June 13, 2012) (finding that the witness's limited experience as a law enforcement officer, coupled with his educational and professional experience, qualified him to offer expert testimony).

III. The trial court erred in permitting the jury to consider the testimony of the Respondents' expert witness.

"Expert testimony may be used to help the jury to determine a fact in issue based on the expert's specialized knowledge, experience or skill and is necessary in cases in which the subject matter falls outside the realm of ordinary lay knowledge." *Watson v. Ford Motor Co.*, 389 S.C. 434, 445, 699 S.E.2d 169, 175 (2010). In South Carolina, the proper analysis for determining admissibility of expert testimony is under the South Carolina Rules of Evidence. *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. The trial court must make three preliminary findings pursuant

to Rule 702 before the jury may hear expert testimony.

First, the trial court must find that the subject matter is beyond the ordinary knowledge of the jury, thus requiring an expert to explain the matter to the jury. *Watson,* 389 S.C. at 446, 699 S.E.2d at 175. The Department agrees that accident reconstruction and post-collision determination of the speed of a motor vehicle is beyond the ordinary juror's knowledge and requires expert testimony.

The second preliminary finding the trial court must make is that the expert has acquired the requisite knowledge and skill to qualify as an expert in the particular subject matter. *Id.* The Department agrees that Mr. Schussel has acquired the requisite knowledge and skill to qualify as an expert in accident reconstruction.

The third preliminary requirement is that the trial court must evaluate the substance of the testimony and determine whether it is reliable. The trial court listened to the proffered testimony and committed reversible error in allowing the jurors to hear Mr. Schussel's opinions. The Department moved the trial court to exclude the testimony, (R. p. 86, lines 15–16; p. 92, lines 13–17; p. 105, line 4; p. 128, lines 19–23), and the trial court overruled the objection, (R. p. 91, lines 10–20; p. 105, line 24).

The *Watson* case is an excellent guide that the trial court should have

followed. There, the witness, proffered as a cruise control expert,

> testified that he had worked in the automotive industry as a trainer, consultant, software developer, and writer since the early 1980s and was currently conducting seminars to train automobile technicians who focus on the brake systems in vehicles. On cross-examination, he admitted that he had no professional experience working on cruise control systems prior to this litigation. He also admitted that he had not conducted any comparison of the [vehicle's] cruise control system to any other system and acknowledged that he had never taught or published papers on cruise control systems.

Watson, 389 S.C. at 447, 699 S.E.2d at 176. The trial court qualified him as an expert, however, and allowed him to testify. *Id.*

On appeal, the Supreme Court found no evidence to support the trial court's qualification of him as an expert on cruise control systems. *Id.* at 448, 699 S.E.2d at 176. The court found that he had no knowledge, skill, experience, training, or education specifically related to the subject testimony. *Id.* It appeared to the court that the witness merely studied the cruise control system just before trial. *Id.* The court held that

> [w]hile [the witness] may have been qualified as an expert in other aspects of automobile components, such as the brake system, the trial court failed to properly evaluate [his] qualifications specific to cruise control systems. . . . Accordingly, we hold that the trial court erred in qualifying [the witness] as a cruise control expert.

Id. The result must be the same for the Respondents' expert testimony in this case.

The court in *Watson* identified the factors that trial courts should consider when determining whether scientific expert evidence is reliable: (1) publications and peer review of the technique; (2) prior application of the method to the type of evidence involved in the case; (3) quality control procedures used to ensure reliability; and (4) consistency of the method with recognized scientific laws and procedures. *Id.* at 450, 699 S.E.2d at 177 (quoting *Council*, 335 S.C. at 19, 515 S.E.2d at 517). In this case, Mr. Schussel did not satisfy any of the requirements, and the trial court's decision permitting him to testify was in error.

Mr. Schussel admitted that he did not go to the scene of the crash, did not identify the point of impact, and did not take any measurements; instead, he relied on measurements taken by others without verifying their accuracy or methods, and he conceded that he uses a computer program that performs his calculations and generates a spreadsheet to automate the process of his particular accident reconstruction. (R. p. 79, lines 3–13; p. 89, lines 1–11.) The method he used in this case was developed internally by his company, but he does not always utilize the program in his work. (R. pp. 79–80.) Rather than being subject to verification or independent testing to determine its accuracy and quality, Mr. Schussel's his is "internally qualified," meaning that he and his partners check it in-house, (R. p. 80, lines 4–8), but

they do not permit access to their work (R. p. 82, lines 6–16.)

The system that Mr. Schussel and his firm developed and that he utilized in this case has never been published or critiqued. (R. p. 80, lines 16–22.) In fact, he has not published it, or anything else, and does not intend to. (R. p. 82, lines 3–5.) In sum, he can point to no publications, there has been no peer review of the technique, and he has no intention of subjecting his work for review. (R. p. 81, lines 6–8.) It cannot be said that his testimony satisfies any of the *Watson* prerequisites. His one prior application of the method is subject to the same criticisms. There is no way to verify that he followed recognized scientific laws and procedures.

Additionally, there is no way to determine what, if any, quality control procedures Mr. Schussel used to ensure reliability, since he used only one approach to come up with his determinations in this case. (R. pp. 82–83.) Similarly, it is impossible to discern and evaluate the consistency of the method he used by comparing it with recognized scientific laws and procedures. Other than one prior use of his method, there was no testimony about any prior application of the method to the type of evidence involved in the case.

Without access to the program, and faced with a total paucity of exposure to outside review, there is no way for the trial court to determine

that Mr. Schussel's opinion was reliable. An excellent indication that his result is not reliable is the wide variation of his result from the determinations of both the Department's expert and the independent reconstruction completed by Sergeant Lee of the MAIT. Both calculated the cruiser speed to be within a range at least 15 MPH lower than Mr. Schussel's absolute number.

Further undermining the result offered by Mr. Schussel is the unreliability of the underlying information he used to come up with his opinion. He cannot demonstrate adequate quality control procedures to ensure the trial court that his work is reliable when neither he nor any of his staff performed any of the information gathering and measuring work. He did not visit the site of the accident and, therefore, did not make any personal observations or collect any data, take any measurements or perform any tests in the field, (R. p. 89, lines 1–11), as was done by both Sergeant Lee, (R. p. 142, lines 10–14), and the Department's expert, (R. p. 127, lines 20–21). Mr. Schussel relied entirely on a hodgepodge of data gleaned from reading the MAIT report and from dissecting the work of the Department's expert. The Department has no question as to the data its own expert collected, since that same expert utilized and independently verified the accuracy of his work. The same cannot be said of Mr. Schussel. Neither his

work with the computer program nor his results have the requisite indicia of reliability. It was error for the trial court to permit him to testify.

The trial court heard all of the testimony about the proffered expert, including the opinions the Respondents wished him to provide, outside the presence of the jury. The trial court should have applied the *Watson* factors and excluded the testimony. As proponent of the evidence, the burden fell on the Respondents to satisfy the foundation requirements. *Clark v. Cantrell*, 332 S.C. 433, 449, 504 S.E.2d 605, 614 (Ct. App. 1998). Because they did not do so, it constituted prejudicial error to admit the testimony.

Conclusion

Based upon the evidence presented at trial, the law and argument presented in the Department's post-trial motions, and the arguments set forth above, this Court should reverse.

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Respectfully submitted,

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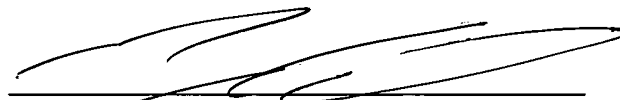
By: 

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May 10, 2013
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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM COLLETON COUNTY
Diane Schafer Goodstein, Circuit Court Judge

Civil Action No. 2010-CP-15-00894
Appellate Case No. 2012-212865

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v.

Colleton County Sheriff's Department .... Appellant

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CERTIFICATE OF COUNSEL

I certify that the Brief of Appellant and Reply Brief of Appellant comply with Rule 211(b), SCACR. 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.

[SIGNATURE PAGE FOLLOWS]

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May 10, 2013
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I am a legal assistant at Griffith, Sadler & Sharp, P.A., and on May 13, 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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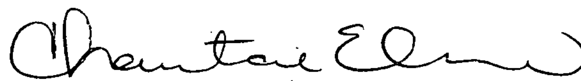

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