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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2023-000718
Circuit Court Case No. 2019-CP-10-00061

Darleen Rash, Individually and as Personal Representative for the Estate of Bronson Harley Rash, ...Appellant-Respondent,

vs.

Dominion Energy South Carolina, Inc., f/k/a South Carolina Electric & Gas Company; Anthony M. Akbar; and Paul Quattlebaum, ... Respondents-Appellants.

RESPONDENT-APPELLANT DOMINION ENERGY SOUTH CAROLINA, INC., F/K/A SOUTH CAROLINA ELECTRIC & GAS COMPANY'S INITIAL BRIEF AS RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

Did the trial court properly allow the jury to watch a video demonstration of the accident scene that accurately depicted conditions on the date of the accident?

SUGGESTED ANSWER: *Yes.*

Did the trial court properly exclude the expert testimony of Paul McCullough due to his lack of qualifications to render an opinion as to sight lines in this automobile accident?

SUGGESTED ANSWER: *Yes.*

Did the trial court properly deny Plaintiff's motion for judgment notwithstanding the verdict under the "thirteenth juror" doctrine?

SUGGESTED ANSWER: *Yes.*

Should the Court affirm as to DESC where the trial court excluded evidence of citations issued by the City of North Charleston to Defendants Mr. Akbar and Mr. Quattlebaum (but not to DESC)?

SUGGESTED ANSWER: *Yes.*

STATEMENT OF THE CASE

A. Procedural History

This case went to trial in the Circuit Court of Charleston County from March 20, 2023, to April 4, 2023. Plaintiff Darlene Rash ("Plaintiff"), individually and as Personal Representative of the Estate of Bronson Harley Rash ("Mr. Rash"), presented her case against Defendants. Ultimately, the jury returned a verdict in favor of the Defendants: (a) Respondent-Appellant Dominion Energy South Carolina, Inc., f/k/a South Carolina Electric & Gas Company's ("DESC"); (b) Respondent-Appellant Anthony M. Akbar ("Mr. Akbar"); and (c) former[1] Respondent-Appellant Paul Quattlebaum ("Mr. Quattlebaum"). The trial judge denied Plaintiff's post-trial motions, and Plaintiff filed the instant Notice of Appeal.[2] For the reasons set forth herein, this Court should reject Plaintiff's arguments and affirm the trial court's verdict and other rulings against Plaintiff.

B. Allegations of the Complaint

Plaintiff provided the following synopsis of her claims in her Amended Complaint:

> On the evening of February 19, 2017, Bronson Rash was traveling North on Meeting Street Road in North Charleston, South Carolina, on his 2017 BMW Motorcycle heading to work at Charleston County EMS. At or about the same time, Daniel McJunkin was traveling on Hedgewood Street and approaching a stop sign at the intersection of Meeting Street. At some point, and unexpectedly to Rash, Mr. McJunkin pulled directly in front of Rash on Meeting Street Road while attempting to make a left turn. Unfortunately, McJunkin pulled out in front of Rash at a time where it was impossible for Rash to brake or avoid McJunkin's vehicle and as a result, Rash's motorcycle and McJunkin's vehicle made contact causing Rash to go airborne and suffer severe fatal injuries. Additionally, several issues existed with regard to the design of the intersection, the placement of utility poles surrounding the intersection, overgrown shrubbery obstructing motorists' line of sight, parked vehicles and other visual impediments. Tragically, as a result of Defendants' failures, Bronson Rash lost his life.

---

1 Mr. Quattlebaum is no longer a party to this appeal.

2 DESC also filed a Notice of Cross-Appeal, relating solely to the denial of its motions for directed verdict. Should the Court find that any of Plaintiff's arguments on appeal have merit, it should still affirm as to DESC because the trial judge should have entered a directed verdict for it.

(*See* Pl.'s Am. Compl., at 3-4). Plaintiff alleges that "[Mr.] McJunkin's sight was restricted and/or impaired by a fence, utility poles, vegetation, illegally parked vehicles and roadway curvature." (*See* Pl.'s Am. Compl. ¶ 17). She asserts that Defendants had a duty regarding "the location, positon (sic), and size of structures or other obstructions," "utility poles," and other alleged obstructions. (*See* Pl.'s Am. Compl. ¶ 18(a) & (e)).

Plaintiff asserted wrongful death and survival claims against DESC alleging negligence in the following respects:

a. In creating a dangerous and defective condition by installing utility poles in a defective and dangerous manner;

b. In allowing a dangerous and defective condition to exist that is reasonably foreseeable to cause injuries to motorists;

c. In failing to take precautions to reduce the risk of injury to Plaintiff and other motorists;

d. In permitting and allowing this dangerous and defective condition to exist after Defendant Dominion knew or should have known that the condition was present and hazardous to Plaintiff and other motorists;

e. In having actual and constructive notice that the subject location as designed and maintained created and unreasonable risk of harm to motorists;

f. As a direct and proximate consequence of the carelessness, recklessness, and negligence of Defendant Dominion, Plaintiff Bronson Rash was killed.

(*See* Pl.'s Am. Compl. ¶ 20).

C. The Accident

Plaintiff's claim against DESC is that two utility poles blocked Mr. McJunkin's view as he attempted to turn left from Hedgewood Street onto Meeting Street Road heading south. (*See id.* ¶ 17; Tr. Transc., at 160:11-161:17). Plaintiff claims these poles prevented Mr. McJunkin from seeing the motorcycle Mr. Rash operated heading north on Meeting Street Road.

Daniel McJunkin drove his Toyota Tacoma truck on Hedgewood Street in Charleston with his wife and son. (*See* Tr. Transc., at 270:13-271:15). He came to a stop sign where

Hedgewood Street intersected Meeting Street Road. (*See id.* at 271:11-273:13). He was turning left onto Meeting Street Road, when Mr. Rash's motorcycle, moving northbound on Meeting Street Road, struck his vehicle. (*See id.* at 273:16-274:17). Mr. Rash sustained fatal injuries in the accident. (*See* Pl.'s Feb. 28, 2019 Am. Compl., at 3).

The photo below depicts the view heading north on Meeting Street Road (with the double yellow line), where Mr. Rash operated his motorcycle around the curve toward the scene of the accident (Hedgewood Street is on the right hand side of Meeting Street Road in the picture):

(*See* DESC Tr. Ex. 50). The two utility poles in the upper center of this photograph form the basis for Plaintiff's claims against DESC (the "Poles").

The following photo depicts the view from Hedgewood Street (from whence Mr. McJunkin attempted to turn left) looking southbound down Meeting Street Road:

(*See* DESC's Tr. Ex. 15). Two red arrows identify the Poles at issue.

The following photo gives an elevated view of the accident scene:

(*See* DESC Tr. Ex. 5).

ARGUMENT

A. Standard of Review

1. Evidentiary Rulings.

"Qualification of an expert and the admission or exclusion of his testimony is a matter within the sound discretion of the trial court. Similarly, the admission or exclusion of evidence in general is within the sound discretion of the trial court. In both instances, the trial court's decision will not be disturbed on appeal absent an abuse of discretion." *Fields v. Reg'l Med. Ctr.*, 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006); *accord Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 192, 407 S.E.2d 630, 632 (1991) ("[A]bsent [a] clear abuse of discretion amounting to an error of law, the lower court's ruling will not be disturbed on appeal.") (citation omitted). "The standard of review for evidentiary rulings is very deferential." *In re Bilton*, 432 S.C. 157, 161, 851 S.E.2d 442, 444 (Ct. App. 2020).

"'[T]o reverse a case based on the erroneous admission or exclusion of evidence, prejudice must be shown.'" *First Citizens Bank & Tr. Co. v. Park at Durbin Creek*, 419 S.C. 333, 339, 797 S.E.2d 409, 412 (Ct. App. 2017) (*quoting Commerce Ctr. of Greenville, Inc. v. W. Powers McElveen & Assocs., Inc.*, 347 S.C. 545, 559, 556 S.E.2d 718, 725 (Ct. App. 2001)).

2. Motion for New Trial Under the "Thirteenth Juror" Doctrine.

"An order denying a new trial on this theory will hardly ever be reversed." *Burke v. AnMed Health*, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011) (emphasis added). "'A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law.'" *Folkens v. Hunt*, 300 S.C. 251, 254-55, 387 S.E.2d 265, 267 (1990) (*quoting South Carolina State Highway Department v. Clarkson*, 267 S.C. 121, 226 S.E.2d 696 (1976)); *accord Trivelas v. South Carolina Dep't of Transp.*, 357 S.C. 545, 553, 593 S.E.2d 504, 508 (Ct.

App. 2004). This Court's "review is limited to the consideration of whether evidence exists to support the trial court's order." *See Folkens v. Hunt*, 300 S.C. at 255, 387 S.E.2d at 267.

"'[T]o reverse the denial of a new trial motion under [the thirteenth juror doctrine the Court,] must, in essence, conclude that the moving party was entitled to a directed verdict at trial.'" *Curtis v. Blake*, 392 S.C. 494, 500, 709 S.E.2d 79, 82 (Ct. App. 2011) (*quoting Parker v. Evening Post Publ'g Co.*, 317 S.C. 236, 247, 452 S.E.2d 640, 646 (Ct. App. 2001)).

B. The Trial Court Did Not Err in Allowing the Jury to View the Video Demonstration Presented During the Testimony of DESC's Expert, Mike Sutton.

1. The Trial Judge Did Not Abuse Her Discretion in Allowing the Jury to View the Videos as Demonstrative Evidence.

a. The Nature of the Videos.

Plaintiff requests reversal on the grounds that "[d]uring the testimony of defense expert, Mike Sutton, two videos were played to the jury, over the objection of the Appellant, to allegedly demonstrate the line of sight from Mr. McJunkin's view point." (*See* Pl.'s Appellant Br., at 4). She first objects that "[t]he videos are based, to a great degree, on speculation, and are not relevant without a proper factual underpinning." (*See id.* at 5). She further argues that the videos did not fairly and accurately represent the accident scene. (*See id.* at 5-10). She finally asserts that the trial court erred in showing the videos to the jury because the danger of unfair prejudice, confusion of the issues, or misleading the jury substantially outweighs their probative value. (*See id.* at 10-11). For the reasons that follow, the trial judge properly allowed the jury to watch these demonstrative videos.

Defendants presented the expert witness testimony of Michael Sutton at trial. Mr. Sutton testified that he has investigated at least 2,500 to 3,000 automobile accidents. (*See* Tr. Transc., at 2151:16-19). He has testified in South Carolina courts "as an expert in accident reconstruction and mechanical engineering" approximately 20 times. (*See id.* at 2153:2-8). Overall, he has testified as an expert in about 180 trials. (*See id.* at 2166:13-17). The trial judge concluded that Mr. Sutton "clearly is qualified as an expert in the field of mechanical engineering and accident

reconstruction based on Rule 702 and its progeny of cases that have interpreted the rule." (*See id.* at 2168:25-2169:7).

During his testimony, Mr. Sutton showed the jury a video that he created of the accident scene on the same day of the year and same time of day as the accident, which demonstrated his opinions concerning the view available to Mr. McJunkin at the time of the accident. Mr. Sutton testified to the jury:

> Q. Mike, before we broke, we had started talking about a video that you had had taken at the scene of this accident. Would you describe for the jury just in your own words what you had done? And then we'll look at it.
>
> A. Okay. So the idea that I had, since there's a question about the sight distance, maybe the best way to show the sight distance would be to put yourself in the position of Mr. McJunkin. So we put a pickup truck on Hedgewood at a place where you could see and then had a motorcycle drive around the curve. And that's what we did.
>
> To set that up, we chose the anniversary date of the accident, so February 19 of 2023. A couple of engineers and personnel from my company went down to the accident site and set up this reconstruction and videoed it.
>
> And what was used was a 2011 Toyota Tundra, which is very similar to the 2014 that Mr. McJunkin was driving, just slight differences but it's the same size. And for the purposes of shooting a video, it was well suited for the exercise.
>
> And then a videographer was in the passenger seat with two video cameras at the face of the driver, so to give you a driver's-eye view of the approach of the motorcycle. These are very high-quality cameras, very expensive cameras. This professional photographer -- he doesn't work for my company, but he's a company that I work with -- took the video. . . .
>
> So what we did -- we also did a few things since we're taking this video in 2023 and the accident was in 2017. In a post processing of the video, we did a couple things. One, we made sure the speed was correct. So the motorcycle drove through the curve and through the intersection on the night of the anniversary at a speed. And what we did was we – in post processing we just made sure that the video was playing at the correct speed. So we did two speeds. We did 35 miles per hour and 55 miles per hour.
>
> Also what we did is, through some software, we added vegetation to the fence that was not there in 2023 but existed in 2017, as you've seen in the

> pictures. And the idea there was -- and what I want to show from this video is just, you know, visibility is pretty straightforward because you're just looking at a light coming at you, which would be the headlight of the motorcycle.
>
> And just to get an idea, as I've said before, it's my opinion that from a place where you pull up and where you can see at the intersection, you've got five or six seconds of sight distance. And I wanted to show what that looked like, so the purpose of this video was to demonstrate that part of my opinion.

(*See* 2335:25-2338:6).

Initially, the videos are not "computer animations," as Plaintiff suggests. They are actual videos of actual vehicles at the actual scene of the accident (on the same day of the year and approximately the same time as the accident). Mr. Sutton made some adjustments to the videos to make them even more accurate, but they are not mere animations or simulations. They are depictions of the actual accident scene under similar conditions, not a reproduction thereof. Moreover, the videos do not purport to show how the accident occurred and do not depict any actual collision. They merely demonstrate Mr. Sutton's opinions in this case concerning the amount of visibility available to Mr. McJunkin on the night of the accident.

Mr. Sutton made the videos on February 19, 2023 — the same calendar date as the accident — and at approximately the same time as the accident, to mimic the dusk lighting. (*See* Tr. Transc., at 2338:7-21). The trial judge showed the jury the videos (marked for identification[3] as Defendant Akbar's Exhibits 94 and 95), and Mr. Sutton testified about how they demonstrated and explained his opinions. (*See* Tr. Transc., at 2339:17-2344:10). Mr. Sutton opined to the jury that the sight lines at the accident scene complied with relevant standards:

> [W]e looked at the sight line from different perspectives on Hedgewood to the center of the lane.
>
> And as I said before, depending on where you pull up, if you pull up short of the road, you might be, say, 3 feet short of the road, then it's 300 feet of sight distance. If you pull up to that AASHTO position which is where AASHTO says most people are going to stop, it's 250 feet to the center of the road. . . . If you're at the -- where the stop bar was on the day of the wreck, then it's 210 feet, but

---

[3] The videos were not actually admitted into evidence.

> you'd be back behind that telephone pole that's nearest to the intersection. And so what I did there is then I looked at – of course, I looked at standards. Again, you heard this 390 feet, which comes from AASHTO. However, if you read AASHTO, they say for purposes of avoiding collisions -- er, seeing vehicles and avoiding collisions, you don't necessarily need the 390. You need the stopping sight distance for the roadway. And for this roadway, that's 250 feet.
>
> So if you read what AASHTO tells you at this intersection, as far as from avoiding collisions, then the 250 feet would be satisfactory.

(*See* Tr. Trans., at 2190:18-2192:8). However, he did not rely upon the videos to formulate those opinions. Rather, he conducted his own independent analysis. He merely arranged for the creation of the videos to help visually demonstrate his opinions about Mr. McJunkin's line of sight to the jury. Plaintiff has not argued that the videos contradicted Mr. Sutton's expert testimony; in fact, they accurately support those opinions.

b. <u>The Videos Were Appropriate Demonstrative Evidence.</u>

"Demonstrative evidence includes items such as a photograph, chart, diagram, or video animation that explains or summarizes other evidence and testimony. Such evidence has secondary relevance to the issues at hand; it is not directly relevant, but must rely on other material testimony for relevance." *Clark v. Cantrell*, 339 S.C. 369, 383, 529 S.E.2d 528, 535 (2000), *quoted in Hamilton v. Reg'l Med. Ctr.*, 440 S.C. 605, 629-30, 891 S.E.2d 682, 695 (Ct. App. 2023)). "Demonstrative evidence is distinguishable from exhibits that comprise 'real' or substantive evidence, such as the actual murder weapon or a written document containing allegedly defamatory statements." *Id.* "'[T]he standard for merely showing or exhibiting demonstrative evidence . . . would not be higher than the standard for actually admitting demonstrative evidence.'" *Gibson v. Wright*, 403 S.C. 32, 37-38, 742 S.E.2d 49, 52 (Ct. App. 2013) (*quoting Davis v. Traylor*, 340 S.C. 150, 156-57, 530 S.E.2d 385, 388 (Ct. App. 2000)).

Plaintiff relies heavily on the Supreme Court's decision in *Clark v. Cantrell*, 339 S.C. 369, 529 S.E.2d 528 (2000), which — unlike this case — involved computer animation purporting to show how an accident actually occurred. The trial judge refused to allow the animation to be shown to the jury, because it did not accurately reflect the testimony of witnesses

and reconstruction experts. Although the Supreme Court affirmed the exclusion of the animation, it held that such animations *could* be admissible under proper circumstances:

> Despite the dangers, computer animations can serve worthwhile purposes if screened carefully and admitted cautiously. We hold that a computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901, SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE. [Citations omitted.]

See id., 339 S.C. at 384, 529 S.E.2d at 536.

The Supreme Court held that the proponent had properly authenticated the computer animation, which was relevant. However, it excluded the animation because it did not fairly and accurately reflect the evidence (particularly the testimony of the witness who proffered the animation and his expert):

> The animation did not accurately reflect the initial position of Anderson's car as Cantrell[, the proffering witness,] described it in her testimony. A portion of the animation also made it appear that Anderson's car pulled directly in front of Cantrell's car when Cantrell was almost upon it. Cantrell's expert witness, however, testified Cantrell could have first seen Anderson's car some distance back from the point where Cantrell's car initially was positioned in the animation.

See id., 339 S.C. at 387, 529 S.E.2d at 538. Because of this, the Court also concluded that "the probative value of the animation did not substantially outweigh the danger of unfair prejudice and misleading the jury due to the inaccuracies it contained." *See id.*

Clark is distinguishable from this matter in the first instance because *Clark* involved a computer generated animation of how the accident happened, not actual videos of the accident scene. The videos at issue do not purport to demonstrate the collision and how it occurred. Instead, the videos depict only the accident scene and views, just like the many photographs of the accident scene that the trial judge admitted into evidence from both the plaintiff and the defendants without objection. As a result, *Clark* has no bearing on the admissibility of the video

involved in this case. However (as discussed in the following section), even assuming that *Clark* applies, the trial judge did not abuse her discretion in allowing the jury to watch the videos.

c. The Trial Judge Did Not Abuse Her Discretion in Concluding That the Videos Fairly and Accurately Depicted the Sight Lines and Accident Scene.

The trial judge did not abuse her discretion in allowing the jury to watch the videos and she did not abuse her discretion in concluding that they fairly and accurately depicted the accident scene and the line of sight and assisted the jury's understanding of the issues.

The evidence shows that Mr. Sutton carefully created the videos to ensure their accuracy. Mr. Sutton testified in great detail about the creation of the videos:

> Q. And did you essentially take videos of how much sight distance someone would have on that day at the time that this accident occurred?
>
> A. Yes. It puts it in perspective. And you can time these, you know, because, as you imagine, what you can do is see -- you know, you can see the motorcycle coming around the curve. Now, we did take a few steps to try to be fair about -- because we're doing this in 2023 and this accident happened in 2017. So the intersection -- as far as the elements that have been talked about in this case, one of them was the vegetation.
>
> So we originally took -- for the motorcycle, we couldn't find a BMW similar type, so we took a Suzuki. It was a 250 Suzuki, so a smaller bike. And then we put a BMW headlight on it. So we put a BMW headlight from a 2017 Scrambler on this bike at the same height. Right? Because all you're really looking at are the headlights -- or the headlight of the bike. And we took a Toyota Tundra which was substantially similar to Mr. McJunkin's vehicle. We shot the video there on February 19.
>
> And then we did some post processing of the video. And the reason that we did that was so we could add in the vegetation that you seen on the police pictures. And that was done in a piece of software where you can tie to the video camera.
>
> We did three shots. We did 6:35, 6:37, and 6:39 p.m., so two minutes apart. Because it is right at dusk, it's pretty dark down on the road, but it's that time of night where the sky still has a little light. So we did three shots, two different cameras, same camera position basically, which was at the eye level of the driver of the Tundra. And, you know, we framed it such that you could see part of the pickup truck and then you can look out at the curve and watch the motorcycle approach.

> And then in the post processing, we were able to adjust the speed of the motorcycle, and I did 35 and 55 just to see what the difference looks like.

(*See* Tr. Transc., at 2243:1-2244:12). Mr. Sutton testified that he did his "best to reproduce accurate conditions at that intersection as [he] understood them to be on the date of the accident" and that "[t]he roadway is the same." (*See id.* at 2260:6-8). He testified that the videos were "an accurate representation of what the view would have been from the intersection the night of the accident." (*See id.* at 2341:24-2342:2). As Mr. Akbar's counsel argued below, the videos are a "good-faith reenactment based on data and evidence provided in this case." (*See* Tr. Transc., at 2262:8-12).

The trial judge only allowed the jury to watch the videos after engaging in an extensive exploration of the videos and their potential demonstrative use. She viewed the videos several times and received lengthy proffer testimony from Mr. Sutton about the videos to assist in her analysis. (*See* Tr. Transc., at 2245:6-2329:13). She actively engaged the attorneys and Mr. Sutton in an effort to probe the accuracy of the videos. (*See id.*). In fact, when she expressed some concern about one aspect of the videos, Mr. Sutton used a lunch break to modify the videos to directly address the judge's inquiries; this led to further inquiry to ensure the accuracy of the videos to the extent reasonably possible. (*See generally* Tr. Transc., at 2270:7-2335:5). After diligently working to determine that the videos were accurate, the trial judge carefully considered the issue and gave a well-reasoned explanation of the grounds for her decision to allow the jury to watch the videos:

> I am inclined to agree with the defense. No video has to be perfect. This really isn't a video animation or re-creation. It's more of a demonstrative video that was created to aid the testimony of the witness. And I don't think -- everything you raised, Mr. Willey, goes to the issue of the weight of the testimony, not its admissibility, nor for their use of using it -- using the videos demonstratively. . . .
>
> [T]hat case law is clear that when using anything of this type, the Court needs to look at whether it's authentic. And I would find for the record that the animations are authentic. They are clearly relevant. "Relevance" is defined as whether it will make an issue of consequence more or less probable. And here in this case, speed is an issue, sight line is an issue. And it's clearly relevant. It will aid this witness in his testimony.

> And it does have the tendency to make an issue of consequence more or less probable. Whether it's a fair and accurate representation of the evidence, as Ms. Wesley and Mr. Cox have observed and I agree, I have not been able to find anything in case law that requires that it be perfect. And as I've already surmised, the only way it could be perfect was if someone were out there that night at that particular date and time and was able to actually video this incident. And as we know, that isn't possible and didn't happen.

(*See* Tr. Transc., at 2324:24-2326:21). For the reasons that follow, the trial judge did not abuse her discretion.

The extensive time that the trial court spent shows that, far from abusing her discretion, she exercised great care in reviewing the issue and ensuring fairness. She received a lengthy proffer concerning the videos. She viewed the videos multiple times. She considered and responded to all of the plaintiff's objections. She required that Mr. Sutton edit the videos to ensure they accurately reflected the accident scene and illustrated the testifying expert's opinions. While Plaintiff may cite some evidentiary disputes, the trial judge had a reasonable basis to conclude that the videos were proper demonstrative exhibits. Plaintiff has not shown a manifest abuse of discretion. As a result, the Court should affirm the trial judge's decision to allow the jury to watch the videos.

2. <u>The Record Does Not Show That the Videos Were Unfair or Inaccurate.</u>

In her Brief, Plaintiff argues the trial judge should not have shown the videos to the jury because they were not fair and accurate. For the reasons that follow, none of these arguments supports a finding that she abused her discretion.

Plaintiff first argues that the video is not a fair and adequate representation because it utilized vehicles slightly different from those involved in the accident. For example, Plaintiff complains that the video shows a 250 Suzuki motorcycle, rather than the 2017 BMW Scrambler that Mr. Rash operated. She also argues that the video is deficient in that it depicts Mr. McJunkin's vehicle as a 2011 Toyota Tundra, rather than the 2014 Tundra that Mr. McJunkin drove at the time of the accident. However, Plaintiff does not cite to any record evidence to suggest that the use of these substitutes actually rendered the video inaccurate. She

does not present any record evidence that the use of slightly different vehicles made the video unfair or inaccurate. In fact, she does not cite any material difference between the 2011 and 2014 Toyota Tundras; she presents no record evidence that the use of the Suzuki motorcycle for the video prejudiced Plaintiff. Plaintiff entirely ignores that Mr. Sutton testified the Suzuki had a BMW headlight[4] installed at the same height as the BMW Scrambler precisely because at dusk the approaching headlight the most salient visible feature. Plaintiff ignores that Mr. Sutton used a Tundra model "substantially similar to Mr. McJunkin's vehicle." (*See* Tr. Transc., at 2243:12-19). Plaintiff has not even attempted to show that the depiction of these vehicles rendered the video impermissibly inaccurate in a prejudicial way, and indeed there is no record evidence to support such an argument.[5]

Plaintiff next complains that the video's depiction of the location of the Toyota Tundra and the driver's sight line "does not coincide with the trial testimony of Mr. McJunkin." (*See* Pl.'s Appellant Br., at 6). Specifically, she disputes the video's depiction of the Tundra portrayed as pulled forward from stop bar painted in the road. (*See id.*, at 7). Mr. McJunkin demonstrated where he first stopped by drawing a triangle on a photograph being shown to the jury. (*See* Tr. Transc., at 271:18-273:9). He additionally testified to his belief that he moved the Tundra forward after stopping:

> Q. And after you had stopped where you had marked there behind the stop bar, did you pull forward at all?
>
> A. I believe I did.

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[4] Mr. Sutton testified that the size of the motorcycle was immaterial, while the nature and location of its headlight was: "since we're just looking at the headlight -- which is basically pretty much all you're going to be able to see, especially at a distance -- we bought a headlight from a 2017 BMW Scrambler and we attached it to the Suzuki at the same height. So the headlight on the motorcycle in the video is a BMW headlight from a Scrambler, 2017, and it's mounted at the correct height." (*See* Tr. Transc., at 2337:2-9).

[5] If anything, the only evidence is that any difference would have *benefitted* Plaintiff. She concedes that "[t]he Suzuki is a smaller bike than the BMW" that Mr. Rash was operating. (*See* Pl.'s Appellant Br., at 6). If anything, this would have made the motorcycle *less visible* in the video shown to the jury. Any inaccuracy resulting from the use of the Suzuki would have prejudiced Defendants, not Plaintiff.

(*See* Tr. Transc., at 273:20-22). While no evidence establishes to a mathematical certainty the *precise* location of Mr. McJunkin's vehicle at the intersection, this does not render the videos impermissibly inaccurate. Mr. Sutton based the videos on his view of the evidence. Importantly, Plaintiff has not shown that the videos are contrary to undisputed evidence; instead, she complains about Mr. Sutton's interpretation of the evidence. If Plaintiff disagreed with Mr. Sutton's construction of the evidence, she could have attacked the factual underpinnings of his testimony and argued that the jury should not give weight to the videos.

Mr. Sutton testified that he took reasonable steps to ensure that the videos accurately depicted the location of Mr. McJunkin's truck:

> Q. Mike, would you -- how did you decide where to place the pickup truck, and what did you base it on?
>
> A. So I based it on, in my opinion, this is where a driver would pull up so they can see at the intersection. It puts their head at the position of the old stop bar. And I did consider Mr. McJunkin's testimony. I read his trial transcript, and he says he believes he pulled forward after he came to a stop.
>
> So again, that's what this depicts. In his deposition, he did draw a car at the stop bar, saying that's where he stopped. But also in his deposition, he can't remember where he stopped last. So again, this -- I don't know exactly where Mr. McJunkin stopped. But if you stop at this position, it's where a driver would stop if they wanted to have a clear sight line of the curve.

(*See* Tr. Transc., at 2259:18-2260:9). This is consistent with the testimony of Plaintiff's own expert, J. Mark Teague, that drivers typically stop about six feet from the side of the road they will be entering:

> Six feet is kind of that magic number for drivers – and that's just based on research over the years -- that most drivers, once their car gets closer than 6 feet to a roadway, they start feeling really uncomfortable. So most drivers will stop at 6 feet. And that number goes through -- a lot of times signs and drainage ditches and things like that are 6 feet away from the travel path. Sometimes shoulders are 6 feet. So that number is kind of a common number in the roadway design field.
>
> So then you have -- you have the 6 feet. Then you have the vehicle's hood, the engine, and then the driver's eye. Generally, that's in the neighborhood of 7 to 8

feet for most vehicles, and that's what AASHTO says to use. That's where your 14 comes from. That's where your driver's eye is from the edge of the pavement.

(*See* Tr. Transc., at 1214:24-1215:13; *accord* Tr. Transc., at 1390:3-23). He testified that using this figure placed Mr. McJunkin slightly closer to Meeting Street Road than he testified. (*See* Tr. Transc., at 1390:19-23). Doing so would have increased Mr. McJunkin's line of sight. (*See* Tr. Transc., at 1390:24-1391:1). He further testified that [m]ost drivers will not get their car more than 6 feet away from the travel lane. They just feel uncomfortable." (*See* Tr. Transc., at 1263:18-20).

The trial judge had sufficient factual basis to support her conclusion that Mr. Sutton reasonably and accurately placed the Toyota Tundra in the video. While Plaintiff disputes the precise location of Mr. McJunkin's truck, that goes to the weight of this evidence, not its admissibility. There is ample evidence supporting Mr. Sutton's location of the Toyota Tundra in the videos. If Plaintiff disagreed with that placement, she could have argued that the jury should disregard the videos. The trial judge did not abuse her discretion in showing the videos to the jury.

Plaintiff next argues that the videos are not fair and accurate depictions because the intersection changed after the accident, including the addition of a crosswalk in 2018 and moving of the stop bar forward in 2019. (*See* Pl.'s Appellant Br., at 7). Again, she does not explain precisely how these changes rendered the videos unfair or inaccurate. Mr. Sutton's testimony clearly reflects that he undertook reasonable efforts to make the videos accurately depict the scene:

Q. Okay. Did you do your best to reproduce accurate conditions at that intersection as you understood them to be on the date of the accident?

A. Yes. The roadway is the same.

(*See* Tr. Transc., at 2259:18-2260:9). In light of the trial judge's lengthy and diligent efforts to ensure the accuracy of the videos, Plaintiff has not shown that she abused her discretion.

Plaintiff next asserts that the video is inaccurate because vegetation on Quattlebaum's property had been removed. (*See* Pl.'s Appellant Br., at 8). As she notes, Mr. Sutton used a

photograph from the night of the accident depicting the vegetation and placed it into the video, making it 90% opaque to account for the gaps in the vegetation that light could shine through. (*See id.*). Plaintiff contends that "this is not an accurate representation of the visibility through that vegetation, as leaves and sticks are 100% opaque." (*See id.*). She concludes that "a 90% opaque bush would show much more light coming through it than the vegetation in reality, making the motorcycle purporting to be Mr. Rash more visible in the video animation." (*See id.*). However, she provides no record evidence supporting her supposition that the videos were inaccurate. To the contrary, Mr. Sutton reasonably accounted for headlights being able to shine, at least in part, through the gaps in a shrub or other vegetation. He chose a conservative 10% translucency for his demonstration. Again, Plaintiff presents no evidence to support that the 90% opaque vegetation on the videos was inaccurate.[6]

Finally, Plaintiff argues that the video is misleading because "it shows much better visibility than what has been testified to," since Mr. McJunkin testified that he did not see Mr. Rash's motorcycle. (*See* Pl.'s Appellant Br., at 8 ("[A] demonstration of what may have been his line of sight depending on how far forward he pulled up and how fast Mr. Rash was going is misleading for the jury because the fact remains Mr. McJunkin never saw him.")). However, Mr. McJunkin testified clearly that ***nothing*** obstructed his view. As a result, if he did not see Mr. Rash, it could have been due to one of a multitude of factors, including inattention, the curvature of the road, or the speed of the motorcycle. Mr. McJunkin's testimony that he did not see Mr. Rash's vehicle does not foreclose that the videos — which Mr. Sutton created and the trial court scrutinized with great care — were fair and accurate.

Most importantly, the video was an accurate—indeed, identical—photographic representation of Mr. McJunkin's sight lines with respect to DESC's Poles as he approached

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6 Plaintiff's expert conceded that at least some light would pass through vegetation: "[A]s I said before, the shrubs are one of these things that they -- they're like looking through a gauze or something like that. We can see through it, we get light through it, but it clearly impacts our vision, our view of the scene. And if we're really focused, we can look through it." (*See* Tr. Transc., at 1017:12-17).

Meeting Street Road. Plaintiff could, and did, argue about where Mr. McJunkin might have been looking at various times as he approached, but she does not dispute that the video depicted the Poles in exactly the same location as they were at the time of the accident. Defendants offered the video to show what Mr. McJunkin *could* see, not necessarily what he did see.

For the foregoing reasons, Plaintiff has not shown that the trial judge abused her discretion in finding that the videos fairly and accurately depicted the intersection in issue and demonstrated Defendants' expert Mr. Sutton's opinions concerning its sight features.

3. The Danger of Unfair Prejudice or Misleading the Jury Did Not Substantially Outweigh the Probative Value of the Videos.

Plaintiff next argues that Rule of Evidence 403 required the exclusion of the videos because they are misleading and not based on the evidence. This is essentially the same argument discussed above.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *See* S.C.R. Evid. 403. The law is certain that only unfairly prejudicial evidence may be excluded under Rule 403:

> "All evidence is meant to be prejudicial; it is only unfair prejudice which must be avoided." *State v. Bratschi*, 413 S.C. 97, 115, 775 S.E.2d 39, 49 (Ct. App. 2015) (*quoting State v. Gilchrist*, 329 S.C. 621, 630, 496 S.E.2d 424, 429 (Ct. App. 1998)). "Evidence is unfairly prejudicial if it has an undue tendency to suggest a decision on an improper basis, such as an emotional one." *State v. Wilson*, 345 S.C. 1, 7, 545 S.E.2d 827, 830 (2001). The burden is "on the opponent of the evidence to establish inadmissibility" under Rule 403. *State v. King*, 424 S.C. 188, 200 n.6, 818 S.E.2d 204, 210 n.6 (2018). "A trial [court's] decision regarding the comparative probative value and prejudicial effect of evidence ***should be reversed only in exceptional circumstances***." *State v. Sledge*, 428 S.C. 40, 55, 832 S.E.2d 633, 641-42 (Ct. App. 2019) (alteration in original) (*quoting State v. Collins*, 409 S.C. 524, 534, 763 S.E.2d 22, 28 (2014)).

State v. Hopkins, 431 S.C. 560, 571, 848 S.E.2d 368, 373 (Ct. App. 2020) (emphasis added).

As discussed above, the videos were highly probative in demonstrating Mr. Sutton's opinions to the jury. They are not animations; they are videos of substantially similar vehicles at the precise accident scene in issue. Mr. Sutton went to great lengths to ensure that, to the extent humanly possible, he accurately depicted the conditions on the day of the accident. The trial judge deeply probed him about the video until she satisfied herself that the videos were fair and accurate. The videos are extremely probative, particularly as to Mr. McJunkin's sight lines with respect to the Poles. This case is centered around Mr. McJunkin's line of sight and view on that evening. Plaintiff has not shown that this is an exceptional circumstance where the trial judge abused her discretion. If Plaintiff had issues with the videos, she could have cross-examined Mr. Sutton or even made her own demonstrative video. She could have argued that the jury should disregard the videos as unreliable. In any event, Plaintiff has not shown that the videos improperly impacted the jury. In fact, nothing even suggests that the videos misled or unfairly prejudiced the jury. Consequently, the Court should affirm the trial court's ruling as to these videos.

4. Even If the Trial Judge Abused Her Discretion in Allowing the Jury to Watch the Videos, Such Error Was Harmless.

Even if Plaintiff could show that the trial judge abused her discretion in allowing the jury to watch the videos, such error does not warrant reversal, as Plaintiff has not made any showing that the verdict would have been any different had the jury not seen them. "To warrant a reversal based on the admission of evidence, the appellant must show both error and resulting prejudice." *Campbell v. Jordan*, 382 S.C. 445, 453, 675 S.E.2d 801, 805 (Ct. App. 2009).

Mr. Sutton explained to the jury in detail how he and his associates created the videos and why he believed they accurately reflect the accident scene as shown by the evidence. (*See* Tr. Transc., at 2335:25-2340:13). The videos are entirely consistent with his testimony about the sight lines; in other words, irrespective of whether the jury saw the videos, it still received evidence consistent with what the videos depicted. After direct examination and the demonstration of the videos to the jury, Plaintiff's counsel engaged in an extensive cross-

examination of Mr. Sutton, where he had the opportunity to probe Mr. Sutton about the videos. (*See* Tr. Transc. 2350:1-2351:24, 2365:22-2374:20, 2378:18-2439:22). Plaintiff also had the opportunity to argue to the jury in her closing that they should disregard the videos because of these issues going to their weight.

Plaintiff has made no showing that the jury's verdict turned on its viewing of the videos. To the contrary, the verdict came after a two-week trial, with numerous factual and expert witnesses. The parties introduced dozens of exhibits, including photographs of various views of the scene of the accident, including from the night of the accident. Plaintiff cites nothing showing that the jury based its decision solely on the videos or to the exclusion of this particular evidence. In fact the videos, which demonstrated that the Poles did not block the view of someone approaching Meeting Street Road on Hedgewood Street, were all but superfluous in light of Mr. McJunkin's undisputed testimony that nothing blocked his view.

For the foregoing reasons, the Court should affirm the trial court's decision to allow the jury to watch the demonstrative videos.

C. The Trial Court Did Not Err in Excluding the Expert Testimony of Paul McCullough.

Plaintiff next argues that the trial judge erred in excluding the expert opinion testimony of one of her proposed experts, Paul McCullough. Mr. McCullough is Plaintiff's brother, who is an engineer. He completed a scan of the accident scene three days after the accident. (*See* Pl.'s Appellant Br., at 13). The trial court ordered that Mr. McCullough could provide factual testimony but he was not qualified to render expert opinions. Plaintiff contends that Mr. McCullough's "testimony was being elicited to 1) set the foundation for subsequent testimony, and 2) provide his own expert opinion regarding the crash, specifically that the sight distance at the intersection was insufficient due to the obstructions present in the laser scan taken three days after the crash." (*See id.*). Plaintiff contends in her appeal that the trial court "erred in refusing to qualify Mr. McCullough as an expert in civil and structural engineering, [and]

accident reconstruction . . . project management."[7] (*See* Pl.'s Appellant Br., at 15). For the reasons that follow, the trial judge did not abuse her discretion in finding Mr. McCullough unqualified to give expert opinions.

1. Plaintiff Did Not Preserve This Issue for Appellate Review Because She Did Not Proffer Mr. McCullough's Testimony.

Plaintiff has not properly preserved this issue for appeal because she did not proffer Mr. McCullough's testimony to clearly inform the trial court (and this Court) as to the precise nature of his proposed expert testimony. As a result, the Court should affirm the trial judge's rulings regarding Mr. McCullough's testimony.

Trial began on March 20, 2023. Plaintiff called Mr. McCullough as her second witness on March 21, 2023. Early in his testimony, Defendants challenged Mr. McCullough's qualifications. Outside of the presence of the jury, Mr. McCullough gave extensive *voir dire* testimony regarding his qualifications and the parties argued about his qualifications (or lack thereof). (*See* Tr. Transc., at 285:12-378:21). At that time, the trial judge made clear that "I don't intend to go into the substance of this testimony. We're *voir dir*ing him regarding his qualifications as an expert." (*See* Tr. Transc., at 317:3-5; *accord id.* at 319:1-2 ("I'm not getting into the substance of his testimony, Mr. Willey.")).

Following *voir dire*, the trial judge took Defendants' objections to Mr. McCullough's qualifications under advisement. Although she did not then rule on Mr. McCullough's qualifications, the trial judge allowed Plaintiff to call Mr. McCullough to give limited factual testimony about measurements he made and data he collected at the scene of the accident.

The trial judge clarified that, if she ultimately excluded Mr. McCullough's expert testimony, Plaintiff could proffer his proposed opinions to preserve the issue for appellate review:

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[7] The trial judge did allow Mr. McCullough to testify about his work taking certain data at the accident scene. (*See* Tr. Transc., at 484:19-527:12).

> THE COURT: He told me that was what he's going to ask when he testified. And I just think he'd be clear he can't go beyond that because I've not ruled on the objection.
>
> MR. WILLEY: Right. And he would just be subject to recall after her objection -- er, after her ruling is --
>
> THE COURT: And ***if I don't allow him, then we'll at some later point proffer his testimony.*** . . . And if I allow it, then he'll testify.

(*See* Tr. Transc., at 377:23-378:6 (emphasis added)). The following day (March 22, 2023), the trial judge reiterated that, if she excluded Mr. McCullough's testimony, Plaintiff could make a proffer:

> MR. WILLEY: May we proffer the testimony?
>
> THE COURT: Not right now. I haven't made a decision. If I let it in, you have it in. ***If I don't let it in, we'll proffer it. But we're not taking up time right now to do a proffer.***

(*See* Tr. Transc., at 613:16-20 (emphasis added)).

On Tuesday March 28, 2023, the trial judge made a detailed ruling that Mr. McCullough was unqualified to give expert testimony on the line-of-sight issue. (*See* Tr. Transc., at 1817:5-1819:7). When the trial judge asked Plaintiff's counsel whether he had "anything else we need to take up before we adjourn for the evening from the plaintiff," he replied "[n]o, your Honor." (*See id.*). Plaintiff's counsel did not ask to proffer Mr. McCullough's testimony at that time. In fact, despite her attorney's stated intent to make a proffer of Mr. McCullough's opinions, Plaintiff never again asked to proffer Mr. McCullough's testimony for this Court's review. Consequently, Plaintiff never placed the substance of the anticipated expert testimony on the record for review.

"It is well settled that a reviewing court may not consider error claimed in the exclusion of testimony unless the record on appeal shows fairly what the rejected testimony would have been." *Jamison v. Ford Motor Co.*, 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007). "An alleged erroneous exclusion of evidence is not a basis for establishing prejudice on appeal in absence of an adequate proffer of evidence in the court below." *Greenville Mem'l Auditorium v. Martin*, 301 S.C. 242, 244, 391 S.E.2d 546, 547 (1990) (citations omitted); *Harris v. Palmetto*

Pediatric Prof'ls, Inc., No. 2005-UP-453, 2005 S.C. App. Unpub. LEXIS 33, at *6 (Ct. App. July 19, 2005) ("The failure to proffer evidence makes it impossible for this court to determine if any real prejudice resulted from the exclusion."). "A proffer allows [the Court] to evaluate to what extent the exclusion of the testimony was prejudicial." *State v. Moorer*, 439 S.C. 525, 548, 888 S.E.2d 725, 737 (Ct. App. 2023).

Plaintiff never made a proffer of the substance of Mr. McCullough's proposed opinion testimony on line of sight. Plaintiff's counsel's disclosed at trial that Mr. McCullough would "testify that the sight distance at this intersection is insufficient due to these obstructions." (*See* Tr. Transc., at 370:19-21). The record does not state what Mr. McCullough's opinions would have been had the trial judge allowed him to give his opinions. As a result, this court does not have sufficient information to determine whether — if the trial judge abused her discretion — this prejudiced Plaintiff. Without knowing what Plaintiff wanted Mr. McCullough to testify to, it is impossible for this Court to make an informed determination that the trial judge's supposed error actually prejudiced Plaintiff.

Because Plaintiff did not preserve this issue via proffer, this Court should affirm the jury's verdict and the trial judge's exclusion of Mr. McCullough's proposed expert testimony.

2. The Trial Court Did Not Abuse Her Discretion, Because Mr. McCullough Was Not Qualified to Provide Expert Testimony on Line of Sight in an Automobile Accident Case.

At the start of Mr. McCullough's testimony, DESC and the other Defendants objected and asserted that "[p]ursuant to rules 401, 402, and 403 on evidence generally, and 702, 703, and 707 under Rules of Evidence applicable to experts, this witness is not qualified." (*See* Tr. Transc., at 288:8-11). For the following reasons, this Court should affirm the trial court, as the trial judge did not abuse her discretion in determining that Mr. McCullough was unqualified.

Paul McCullough's primary qualification is that he is the brother of Plaintiff Darleen Rash and the uncle of Decedent Bronson Rash and desirous of helping them in this case. He is a

civil engineer, specializing in structures, not the investigation of automobile accidents or determination of lines of sight of automobile operators. He testified about his background:

Q. Mr. McCullough, please tell the Court a little bit about your educational background.

A. I'm a civil engineer with a master's degree in structural engineering. I did construction management. After doing post-tensioned segmental bridge design, I worked at S-E-A, which is my current employer, which is a forensic engineering firm, for the last 15 years.

I have done a variety of investigations, with the most latest evaluations primarily focused on construction defects. However, prior to that, I've performed a multitude of investigations regarding damage assessments, scene documentation, line-of-sight evaluation, and calculations as it relates to deflections, displacements, and damage to structural members.

Q. And with respect to your education, what are your degrees specifically in?

A. My bachelor's degree is in civil engineering. My master's degree is in structural engineering, with an emphasis on reinforced concrete. I have a general contractor's license in the State of Florida and a building contractor's license in -- sorry. Excuse me. Building contractor's license in the State of Florida and a general contracting license in the State of California. I hold a multitude of PEs, professional engineering licenses, from California through the Gulf states, North Carolina, South Carolina, and Georgia, inclusive of Florida.

Q. And you've been certified in project management?

A. Certified in project management as a PMP licensing, yes.

Q. And have you given testimony in cases before about accident reconstruction?

A. Yes. Basically, any unplanned event is -- has all elements of accident reconstruction. Whether it be a natural event such as a hurricane, a fire, an arson, or any type of a car going into a building, damage profiles, all of those are accident reconstructions, yes.

Q. And in a case like that, with respect to your role, explain to the Court what it is that you do.

A. So first off, it's establishing and gathering all the facts, documenting the scene in totality. That can be a range of either taking interviews, doing field notes, taking photographs with traditional photography, but also

> inclusive of using drone mapping, drone photography, and digital mapping technology such as the laser scanner to completely document the scene and all lines of sight.

(*See* Tr. Transc., at 299:12-301:5). He testified that he has been qualified as an expert witness in the fields of civil and structural engineering. (*See id.* at 319:19-24).

When he has been qualified as an expert witness in court, it has been limited to construction cases and one arson case. (*See id.* at 338:10-18). His marketing bio from his firm's website does not list either accident reconstruction or line of sight as his areas of expertise. (*See id.* at 338:22-339:18). He testified that he does not perform "vehicle-accident reconstruction, I do not perform full vehicle-accident reconstructions, no." (*See id.* at 341:16-342:8). Mr. McCullough conceded that he had never done a line-of-sight analysis for a motor vehicle accident; in fact, he had only worked as an expert witness in one line-of-sight case involving arson to a structure. (*See id.* at 342:24-343:5). He had never taken an accident reconstruction course or a course in line-of-sight concerning automobile accident reconstruction. (*See id.* at 343:6-19). As to issues such as speed, Mr. McCullough relied on the opinions of his colleagues within his firm. (*See id.* at 343:23-346:7).

After hearing extensive *voir dire* testimony and legal arguments (and taking several days to consider the issue), the trial judge made a detailed ruling that Mr. McCullough was not qualified to give expert testimony:

> Now, that leaves me with -- that leaves us with the plaintiff's attempt to qualify Mr. McCullough as an expert and the defense's objection to that attempt, which the Court took under advisement. And there are several objections interposed regarding Mr. McCullough's testimony, those being Rule 401, 402, 403, 702, and 703. The Court would find as follows based on the arguments as well as the prevailing case law.
>
> That the objection to admitting Mr. McCullough as an expert in the area of line-of-sight testimony is sustained. He lacks the training -- specialized training or other expertise to testify regarding those matters. . . .
>
> But he's -- while I have a great deal -- not -- I don't disregard his training as it regards the construction arena, that the specialized education, training, and experience that he has had in that area and the services that he provides for his company, the courses that he listed regarding – when elicited regarding

> specialized training and experience to be a sight -- a line-of-sight testimony simply, in parenthetic with that, he is a civil engineer -- ergo, he has the expertise to testify as a line-of-sight expert – that currently those type duties are delegated to a civil engineer versus that of a[n] accident reconstructionist.
>
> And while that may be true, there's no testimony that it has been delegated to him in the duties in his firm or that he has any specialized training or experience in that area. In addition, the courses that he listed regarding his ability to be an expert in the area of line of sight really are the courses that any first- and second-year civil engineer, mechanical engineering, or otherwise takes when involved in an engineering curriculum at any college of note. So based on what has been presented to the Court, he does not meet the criteria of an expert for line of sight. He might well meet the criteria as an expert in the areas that he, in fact, performs those duties for -- in his company, that being construction and -- structural design and construction management. But we cannot sort of bootstrap that to line of sight. . .
>
> I can't discern any prejudice to the plaintiffs in excluding him as an expert because they have already had two witnesses that have testified as to line of sight who were qualified as experts. And frankly, his testimony would be cumulative.

(*See* Tr. Transc., at 1817:5-1819:7).

Mr. McCullough's expertise was limited to issues relating to construction and design; he has no relevant specialized expertise in investigating automobile accidents or any other expertise that would be helpful to the jury in understanding the line of sight issues. He testified about the data that he gathered in surveying the site, and the trial judge admitted evidence of his survey into evidence. The trial judge did not make her ruling in a vacuum or on a whim. It was the product of hours of *voir dire* testimony and argument. She cited specific evidentiary bases for her decision. Although Plaintiff may disagree with the trial judge's decision, she has not shown that the trial judge manifestly abused her discretion in excluding Mr. McCullough's testimony.

3. Even If the Trial Judge Abused Her Discretion, Such Error Was Harmless.

Even if the trial court erred in excluding the expert testimony of Mr. McCullough, "to warrant reversal, [Plaintiff] must show that [she] was prejudiced by the admission of this evidence. [Citation omitted.] Prejudice is a reasonable probability that the jury's verdict was influenced by the challenged evidence." *See Watson v. Ford Motor Co.*, 389 S.C. 434, 448, 699 S.E.2d 169, 176 (2010). For the following reasons, Plaintiff has not shown that — had the trial

judge allowed Mr. McCullough to give expert testimony — it is reasonably likely that the jury would have returned a different verdict.

"Proof that an error caused the appellant prejudice is a prerequisite to reversal based on error where the trial court's discretion is involved." *Carlyle v. Tuomey Hosp.*, 305 S.C. 187, 192, 407 S.E.2d 630, 633 (1991) (*citing Dunn v. Dunn*, 298 S.C. 499, 381 S.E.2d 734 (1989)). "Appellate courts recognize -- or at least they should recognize -- an overriding rule of civil procedure which says: whatever doesn't make any difference, doesn't matter." *McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987). The South Carolina Rules of Civil Procedure bolsters this:

> No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

See S.C.R. Civ. P. 61.

The erroneous admission of evidence is not prejudicial if the evidence would be cumulative. *See Clark v. Cantrell*, 332 S.C. 433, 450, 504 S.E.2d 605, 614 (Ct. App. 1998) ("[O]ther information contained in the diagram had already been introduced to the jury and would have been cumulative."); *Rutledge v. St. Paul Fire & Marine Ins. Co.*, 286 S.C. 360, 367, 334 S.E.2d 131, 136 (Ct. App. 1985) ("In any case, we find no prejudice. Counsel conceded at oral argument the evidence proffered by Johnson was cumulative to other evidence in the record. Rutledge himself testified the fire was set."). As the trial court found and the trial record confirms, Mr. McCullough's apparent proposed testimony would have been cumulative of other evidence presented to the jury, including from her other experts. As a result, the trial court's exclusion of Mr. McCullough did not prejudice Plaintiff.

Plaintiff argued before the trial judge that Mr. McCullough was "going to testify that the sight distance at this intersection is insufficient due to these obstructions." (*See* Tr. Transc., at

370:19-21). While this statement does not provide much detail about his specific proposed testimony, such testimony would have been cumulative.

For example, Plaintiff's expert Dr. Ruston Hunt testified to his opinions that the Poles and other things partially blocked Mr. McJunkin's vision:

> [T]he presence of fencing, power poles, and shrubbery partially occlude the driver's view of vehicles in the near lanes of traffic on Meeting Street. "Occlude" is just a fancy word for "block." Just kind of blocks the view. . . . The presence of fencing, power poles, and shrubbery partially occlude the driver's view of the vehicles. . . .
>
> Mr. McJunkin was not aware of his view being blocked. He stated that "I never saw the motorcycle." My point there is this is consistent with the short sight distance that he had. And there wasn't like a wall. He didn't know "Okay. I'm up next to a building here. I have to be able to look around it." It was this sort of, you know, feathery bush and a couple of poles, but those are fairly skinny.
>
> So it's this blocked view a little bit that would have made it difficult for him. But he probably wouldn't have appreciated how difficult it was. You know, you can't look at a bush and say, "I can see 70 percent through that" or 60 percent or 92 percent. You know, you just, "Well, I don't see a car," and so you go ahead.
>
> And if I didn't already say it, the problem there – and we have this a lot -- is this idea that you don't know what you don't know. You know, "Oh, I didn't realize I couldn't see 300 feet down the road." Yeah, I can see what I can see. People don't stop unless you're a person like me, who's constantly questioning these things, "I don't think I've got a clear sight distance there." A person like Mr. McJunkin would say, "Well, it's clear as far as I can see, and that's all I can do, so I'm going to pull forward."

(*See* Tr. Transc., at 930:23-934:10). He further testified with regard to the Poles:

> We've got these poles. There's two different poles. There's the shrubs. There's the fence and the curve in the road. All of these things create a moving scenario for him as he drives. He comes like this, so this pole is blocking over here at first. But as he comes past it, now it's over here and now this pole blocks.
>
> There's actually going to be an instance -- more than just an instance, but a short period where this pole blocks his view on this side. And then as he goes a little more forward, it blocks it on the other side. And you don't see through those. I mean, that's solid. Even though they're narrow, but that's a 12-inch pole just 14 feet away and another pole -- I forget the distance, but it's down a ways. So he's got a couple of solid objects there.

(*See* Tr. Transc., at 1001:3-23).

Another of Plaintiff's experts, J. Mark Teague, testified that "the two utility poles that we've been discussing in the case did block the sight distance for a vehicle coming out of Hedgewood" and that the "pole[s] were in the public right-of-way." (*See* Tr. Transc., at 1213:11-18). Mr. Teague opined about the sight distance and testified that it did not comply with AASHTO standards:

> Q. All right. Mr. Teague, you indicated that the sight distance you calculated at that intersection was what number?
>
> A. Two hundred and four feet. . . .
>
> Q. Mr. Teague, tell the jury the significance of that sight distance.
>
> A. The sight distance of 204 feet was less than what AASHTO -- what I described earlier -- says you should have for a left turn from a stop sign. AASHTO says it should be 390 feet. The South Carolina, what is call the ARMS manual --and that's the Access and Roadside Management Standards, put out by the SCDOT -- has a similar table, and it also says 390 feet. It basically mimics what AASHTO says. . . .
>
> Q. And so just so we're clear, because I heard it wrong too, but the sight distance at that intersection, according to AASHTO guidelines, should be 390 feet.
>
> A. That's correct. Three nine zero.
>
> Q. Okay. And you calculated it in October of 2018 as 204 feet?
>
> A. That's correct.

(*See* Tr. Transc., at 1217:9-1218:22). He testified that "the fence and the poles and the vegetation all contributed to having that sight distance reduced significantly from what needed to be at 390." (*See* Tr. Transc., at 1219:5-7).

Plaintiff's experts Dr. Hunt and Mr. Teague were both permitted to use and rely upon the data that Mr. McCullough compiled at the accident scene. The trial judge allowed Mr. McCullough to testify extensively about his gathering of data and use of it for documenting scene features and distances, even allowing an in-courtroom demonstration of the scanning equipment, its methodology, and its accuracy. (*See* Tr. Transc., at 484-527). Plaintiff's two

other experts, Dr. Hunt and Mr. Teague, used Mr. McCullough's data in formulating the opinions they communicated to the jury; the fact that Mr. McCullough did not qualify to add a third such opinion did not prejudice Plaintiff.

In her closing, Plaintiff emphasized to the jury that multiple experts opined that the Defendants' conduct improperly reduced Mr. McJunkin's line of sight, proximately causing the accident:

> And remember, we didn't bring you just Mr. McJunkin. We brought you multiple engineering experts -- four engineering experts that came in and testified in this case. You heard from Dr. Hunt, who's an engineer. You heard from Mark Teague, a transportation engineer. And you heard from Ken Richardson, the mechanical engineer and accident reconstructionist.
>
> And they all agree it is the poles, bushes, and fence that are the visibility obstructions at this intersection that are the causative factors -- the causative factors for this collision. . . .
>
> [Dr. Hunt's] opinions in this case were that there's no clear view from the stop bar of traffic on Meeting Street; that from the stop bar, Mr. McJunkin, where he was legally required to stop, had no clear view. He told you that the poles, bushes, and fencing blocked drivers' view of vehicles. . . .
>
> [Mr. Teague] told you that without any of these obstructions, you would have well over 300 feet line of sight. Without the bushes, without the poles, you would have well over 300 feet line of sight. And remember, that's more than six seconds going 35 miles an hour.

(*See* Tr. Transc., at 3080:19-3081:24, 3089:3-7). Ultimately, the jury chose to discredit the testimony of these witnesses and their interpretation of the facts and the relevant guidelines, and to accept the opinions of Defendants' expert, Michael Sutton, that Mr. McJunkin had a sufficient line of sight. (*See* Tr. Trans., at 2190:18-2192:8). However, it remains the case that the trial judge allowed Plaintiff to present evidence and opinions in support of her claims.

In light of the multiple experts who testified on Plaintiff's behalf on the line of sight issue, Mr. McCullough's testimony would have been cumulative. Plaintiff has made no showing that the trial court's exclusion of Mr. McCullough's testimony actually prejudiced her. As a result, this Court should affirm the trial court's rulings.

D. The Trial Court Did Not Err in Denying Plaintiff's "Thirteenth Juror" Motion for Judgment Notwithstanding the Verdict.

1. Plaintiff Has Failed to Properly Preserve and Raise This Issue for Appellate Review.

The Court should affirm the trial judge's denial of Plaintiff's Motion for judgment notwithstanding the verdict under the "13th juror" doctrine, because she has not properly preserved the issue for appellate review. Specifically, Plaintiff's Brief does not sufficiently make this argument, with proper legal and factual support.

"Preserving issues for appellate review is a fundamental component of appellate practice." *McClurg v. Deaton*, 395 S.C. 85, 86 n.1, 716 S.E.2d 887, 887 n.1 (2011) (*citing* J. Toal, S. Vafai, and R. Muckenfuss, *Appellate Procedure in South Carolina*, 65 (1999)). "[I]t is error for the appellate court to consider issues not properly raised to it." *Langehans v. Smith*, 347 S.C. 348, 352, 554 S.E.2d 681, 683 (Ct. App. 2001) (citations omitted).

Irrespective of whether she properly raised the issue in the *trial court*, Plaintiff must also properly raise and preserve all issues in *this Court.* "South Carolina law clearly states that short, conclusory statements made without supporting authority are deemed abandoned on appeal and therefore not presented for review." *Glasscock, Inc. v. United States Fid. & Guar. Co.*, 348 S.C. 76, 81, 557 S.E.2d 689, 691 (Ct. App. 2001); *accord Ellie, Inc. v. Miccichi*, 358 S.C. 78, 99, 594 S.E.2d 485, 496 (Ct. App. 2004) ("[W]here an issue is not argued within the body of the brief but is only a short conclusory statement, it is abandoned on appeal."); *State v. Crocker*, 366 S.C. 394, 399 n.1, 621 S.E.2d 890, 893 n.1 (Ct. App. 2005) ("[C]onclusory statements unaccompanied by argument and citation to authority are insufficient to preserve an issue for appellate review."); Rule 208(b)(1)(D), SCACR ("At the head of each part, the particular issue to be addressed shall be set forth in distinctive type, followed by discussion and citations to authority.").

In arguing the "thirteenth juror" issue, Plaintiff sets forth the general legal standards governing the review of such a motion. However, Plaintiff's substantive argument in her Brief in

support of the "thirteenth juror" doctrine argument consists of *two*[8] *sentences* with no citation at all to the record. She does not reference any specific evidence supporting her contention that the trial judge erred. She does not cite testimony or exhibits that the trial judge and jury failed to consider. She does not show that the evidence was so overwhelming that the trial judge abused her discretion in denying this motion. In light of the foregoing, Plaintiff has not properly raised the issue of the trial judge's denial of her "thirteenth juror" motion for this Court's review.

2. Ample Evidence Supports the Jury's Verdict.

Even if Plaintiff properly preserved and presented this issue for appellate review, the trial judge did not abuse her discretion in rejecting Plaintiff's "thirteenth juror" argument. "The trial judge, sitting as the thirteenth juror charged with the duty of seeing that justice is done, has the authority to grant new trials when he is convinced that a new trial is necessitated on the basis of the facts in the case." *Vinson v. Hartley*, 324 S.C. 389, 403, 477 S.E.2d 715, 722 (Ct. App. 1996). "The [thirteenth juror] 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.'" *Lane v. Gilbert Constr. Co.*, 383 S.C. 590, 597, 681 S.E.2d 879, 883 (2009) (*quoting Norton v. Norfolk Southern Railway Co.*, 350 S.C. 473, 478, 567 S.E.2d 851, 854 (2002)). As noted above, an order denying a new trial under the thirteenth juror doctrine "will hardly ever be reversed." *See Burke v. AnMed Health*, 393 S.C. 48, 55, 710 S.E.2d 84, 88 (Ct. App. 2011).

In her Brief, Plaintiff argues that the trial judge erred in denying her "thirteenth juror" motion "because the expert testimony in the case showed that the poles and bushes at the intersection of Hedgewood and Meeting Street Road obstructed visibility." (*See* Pl.'s Appellant's

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8 One of those sentences did not even argue that the admitted evidence mandated granting her "thirteenth juror" motion. Instead, it focused on arguing that the trial judge erred in excluding Mr. McCullough's expert testimony and evidence of citations given to two adjoining property owners. These issues are discussed elsewhere in this brief. However, alleged errors in the admission or exclusion of evidence are not proper bases for a "thirteenth juror" motion. Instead, that doctrine applies where a party contends that the *admitted evidence* does not support the verdict.

Br., at 19). She does not state which experts testified to this before the jury. She does not quote such testimony. She omits that Defendants presented factual evidence and expert opinion controverting the allegation that there was visual obstruction at the intersection. Instead, she baldly contends that the trial judge abused her discretion in denying Plaintiff's "thirteenth juror" motion simply because there was some evidence supporting her claims. She does not show that this case is so extreme that the trial judge should have granted an extraordinary "thirteenth juror" motion.

Contrary to Plaintiff's argument, ample evidence supported the jury's conclusion that the Poles did not obstruct Mr. McJunkin's view at the time of the accident. Mr. McJunkin was once a defendant and had every incentive to blame someone else. However, he did not. Instead, he testified under oath that *nothing* obstructed his view:

Q: Mr. McJunkin, do you recall having your deposition taken in December of 2019?

A: I do.

Q: And when you had your deposition taken in December of 2019, did you swear an oath to tell the truth at that time?

A: I did.

Q: And during that December 2019 deposition, *do you recall saying that nothing obstructed your view at that intersection on February 19, 2017?*

A: I did. . . .

Q: Let me ask you this. During your deposition in December of 2019, was your testimony *true and accurate* to the best of your recollection at that time?

A: Yes, sir.

Q: *And is your testimony here today true and accurate to the best of your recollection today?*

A: *Yes, sir.*

(*See* Tr. Transc., at 279:3-11 & 281:13-19 (emphasis added)). Mr. McJunkin did not alter this testimony even though he revisited the accident scene after his deposition and saw the Poles:

> Q. Mr. McJunkin, when you returned to this intersection after your deposition had been taken in 2019, tell us what you observed there.
>
> A. When I returned, there are utility poles. There are fences or vegetation in or about that area.
>
> Q. Did returning to that intersection after your deposition had been taken, did that refresh your recollection as to what that intersection looked like?
>
> A. It – I don't know that any condition changed.

(*See* Tr. Transc., at 281:4-12). He *never* testified that the Poles obstructed his vision; not at deposition and not at trial. Mr. McJunkin's testimony alone is more than sufficient to support the jury's verdict.

Additionally, Mr. Sutton (Defendants' expert) testified that the Poles did not obstruct Mr. McJunkin's vision or contribute to the accident:

> Q. Here do you believe the poles were a sight obstruction to Mr. Rash or Mr. McJunkin?
>
> A. No.
>
> Q. Do you have a conclusion as to whether or not these utility poles played a role in this collision?
>
> A. I do.
>
> Q. And what is that conclusion?
>
> A. It's my opinion that they didn't contribute or cause this collision.

(*See* Tr. Transc., at 2199:9-17).

These are examples of the abundance of evidence that supported the jury's verdict. Plaintiff has not made (or even approached making) a showing that the evidence is so indisputably strong that this court should disregard the jury's verdict entered after a lengthy trial. While Plaintiff may disagree with the jury's verdict, she cannot reasonably argue that the evidence *only* supports one conclusion (that the jury was wrong). There are certainly items of

evidence that would support the verdict. This is not a proper case for a judge or appellate court to take the extraordinary step of substituting its own judgment for the jury's.

Therefore, the Court should affirm the trial judge's denial of Plaintiff's motion under the "thirteenth juror" doctrine.

E. The Court Should Affirm As to Defendant DESC Notwithstanding the Trial Court's Exclusion of Temporally Remote Citations That the City of North Charleston Issued to Defendants Mr. Akbar and Mr. Quattlebaum.

Plaintiff's final argument is that the trial judge erred in excluding from evidence various citations that the City of North Charleston issued to Defendants Mr. Akbar and Mr. Quattlebaum. Plaintiff has alleged that Defendants Mr. Akbar and Mr. Quattlebaum are liable because of their failure to properly maintain their properties. (*See* Pl.'s Am. Compl. ¶ 20, at 10-11). Plaintiff argues in her appeal that the trial judge should have admitted the citations because, at least one of them, "put the *homeowners* on notice that the bushes created a hazard and blocked the line of sight down Meeting Street Road." (*See* Pl.'s Appellant Br., at 21 (emphasis added)).

These citations had nothing to do with the location or placement of the Poles or with any of DESC's conduct. Plaintiff does not argue that the trial judge should have admitted this evidence with respect to her claims against DESC. She does not argue that this evidence was relevant to DESC's potential liability, which was based on the placement of the utility Poles. Rather, Plaintiff argues only that evidence of these citations was relevant "to show that *the homeowners* were aware of the vision impediment and did nothing to correct it." (*See* Pl.'s Appellant Br., at 21 (emphasis added)). Plaintiff has not argued in this appeal that the trial judge's refusal to admit those citations caused it any harm in connection with the verdict as to DESC.

F. For the Reasons Set Forth in DESC's Brief as Appellant, the Court Should Affirm Because — Notwithstanding Plaintiff's Arguments on Appeal — DESC Was Entitled to a Directed Verdict as to Liability.

In its Brief as Appellant previously filed with this Court, DESC argued that the evidence mandated the entry of a directed verdict in its favor. In particular, it was undisputed that

Mr. McJunkin had testified that nothing — including DESC's Poles — obstructed his vision on the evening of the accident. Moreover, it was undisputed that the placement of DESC's Poles was in compliance with the City of North Charleston's ordinances. Finally, there was no evidence that DESC violated a duty of care to Mr. Rash in connection with this accident. DESC incorporates by reference, as if set forth at length herein, its Brief as Appellant. For the reasons set forth therein, the Court should affirm the district court's ruling and verdict in favor of DESC.

CONCLUSION

For the reasons set forth above, the verdict, the trial court's evidentiary rulings, and the denial of Plaintiff's post-trial motions raised in Plaintiff's Appellant's Brief were all appropriate. The Court should, therefore, affirm the jury's verdict and the trial court's challenged rulings.

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March 28, 2024

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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
In the Court of Common Pleas for the Ninth Judicial Circuit

Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2023-000718
Circuit Court Case No. 2019-CP-10-00061

Darleen Rash, Individually and as Personal Representative for the Estate of Bronson Harley Rash, ...Appellant-Respondent,

vs.

Dominion Energy South Carolina, Inc., f/k/a South Carolina Electric & Gas Company; Anthony M. Akbar; and Paul Quattlebaum, ... Respondents-Appellants.

PROOF OF SERVICE

I certify that I have served the **RESPONDENT-APPELLANT DOMINION ENERGY SOUTH CAROLINA, INC., F/K/A SOUTH CAROLINA ELECTRIC & GAS COMPANY'S INITIAL BRIEF AS RESPONDENT** on counsel for the above-referenced Appellants-Respondents by email in accordance with the South Carolina Supreme Court's Order re: Methods of Electronic Filing and Service Under Rule 262 of the South Carolina Appellate Court Rules (As Amended May 6, 2022) on March 28, 2024, addressed to their attorneys of record:

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