

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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

Hon. Deadra L. Jefferson, Circuit Court Judge

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

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

vs.

Dominion Energy (formerly South Carolina Electric & Gas  
Company), Anthony M. Akbar, and  
Paul Quattlebaum ..... Respondents/Cross-Appellants.

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**JOINT MOTION TO STRIKE RESPONDENT’S BRIEF  
AND TO STAY CROSS-APPELLANTS’ DEADLINES  
UNTIL THE COURT RULES ON THE MOTION**

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Cross-Appellants Anthony Akbar and Dominion Energy (“Cross-Appellants”) jointly move this Court for an order striking Appellant-Respondent Darleen Rash (“Respondent Rash”)’s Initial Brief as Respondent, filed with this Court on May 6, 2024. Cross-Appellants also respectfully request an order from the Court staying the deadlines for filing Cross-Appellants’ initial reply brief until after it rules on this Motion to Strike. See Rule 240(b), SCACR.

### **A. Stay of Time Limit**

As detailed below, Respondent Rash’s brief is so replete with improper argument and material outside of the trial record, a stay of the Reply deadlines is proper while the Court considers the motion to strike Respondent Rash’s brief. Cross-Appellants cannot know what they are responding to until the motion is ruled upon. Rule 240(b), SCACR anticipates that in such circumstances a stay of the briefing schedule may be ordered by the Court.

### **B. Striking Respondent Rash’s Initial Brief as Respondent**

There are two grounds for this motion: First, Respondent Rash’s brief is so glutted with improper quotations of and references to materials outside of the trial record and not properly before this Court that the brief’s propriety cannot be salvaged by simply striking portions of it. Second, Respondent’s brief improperly (and misleadingly) creates and devotes *pages* of argument to “issues” that were not raised by either Cross-Appellant but instead are an inappropriate re-packaging of (and new argument on) Respondent Rash’s own issues from her Initial Brief as Appellant.

#### **1. Improper deposition testimony pervades Respondent’s Brief.**

This is an appeal by plaintiff, and cross-appeals by defendants, from various decisions made by the trial court over the course of a three-week jury trial and in its aftermath.<sup>1</sup> As such, and particularly as to the facts, this Court is to consider only the evidence that was presented to the trial court.

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<sup>1</sup> See *Notice of Appeal*, filed May 1, 2023, *Notice of Cross-Appeal* by Defendant Anthony Akbar, filed May 5, 2023, and *Notice of Cross-Appeal* by Defendant Dominion Energy, filed May 8, 2023.

Respondent's brief is strewn with improper factual references to – and quotations of – deposition testimony taken prior to trial, which was neither before the jury nor the trial judge. The deposition references are numerous; in her 27-page-long brief, Respondent discusses in more than 18 places statements made in depositions which were never before the trial court. Respondent refers to, and extensively quotes, testimony given in the deposition of trial witness Paul McCollough (who was not permitted to testify as an expert by the trial judge, but who did testify as a fact witness at trial), as well as statements made in the deposition of Defendant Akbar. Both witnesses testified at trial, and neither was impeached using the deposition testimony distributed throughout Respondent's brief.

Notably, the quotations from deposition testimony are made baldly in the Brief – there are not, and nor will there be, Record citations to the testimony, **because the deposition testimony does not belong in the Record on Appeal**. *See* Rule 210(c), SCACR (“The Record shall not, however, include matter which was not presented to the lower court or tribunal.”).

Respondent must know the quotations and deposition references are improper. Despite citing them in her brief, Respondent did not include the deposition transcripts in her Designation of Matter for Inclusion in the Record on Appeal – an acknowledgment, no doubt, that the deposition testimony has no place in these appellate filings. The designation of matter to be included in the record on appeal “may only propose to include portions of the transcript, pleadings, orders, exhibits or other materials which

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may be properly included in the Record on Appeal [See Rule 210(c)].” Rule 209(b), SCACR (brackets in original), *citing* Rule 210(c): “The Record shall not, however, include matter which was not presented to the lower court or tribunal.”

Cross-Appellants are not aware of any authority that allows references to, or quotations of, irrelevant, biased materials, which were not presented to and considered by the court below, to be included within an appellate brief. In fact, the South Carolina Appellate Court Rules specifically contemplate the opposite.

Cross-Appellants respectfully request that this Court strike Respondent’s brief in its entirety. This relief is warranted, given the pervasive extent of the improper citations, and Respondent’s evident awareness – by not including the deposition transcripts in her Designation of Matter for Inclusion in the Record on Appeal – that citation to such material is not permitted. Alternatively, and at a minimum, this Court should order Respondent to withdraw her Brief, remove from it every quotation of and reference to deposition testimony, and re-file.

## **2. Respondent’s Response Brief is not really a response.**

The Brief that Respondent Rash filed on May 6, 2024, is ostensibly a response brief, the purpose of which should be to answer the arguments raised in Cross-Appellant’s initial briefs. Due to overlap of issues between Cross-Appellants Akbar’s and Dominion Energy’s briefs, there were a total of three issues to which Mrs. Rash should have responded.<sup>2</sup> *See* Rule 208(b)(1)(E) (“The brief shall be divided into as many parts as there

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<sup>2</sup> Cross-Appellant Akbar raised two issues on appeal: the first was the question of whether the trial court erroneously found the existence of duty to be a question of fact. As a matter of law, Mr. Akbar has no duty to roadway passerby, and he therefore was entitled to directed verdict in this case. Mr. Akbar’s second issue was whether Mr. Akbar was entitled to a Directed Verdict

are issues to be argued”). But Mrs. Rash’s Response Brief has four issues. The first “question presented” by Respondent Rash’s Response Brief actually responds to none of Cross-Appellants’ issues.<sup>3</sup> And the second “issue”<sup>4</sup> inappropriately uses the improper arguments made (and deposition testimony cited) in the first “issue” as a platform to re-frame, re-argue, and elaborate on the same arguments Mrs. Rash made in her own appeal. Considering that Mrs. Rash is allotted by the rules 75-pages of briefing in her own appeal, it is inappropriate for her to use a response brief on cross-appeal to expand that page limitation and raise new points that she did not make in her own initial brief. *See* Rule 208, SCACR. Moreover, as discussed above, most of Mrs. Rash’s purported “response” arguments depend on deposition testimony that is not properly before this Court because it was not ever before the trial court.

## CONCLUSION

In sum, Mrs. Rash’s Response Brief violates the appellate court rules in such a pervasive way that merely striking portions of it would be an insufficient remedy. Cross-Appellants respectfully request that this Court strike it in its entirety. Alternatively,

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because Mrs. Rash presented no evidence of causation in fact. Contemporaneously, Cross-Appellant Dominion Energy also raised two issues on cross-appeal. The first was the same as Mr. Akbar’s second: whether Dominion Energy was entitled to a Directed Verdict because Mrs. Rash presented no evidence of causation in fact. Dominion’s second issue was whether the trial court should have granted Dominion’s motions for directed verdict because plaintiff did not present any evidence that Dominion breached a duty of care to Mr. Rash.

<sup>3</sup> Issue “I.,” beginning at page 9 in Mrs. Rash’s Response Brief, concerns the trial court’s decision to exclude expert testimony by plaintiff’s witness Paul McCullough. It is almost identical to Issue II of Mrs. Rash’s initial brief in her own appeal, which begins on page 12 of her brief filed January 5, 2024.

<sup>4</sup> Issue “II.,” beginning at page 15 in Mrs. Rash’s Response Brief, is an altogether improper mish-mash of inappropriate deposition testimony and Mrs. Rash’s Issue IV in her own appeal.

every reference to and quotation of deposition testimony should be eradicated from the brief, along with all arguments that properly belong within Mrs. Rash's own appeal.

Respectfully submitted,

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May 21, 2024  
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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**PROOF OF SERVICE**

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I certify that on May 21, 2024, I served JOINT MOTION TO STRIKE RESPONDENT'S BRIEF AND TO STAY CROSS-APPELLANTS' DEADLINES UNTIL THE COURT RULES ON THE MOTION on Appellant/Cross-Respondent Darleen Rash, Individually and as Personal Representative for the Estate of Bronson Harley Rash, as well as on Respondent Dominion, by sending the same to their below-listed attorneys of record at their email addresses of record with AIS.

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Respectfully submitted,  
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May 21, 2024