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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.

REPLY IN SUPPORT OF JOINT MOTION TO STRIKE RESPONDENT'S BRIEF AND TO STAY CROSS-APPELLANTS' DEADLINES UNTIL THE COURT RULES ON THE MOTION

Respondent-Appellant Dominion Energy South Carolina, Inc., f/k/a South Carolina Electric & Gas Company ("DESC") and Respondent-Appellant Anthony M. Akbar ("Akbar") submit this Reply in support of their Joint Motion to Strike Respondent's Brief and to Stay Cross-Appellant's Deadlines Until the Court Rules on the Motion.

INTRODUCTION

Following years of litigation and a lengthy jury trial, a jury returned a verdict in favor of Defendants DESC and Akbar.[1] Darlene Rash, Individually and as Personal Representative for the Estate of Bronson Harley Rash ("Rash" or "Plaintiff") appealed from that verdict and the denial of her post-trial motions, arguing that the trial judge abused her discretion in certain evidentiary

[1] Defendant Quattlebaum settled with Plaintiff post-verdict and has been dismissed from this appeal.

rulings and in refusing to act as the "thirteenth juror." DESC and Akbar cross-appealed, asserting that—even if there is any merit to Rash's appeal—the Court of Appeals should nevertheless rule in favor of DESC and Akbar because the trial judge should have directed a verdict in their favor. Rash filed her Initial Brief as Respondent, which should have been limited to addressing DESC's and Akbar's cross-appeal: i.e., whether the trial judge properly concluded that the evidence *admitted at trial* created a jury issue sufficient to deny their directed verdict motions. Instead, Rash's Initial Brief as Respondent cited to various documents—most notably the discovery deposition of one of Rash's proposed expert witnesses and deposition testimony by Akbar not elicited at trial—that were not considered by the trial judge in her analysis of DESC's and Akbar's directed verdict motions.

On May 21, 2024, DESC and Akbar filed the instant Joint Motion to Strike Respondents' Brief and to Stay Cross-Appellant's Deadlines Until the Court Rules Upon the Motion ("Motion to Strike"), asking the Court to strike the Initial Brief as Respondent of Appellant-Respondent Darleen Rash in its totality. The basis for the Motion to Strike is that Rash's Initial Brief of Respondent: (a) does not address the specific issues raised in DESC's and Akbar's cross-appeal; and (b) relies heavily—almost exclusively—on discovery depositions that were never admitted into evidence at trial and were not considered in connection with DESC's and Akbar's motions for directed verdicts. On May 31, 2024, Rash filed her Response to DESC's and Akbar's Motion to Strike Respondent's Brief ("Return"). For the following reasons, Rash's Return does not set forth a proper basis for this Court to deny DESC's and Akbar's Motion to Strike.

A. Rash's Justification for Utilizing Deposition Testimony Outside of the Trial Record Is Illogical and Contrary to the Rules.

Rash engages in creative reasoning to justify loading her Initial Brief as Respondent with deposition testimony outside of the trial record, but her rationale is flawed from the outset. She acknowledges that the cross-appeal argument to which she is supposed to be responding "concerns [DESC's and Akbar's] asserted entitlement to a directed verdict." (*See* Pl.'s Return, at 2). She contends that, in her Initial Brief as Respondent, she "endeavored to demonstrate that there was

ample evidence to warrant sending this case to the jury, including evidence from her expert witness, Paul McCullough, which Appellant contends was wrongfully excluded by the trial judge." (*See* Pl.'s Return, at 2). However, *excluded* testimony could not conceivably be part of any "evidence" that might have precluded directed verdict or warranted sending the case to the jury. If it was **excluded**, then it never came into evidence. A decision on a directed verdict motion, which is made "at the close of evidence," only considers and evaluates *the evidence that has been presented to that point in a trial. See* Rule 50, SCRCP; *Swinton Creek Nursery v. EFC*, 334 S.C. 469, 476, 514 S.E.2d 126 (1999) ("When the evidence yields only one inference, a directed verdict in favor of the moving party is proper.").

Expert testimony from McCullough was disallowed; it was not presented as evidence, nor was it even proffered. McCullough's deposition transcript was not read into evidence at trial. The deposition transcript was not admitted as a trial exhibit, nor was it even identified as a Court exhibit. For all these reasons, Rash is wrong—and in defiance of the rules and basic logic—to claim that she may employ non-admitted evidence to demonstrate that the directed verdict decision was correct.

B. Rash Mischaracterizes the Voir Dire of Mr. McCullough.

Rash fuzzily posits that during the "voir dire of McCullough, *which essentially also served as a proffer of his testimony*, his deposition testimony also was referenced." (*See* Pl.'s Return, at 2) (italics added). This statement is incorrect: the trial voir dire of Mr. McCullough was ***not***—"essentially" or otherwise—a proffer of his testimony. To the contrary, the voir dire only addressed Mr. McCullough's *qualifications*, and in particular, his lack of relevant qualifications. The trial voir dire did not set forth the substance and scope of Mr. McCullough's opinions and it did not provide the trial court with a basis to analyze Plaintiff's proposed substantive testimony by Mr. McCullough.[2]

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[2] As DESC and Akbar argue in their own Initial Briefs as Respondents, Rash did not properly preserve her right to appellate review of the exclusion of Mr. McCullough's opinion testimony because she did not make an appropriate proffer on the record at trial.

Voir dire testimony is not designed to be, and was not here, a substitute for a proper proffer. To the contrary, the trial judge clarified 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. Trans., at 317:3-5; *accord id.* at 319:1-2 ("I'm not getting into the substance of his testimony, Mr. Willey.")). The trial judge deferred on ruling on certain issues concerning Mr. McCullough's testimony, but repeatedly informed Plaintiff's counsel that, *if* she excluded that testimony, Plaintiff would be given an opportunity to make a proffer on the record. (*See* Tr. Trans., at 377:23-378:6, and 613:16-20). However, although the trial judge ultimately excluded Mr. McCullough's expert testimony, ***Plaintiff never proffered his testimony to the trial judge.*** **It was therefore never made a part of the trial record and cannot be cited on appeal.**

C. The Attachment of Discovery Deposition Transcripts to a Summary Judgment Filing Does Not Make Them Proper for the Court's Consideration in This Cross-Appeal.

Rash argues that she properly relied on the deposition of Paul McCullough in her Brief as Respondent because his "full deposition transcript was filed as Exhibit 6 to Rash's filed memorandum in opposition to Dominion's motion for summary judgment."[3] (*See* Pl.'s Return, at 2). She further asserts that this "memorandum and the exhibits were filed before the trial court, and the same trial judge who considered the Dominion's motion and presided over the trial, Judge Jefferson, denied summary judgment a mere five days before trial." (*See id.*). However, Rash does not contend that her opposition to DESC's Motion for Summary Judgment was admitted into

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[3] Rash's Return points out that DESC "themselves attached a portion of McCullough's deposition to their memorandum filed during the trial – when McCullough was called as a witness – challenging his qualification as an expert witness." (*See* Pl.'s Return, at 4). DESC's Motion to Exclude Opinions of Plaintiff's Expert Paul McCullough does quote several excerpts of Mr. McCullough's discovery deposition. However, DESC's Motion to Exclude was never itself admitted into evidence for the jury's consideration and was only submitted to show that Mr. McCullough was so unqualified that his "opinions" should not be admitted for the jury's consideration. The trial judge agreed with DESC's analysis. In any event, the mere citation to deposition excerpts in a Motion to Exclude does not make the deposition a proper subject for the trial court's consideration on motions for directed verdict (or for this Court's consideration in reviewing the denial of directed verdicts).

evidence at trial. It was not. Rash's argument reinforces that she has not opposed DESC's and Akbar's cross-appeal based on the directed verdict rulings.

Including a deposition transcript as an exhibit to one's memorandum in opposition to a motion for summary judgment prior to trial does not make it part of the trial record. It does not matter whether a ruling on that motion was made days or weeks or months before the trial—it is not part of the trial and thus not part of the trial record. Rash knew the McCullough deposition was not part of the trial record because she did not include it in her Designation of Matter to be Included in the Record on Appeal. Rash is now attempting to find a back door to make McCullough's deposition testimony part of the record: "Appellant requests that this Court permit an amended designation of matter to be filed that includes the memo in opposition to Dominion's summary judgment and the attached exhibits." (*See* Pl.'s Return, at 2). Rash cites no appellate court rule or precedent that would permit taking an exhibit from motion briefing made and ruled on during the pretrial stage of a case and transforming it into part of the trial record for purposes of considering rulings on directed verdict.

D. <u>The Motion to Strike Does Not Play "Gotcha" with Rash; It Only Seeks Compliance with Well-Settled Appellate Procedural Law.</u>

In an effort to justify her reliance on discovery depositions, Rash argues that "error preservation rules should not be used as a game of 'gotcha' in the hopes of trapping an unwary attorney." (*See* Pl.'s Return, at 3). In support of this assertion, Rash relies on Chief Justice Toal's dissent in *Atlantic Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 730 S.E.2d 282 (2012). Respectfully, Rash's argument is misplaced, as the Motion to Strike is not an attempted "gotcha" premised on some hyper-technicality, and nor does the motion pertain to an ostensibly unpreserved issue—it simply argues that the Appellate Court Rules do not permit Rash to permeate her brief with citations to materials that were not before the trial court. Further, the Motion to Strike points out that Rash has tried to include an improper "issue" that is not responsive to any issue in the cross-appeal.

DESC and Akbar urge the Court to consider Justice Hearns' majority opinion in *Atlantic Coast Builders*, which more accurately reflects what the Motion to Strike seeks to accomplish:

> [T]hese [issue preservation] rules must also be applied consistently and not selectively. If our review of the record establishes that an issue is not preserved, then we should not reach it. This is so regardless, to use the Chief Justice's terms, of the "life-blood litigant or criminal defendant" before us. However, this is not a "gotcha" game aimed at embarrassing attorneys or harming litigants, but rather is an adherence to settled principles that serve an important function. While it may be good practice for us to reach the merits of an issue when error preservation is doubtful, we should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved. Here, we do not believe the existence of this procedural bar is questionable and would place no weight on the fact that neither the parties nor the court of appeals raised it.

See Atl. Coast Builders, 398 S.C. at 329-30, 730 S.E.2d at 285. DESC and Akbar are only asking that the Court require Rash to respond to their cross-appeal in a manner consistent with the rules governing this Court. Insisting that Rash oppose their cross-appeal—which challenges the denial of directed verdicts—with evidence that was *actually admitted at trial* with arguments that are actually responsive is not setting a trap for the unwary. Far from playing a "gotcha game," DESC and Akbar simply seek to have this Court adjudicate their cross-appeal pursuant to the rules and based on the appropriate record.

E. <u>The Relief Requested in the Motion to Strike is "Extraordinary," but Warranted.</u>

Rash argues that "[t]he remedy sought by Cross-Appellants in their joint motion is extraordinary—striking Appellant's brief in its entirety—and should be denied by this Court." (*See* Pl.'s Return, at 1). Rash is correct that the requested relief is unusual. However, that is because Rash's Brief as Respondent is, itself, "extraordinary" in its flouting of the Rules.

The *vast majority of* Rash's Brief as Respondent relies exclusively on discovery depositions that were never admitted into evidence at trial, which are the platform for inappropriate, non-responsive arguments. Rash scarcely cites any of the thousands of pages of trial testimony and exhibits that were admitted at trial. Rash can cite no authority that would allow this court to consider discovery depositions in its analysis of DESC's and Akbar's argument that the trial judge should have granted a directed verdict based on the evidence presented to the jury. Rash's

misplaced reliance on deposition testimony that the trial judge could *not* have considered in deciding directed verdict motions pervades her Brief as Respondent. It would be challenging for the Court to partially strike only the impermissible deposition references, as they are not isolated. Moreover, Rash dedicates almost one-third of her brief to new arguments, as to her own issues on appeal (pertaining to McCullough's testimony), which are not responsive to the issues on cross-appeal and are an improper attempt at a "second-bite-of-the-apple" as to her own issues. These non-responsive arguments, which refer to testimony that was not proffered, are not proper in a response brief. In this extraordinary circumstance, the appropriate remedy for Rash's improper reliance on discovery depositions is to strike her Brief as Respondent *in its entirety.*[4]

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[4] Attached hereto as Exhibit A is Rash's Initial Brief as Respondent, with the improper portions stricken. Very little remains, other than discussions of various cases and law. As alternative relief (in the event the Court does not wish to strike the entire brief), the Court should substitute the attached redacted Initial Brief as Respondent in place of the version Plaintiff filed.

CONCLUSION

For the foregoing reasons, DESC and Akbar respectfully request that the Court strike Appellant-Respondent's Brief as Respondent because it relies on discovery information that was never admitted into evidence at trial.

s/ Ainsley F. Tillman
FORD WALLACE THOMSON LLC
Ainsley F. Tillman (SC Bar #70551)
Ian S. Ford (SC Bar #12463)
715 King Street
Charleston, SC 29403
(843) 277-2011
Counsel for Respondent-Appellant Anthony M. Akbar

I.S. Leevy Johnson (SC Bar #3020)
George C. Johnson (SC Bar #9308)
Chelsea A. Glover (SC Bar #103896)
JOHNSON TOAL & BATTISTE, P.A.
P.O. Box 1431
Columbia, South Carolina 29202
(803) 252-9700

and

David S. Cox (SC Bar #66195)
M. Dawes Cooke, Jr. (SC Bar #1376)
John W. Fletcher (SC Bar #69550)
BARNWELL WHALEY PATTERSON & HELMS, LLC
211 King Street, Suite 300
Charleston, SC 29401
(843) 577-7700

Counsel for Respondent-Appellant Dominion Energy South Carolina, Inc., f/k/a South Carolina Electric & Gas Company

June 7, 2024

IN THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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

DARLEEN RASH, Individually and as Personal Representative for the ESTATE OF BRONSON HARLEY RASH

Appellant-Respondent,

v.

DOMINION ENERGY (formerly SOUTH CAROLINA ELECTRIC & GAS COMPANY); ANTHONY M. AKBAR; and PAUL QUATTLEBAUM

Respondent-Appellants.

APPELLANT-RESPONDENT DARLEEN RASH'S INITIAL BRIEF AS RESPONDENT

POULIN | WILLEY

/s/ Roy T. Willey, IV
SC Bar #: 101010
32 Ann Street
Charleston, SC 29403
(803) 222-2222
roy@akimlawfirm.com
Attorney for Appellant

May 6, 2024
Charleston, South Carolina

EXHIBIT A

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Suggested Answer: No

III. Did the trial court err in denying Akbar's and DESC's motions for directed verdict where there were unresolved questions of fact concerning whether the negligent driver's view was obstructed by Akbar and DESC?

Suggested Answer: No

IV. Did the trial court err in denying Akbar's and DESC's motions for directed verdict when the evidence suggests both parties violated North Charleston's Ordinances creating a duty under negligence per se and common law negligence?

Suggested Answer: No

STATEMENT OF THE CASE

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 and his family were traveling on Hedgewood Street after leaving his father's house. Mr. McJunkin was operating a 2014 Toyota Tundra. Mr. McJunkin stopped at the stop bar and looked both ways before turning

left onto Meeting Street Road. Unfortunately, Mr. McJunkin did not see Bronson Rash. Mr. McJunkin's truck collided with Bronson Rash's motorcycle, causing him to be thrown from the motorcycle. Rash ultimately passed away from injuries sustained during the accident.

On the left-hand side of Meeting Street, there were multiple items that obstructed McJunkin's view as he proceeded to make a left turn. These obstructions included the property located at 3891 Walnut Street, owned by Anthony Akbar, and the property at 3895 Walnut Street, owned by Paul Quattlebaum. Both lots contained fences with overgrown vegetation.

Additionally, Dominion Energy's two power poles on Meeting Street Road served to block McJunkin's view. [redacted]

On January 4, 2019, Appellant-Respondent brought negligence, wrongful death, and survivorship claims against Respondents for Bronson Rash's death. Respondents asserted general denials of Appellant's claims.

On March 30, 2023, trial on this matter began. Appellant had nineteen witnesses including Daniel McJunkin, Paul McCullough, Marshall White, Sarah Shearer, Valeria Pacheco Rubi, Christopher Bragg, Robert Edgerton, Michael Johnson, Krista Venesky, Jamison Spencer, Joey Svendsen, Ruston Hunt, Amanda Henderson, Robert Madison, Jr., J. Mark Teague, Kendrick Richardson, Shirley Richardson, Arthur Rash, and Darleen Rash. Appellants were also able obtain testimony from two rebuttal witnesses – Kendrick Richardson and Marshall White. Respondents had seven witnesses including Christine Holmstedt, Anthony Akbar, Michael Sutton, Marie Wearing, Cindy Hux, Joel Knight, and Paul Quattlebaum.

Appellant-Respondent's expert witness Paul McCullough was excluded from giving testimony in the case. (*See* R. Vol. 7, p. 1817, lines 13-14). Dominion Energy's expert Mark E. Sutton was able to provide testimony at trial and to present a computer-generated reconstruction as evidence. Without being able to hear Mr. McCullough's testimony, the jury was not made aware of material issues of fact concerning the possible obstructions affecting Mr. McJunkin's vision at the time of the collision.

A verdict was rendered for the Respondents on April 4, 2023. Appellant requested ten additional days for post-trial motions and was denied by the trial court. Appellant then submitted post-trial motions in open court, which included Plaintiff's Motion for Judgment Notwithstanding the Verdict and a Motion to Invoke the 13th Juror Doctrine, in addition to other motions. All of Appellant's motions were denied by the trial court.

A written denial on Plaintiff's Motion for Judgement Notwithstanding the Verdict was issued on April 13, 2023, by way of a Form 4 Order. A formal written order denying both the Motion for Judgment Notwithstanding the Verdict and the Motion to Invoke the 13th Juror Doctrine was issued on December 5, 2023. Appellant filed a Notice of Appeal on May 1, 2023 and submitted its initial brief to this Court on January 5, 2024. Respondents Dominion and Akbar Cross-Appealed in their briefs filed on January 5, 2024.

ARGUMENTS

Without being able to present the testimony of Paul McCoullough, the Plaintiff's case was prejudiced, and the jury did not get an accurate depiction of the collision that took place on February 19, 2017. Appeallant asks that this court deny Respondents' requests for a directed verdict on the issues of proximate cause for Respondents Akbar and Dominion Energy.

Appellants assert that the issues at trial were properly submitted to the jury and that they should be submitted to a jury if a new trial is granted.

I. [redacted]

[redacted]

[redacted].

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

II. [redacted]

THE VIOLATIONS OF ORDINANCES OF THE CITY OF NORTH CHARLESTON, CREATE A REASONABLE QUESTION OF FACT THAT SHOULD BE RESOLVED BY THE JURY AND NOT ON DIRECTED VERDICT.

Respondents have been asking for a directed verdict on the grounds that there is insufficient evidence to establish causation as to Respondent Akbar's shrubs as well as Respondent Dominion's light poles (Respondent-Appellant Anthony Akbar at 23 and Respondent Appellant Dominion Energy at 10). [redacted]

i. STANDARD OF REVIEW

When reviewing a motion for directed verdict the appellate court uses the same standard as the trial court. *Hennes v. Shaw*, 397 S.C. 391, 398, 725 S.E.2d 501, 505 (Ct. App. 2012) When deciding on a directed verdict, the evidence must be viewed in the light most favorable to the moving party. *Id.* A motion for a directed verdict is only granted when there is an error of law or there is no evidence to support the ruling. *Id.*

ii. [redacted]

To prevail on a claim of negligence in South Carolina, the plaintiff must establish four elements: duty, breach, causation, and damages. *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). Causation is established by proving that the negligence was the proximate cause of the injury, such that the injury would not have occurred but for the act or omission of the Defendant. *Vinson v. Hartley*, 324 S.C. 389, 401, 477 S.E.2d 715, 721 (Ct. App. 1996). Proximate cause is proven by establishing both legal cause and causation in fact. *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996). Legal cause is established by foreseeability *Id.* Foreseeability is established when the injury caused was the natural and probable consequence of the act or omission giving rise to the claim of negligence. *Id*. at 324 S.C. 400-01, S.E. 2d 721. Proximate cause is typically a question for the jury to decide. The court's only function is to determine whether certain conclusions are the only reasonable inferences that can be drawn from the evidence *Id.* at 324 S.C. 402, S.E. 2d. 721. Foreseeability is not determined by whether the defendant could have foreseen the injury sustained by the plaintiff, but whether the injury is the natural and probable consequence of an act or omission. *Tobias v. Carolina Power & Light Co.*, 190 S.C. 181, 2 S.E.2d 686, 688 (1939).

In *Vinson v. Hartley*, the Appellant was denied a new trial because all the evidence supported a conclusion that the motor vehicle collision did not cause dental damage to the Appellant. 324 S.C. 389, 410, 477 S.E.2d 715, 726 (Ct. App. 1996). The damage to Vinson's car was so minor that he did not know his car had collided with Hartley's. Vinson also admitted that nothing occurred in the accident that would have caused a mouth injury, and none of the testimony from medical doctors supported Vinson's injury was caused by the accident. 324. S.C. 410. 477 S. 2d 726. In Vinson, unlike in this instant case, there was no evidence to support that

the collision caused the injury, so a directed verdict was appropriate. *Shaw*, 397 S.C. 398, 725 S.E.2d 505.

In *Tobias v. Carolina Power and Light Co.*, the Supreme Court of South Carolina found that the injury to Tobias was foreseeable and that Carolina Light and Power Co. was negligent in how they installed an electric light pole and guy wires. 190 S.C. 181, 2 S.E.2d 686, 688 (1939). Tobias was walking along a public highway and was hit by an automobile, causing him to be thrown against the exposed guy wires of an electric light pole installed by Carolina Light and Power Co. Tobias went blind in his left eye and sustained a leg injury. *Id.* at 190 S.C. 181, 2 S.E. 2nd 687. The South Carolina Supreme Court held that it was not unreasonable for the jury to find that South Carolina Light and Power Co. should have reasonably anticipated that installing an electric light pole in the middle of a public highway would cause injury to a pedestrian. *Id*. at 190 S.C. 181, 2 S.E.2d 688. The Court found that the collision, even "in this day of freakish traffic accidents," "was not of such an unusual and extraordinary character that it could not have been foreseen that some such occurrence might probably take place." *Id*. The specific injury to Tobias did not need to be foreseen. South Carolina Light and Power Co. only needed to anticipate that an injury would occur due to their negligent installation of the electric light pole and guy wires. *Id*.

In *Harrison v. Morgane,* the Supreme Court of South Carolina held that allegations in a compliant were enough to establish that the defendant could have been the proximate cause of the Plaintiff's injury. 202 S.C. 491, 25 S.E.2d 742, 743 (1943). In *Harrison*, the negligence complained of was an obstruction in middle of the highway, a hole in the shoulder of the highway, and a failure to warn drivers of these dangers. *Id*. The Appellants argued that the amended complaint admitted to contributory negligence on Harrison's part. *Id*. The Court,

viewing the allegations in the amended complaint as true, found that there was no admittance of contributory negligence by Harrison and that the demurrer and grant of non-suite were rightfully denied. *Id*. The differences in the original complaint and the amended compliant did not give rise to the only conclusion being that Harrison caused his own injury. 202 S.C. 491, 25 S.E.2d 744. The complaint was sufficient in presenting questions of fact related to Morgane's negligence.

[redacted] and the evidence presented at trial, it was foreseeable that the utility poles and overgrown vegetation would have caused an accident. [redacted] The North Charleston Code of Ordinances Appendix A Article IV sec. 4-13 also states that "poles and support structures less than twelve (12) inches in diameter may be permitted in such areas." [redacted]

[redacted]Mr. McJunkin's [redacted] testimony at trial makes this issue more relevant. [redacted]Mr. McJunkin's testimony indicates that he did pull ahead of the stop bar but that he did not see Bronson Rash when he turned into the intersection. Tr. Transc., at 273; 20-21& 274; 15-17. [redacted]

These testimonies raise a question of fact as to whether Mr. McJunkin could see past the bushes and the light poles before his collision with Bronson Rash occurred. It would not make sense for Mr. McJunkin to have turned into the intersection if Bronson Rash was visible on the night of the accident.

Between the AASHTO guidelines, the Ordinances of the City of North Charleston, a reasonable jury could conclude that an injury could occur at the intersection of Meeting Street Road and Hedgewood Street. As stated in *Tobias,* foreseeability is not predicated on whether the specific injury suffered could have been anticipated but rather whether an injury could be anticipated based on the act. *Tobias* at 190 S.C. 181, 2 S.E.2d 688. The Court in *Tobias* believed it was foreseeable that an injury would occur due to the improper placement of a light pole on a highway. *Id.* Using the Court's logic, the idea that two utility poles placed on a curve in a residential area could obstruct a driver's vision and cause an injury is not so remote "that it could not have been foreseen that some such occurrence might probably take place." *Id.*

The foreseeability of the collision would mean that the evidence does not support a ruling in favor of a directed verdict.

Respondent Akbar also should have been able to foresee that an injury would occur due to the overgrowth of the vegetation on his property and conditions around the intersection of Hedgewood Street and Meeting Street Road. ,

[redacted] *See* [redacted] Respondent Akbar was [redacted] put on constructive notice by the city of North Charleston through its ordinances. Sec. 9-42 of chapter 9 Article II of the North Charleston South Carolina Code of Ordinances states:

> Every occupant, tenant and owner of every building and/or the holder of any possessory interest in any vacant lot abutting on a sidewalk or road right-of-way in the city shall jointly and severally keep and maintain such sidewalk, to the curb line thereof or if there is no sidewalk then to the edge of the road, in a clean and proper condition and free from trash, ashes, rubbish and unsightly grass and weeds.

Ord. Sec. 9-42 Ordinance section 9-67 states:

> Without limitation upon and in addition to any conditions which may constitute common nuisances under section 9-66, the following are declared to be unhealthy and unsightly conditions constituting public nuisances and endangering the life, health, safety, welfare and property of the entire community: conditions which afford a breeding place for and/or attract insects, rodents or reptiles or otherwise create a substantial risk of danger to health and/or safety through disease, fire, safety hazards or other means, including, but not limited to:
> (2) Grass, noxious weeds, vegetable growth, briars, brush and plants more than one foot in height except when cultivated or maintained.

Mr. Akbar was aware or should have been aware of the danger that the overgrown vegetation presented from his many years of living near the intersection, [redacted]. Respondent Akbar should have foreseen that a

collision would occur if he let his vegetation continue to be unkempt. *Tobias* at 190 S.C. 181, 2 S.E.2d 688. With this evidence in mind, a jury could find that Respondent Akbar's overgrown vegetation was the proximate cause of the collision.

III. BOTH RESPONDENTS DOMINION AND AKBAR HAD A DUTY NOT TO OBSTRUCT THE INTERSECTION AT COMMON LAW AND UNDER THE NEGLIGENCE PER SE DOCTRINE

i. STANDARD OF REVIEW

As previously stated, negligence is proven by establishing duty, breach, causation, and damages. *Babbs,* 405 S.C. 153, 747 S.E.2d 181. Duty is a question of law and arises when one party should exercise reasonable care to protect others. Miler v. City of Camden, 317, S.C. 28, 31. 451 S.E.2d 401, 403 (Ct. App 1994). While the question of duty is determined by the court, the question of breach is determined by the jury. *Id*.

In South Carolina, there are different rules regarding liability for falling trees or limbs that are applicable to this case. *Israel v. Carolina Bar-B-Que, Inc.* 292 S.C. 282, 288, 356 S.E.2d 123, 127 (Ct. App. 1987). "An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance". *Miller v. City of Camden*, 317 S.C. 28, 33, 451 S.E.2d 401, 404 (Ct. App. 1994), *aff'd as modified*, 329 S.C. 310, 494 S.E.2d 813 (1997). South Carolina case law provides that at common law a duty existed for both Akbar and Dominion.

In rural parts of the state landowners do not have a duty to improve their land by removing dangerous trees to keep others safe. *Id.* (citing Prosser and Keaton, On the Law of Torts, Chapter 10, Section 57, at 391 (5th ed. 1984)). In urban areas landowners have a duty to move fallen trees that block streets and to inspect their property to make sure that their trees do not present a hazard. *Id*. In *Israel*, this court also adopted the rule that "a landowner in a

residential or urban area has a duty to others outside of his land to exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on his premises, including trees of purely natural origin." *Israel,* 292 S.C. 288, 356 S.E.2d 127.

In *Israel,* Charlotte Israel sued Carolina Bar-B-Que, Inc. and Andrew Berry after a limb from a "bushy" tree on Berry's property fell on Ms. Israel's car, which was parked in Carolina Bar-B-Que's lot. *Id.* at 292 S.C. 284, 356 S.E.2d, 125. Berry was aware of the dangerous limbs that hung over Carolina Bar-B-Que's property. *Id*. at 292 S.C. 285, 356 S.E. 2d 126. After a reasonable inspection, this Court found that Berry should have known that a dangerous and decaying tree limb was hanging over Carolina Bar-B-Que's property and that the lower court did not err in denying a directed verdict in favor of Berry. *Id*. at 292 S.C. 289, 356 S.E.2d 127.

ii. ARGUMENT – DUTY OF AKBAR AND DOMINION TO AVOID OBSTRUCTING THE INTERSECTION UNDER COMMON LAW

[redacted] Respondent Akbar also had constructive notice of the need to trim his hedges because of Ord. Nos 9-42 and 9-67, City of N. Chas Code of Ord. [redacted]. At 292 S.C. 285, 356 S.E. 2d 126. Since Respondent Akbar [redacted] had constructive notice through the ordinances of the city of North Charleston, duty under the common law was established and it would be improper to grant a directed verdict in his favor. *Id*. 292 S.C. 289, 356 S.E.2d 127.

This case is distinguishable from *Underwood v. Coponen* as the circumstances in Underwood were different from those here. In *Underwood,* Taylor, the landowner, did not owe a duty to the drivers when his tree limbs partially obstructed a stop sign because Coponen was not

even looking for a stop sign. *Underwood v. Coponen* 367 S.C. 214, 218 625, S.E.2d 236, 238 (Ct. App 2006). This court also knew that Taylor also did not owe a duty to trim his tree because "neither Underwood nor Coponen knew Taylor trimmed the tree" *Id*. at 367 S.C. 219, 625 S.E.2d 239. In this case however, the city municipal code put all the residents of North Charleston on constructive notice that they all owed a duty to not allow their vegetation to obstruct the road. Ord. Nos. 9-42 and 9-67, City of N. Chas Code of Ord. *See also* North Charleston South Carolina Code of Ordinances Appendix A Art. IV Ord No. 4-139 (No planting shall be placed or maintained, and no fence, building, wall, or other structure shall be constructed after the effective date of this ordinance, in such a manner as to obstruct visibility at intersections). Therefore, Respondent Akbar, Bronson Rash, and Mr. McJunkin had all been put on constructive notice by the city not to let the vegetation on their properties block the road and had a duty to keep the road clear of obstructions.

Dominion also had a duty to Bronson Rash at common law. As stated earlier, duty is created at law by "by statute, contract, relationship, status, property interest, or some other special circumstance". *Miller,* 317 S.C. 33, 451 S.E. 404 (Ct. App. 1994), *aff'd as modified*, 329 S.C. 310, 494 S.E.2d 813 (1997)

Here exists a special circumstance, as these poles were owned by Dominion. [redacted]

[redacted]

Additionally, § 4-13 of Appendix A of the North Charleston South Carolina Code of Ordinances permits poles of less than 12 inches near streets. [redacted]

[redacted] Ultimately, these combined factors violate a duty that Dominion should have been aware of as a provider of a public utility that has to comply with industry standards and city ordinances.

iii. ARGUMENT – DUTY OF AKBAR AND DOMINION TO AVOID OBSTRUCTING THE INTERSECTION UNDER THE NEGLIGENCE PER SE DOCTRINE

Both Akbar and Dominion had a duty under the negligence per se doctrine, as both Respondents directly violated Ord No. 4-13 and Ord. No. 9-67. Under South Carolina's negligence per se case law, "the determination of whether a statute has been violated is a question of fact for the jury." *Nuguyen v. Uniflex Corp.* 312 S.C. 417, 421, 440 S.E.2d 887,889 (Ct App. 1994). The determination of whether the violation of a statue is the proximate cause of an injury is also a question for the jury. *Id*.

In *Nguyen* this court found that the trial court did not err in instructing the jury that proof of Uniflex Co. violating the fire safety occupancy ordinances was proof of negligence. *Id*. 312 S.C. 421, 440 S.E.2d 890. *Id*. 312 S.C. 421, 440 S.E.2d 890. This court was able to infer there was some question as to whether the Fire Safety ordinance regarding the storage of chlorine was violated during the applicable time. *Id*. 312 S.C. 421, 440 S.E.2d 889. This court also recognized the "ordinances were obviously enacted" to protect neighboring property owners. *Id*. The appellants in *Nguyen* even conceded that violation of the ordinances at issue in that case "might constitute negligence per se." *Id*. at 312 S.C. 420, 440 S.E.2d 889. Since there was still an inference that raised a question of fact for the jury, it was appropriate for the trial judge to submit to the jury the question of negligence per se. *Id*. 312 S.C. 421, 440 S.E.2d 890.

In this instant case there is a question of fact as to whether Respondents Akbar and Dominion violated Ord. 4-13. The ordinance in its entirety reads that:

> Visibility at railroad and street intersections shall be unobstructed. No planting shall be placed or maintained, and no fence, building, wall or other structure shall be constructed after the effective date of this ordinance, in such a manner as to obstruct visibility at intersections. No structure or planting shall be permitted at any point between a height of two and one-half (2½) feet and ten (10) feet above the upper face of the nearest curb (or street centerline if no curb exists) and within the triangular area bounded on two (2) sides by the street or railway right-of-way lines. However, poles and support structures less than twelve (12) inches in diameter may be permitted in such areas.

[redacted] Both violations should be for the jury to decide. As asserted in earlier briefs, there is also a potential violation of Sec. 9-67

> Without limitation upon and in addition to any conditions which may constitute common nuisances under section 9-66, the following are declared to be unhealthy and unsightly conditions constituting public nuisances and endangering the life, health, safety, welfare and property of the entire community: conditions which afford a breeding place for and/or attract insects, rodents or reptiles or otherwise create a substantial risk of danger to health and/or safety through disease, fire, safety hazards or other means, including, but not limited to:
> (2) Grass, noxious weeds, vegetable growth, briars, brush and plants more than one foot in height except when cultivated or maintained;
>
> Ord. No9-67, City of N. Chas Code of Ord.

Respondent Akbar maintains that this ordinance does not apply to negligence per se under the Whitlaw case, pointing out "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991)." Appellant argues that this standard is met under all the ordinances.

Just as the ordinances in *Nguyen* were similar to the ordinances related to the present case, the "ordinances were obviously enacted" to protect neighboring property owners and designed to protect the health and safety of the residents of the North Charleston Community. *Nguyen* at S.E.2d 890. Sec. 9-67. The precedent set in *Nguyen* is not limited to just rodents, as it contemplates a broad range of possible injuries that pose "substantial risk of danger to health and/or safety through disease, fire, safety hazards or other means," The ordinance encapsulates a broad range of injuries, which is consistent with the negligence law of this state. *See Tobias.* At 190 S.C. 181, 2 S.E.2d 688 (the injury suffered does not have to be the exact injury anticipated). South Carlina case law and the ordinance suggest a broader reading. The essential purpose of the ordinance is to protect the "health, safety, and welfare" of the residents of North Charleston from danger caused by "unhealthy and unsightly conditions" Ord. No. 9-67, City of N. Chas Code of Ord. Since it is a question of fact that Bronson Rash died because of Respondent Akbar's violation of Sec. 9-67, the harm that Bronson Rash and the Appellant suffered directly affected their health, safety, and welfare. If a person dies, something must have greatly affected their wellbeing and the wellbeing of their relatives. Since both Bronson Rash and the Appellant's health, safety, and welfare were impacted, their injuries are those contemplated by the ordinance.

Additionally, the second part of the *Whitlaw* test is met under Sec. 9-67, as the ordinance is designed to protect the "health, safety, and welfare of the entire community" Ord. No. 9-67, City of N. Chas Code of Ord. The language of the statue does not limit the right to bring a cause of action to only the city. The decedent was, and the Appellant is, a member "of the entire community" of North Charleston. *Id*.

The same rationale could also be applied to Ord. No. 4-13 under the *Whitlaw* test. Under part one of the Whitlaw test this ordinance is clearly established to prevent drivers from crashing at intersections, as it states that nothing should be built or planted "in such a manner as to obstruct visibility at intersections" Ord. No. 4-13. This ordinance also applies to utility poles that create an obstruction greater than 12 inches. "Poles and support structures less than twelve (12) inches in diameter may be permitted in such areas" *Id.* Since the place where the harm occurs is specified in that ordinance as a road intersection, part 2 of the *Whitlaw* test is met. Naturally, the class of people who would most often be affected by obstructions at intersections would be drivers. Both Bronson Rash and Mr. McJunkin were driving moter vehicles at the time of the collision. Under the *Whitlaw* test rationale, a copy of Ord. No. 4-13 should also be provided to the jury to determine if negligence per se was violated.

CONCLUSION

Appellants ask that this court not grant a directed verdict in this case but rather remand for a new trial. [redacted] significant questions of fact remain, which must be resolved by a jury.

[SIGNATURE ON FOLLOWING PAGE]

May 6, 2024
Charleston, South Carolina

Respectfully submitted,

POULIN | WILLEY

/s/ Roy T. Willey, IV
S.C. Bar #: 101010
32 Ann Street
Charleston, SC 29403
(803) 222-2222
roy@akimlawfirm.com

ATTORNEY FOR APPELLANT-RESPONDENT

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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 **RESPONDENTS-APPELLANTS' REPLY IN SUPPORT OF JOINT MOTION TO STRIKE RESPONDENT'S BRIEF AND TO STAY CROSS-APPELLANT'S DEADLINES UNTIL THE COURT RULES ON THE MOTION** 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 June 7, 2024, addressed to their attorneys of record:

Roy T. Willey, IV, Esq.
Lane Jefferies, Esq.
Poulin Willey Anastapoulo, LLC
32 Ann Street
Charleston, SC 29403
(803) 222-2222
Attorneys for Appellant-Respondent Darleen Rash, Individually and as Personal Representative for the Estate of Bronson Harley Rash

Ian S. Ford, Esq. (SC Bar No.: 12463)
Ainsley Fisher Tillman, Esq. (SC Bar No.: 70551)
Ford Wallace Thomson LLC
715 King Street
Charleston, SC 29403
(843) 608-1234 (Mr. Ford)
(843) 277-2011 (Mrs. James)
(843) 266-1289 (Ms. Tillman)
Attorneys for Respondent-Appellant Anthony M. Akbar

BARNWELL WHALEY PATTERSON & HELMS, LLC

By: _____
David S. Cox (SC Bar #66195)
M. Dawes Cooke, Jr. (SC Bar #1376)
John W. Fletcher (SC Bar #69550)
211 King Street, Suite 300
Charleston, SC 29401
(843) 577-7700

and

I.S. Leevy Johnson (SC Bar # 3020)
George C. Johnson (SC Bar # 9308)
Chelsea A. Glover (SC Bar #103896)
JOHNSON TOAL & BATTISTE, P.A.
Office Box 1431
Columbia, South Carolina 29202
(803) 252-9700

Attorneys for Respondent-Appellant Dominion Energy South Carolina, Inc., f/k/a South Carolina Electric & Gas Company