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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas
The Hon. Deadra L. Jefferson, Circuit Court Judge

Appellate Case No. 2023-000718

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 REPLY BRIEF

POULIN | WILLEY | ANASTOPOULO, LLC

Roy T. Willey, IV
S.C. Bar Number: 101010
32 Ann Street
Charleston, South Carolina 29403
(803) 222-2222
Roy@akimlawfirm.com

Attorney for Appellant-Respondent

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I. THE COURT ERRED IN PERMITTING THE DEFENSE TO SHOW A VIDEO THAT MATERIALLY MISREPRESENTED THE FACTS AND THEREFORE WAS NOT A FAIR AND ACCURATE REPRESENTATION OF THE EVIDENCE.

The trial court erred in admitting a video offered by the defense that was filmed more than three years after the traffic accident at issue, which, not surprisingly, showed changes to the intersection and removal of vegetation. (Tr. T. 2255, ll. 13-17). Michael Sutton, the expert through whom the video was introduced as demonstrative evidence, conceded he had to alter the video to account for the changes to the site. (Tr. T. 2435, l. 11 – 2439, l.21). The differences in the site from the time of the accident were material and should have resulted in the video's exclusion. Instead, the trial court admitted the highly prejudicial video, constituting reversible error.

Initially, not only were there changes to the intersection and removal of vegetation since the time of the accident in 2017, but McJunkin's testimony also revealed a substantial difference between the line of sight that McJunkin would have had versus what was displayed on the video. For example, McJunkin testified that he stopped at the stop bar, but by 2020 the intersection had changed, as a sidewalk and crosswalk had been added. (Tr. T. 419, ll. 15-20; 1212, l 14.). These differences are readily apparent because photographs were taken on the scene within a week of the accident, unlike the defense's video which was created years later. The trial court's admission of the video here is in stark contrast to the type of photographs or videos of an accident scene normally admitted. *See, e.g.*, *Still v. Hampton & Branchville R.R.*, 258 S.C. 416, 429, 189 S.E.2d 15, 21 (1972) (affirming admission of photographs taken the night of the accident and two weeks later); *Ford v. S.C. DOT*, 328 S.C. 481, 488, 492 S.E.2d 811, 815 (Ct. App. 1997) (admitting photographs of accident scene taken on the day of the accident). Indeed, case law is directly contrary to the trial court's ruling here and demonstrates that videos taken years following an event are not

admissible unless it is clear that the scene has not been materially altered. *See generally Clark v. Cantrell*, 339 S.C. 369, 386, 529 S.E.2d 528, 537-38 (2000) (affirming exclusion of computer animation when the animation showed the car in a different position than the testimony at trial).

Whether a video fairly and accurately depicts the evidence is a threshold question for the trial court. *Id*. at 386, 529 S.E.2d at 537.[1] In admitting the video here, the trial court abdicated its gatekeeping responsibility and effectively ignored the requirement that the video be a fair and accurate representation of the evidence, erroneously leaving those issues for cross examination. (Tr. T. 2329, ll. 3-13). In order for a video to be admissible, the trial court must be convinced that "important elements must be identical or very similar to the scene" as reflected by other testimony and the display "must be technically correct on details such as distance, terrain, relative speed, path of travel, and surroundings." *Id.*

The trial court also failed to apply the heightened standard of admissibility which applies to the admission of a video. A video, particularly one taken three years after the incident which admittedly depicts a scene that has been materially altered, should only be admitted where "the probative value of the animation must *substantially* outweigh the danger of unfair prejudice…." *Id.* at 387, 529 S.E.2d at 538 (emphasis added). This is the reverse of the traditional Rule 403 test,

[1] Dominion contends the framework in *Clark* does not apply because this was a video rather than a computer animation. This is a distinction without a difference because in both instances, a party attempts to recreate a scene to assist in explaining that party's version of events. Whether by video or computer animation, both must accurately and fairly depict the "important elements" that existed at the time of the accident. The Court in Clark also cited caselaw equating computer animations to "a real-life re-creation" and other cases where recreations were excluded because they did not sufficiently align with the testimony at trial. *See id.* at 386-87, 529 S.E.2d at 537.

The video also is analogous to an experiment where stringent requirements exist to ensure the experiment accurately reflects the evidence and does not have a danger of misleading or confusing the jury. *See Weaks v. S.C. State Highway Dep't*, 250 S.C. 535, 543, 159 S.E.2d 234, 237-38 (1968) (finding evidence of an experiment in a motor vehicle collision case was not substantially similar because the evidence did not account for "the human element involved").

and courts of this state "must be vigilant not to treat Rule 403 in a cursory manner." *State v. Perry*, 430 S.C. 24, 75-76, 842 S.E.2d 654, 681 (2020) ("Rule 403 prohibits the admission of evidence when its probative value is substantially outweighed by the danger of unfair prejudice."). Accordingly, the trial court erred in reserving critical issues on the accuracy of the video for cross examination.

Moreover, the video essentially enabled the defense to represent to the jury a scene that was different than when the accident occurred and one that had undergone improvements that otherwise would have constituted subsequent remedial measures under Rule 407, SCRE. Plaintiff was not permitted to elicit testimony on these improvements yet the defense's video showed a scene with those changes. *Carson v. CSX Transp., Inc.*, 400 S.C. 221, 235, 734 S.E.2d 148, 155 (2012) (excluding photographs showing post-accident under Rule 407). This increased the propensity to confuse the jury as to the conditions of the scene at the time of the accident and certainly could well have affected the jury's determination of the critical question concerning line of sight.

Ultimately, the trial court permitted the defense to display a video that depicted an outdoor scene over three years after the traffic accident occurred. Time changed the intersection, significant improvements were made, vegetation was removed, and lighting was corrected. These differences were material, and they fell far short of being "identical or very similar" to the surroundings in February of 2017. Accordingly, the trial court erred in permitting the defense to show the video to the jury, and this error was prejudicial. Thus, Rash requests this Court reverse and remand for a new trial.

II. THE TRIAL COURT ERRONEOUSLY FAILED TO QUALIFY PAUL MCCULLOUGH AS AN EXPERT IN CIVIL AND STRUCTURAL ENGINEERING, ACCIDENT RECONSTRUCTION, AND PROJECT MANAGEMENT.

A. THIS ISSUE IS PRESERVED FOR REVIEW BECAUSE A PROFFER OCCURRED AND THE RECORD PROVIDES SUFFICIENT EVIDENCE FOR THIS COURT'S REVIEW.

As a threshold matter, Respondent-Appellants are wrong that this issue is not preserved for review because there was no apparent proffer of the evidence. McCullough was questioned extensively about his qualifications by the parties, and the record clearly demonstrates the subject matter and opinions that McCullough would have given before the jury. Therefore, regardless of whether a thorough proffer of the substance of McCullough's testimony occurred, the issue was raised to the trial court, and the record provides ample evidence for this Court to review on appeal.

Rash submits that the lengthy *voir dire* and the parties' arguments concerning the qualifications of McCollough were essentially the equivalent of a proffer. *Herron v. Century BMW*, 395 S.C. 461, 466, 719 S.E.2d 640, 642 (2011) ("Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue."). After hearing the parties' initial arguments, which span over fifteen pages in the record, McCullough presented *voir dire* testimony that accounts for nearly *fifty* pages. The following colloquy demonstrates that the substance of McCullough's expert testimony was discussed on several occasions:

> THE COURT: That is the area you're going to be seeking his testimony from, line of sight.
>
> MR. WILLEY: That is what he, yes, testifies about through the data. That's correct.

(Tr. T. 335, ll. 13-16). Additionally, the trial court thereafter acknowledged, "I'm clear about what you're going to ask him." (Tr. T. 369, ll. 4-5). Moreover, the trial court also instructed Rash's counsel to "tell me exactly what [McCullough's] going to say," and counsel responded, "[h]e is going to testify that the sight distance at this intersection is insufficient due to these obstructions." (Tr. T. 370, ll. 19-21). While the trial court instructed Rash on two occasions to refrain from questioning McCullough on the substance of his opinions, (Tr. T. 317, ll. 3-5; 319, ll. 1-2), the trial

court was clearly aware of the substance of McCullough's expected testimony, and this Court can easily discern it from the record. *See also State v. Jenkins*, 322 S.C. 360, 367-68, 474 S.E.2d 812, 817-17 (Ct. App. 1996) (finding an issue preserved when "it was very clear what testimony defense counsel hoped to elicit on cross-examination" and when counsel sought to proffer the testimony but was limited by the trial court and acknowledging, "[w]e further recognize that trial attorneys often walk a fine line in advocating their clients' interests and accepting the rulings of the trial judge with grace and courtesy"). Therefore, the lengthy testimony of McCullough, together with the trial court's clear understanding of why he was being offered, essentially equated to a proffer. Even though the word proffer was not used in the record, this Court should "adhere to the time-tested adage: if it walks like a duck, quacks like a duck, and looks like a duck, then it's a duck." *Wudi Indus. (Shanghai) Co. v. Wai L. Wong*, 70 F.4th 183, 191 (4th Cir. 2023); *see also Herron*, 395 S.C. at 466, 719 S.E.2d at 642. The requirement of a proffer to preserve an issue for appeal was clearly satisfied here.

Assuming arguendo that a formal proffer was not made in this case, Rash submits one was not needed in order to preserve this issue for appeal because it is "very clear what testimony [Rash] hoped to elicit" from McCullough. *Jenkins*, 322 S.C. at 367, 474 S.E.2d at 816; *see Smith v. Haynsworth*, 322 S.C. 433, 435 n.1, 472 S.E.2d 612, 613 (1996) ("[G]iven that the reason for the proffer was to establish that Adams was, in fact, qualified as an expert, we find it was sufficient."); *Weir v. Citicorp Nat'l Servs*., 312 S.C. 511, 519, 435 S.E.2d 864, 869 (1993) (Toal, A.J., dissenting) (contending an attorney's argument to the court as to what a witness would testify too was an adequate proffer); *Rawlinson Rd. Homeowners Ass'n v. Jackson*, 395 S.C. 25, 37, 716 S.E.2d 337, 344 (Ct. App. 2011) (finding the failure to proffer excluded testimony did not prevent appellate review because "the intended content of the testimony is sufficiently clear from the record");

Jamison v. Ford Motor Co., 373 S.C. 248, 260, 644 S.E.2d 755, 761 (Ct. App. 2007) (noting the rule requiring proffers of excluded testimony "has been relaxed where the appellate court is able determine from the record what the testimony was intended to show and that prejudice clearly exists"). Therefore, the issue is preserved for review, and this Court should address the merits.

B. THE TRIAL COURT ERRED IN EXCLUDING MCCULLOUGH AS AN EXPERT WITNESS.

The trial court erred in excluding McCullough as an expert witness, as his qualifications and experience overwhelmingly demonstrated that he had the "knowledge, skill, experience, training, or education" to testify as an expert pursuant to Rule 702, SCRE and offer an opinion on line of sight. While the trial court is afforded some latitude in determining whether a witness is qualified as an expert, the trial judge here abused that discretion by disallowing McCullough's qualification as an expert based on purported bias and the ostensible cumulative nature of his testimony.

There is no one, neat test—no mandatory requirements—for determining an expert in the state of South Carolina. *Teseniar v. Pro. Plastering & Stucco, Inc*., 407 S.C. 83, 90, 754 S.E.2d 267, 270 (Ct. App. 2014). Rather, "there are a variety of ways in which a person can become so skilled or knowledgeable in a field that their opinion in a scientific, technical, or specialized area can assist the trier of fact in determining a fact or in understanding the evidence." *Id.* (quoting *Fields v. J. Haynes Waters Builders, Inc*., 376 S.C. 545, 556, 658 S.E.2d 80, 86 (2008)).

In *Tesenair*, this Court reversed the trial court's decision to exclude Chris Dawkins as an expert in construction and architecture. *Id*. at 97, 754 S.E. at 274. This Court noted that "Dawkins had a lengthy career in the constructions business" and had an extensive education background" such that he was qualified to be an expert witness, and his lack of familiarity with a particular code did not disqualify him in that regard. *Id.* at 92, 754 S.E. at 272. While the appellant in that case

was able to offer another expert witness, that witness was not an expert in architecture and could not critique the respondent's expert's testimony. *Id.* at 93, 754 S.E. at 272. Without having Dawkins as an expert, the appellant was prevented from being able to rebut the respondent's testimony. *Id.* This Court held that Dawkins' testimony would have assisted the trier of fact in coming to a more informed decision, and his exclusion was determined to be an abuse of discretion and prejudicial error. *Id.* at 92-93, 754 S.E. at 272.

Similarly, in *Wilson v. Rivers*, the Supreme Court of South Carolina determined a doctor of human physiology could serve as an expert in biomechanics because of his education in combination with his training in biomechanics. 357 S.C. 447, 452–53, 593 S.E.2d 603, 605–06 (2004). The Respondents there had objected to the Petitioner's expert, Dr. Harding, being admitted as an expert in biomechanics in a car collision case. *Id.* at 450, 593 S.E.2d at 604. Dr. Harding's testimony was excluded under Rule 403 of the SCRE. *Id.* at 450, 593 S.E.2d at 605. The Supreme Court of South Carolina stated that "[t]he test for qualification of an expert is a relative one that is dependent on the witness's reference to the subject. *Id*. at 452, 593 S.E.2d at 605. Dr. Harding had extensive experience in both human physiology and in the field of biomechanics and had served as an expert in other states. *Id.* at 450, 593 S.E.2d at 604. While Dr. Harding did not have a degree in biomechanics, his experience, training, education, and past qualifications allowed him to serve as an expert. *Id*. at 452-53, 593 S.E. at 605. His testimony would have assisted the jury in determining the facts at issue, especially since he was more qualified than the jury to evaluate how the human body would be affected by a moving vehicle. *Id.*

The Supreme Court also held that the trial court abused its discretion by excluding Dr. Harding under SCRE 403 on the grounds that it would be confusing to the jury. *Id.* at 453, 593 S.E. at 605. Dr. Harding had consulted several sources including depositions, photographs, impact

tests, medical records, and the car accident report. *Id.* Dr. Harding also explained the methods he used without contradicting himself. *Id.* at 454, 593 S.E. at 605. The Supreme Court found that the probative value of Dr. Harding's testimony would have outweighed any prejudicial effect. *Id*.

Just as in *Teseniar*, McCullough's combination of work experience and training qualified him as an expert witness and his exclusion was prejudicial error that should be reversed. Without being able to present McCullough's testimony, it was impossible for Appellant to rebut Respondents' testimony at trial. McCullough was also able to establish himself as an expert based on the circumstances similar to Dr. Harding in *Wilson* and Chris Dawkins in *Teseniar*. Dr. McCullough had both extensive education and experience in the field in which he was offered as an expert. *Teseniar*, 407 S.C. at 92, 754 S.E. at 272 and *Wilson*, 357 S.C. at 452-53, 593 S.E. at 605. McCullough has a bachelor's degree in civil engineering and a master's degree in civil structural engineering from the University of Florida, and he has experience in performing investigations into causation and damages for events that take place on properties and roadways. He had over fifteen years of experience with his current employer, SEA, a forensic engineering firm. Throughout his years at SEA, he had worked on a variety of investigations, including those regarding damage assessments, scene documentation, line-of-sight evaluation, and calculations as it relates to deflections, displacements, and damage to structural members. (Tr. T 299, ll. 14-25).

Further, while prior testimony as an expert witness is not required, he also had substantial litigation experience. He had been deposed over twenty times (Tr. T. 322, l. 20-23), and he had previously been qualified as "civil engineering and the line-of-sight corridor." (Tr. T. 321, l. 8-9). McCullough had never before been found not qualified as a civil engineer (Tr. T. 323, l. 3-5), and he was licensed as a professional engineer in three states, including South Carolina. (Tr. T. 323, l. 6-12). Respondent-Appellants quarrel with the fact that McCullough's bio did not identify him as

a line-of-sight expert, or that McCullough did not primarily work in vehicle accident cases. But those arguments miss the mark. McCullough testified that line-of-sight is best understood to fall under the umbrella of civil engineering, a field in which McCullough was eminently qualified, and his experience was a key component to his qualifications. (Tr. T. 336, ll. 4-16).

Additionally, McCullough testified that "the core principles" concerning a line-of-sight analysis are the same an expert would use in other areas of civil engineering, such as for land surveying. (Tr. T. 336, ll. 1). Rather than analyze whether the general principles of civil engineering that related to a line-of-sight analysis applied in the motor vehicle context—which they undoubtedly do—the trial court improperly narrowed its focus on whether McCullough held a certificate for a training course or had been qualified in a motor vehicle accident case. This was the wrong analysis because it placed too high a bar on admitting McCullough as an expert. *See 5 Star, Inc. v. Ford Motor Co*., 408 S.C. 362, 368, 759 S.E.2d 139, 142 (2014) (finding a licensed electrical engineer qualified to testify about automobile design even though his experience was broader).

Moreover, the record reveals the trial court cited at least two grounds that are clearly erroneous in finding McCullough not qualified as an expert. First, the court stated because McCullough utilized colleagues in his office to help create the video he intended to use in support of his opinions, McCullough could not testify as an expert. (Tr. T. 1817, l. 17-23). The court apparently believed that since defense counsel had no ability to question the colleague about the methodology for compiling the data, McCullough could not testify. This is flatly wrong because not only did McCullough repeatedly testify that he collected the data, that the technology he used is reliable, and that the methodology is generally accepted in the community, even if the input of data by a colleague created hearsay concerns, McCullough can rely on that evidence in support of

his opinion. *Hundley v. Rite Aid of S.C., Inc*., 339 S.C. 285, 295, 529 S.E.2d 45, 50 (Ct. App. 2000) ("[A]n expert may testify as to matters of hearsay for the purpose of showing what information he relied on in giving his opinion of value.").

Second, the trial court's conclusion that McCullough's testimony would have been cumulative is also erroneous.[2] McCullough was the *first* expert witness Rash attempted to call, and the second witness overall. It is improper for the trial court to wait several days and until after the plaintiff has presented most of her case and then hold that McCullough's testimony would have been cumulative. McCullough's testimony, if it had been properly allowed by the trial court, would not have been cumulative because he was the first expert called by Rash. Clearly, the first expert witness to be called by a plaintiff could not be cumulative. By improperly excluding McCullough, the trial court's decision altered Rash's trial strategy, as Rash made it clear that she intended to use McCullough to set up the subsequent testimony from her other experts. Further, the substance of McCullough's testimony on line of sight is clear. Taken together, it is evident that Rash was prejudiced by the improper exclusion of McCullough's testimony.

III. THE TRIAL COURT ERRED IN EXCLUDING EVIDENCE OF PRIOR CITATIONS ISSUED TO DEFENDANT AKBAR.

The trial court also erred in excluding citations issued to Defendant Akbar for certain code violations. Akbar received violations for his property on May 9, 2013; June 12, 2013; September 24, 2014; and April 6, 2015, and the September violation specifically placed the homeowners on notice that the bushes on their property created a hazard and blocked the line of sight where the traffic accident occurred. Significantly, Rash intended to elicit testimony from Robin Ortiz that the

[2] In one respect, the trial court's belief that the evidence would have been cumulative underscores the fact that there was no mystery as to the opinions McCullough was prepared to offer in his testimony. Therefore, the focus on a purported lack of a formal proffer, which Rash does not concede, is a red herring.

condition of the property at the time of the accident was in a similar condition as when the citations were issued. (Tr. T. 601, ll. 12-21). The trial court's error in permitting this testimony and evidence of the citations prejudiced Rash because she was unable to show the jury that Akbar knew about the condition of his property and his failure to adequately correct the issue left a hazard in place that affected the line of sight, which ultimately contributed to the traffic accident and subjected Akbar to liability.

First, in concluding that the citations were too remote, the trial court failed to account for the testimony from Rash's witness that would have connected the condition of the property at the time when the citations were issued with the property's condition at the time of the accident. By linking the citation with the condition of the property at the time of the traffic accident, Rash sufficiently alleviated any remoteness concerns. Nevertheless, the trial court injected its own argument, based on assumptions that are not supported by the record, in excluding this evidence. For example, the trial court noted, "generally, when you violate a code or ordinance of that type, the code enforcement officer is well aware of you and they come to your property until it gets corrected." (Tr. T. 605, l. 25 – 606, l. 3). The trial court continued, "apparently, there must not have been any concern because they would have kept on issuing—especially if the neighbors were complaining or somebody else called in and complained, they would have come to that property every week till it got done." (Tr. T. 606, ll. 12-16). It was completely improper for the trial court to assume facts not in evidence to support its erroneous ruling. The trial court's assumptions are not only improper overall, they are erroneous because the court ignored what the actual testimony would have shown in favor of the court's own assumptions, clearly engaging in fact-finding that is normally reserved for the jury. The trial court's error in excluding evidence of the citations and the condition of the property prejudiced Rash because whether Akbar's property impaired

McJunkin's line of sight was a quintessential question of fact for the jury. The trial court's exclusion of this evidence prevented the jury from hearing information it needed in reaching a verdict.[3] *Burke v. Republic Parking Sys*., 421 S.C. 553, 561, 808 S.E.2d 626, 630 (Ct. App. 2017) (reversing and remanding for new trial where trial court excluded testimony because "the jury was not permitted to hear and consider all relevant evidence relating to causation and damages, and there is a reasonable probability the jury's verdict was influenced by the trial court's decision").

CONCLUSION

This Court should reverse the trial court and remand for a new trial because the jury was not permitted to hear key testimony from Rash's expert on line of sight, the evidence is not cumulative because McCullough was the first witness whose opinions were being offered in order to lay the groundwork for subsequent experts, and his testimony was fundamental in a case that turned on line of sight. The trial court also erred in in failing to permit evidence and testimony about the City of North Charleston Citations issued to Defendant Akbar, and the court erred in failing to set aside the verdict based on Rash's post-trial motions for JNOV and the thirteenth juror doctrine.[4]

[3] Rash incorporates by reference her brief as Respondent-Appellant in the cross appeal as additional support that this evidence would have been relevant to establishing Akbar's negligence because the citations and supporting testimony created questions of fact that would have been highly relevant to the jury's decision-making.

[4] Rash also contends the trial court erred in failing to set aside the verdict based on her post-trial motions for JNOV and under the thirteenth juror doctrine, which the trial court required to be made immediately following the verdict after denying the common request for ten days. (Tr. T. 3272, ll. 8-14).

Respectfully submitted,

POULIN | WILLEY | ANASTOPOULO, LLC

s/Roy T. Willey, IV
Roy T. Willey, IV
S.C. Bar Number: 101010
32 Ann Street
Charleston, SC 29403
843-618-8888
roy@akimlawfirm.com

Attorney for Appellant-Respondent

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Charleston, South Carolina