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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.

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

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES/ORDINANCES/RULES/REGULATIONS

OTHER MATERIALS

STATEMENT OF ISSUES ON APPEAL

Did the Circuit Court err in denying DESC's motions for directed verdict where the only testimony from the allegedly negligent driver was that his view was not obstructed by the utility poles at issue?

SUGGESTED ANSWER: *Yes.*

Did the Circuit Court err in denying DESC's motions for directed verdict where the evidence was undisputed that DESC fulfilled its obligations under North Charleston's ordinances and the National Electric Safety Code?

SUGGESTED ANSWER: *Yes.*

Did the Circuit Court err in denying DESC's motions for directed verdict where Plaintiff presented no evidence that DESC breached a duty of care to Plaintiff?

SUGGESTED ANSWER: *Yes.*

STATEMENT OF THE CASE

This case went to trial in the Circuit Court of Charleston County. Before the trial judge submitted the case to the jury, she denied Respondent-Appellant Dominion Energy South Carolina, Inc., f/k/a South Carolina Electric & Gas Company's ("DESC") timely motions for directed verdict, which were premised on the failure of Plaintiff Darlene Rash ("Plaintiff"), individually and as Personal Representative of the Estate of Bronson Harley Rash ("Mr. Rash"), to present any evidence supporting the elements of her claims. Ultimately, the jury returned a verdict in DESC's favor as to all claims. The trial judge denied Plaintiff's post-trial motions. Plaintiff subsequently filed a Notice of Appeal. DESC filed the instant 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, the Court should find that a new trial is not necessary as to DESC because the trial judge should have entered a directed verdict in DESC's favor.

A. Factual Background

1. Relevant Allegations of the Complaints

Plaintiff commenced this action on January 4, 2019 by Summons and Complaint against Defendants: (a) Daniel McJunkin ("Mr. McJunkin"); (b) South Carolina Department of Public Safety; (c) South Carolina Department of Transportation; (d) Snyder Event Services, Inc. (corrected to Snyder Party Rental, Inc.); (e) City of North Charleston; (f) DESC; (g) Respondent-Appellant Anthony M. Akbar ("Mr. Akbar"); and (h) former[1] Respondent-Appellant Paul Quattlebaum ("Mr. Quattlebaum"). (*See generally* R. pp. 24-36). On February 28, 2019, Plaintiff filed her Amended Summons and Complaint against those parties. (*See generally* R. pp. 37-50).

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

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[1] Although Mr. Quattlebaum was a party in this case through trial (and obtained a jury verdict in his favor), Plaintiff has recently settled her claims against him. As a result, Mr. Quattlebaum is no longer a party to this appeal.

> 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.

(*See* R. pp. 39-40). 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* R. pp. 41-42 ¶ 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* R. p. 42. ¶ 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* R. pp. 42-47 ¶ 20). She also alleged that: (a) Mr. McJunkin was negligent in his operation of his truck; (b) South Carolina Department of Transportation and South Carolina Department of Public Safety failed to properly design, inspect, maintain and/or repair the intersection of Meeting Street Road and Hedgewood Street; (c) City of North Charleston violated its own ordinances and failed to properly design, inspect, maintain and/or repair the intersection; (d) Snyder Party Rental, Inc. allowed its trucks to park at the intersection of Meeting Street Road and Hedgewood Street and obstruct views; (e) Mr. Akbar failed to properly maintain property located at 3891 Walnut Street, North Charleston, South Carolina 29405; and (f) Mr. Quattlebaum failed to properly maintain property located at 3891 Walnut Street, North Charleston, South Carolina 29405. (*See id.*).

2. Facts Relevant to this Cross-Appeal.

The facts relevant to DESC's cross-appeal are straightforward. 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.* R. pp. 41-42 ¶ 17; R. pp. 193:11-194:17). Plaintiff claims these utility poles somehow prevented Mr. McJunkin from seeing Mr. Rash's motorcycle, which was traveling north on Meeting Street Road.

Daniel McJunkin was driving his Toyota Tacoma truck on Hedgewood Street in Charleston, with his wife and son. (*See* R. pp. 203:13-204:15). He came to a stop sign where Hedgewood Street intersected Meeting Street Road. (*See* R. p. 204:11-206:13). He attempted to turn left onto Meeting Street Road, but the motorcycle that Mr. Rash was operating northbound on Meeting Street Road struck his vehicle. (*See* R. pp. 206:16-207:17). Mr. Rash sustained fatal injuries in the accident. (*See* R. pp. 39-40).

The photograph below depicts Mr. Rash's view heading north on Meeting Street Road (with the double yellow line), where he was operating his motorcycle around the curve toward the scene of the accident (Hedgewood Street can be seen on the right hand side of Meeting Street Road in the picture):

(*See* R. p. 1500). The two utility poles in the upper center of this photograph form the basis for Plaintiff's claims against DESC (the "Poles").

The following picture depicts the view from Hedgewood Street (where Mr. McJunkin was attempting to turn left) looking southbound down Meeting Street Road:

(*See* R. p. 1499). The Poles at issue in Plaintiff's claims against DESC are indicated by the two red arrows.

The following photograph depicts another angle of the scene of the accident:

(*See* R. p. 1498). This photograph was taken looking down Hedgewood Street; Mr. McJunkin's vehicle would be heading toward the viewer, while Mr. Rash's motorcycle would have been approaching from the right-hand side of the picture.[2]

The issues relating to DESC's motions for directed verdict all concern whether the two Poles obstructed Mr. McJunkin's view, thereby preventing him from seeing Mr. Rash approaching on his motorcycle. Mr. McJunkin, however, has never claimed that the utility poles obstructed his view in any way.

B. Procedural History

On March 3, 2023, DESC filed its Motion for Summary Judgment. (*See* R. pp. 95-97). On March 13, 2023, DESC filed its Memorandum in Support of Motion for Summary Judgment. (*See* R. pp. 120-38). By Form 4 Order dated March 15, 2023, the trial court denied DESC's Motion for Summary Judgment because "genuine issues of material fact exist and the motion is premature at this time." (*See* R. pp. 14-16).

The case went to a jury trial from March 20, 2023 to April 4, 2023. At the close of Plaintiff's case, DESC moved for a directed verdict in part because Plaintiff did not present any evidence from which the jury "could reasonably conclude that this accident most probably would not have occurred but for the placement, or improper placement specifically, of Dominion's poles." (*See* R. p. 688:10-17). DESC next argued that it was entitled to a directed verdict because Plaintiff had "not given the jury any evidence from which they can conclude that there was a legal duty that Dominion owed and breached." (*See* R. p. 694:16-21). Finally, DESC moved "for directed verdict as to the survival cause of action because there's no competent evidence for this jury to conclude that there was conscious pain and suffering." (*See* R. p. 695:21-24). DESC supported its initial motion for directed verdict with a Memorandum in Support of Motion for Directed Verdict. (*See generally* R. pp. 149-58). The trial judge denied the Defendants' motions for directed verdict at the close of Plaintiff's case. (*See* R. pp. 720:22-729:12).

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[2] In this photograph, only one of the Poles at issue in Plaintiff's claims against Dominion is visible. The second Pole is out-of-frame to the right side of the picture.

At the close of all evidence, DESC renewed its prior motion for directed verdict, referencing its previously filed Memorandum in Support. (*See* R. pp. 1150:21-1157:21). The trial judge denied the renewed motion for directed verdict. (*See* R. pp. 1205:3-1206:14 ("Dominion, in essence, renewed its original motion. The Court will stand on its original findings regarding the questions of fact that exist and deny the motion.")). The jury returned a verdict in favor of all Defendants. (*See* R. pp. 1466:4-1469:23).

After the jury returned its verdict, Plaintiff made an oral motion for judgment notwithstanding the verdict and to invoke the "thirteenth juror" doctrine. (*See* R. pp. 1470:7-1475:17), which motions were denied. Plaintiff then filed a Notice of Appeal concerning the denial of its post-trial motions.[3] (*See* R. pp. 161-71). In response, DESC filed the instant Notice of Cross-Appeal, seeking review of the trial judge's denial of its motions for directed verdict (only in the event that this Court rules in Plaintiff's favor on *her* appeal). (*See* R. pp. 172-79).

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[3] DESC will address Plaintiff's arguments raised in connection with her Notice of Appeal at the appropriate time. This Brief is limited to arguing that — in the unlikely event the Court finds merit in Plaintiff's appeal — the Court should conclude that Judge Jefferson erred in denying its motion (and renewed motion) for directed verdict. If the Court correctly determines that Plaintiffs' appeal lacks merit, the issue in DESC's cross-appeal will be moot.

ARGUMENT

A. Standard of Review

"On review from a trial court's denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court and views the evidence and all reasonable inferences in the light most favorable to the nonmoving party." *See Allegro, Inc. v. Scully*, 418 S.C. 24, 32, 791 S.E.2d 140, 144 (2016) (citing *Elam v. South Carolina Dep't of Transp.*, 361 S.C. 9, 28, 602 S.E.2d 772, 782 (2004)); *accord Jenkins v. Few*, 391 S.C. 209, 216, 705 S.E.2d 457, 461 (Ct. App. 2010). "A directed verdict motion is properly granted if the evidence as a whole is susceptible of only one reasonable inference." *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 313, 743 S.E.2d 109, 112 (Ct. App. 2013) (citation omitted). "An appellate court will only reverse the [trial] court's ruling when there is no evidence to support the ruling or when the ruling is controlled by an error of law." *Fettler v. Gentner*, 396 S.C. 461, 466, 722 S.E.2d 26, 29 (Ct. App. 2012) (citation omitted).

For the following reasons, the undisputed evidence shows that the trial court should have granted DESC's motions for directed verdict. The evidence presented at trial demonstrates that (a) the alleged conduct of DESC did not proximately cause the accident; and (b) DESC did not breach a duty of care to Mr. Rash.

B. The Trial Judge Should Have Granted DESC a Directed Verdict Because the Undisputed Evidence Demonstrates Beyond Any Question That Plaintiff Did Not Create a Jury Issue As to the Elements of a Negligence Claim.

"'To prevail in an action founded in negligence, the plaintiff must establish three essential elements: (1) a duty of care owed by the defendant to the plaintiff; (2) a breach of that duty by a negligent act or omission; and (3) damage proximately caused by a breach of duty.'" *Hinds v. Elms*, 358 S.C. 581, 585, 595 S.E.2d 855, 857 (Ct. App. 2004) (*quoting Vinson v. Hartley*, 324 S.C. 389, 399, 477 S.E.2d 715, 720 (Ct. App. 1996)); *accord Babb v. Lee Cty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013) ("To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages."). The trial judge erred in allowing this case to go

to the jury in the first instance, because the evidence did not support any of the elements of negligence.

DESC's motions for directed verdict raised two questions relevant to this cross-appeal. First, did Plaintiff present any evidence that the accident most probably would not have occurred if DESC's utility poles were in a different location? Second, did Plaintiff present any evidence that DESC breached a duty of care to Mr. Rash in the design or maintenance of its electric transmission infrastructure? While the jury correctly answered these questions on its own, the trial judge should not have allowed the case to go the jury in this first instance. The record contains no evidence supporting Plaintiff's position on either of these questions. In the unlikely event that this Court agrees with Plaintiff as to her appeal, it should reverse the trial court's denial of DESC's motions for directed verdict and rule in favor of DESC.

In light of the uncontradicted physical evidence and Mr. McJunkin's unequivocal testimony that DESC's utility poles did not block his view, a reasonable jury could not conclude that the accident most probably would not have occurred but for the placement of the poles. Further, it was undisputed that the locations of DESC's poles complied with governing North Charleston city ordinances regarding intersection sight lines and with the National Electric Safety Code. Plaintiff offered no evidence of a different applicable standard of care that could support a jury verdict. As a result, a reasonable jury could not conclude that DESC breached a duty of care to Mr. Rash in the placement of its utility pole.

1. The Trial Court Should Have Granted 'DESC's Motions for Directed Verdict Because Plaintiff Presented No Evidence of Causation in Fact.

There is no evidence that anything DESC did with regard to the placement or location of the Poles contributed *in any way* to the accident. Because Plaintiff presented no such evidence, the trial judge erroneously allowed the jury the opportunity to *speculate* that the Poles somehow caused the accident. Fortunately, the jury diligently listened to the facts and the law, returning a correct verdict in favor of DESC and the other Defendants. Should this Court find any merit in

Plaintiff's appeal, it should reverse the trial judge's denial of DESC's well-founded directed verdict motion because there was no evidence that the Poles proximately caused this accident.

"Negligence is not actionable unless it is a proximate cause of the injury." *Vinson v. Hartley*, 234 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996) (citation omitted). "Proof of proximate cause requires proof of both causation in fact and legal cause." *Id.* (citation omitted). "Causation in fact is proved by establishing the injury would not have occurred 'but for' the defendant's negligence," while "[l]egal cause is proved by establishing foreseeability." *Id.* (citations omitted). "A negligent act or omission proximately causes an injury if, in a natural and continuous sequence of events, it produces the injury, and without it, the injury would not have occurred." *Bailey v. Segars*, 346 S.C. 359, 366, 550 S.E.2d 910, 914 (Ct. App. 2001) (citation omitted); *accord Vinson*, 324 S.C. at 401, 477 S.E.2d at 721 ("Proximate cause is the efficient or direct cause of an injury.").

A plaintiff may not carry the burden of proving proximate cause via surmise, speculation, or conjecture. *See Messier v. Adicks*, 251 S.C. 268, 270, 161 S.E.2d 845, 845-46 (1968) ("It is elementary that in order for plaintiff to recover it was necessary for him to prove that his fall and resulting injuries were the proximate result of some negligent or wanton conduct on the part of the defendant. These are basic to recovery and cannot be left to surmise, speculation, or conjecture."); *accord Thomas v. South Carolina Dep't of Highways & Pub. Transp.*, 320 S.C. 400, 402, 465 S.E.2d 578, 580 (Ct. App. 1995) ("There is no evidence at all that even if the Department had taken Green's license tag and car registration, Green, who had a valid driver's license, would not have been negligently operating either the uninsured vehicle or some other vehicle at the time he ran over Thomas. We can only speculate about what he would or would not have done had the Department recovered his license tag and car registration.").

While proximate cause is typically a jury question, "[a] directed verdict for the defendant is appropriate where there is no evidence from which a jury could reasonably infer the defendant's negligence was a proximate cause of the plaintiff's injuries." *See Sherer v. James*, 290 S.C. 404, 407, 351 S.E.2d 148, 150 (1986). The trial court should have directed verdict in favor of DESC,

because evidence from which the jury could infer or conclude that DESC's conduct concerning the Poles proximately caused the accident was completely lacking.

There was only one witness with direct knowledge of the potential impact of the Poles on the accident: Daniel McJunkin. Mr. McJunkin was operating the truck involved in the accident with Mr. Rash, which was attempting to turn left from Hedgewood Road onto Meeting Street Road. No other witness could testify, with any degree of certainty or first-hand knowledge, whether the Poles caused this tragic accident. For the reasons that follow, the *only* factual, first-hand evidence presented to the jury did not support Plaintiff's argument. As a result, the trial court should have granted DESC a directed verdict to prevent the jury from engaging in conjecture about the cause of the accident.

Mr. McJunkin was once a defendant in the case. He had every motivation to blame someone else for this accident. He had every reason to claim that he did not see Mr. Rash because of the Poles or some other obstruction. If Mr. McJunkin testified untruthfully to protect himself, DESC would have no way to definitively disprove his testimony. Only he knows what he saw or could not see. However, even though it was in his interest to blame DESC, he did not. Instead, he truthfully accepted responsibility and denied that the Poles or any other object obstructed his view. As Plaintiff's first witness at trial, Mr. McJunkin unequivocally testified on direct examination:

> 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* R. pp. 212:3-11 & 214:13-19 (emphasis added)). Mr. McJunkin admitted in his discovery deposition, which he adopted in front of the jury, that *nothing* blocked or obstructed his view at the time of the accident. This is particularly notable, as Mr. McJunkin did not alter his testimony even though he revisited the scene of the accident after his deposition and observed the Poles at that time:

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* R. p. 214:4-12). Despite going back to the scene of the accident after being sued, Mr. McJunkin *never* testified that the Poles obstructed his vision in any way at the time of the accident.

Thus, the *only* evidence presented to the jury from any witness with direct knowledge definitively showed that the Poles did not block Mr. McJunkin's view. Plaintiff did not carry her burden of creating a factual issue for the jury's determination on this issue. Instead, Mr. McJunkin's testimony allows for only one conclusion: that the Poles did not cause the accident. As a result, the trial judge should have ruled that, as a matter of law, Plaintiff could not establish causation, an essential element of her claim.

Plaintiff cannot cite any South Carolina authority upholding a verdict against a defendant for blocking sight lines where, as here, the driver(s) involved in the accident testified that his vision

was not actually obstructed. She cannot cite any case denying a directed verdict under such circumstances. The trial judge committed reversible error when she denied DESC's directed verdict motions, because there was simply no evidence that Mr. McJunkin's vision was obstructed. Her denial of those motions would have allowed the jury to speculate — contrary to the *only* evidence in the record — that Mr. McJunkin's view was blocked when he testified under oath (and without dispute) that it was not. There is no authority allowing for a finding of proximate cause under the unique facts of this case.

This Court's unpublished decision in *Bessinger v. Longcreek Plantation Prop. Owners Ass'n*, No. 2020-UP-214, 2020 S.C. App. Unpub. LEXIS 249 (Ct. App. July 8, 2020), highlights the weakness of Plaintiff's claims against DESC. In *Bessinger,* the trial court granted summary judgment to defendants in an automobile accident (allegedly caused by a tree limb obscuring a stop sign), stating in part:

> [Bessinger] and Ms. Edwards are the only two witnesses to the accident. [Bessinger] testified during her deposition that she does not know if the overgrown tree limb had anything to do with the accident, and she does not know why Ms. Edwards pulled out in front of her school bus. In addition, Ms. Edwards suffered memory loss as a result of the accident, and has no recollection of the accident whatsoever.

See id. 2020 S.C. App. Unpub. LEXIS 249, at *3. This Court affirmed the entry of summary judgment, stating:

> We likewise find Bessinger *has raised merely the possibility that the tree limbs or shrubbery allegedly obscuring the stop sign caused the accident. See McKnight v. S.C. Dep't of Corr.*, 385 S.C. 380, 386, 684 S.E.2d 566, 569 (Ct. App. 2009) ("Negligence is not actionable unless it is a proximate cause of the injuries, and it may be deemed a proximate cause only when without such negligence the injury would not have occurred or could have been avoided." (*quoting Hanselmann v. McCardle*, 275 S.C. 46, 48-49, 267 S.E.2d 531, 533 (1980))); *King v. J. C. Penney Co.*, 238 S.C. 336, 340, 120 S.E.2d 229, 230 (1961) ("[F]or a plaintiff to recover damages, she must prove by the greater weight or preponderance of the evidence not only the injury but also that it was caused by the actionable negligence of the defendant."); *id.* ("This burden cannot be met by relying upon the theory that the thing speaks for itself or that the very fact of injury indicates negligence.").

See id., at *4; *accord Gibson v. Gross*, 280 S.C. 194, 198-99, 311 S.E.2d 736, 740 (Ct. App. 1984) ("[T]here is no evidence in this case that Edwards struck Gibson because the highway was blocked, or because warning devices failed to warn him of the highway's condition. In fact, the evidence suggests that Gross' car blocked only one lane of a four lane highway. In short Gibson failed to establish that his injuries were proximately caused by Gross' negligence."). Like the *Bessinger* plaintiff, Plaintiff asked the jury to speculate about a mere possibility that the Poles might have obscured Mr. McJunkin's view — a possibility that his testimony indisputably refuted.

Even if Plaintiff could show that DESC's utility poles were improperly placed at the intersection and along Meeting Street Road, the uncontradicted evidence shows only that the accident *did not* happen because Mr. McJunkin's view down Meeting Street Road was obstructed. Mr. McJunkin does not know why he did not see Mr. Rash's motorcycle. Consequently, the evidence is insufficient for a reasonable jury to conclude that the accident most probably would not have occurred "but for" the location of the poles. Proximate cause is an essential element of Plaintiff's burden of proof. However, rather than present competent causation evidence, Plaintiff asked the jury to speculate that the utility poles blocked Mr. McJunkin's view in Mr. Rash's direction.

South Carolina courts have long recognized that utility poles are momentary sight-line obstructions; therefore, as a matter of law, their presence is generally not a proximate cause of motorists' failure to see oncoming traffic:

> The accident occurred on a clear day. If the train was in close proximity to the crossing when decedent approached it, as it must have been according to the testimony of the fireman and engineer, he could have heard the whistle and the bell if he had listened. He could have seen the signal lights flashing if he had looked. After he passed the hedge, a distance of 50 feet from the place of the accident, there was nothing to obstruct his view down the tracks to the right for approximately a mile except a line of utility poles, parallel to the track, ***which would only constitute a momentary obstruction***. There was nothing to distract his attention. Under these circumstances if he attempted to enter the crossing in front of an approaching train, he was guilty of gross contributory negligence and recklessness as a matter of law.

See Bramlett v. Southern R. Co., 234 S.C. 283, 288, 108 S.E.2d 91, 93 (1959) (emphasis added); *accord Bishop v. Atlantic Coast Line R.R. Co.*, 213 S.C. 125, 135-36, 48 S.E.2d 620, 624 (1948) (finding poles were "only minor momentary obstructions to the view" and that driver "did not conform to . . . even slight care if he undertook to look at a point where he knew that obstructions would prevent him from seeing an approaching train"); *Dunbar v. Evins*, 198 S.C. 146, 17 S.E.2d 37 (1941) (holding that companies maintaining right of way with telephone poles that allegedly obstructed view of vehicle were not proper defendants). This case presents an even more compelling case to hold as a matter of law that the poles did not cause the accident, as the visual evidence of the scene is wholly consistent with Mr. McJunkin's testimony that his view was not obstructed.

The photographic evidence makes clear that Plaintiff's suggestion that these narrow poles could have prevented Mr. McJunkin from seeing Mr. Rash is illogical. The photograph of Mr. McJunkin's view from Hedgewood Street definitively refutes Plaintiff's claim that the Poles were a visual obstruction:

(*See* R. p. 1499). Mr. McJunkin has consistently denied that the Poles blocked his view, and the physical evidence confirms that he is correct.

DESC's Poles are not the limiting factor in the sight line to the curve in Meeting Street Road. The photographs make clear that from the position just behind the stop bar or moving forward, Mr. McJunkin could see all the way to the point where Meeting Street curves behind the distant fence line. The two Poles are simply not a factor in Mr. McJunkin's ability to see around that curve; the curve in the roadway itself is the limiting factor. Plaintiff's expert, Ruston Hunt, testified about his observation at the scene of the accident that the road curves out of view "much more significantly than I realized" from looking at photographs and that the road "just disappears . . . out of your view." (*See* R. pp. 525:24-526:9). Even viewing the evidence in the light most favorable to Plaintiff, she did not present enough evidence to allow the jury to conclude that the accident most probably would not have occurred if the poles were not there.

Without direct evidence, Plaintiff may argue that her expert witness testimony was sufficient to create a jury question on causation. However, it is insufficient for Plaintiff's experts to opine that the utility poles might have partially occluded the views of motorists. (*See* R. pp. 515:11-6, 559:20-560:24). It is not enough for them to vaguely opine that all the obstructions were somehow causative factors in that they increased the chance of an accident or that the intersection would have been safer without the Poles. None of Plaintiffs' experts opined that, but for the Poles, Mr. McJunkin would have seen Mr. Rash. That is the standard for causation. Plaintiff's expert testimony—that the Poles made an accident more likely—is similar to testimony that the Supreme Court rejected in *Harris Teeter v. Moore & Van Allen,* 390 S.C 275, 701 S.E2d 742 (2010) (finding that expert's contention that, had defendant acted differently, "the percentage of success would have been greater" did not establish causation). Plaintiff's evidence was legally insufficient. Plaintiff failed to present evidence that the Poles actually caused the accident.

In addition, Plaintiff's experts testified that the curvature of Meeting Street Road afforded inadequate stopping distance for Mr. Rash. (*See* R. pp. 522:1-523:7). This further supports that the accident would have happened even if the Poles were not present. "[W]here the cause of plaintiff's injury may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, plaintiff has failed to carry the burden of establishing that his injuries were the proximate result of defendant's negligence." *Fowler v. Coastal Coca-Cola Bottling Co.*, 252 S.C. 579, 167 S.E.2d 572 (1969) (citing *Messier v. Adicks*, 251 S.C. 268, 271, 161 S.E.2d 845, 846 (1968) (reversing trial court's refusal to grant defendant judgment notwithstanding the verdict in trip and fall case, even though evidence showed stairs were too steep, the lighting was inadequate, and railing was improperly constructed, because plaintiff could not say why he tripped)).

For the foregoing reasons, the evidence presented would require the jury to speculate to conclude that the Poles, each less than one-foot wide, blocked Mr. McJunkin's view of Mr. Rash's motorcycle at the precise instant he was looking in that direction. It is at least as likely that the curvature in the road or another obstruction obscured Mr. Rash's motorcycle from Mr. McJunkin.

It is equally likely that Mr. McJunkin simply failed to look in Mr. Rash's direction at the right time or, if he did, failed to perceive him or incorrectly estimated Mr. Rash's speed. It is equally likely that Mr. McJunkin could not see Mr. Rash's motorcycle because of darkening conditions at twilight, the narrow profile of Mr. Rash's motorcycle, the location of the motorcycle in its lane of travel, or simple inattention at the critical moment. (*See generally* R. pp. 561:8-575:10),

As set forth above, Plaintiff has not presented any factual evidence — from eyewitness testimony of those involved in the accident or visual records of the accident scene — that would allow a jury to find that the Poles proximately caused the accident. To the contrary, the evidence permits only one inference: that the Poles did not obstruct Mr. McJunkin's view. Therefore, the trial judge erred in denying DESC's motions for directed verdict because Plaintiff failed to present sufficient evidence that the accident most probably would not have occurred if DESC's utility poles had been located elsewhere. Under those circumstances, there were not genuine issues of fact for the jury to decide.

2. <u>The Trial Court Should Have Granted 'DESC's Motions for Directed Verdict Because Plaintiff Did Not Present Any Evidence That DESC Breached a Duty of Care to Mr. Rash.</u>

a. <u>Plaintiff Did Not Present Any Evidence Supporting a Negligence *Per Se* Claim.</u>

In addition to causation, Plaintiff also bore the burden of proving that DESC owed Mr. Rash a duty of care with regard to the placement of the Poles and breached that duty. However, she did not present sufficient evidence to create a triable issue of fact for the jury. Therefore, the Court should have granted DESC's motions for directed verdict in this matter.

"'An essential element in a cause of action for negligence is the existence of a legal duty of care owed by the defendant to the plaintiff.'" *Thomasko v. Poole*, 349 S.C. 7, 11-12, 561 S.E.2d 597, 599 (2002) (quoting *Bishop v. South Carolina Dep't of Mental Health*, 331 S.C. 79, 86, 502 S.E.2d 78, 81 (1998)). "Without a duty, there is no actionable negligence." *Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007); *accord Hurst v. East Coast Hockey*

League, Inc., 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006) ("If there is no duty, then the defendant in a negligence action is entitled to judgment as a matter of law.").

The determination of the existence of a duty is solely the responsibility of the Court, and whether the law recognizes a particular duty is an issue of law that the court should decide. *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011). Therefore, the trial judge had the task of determining the threshold question of the existence of a duty. This was not a question that should have been presented to the jury. a

Generally, a duty is "the obligation to conform to a particular standard of conduct toward another." *See Huggins v. Citibank, N.A.*, 355 S.C. 329, 332, 585 S.E.2d 275, 277 (2003) (*quoting Hubbard v. Taylor*, 339 S.C. 582, 588, 529 S.E.2d 549, 552 (2000)). "Duty arises from the relationship between the alleged tortfeasor and the injured party. In order for negligence liability to attach, the parties must have a relationship recognized by law as the foundation of a duty of care." *Huggins*, 355 S.C. at 333, 585 S.E.2d at 277. This Court has discussed the standards governing a trial court's consideration of the existence of a duty of care:

> Whether a defendant has acted negligently is a mixed question of law and fact. *Moore v. Weinberg*, 373 S.C. 209, 221, 644 S.E.2d 740, 746 (Ct. App. 2007).
>
> > First, the court must determine, as a matter of law, whether the law recognizes a particular duty. If there is no duty, the defendant is entitled to a judgment as a matter of law. If a duty does exist, the jury then determines whether a breach of the duty that resulted in damages occurred.
>
> *Id.* (internal citations omitted). "Generally, duty is defined as the obligation to conform to a particular standard of conduct toward another." *Id.* A "standard" is "a model accepted as correct by custom, consent, or authority." Black's Law Dictionary 1412 (7th ed. 1999). "Foreseeability of injury, in and of itself, does not give rise to a duty." *Charleston Dry Cleaners & Laundry, Inc. v. Zurich Am. Ins. Co.*, 355 S.C. 614, 618, 586 S.E.2d 586, 588 (2003) (emphasis in original). If the plaintiff fails to prove the defendants owed her a legal duty of care, she fails to prove actionable negligence. *Doe v. Greenville County Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007).

See Nelson v. Piggly Wiggly Cent., Inc., 390 S.C. 382, 391, 701 S.E.2d 776, 780-81 (Ct. App. 2010).

In the present case, the trial court should have granted DESC's motions for directed verdict because there is no evidence supporting that it breached a duty of care to Mr. Rash. When DESC moved for a directed verdict, Plaintiff argued to the trial judge that "this is a negligence – a negligence *per se* case." (*See* R. p. 713:24-25). However, Plaintiff failed to present any evidence to support liability under a theory of negligence *per se*. Therefore, the trial judge should have granted DESC's motions for directed verdict because Plaintiff failed to proffer sufficient evidence to warrant submission of this case to a jury.

Negligence *per se* is a doctrine under which a court may find a violation of a duty of care based on the violation of a statute:

> Negligence per se is a doctrine, used in tandem with a negligence claim, to establish two of the elements of negligence — duty and breach. In order to use a statute for this purpose, plaintiffs must establish a duty owed through proving two recognized criteria: "(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 intended to protect." *Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988). Those two elements ensure that the statute proposed as a basis of duty and breach is being used properly. Both elements are designed to limit negligence *per se*'s use to actions where the plaintiff is owed a duty arising from the statute.

See Denson v. National Cas. Co., 439 S.C. 142, 157, 886 S.E.2d 228, 236 (2023). Negligence *per se* may apply to allegations of violations of a municipal ordinance. *Nguyen v. Uniflex Corp.*, 312 S.C. 417, 420, 440 S.E.2d 887, 889 (Ct. App. 1994) ("The appellants concede that if they violated a fire safety ordinance that such a violation might constitute negligence per se."). Here, notwithstanding Plaintiff's arguments, the uncontradicted trial *evidence* demonstrates clearly that DESC placed the subject utility poles in compliance with governing North Charleston Ordinance as well as the National Electric Safety Code, which establishes nationwide standards for electric transmission infrastructure. Plaintiff provided no basis for the jury to conclude that there was a violation of a statute or ordinance that could support a finding of negligence *per se*.

In her opening statement to the jury, Plaintiff argued that DESC's placement or maintenance of the Poles violated Section 4-13 of the North Charleston Code of Ordinances

Appendix A (Zoning Regulations). (*See* R. pp. 195:22-198:1 ("[I]f either pole, or both combined, created a visibility obstruction at that intersection, then they were placed in violation of this law."). Section 4-13 of Appendix A to the North Charleston Code of Ordinances states that visibility at "street intersections shall be unobstructed" and that no "structure shall be constructed after the effective date of this ordinance, in such a manner as to obstruct visibility at intersections." Plaintiff considered this language in isolation, ignoring the language of the *entire* ordinance. In full, Section 4-13 states (emphasis added):

> Visibility at intersections: 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.***

(*See also* R. p. 1418:15-19). The highlighted language of this ordinance is the most important to this case, which explains Plaintiff's reluctance to acknowledge it.

It was undisputed at trial (and Plaintiff's expert conceded) that the DESC Poles about which Plaintiff complains are both less than twelve inches in diameter. (*See* R. pp. 462:4-463:9, 586:16-19, 1078:21-1079:2, 1094:13-15). Moreover, only one of the poles was even within the sight triangle outlined in the ordinance. As a result, North Charleston ordinance Section 4-13 does not prohibit the placement of the Poles at this intersection where they are present. The Poles could legally have been placed at this intersection exactly where they are. There is no evidence that the Poles — none of which exceed twelve inches in diameter — violated Section 4-13 of the North Charleston ordinances, so as to trigger negligence *per se*. Therefore, the Court should have granted DESC's motions for directed verdict.

In fact, the only evidence is that DESC and its predecessors complied with all standards governing the placement or location of the Poles. The evidence at trial showed that Section 231 of the National Electric Safety Code ("NESC"), which regulates power transmission infrastructure,

provides that utility poles, states that "if there is a cur[b] present, this specifies that the pole should be placed so that they are behind the cur[b] and avoid contact by ordinary vehicles using and located on the traveled way." (*See* R. pp. 1072:18-1076:21). Under this standard, if no curb is present, "the supporting structure or pole should be located a sufficient distance from the roadway to avoid contact by ordinary vehicles using and located on the traveled way." (*See* R. p. *1076*:22-25). This is the only section of the NESC dealing with the placement of utility poles. (*See* R. p. 1077:9-18). Notably, the NESC does not have requirements for utilities to maintain sight corridors. (*See* R. p. 1077:19-21). The Poles in question comply with the NESC, in that they are located at a sufficient distance from the road to avoid contact by ordinary vehicles. Nothing in the NESC required that DESC take into account sight lines or the views of motorists in the placement of the Poles or do anything further.

Simply put, Plaintiff did not present a scintilla of evidence that DESC violated a statute or ordinance that would support negligence *per se*. To the contrary, the *only* evidence is that DESC complied with all governing laws and standards, including North Charleston's ordinances and the NESC. Therefore, the trial judge erred in denying DESC's motions for directed verdict.

b. Plaintiff Did Not Present Any Evidence Supporting the Breach of a Common Law Duty of Care.

As set forth above, Plaintiff argued to the Circuit Court that this was a "negligence *per se*" case, and the evidence does not support such an argument. Additionally, Plaintiff has failed to present any other evidence supporting that DESC breached a duty of care to Mr. Rash.

At trial, Plaintiff did not proffer any expert testimony or other evidence in the field of power distribution infrastructure design that would require a different standard of care for utility companies and show that DESC breached that standard of care. Even if a jury could fashion a standard of care different from the one that ordinance and national standards prescribe, Plaintiff did not provide the jury any expert guidance to define that duty. There is no evidence explaining what placement of the Poles would have fulfilled the duty of care. There is no evidence at all upon which the jury could have concluded that DESC breached a duty of care. At most, Plaintiff's

experts testified that DESC should have done something different, without any foundation to establish the nature of the duty of care on DESC.

Nelson v. Piggly Wiggly, *supra,* involved an accident where a vehicle in the defendant's parking lot drove over a curb stop and injured the plaintiff. The Court affirmed summary judgment for the defendant because there was no evidence that the design of the curb stops violated industry standards, even though the plaintiff's expert testified to his preference that a safer design be used. *Nelson*, 390 S.C. at 393, 701 S.E.2d at 781-82 ("In the present case, Durig attested only to his own preferences rather than to the requirements of any law, ordinance, or recognized industry safety standard. His opinion did not, as a matter of law, establish a duty on Respondents to guard against the possibility that an improperly operated vehicle would injure Nelson."). Plaintiff did not even offer expert testimony that the placement of DESC's Poles was improper, let alone that it breached an applicable standard of care. The only law brought to the attention of the Circuit Court that specifically governs sight lines at the subject intersection, the North Charleston Ordinance, explicitly *authorizes* the placement of poles at intersections. Plaintiff presented no evidence that the duty of care required that DESC do more than the governing NESC or regulations required. Aside from vague *ipse dixit* arguments of her counsel, Plaintiff utterly failed to show that DESC breached a duty of care to Mr. Rash.

By denying DESC's motions for directed verdict, the trial court simply left it to the jury to speculate and craft a duty of care concerning the placement of the Poles without any evidence or guidance that is not consistent with the governing industry and other standards. The implications of this would be enormous. DESC followed the law and national standards to the letter. There is no evidence to the contrary. Plaintiff also failed to present any evidence that the law should impose on DESC a duty to do more than the law and national standards require. To allow a jury to find, with no evidentiary basis, that DESC breached an *ad hoc* standard of care would be devastating not just to DESC, but to the entire industry. Popular opinions should not set the duties on utility companies; instead, professional, nationwide consensus and legislation by elected policymakers should define those duties. The existence of a legal duty is a matter of law, not fact. Even if it

were a matter of fact, Plaintiff submitted no evidence to define the scope of DESC's duty. Therefore, the Circuit Court should have granted DESC a directed verdict based on Plaintiff's failure to establish the applicable standard of care.

CONCLUSION

The path of least resistance for a trial court is always to send a case to the jury, and this jury arrived at the correct conclusion. However, the Circuit Court had an important gate-keeping role. DESC did not make its motions for directed verdict in shotgun fashion, but instead focused them narrowly on two obvious, critical failures in Plaintiff's proof. DESC respectfully submits that — in the event it rules in Plaintiff's favor on her lead appeal — this Court should reverse the trial court's denial of DESC's motions for directed verdict.

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October 24, 2024

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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.

RULE 211 CERTIFICATION

The undersigned certifies that this Respondent-Appellant's Final Brief as Appellant complies with Rule 211(b), SCACR.

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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 FINAL BRIEF AS APPELLANT** 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 October ___, 2024, addressed to their attorneys of record:

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