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 REPLY BRIEF AS APPELLANT

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A. Plaintiff's Arguments Concerning the Exclusion of Mr. McCullough's Expert Testimony Do Not Support Her Position.

In her Brief as Respondent, Plaintiff argues that DESC was not entitled to a directed verdict because the trial judge erred in excluding[2] the expert testimony of witness Paul McCullough.[3] (*See, e.g.*, Pl.'s Resp. Br., at 2: "Without being able to hear 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."). She then implies that—had the trial court admitted Mr. McCullough's opinion testimony—there would have been sufficient evidence to support the denial of DESC's directed verdict motions. It is revealing that Plaintiff's argument in opposition depends on this Court overturning the trial judge's decision to exclude McCullough's expert testimony. Plaintiff implicitly concedes that, without that excluded evidence, she finds little to support the denial of the directed verdict. Nonetheless, Plaintiff's arguments are improper responses to DESC's cross-appeal.

DESC's argument on cross-appeal is that—based on the evidence *admitted* at trial—the trial judge erred in denying its directed verdict motions. Plaintiff's response should have focused on whether there was sufficient evidence to support the trial court's denial of DESC's directed verdict motions. Plaintiff should make her argument that the trial judge *erred* in excluding

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[1] Plaintiff's first attempt at an Initial Brief as Respondent, filed on May 6, 2024, cited matters not properly includable in the record, such as Mr. McCullough's deposition testimony, in violation of Rule 210(c), SCACR ("The Record shall not, however, include matter which was not presented to the lower court or tribunal."). Respondents-Appellants were forced to file a motion to strike Plaintiff's Initial Brief as Respondent because of this violation of the rules. The Court granted this Motion on July 9, 2024, and gave Plaintiff leave to file a second Initial Brief as Respondent - to which this Reply responds.

[2] As DESC previously argued in its Brief as Respondent in response to Plaintiff's appeal, the record and law fully support the affirmance of the trial judge's exclusion of Mr. McCullough's opinion testimony.

[3] The trial court excluded expert opinion testimony from Mr. McCullough, but allowed him to give fact testimony, including testimony about the scene data that he gathered and Plaintiff's other expert witnesses relied upon.

Mr. McCullough's testimony in her appeal, where she carries the burden of convincing this Court that the trial court abused its discretion in excluding Mr. McCullough's testimony. The trial judge did not consider Mr. McCullough's unarticulated expert opinions when she denied DESC's motion for directed verdict, so DESC submits that they are not germane to this Court's review of her ruling.

In any event, even if the admissibility of Mr. McCullough's testimony is properly before the Court on DESC's cross-appeal, Plaintiff has not shown that the trial judge abused her discretion in excluding that testimony. DESC previously argued in its Brief as Respondent that: (a) Plaintiff did not preserve the issue of the admissibility of Mr. McCullough's opinion testimony because she did not proffer his testimony for the trial judge; (b) the trial judge did not abuse her discretion in excluding Mr. McCullough's testimony because he was not qualified to give those opinions; and (c) even if the trial judge abused her discretion, such error was harmless. (See DESC's Br. as Respondent, at 21-31). To avoid unnecessary duplication, DESC incorporates herein by reference its arguments in its Brief as Respondent that this Court should affirm the trial court's exclusion of Mr. McCullough's proposed expert testimony.

Additionally, Plaintiff did not make a proper proffer of Mr. McCullough's testimony. There is nothing in record that would show what, if anything, his testimony would have added to Plaintiff's contentions regarding factual causation or breach of the duty of care. In her Brief as Respondent, she has not identified what in his hypothetical testimony would have supported the trial judge's denial of DESC's Motion for Directed Verdict. Granting Plaintiff the benefit of every doubt, there is nothing in the record to support her claim that Mr. McCullough's excluded testimony would have supported the denial of DESC's Motion for Directed Verdict.

B. Plaintiff Does Not Refute That Mr. McJunkin's Undisputed Testimony Mandates a Directed Verdict in Favor of DESC With Regard to Causation in Fact.[4]

As DESC argued in its Brief of Appellant—even if the Court agrees with Plaintiff on any of the issues raised in her appeal—the trial court should not have submitted this case to the jury in the first instance, because the undisputed evidence definitively shows that DESC's utility poles near the scene of the accident ("the Poles")—DESC's only alleged involvement in the accident—were not the cause in fact of the accident.

1. Plaintiff's Brief as Respondent Erroneously Focuses on "Foreseeability," Not Factual Causation.

Plaintiff fails to directly address DESC's specific causation argument in its cross-appeal, *i.e.*, that there is no evidence showing that "but for" the Poles the accident would not have occurred. Plaintiff's Brief as Respondent does not explain how she can prove causation in light of the undisputed testimony of Daniel McJunkin ("Mr. McJunkin"), the driver of the other vehicle. As discussed below, Mr. McJunkin's testimony—the undisputed evidence on the question—clearly proves that his vision was not obscured by the Poles or anything else. As excerpted below, he testified that nothing obstructed his view. To the contrary, his failure to perceive Bronson Harley Rash's ("Rash") motorcycle was for some other reason (speed, inattentiveness, etc.).

Plaintiff argues that she presented sufficient evidence of causation because the accident was *foreseeable*. However, foreseeability does not address DESC's contentions in its cross-appeal. DESC argues that—irrespective of whether this accident was foreseeable—in light of Mr. McJunkin's undisputed testimony, there was no evidence upon which the jury could conclude that the presence or location of the Poles was a factual cause of the accident. In other words, there is no evidence upon which a reasonable jury could find that, "but for" the Poles, the accident would not have occurred.

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[4] In DESC's Initial Brief as Appellant, it addresses Plaintiff's glaring failure to prove factual causation *first*, as this issue so clearly mandates the grant of a directed verdict in DESC's favor. In her Initial Brief as Respondent, Plaintiff confusingly discusses this issue *second*, not even beginning her discussion of this issue until late in her 14-page brief. DESC will discuss this issue first in its reply to remain consistent with its original Brief as Appellant.

As DESC has previously argued, the law is clear that "[p]roof of proximate cause requires proof of ***both causation in fact and legal cause***." *See Vinson v. Hartley*, 234 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996) (citation omitted) (emphasis added). DESC's appeal focuses exclusively on the first part of proximate cause, causation in fact. "'Causation in fact is proved by establishing the plaintiff's injury ***would not have occurred 'but for' the defendant's negligence***.'" *Wickersham v. Ford Motor Co.*, 432 S.C. 384, 391, 853 S.E.2d 329, 332 (2020) (emphasis added) (*quoting Hurd v. Williamsburg Cty.*, 363 S.C. 421, 428, 611 S.E.2d 488, 492 (2005)). "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.").[5] To fully establish proximate cause, evidence of foreseeability alone is insufficient. In other words, no matter how foreseeable an outcome, a plaintiff cannot show proximate cause without proving that the negligence *actually caused the injury*.

DESC's argument is simply that Plaintiff presented no evidence that would allow a jury to conclude that, without the Poles, the accident would not have occurred. If, as Mr. McJunkin admitted, *nothing* blocked his view at the intersection, the presence of the Poles (or foliage, or anything else) could not have caused the accident. In response to DESC's argument, Plaintiff has not directed the Court to any evidence in the record showing that the Poles actually caused the accident. Plaintiff's Brief as Respondent does not cite to a single item of trial evidence or testimony from which the jury could even infer that the Poles actually obstructed Mr. McJunkin's view and caused the accident. In fact, the only evidence is Mr. McJunkin's testimony that nothing obscured

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[5] On the other hand, "*[l]egal cause* is proved by establishing foreseeability." *See Vinson*, 234 S.C. at 400, 477 S.E.2d at 721 (emphasis added). Plaintiff's Brief as Respondent focuses on responding to *legal* causation based on foreseeability. However, as discussed herein, DESC's argument in this appeal is that there was not sufficient evidence for a jury to return a verdict in Plaintiff's favor because of cause-in-fact. In other words, Plaintiff presented no evidence to permit a jury to decide that, "but for" the presence of the Poles, Mr. McJunkin would have been able to avoid this accident.

his view. Because of this, the Court need not even consider the question of legal causation or foreseeability.

Plaintiff devotes much of her Brief as Respondent to arguing that there is evidence of causation because the accident was "foreseeable." This does not address factual causation and, as a result, Plaintiff has failed to find support for the trial judge's denial of DESC's directed verdict motions. In the event the Court rules in Plaintiff's favor on her appeal and thus reaches DESC's appeal, the Court should reverse the trial judge's denial of DESC's motions for directed verdict.

2. <u>The Evidence Referenced in Plaintiff's Brief as Respondent Would Not Be Sufficient to Support a Jury Verdict on Factual Causation.</u>

DESC's cross-appeal regarding the denial of a directed verdict on factual causation is straightforward and it is based on Mr. McJunkin's uncontradicted testimony—along with common knowledge of driving a motor vehicle near utility poles or other visual obstructions. Mr. McJunkin, Plaintiff's first trial witness, unequivocally testified that "nothing obstructed [his] view" at the time of the accident:

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.

(*See* R. p. 212:3-11 (emphasis added)). He testified that he revisited the scene of the accident after giving his deposition, refreshing his recollection about the scene of the accident, which had not changed since the accident. (*See* R. p. 214:4-12). Mr. McJunkin confirmed that this deposition testimony was true both when first given and at the time of trial. (*See* R. p. 214:13-19). Plaintiff has not directed the Court to any trial evidence contradicting this testimony. To the contrary, this

is the *only* evidence presented to the jury about the factual cause of the accident. In the face of such undisputed evidence refuting causation—coming from a witness with every motivation to shift blame to DESC—the jury had no basis to conclude that DESC's Poles caused this accident. Plaintiff only supports her argument with speculation; however, the Court need not speculate. Mr. McJunkin's testimony eliminates any argument that the Poles could have blocked his view.

Mr. McJunkin's testimony is consistent with what everyone knows about driving motor vehicles. Utility poles, street signs, and other opaque structures are ubiquitous; if a structure is obstructing a motorist's view, it is the motorist's responsibility to move enough to see around it. *See e.g., Bishop v. Atl. Coast Line R.R. Co.,* 213 S.C. 125, 135-36, 48 S.E.2d 620, 624 (1948) (finding that poles were "only minor momentary obstructions to the view" and "[driver] did not conform to due care or even slight care if he undertook to look at a point where he knew that obstructions would prevent him from seeing an approaching train, for it would be futile for a traveler to look at a place where he knew beforehand he could not see."). Plaintiff's briefing consistently omits that Mr. McJunkin testified that he pulled forward after stopping. He demonstrated where he first stopped by drawing a triangle on a photo shown to the jury (*see* R. pp. 204:18-206:9) and then testified that he moved his truck forward after stopping:

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

(*See* R. p. 206:20-22).

Likewise, Plaintiff's briefing consistently gives the misleading impression that the two utility poles in issue were situated next to each other to create an obstruction. In fact, the second pole was 138 feet down the road from the intersection, per the testimony of Plaintiff's own experts. (*See* R. pp. 521:13-16, 637:10-17, 777:11-13, 840:11-17). The following photo depicts the view from Hedgewood Street (from whence Mr. McJunkin attempted to turn left) looking southbound down Meeting Street Road:

(*See* R. p. 1499). Two red arrows identify the Poles at issue.

Importantly, Plaintiff's Brief as Respondent does not cite any record evidence supporting that the Poles actually obstructed Mr. McJunkin's view of Mr. Rash's motorcycle. She identifies no evidence that Mr. McJunkin lied when he testified that nothing obstructed his view. The evidence Plaintiff cites to support her argument that DESC was not entitled to a directed verdict on causation is the testimony of Shirley Richardson, expert Rushton Hunt, and expert Mark Teague. For the reasons that follow, this evidence does not support Plaintiff's argument that there was sufficient evidence to submit the case to the jury.

First, Plaintiff cites testimony from a nearby resident, Shirley Richardson. Ms. Richardson testified generically that she has difficulty seeing at the intersection. Among other things, she testified:

> There is -- there was some shrubbery on the fence, and there's a pole there that, you know, it obstructs your view making the left turn. Coming at -- the cars are coming

this way, and you've got to inch up. You just can't really see, so you have to get up much closer. You've got to see between the pole and the bush.

(*See* R. p. 606:20-25). She also testified that she called DESC to advise it that "[t]he pole is in an awkward position because you have to actually inch out to be able to see beyond the pole in conjunction with the hedges." (*See* R. p. 632:14-16).

Ms. Richardson's testimony is insufficient to support a jury finding of causation in fact. First, and foremost, Ms. Richardson conceded that, if someone "inches up" a bit at the intersection, "you can get a clear view of Meeting Street because the pole is then behind you." (*See* R. p. 638:5-9). In other words, even if the jury accepted all of Ms. Richardson's testimony, she could not testify that the DESC's Poles caused this particular accident. To the contrary, her testimony was that a driver *could* "get a clear view" by simply inching up at the intersection.

Ms. Richardson did not observe the accident itself. (*See* R. pp. 634:25-635:2). There is no evidence to suggest that she had any knowledge of the locations of the vehicles, the specific conditions at the time of the accident, lighting, or anything else. She did not testify that this accident occurred because Mr. McJunkin could not see Mr. Rash due to the Poles. She did not have the knowledge to testify to this factually and was not qualified as an expert witness competent to opine regarding what Mr. McJunkin could see. At most, she testified about her generic personal complaints about vision at the intersection.[6] This is not, in any way, probative of whether the Poles actually caused the accident.[7]

Plaintiff next cites the testimony of expert witness Dr. Rushton Hunt. Dr. Hunt testified that "the view from Mr. McJunkin's vantage point—stopped, as he testified that he was, at the stop bar—was not a clear view sufficiently far up the road because, as it says in Number 2, we had

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[6] Ms. Richardson's testimony, as with the testimony of Plaintiff's three expert witnesses (Dr. Rushton Hunt, Mark Teague and Ken Richardson), explains that the preceding sharp curve on Meeting Street Road made this a challenging intersection, (*See* R. pp. 516:2-15, 577:6-17, and 590:18-592:5).

[7] Finally, Ms. Richardson's testimony about her efforts to contact DESC about this intersection reflects a serious lack of specificity. She does not know when—even what year—she contacted DESC about this intersection. (*See* R. p. 636:12-18). She does not know whether she did so before or after the accident and does not know what number she called. (*See* R. p. 636:19-23).

these poles, bushes, fencing that blocked the view of the vehicles that were coming around the curve" (*See* R. p. 528:4-10). Plaintiff relied on Dr. Rushton's testimony about how eliminating the Poles and shrubs theoretically *might have* changed things:

> Q. All right. And in this case, with respect to the elimination, do you have an opinion about how elimination of the obstructions could have changed the outcome of this particular incident?
>
> A. Well, yes. I mean, I've said already that if we can buy another hundred feet, another two seconds of reaction time for people traveling in the direction that Mr. Rash was, that's a game-changer. That's a mitigation. ***We didn't eliminate the possibility, but we've tremendously reduced the likelihood by giving people two extra seconds***.

(*See* R. p. 558:1-10 (emphasis added)).

Dr. Rushton's testimony would not be sufficient to support a verdict on causation in fact. To the contrary, he only testified generally about an obstruction at this accident scene. He did not differentiate the impact of the Poles from any other obstructions or challenges. Plaintiff does not cite to any testimony from Dr. Rushton opining with certainty that: (a) Mr. McJunkin could not see Mr. Rash in the moments leading up to the accident because of the Poles; ***and*** (b) but for this obstruction, the accident would not have occurred. Plaintiff cannot rely on mere evidence that there was some obstruction at this intersection. She must also show that the obstruction actually caused this accident. Dr. Rushton's testimony does not do this.

To the contrary, Dr. Rushton testified that, at most, if the obstructions were not present at the intersection, this would have made it *possible* to avoid the accident: "We didn't eliminate the possibility, but we've tremendously reduced the likelihood by giving people two extra seconds." This is not evidence that the Poles actually caused the accident. To the contrary, it is entirely possible that, in the absence of the Poles (or other obstructions) this tragedy would have still occurred. As a result of the foregoing, Dr. Rushton's testimony did not, and could not, create an issue for the jury on factual causation.

Finally, Plaintiff cites the testimony of expert Mark Teague concerning his "observ[ation] that there was a sight-distance restriction with the utility poles, a fence, and vegetation." (*See* R.

p. 577:8-9). He further testified to his opinion that "the two utility poles that we've been discussing in the case did block the sight distance for a vehicle coming out of Hedgewood." (*See* R. p. 578:11-16). Again, as with Dr. Rushton's testimony, Mr. Teague's cited testimony does little beyond suggesting that there was some obstruction of vision at the intersection. Even assuming this to be true, it is not evidence that the Poles actually caused this accident. Mr. Teague did not testify that, in fact, Mr. McJunkin could not see Mr. Rash's motorcycle immediately before impact because of the Poles. In the cited testimony, Mr. Teague did not present any evidence upon which a jury could base a verdict that, but for the Poles, the accident would not have occurred. As our Supreme Court has stated:

> If abstract specialized knowledge is not connected to the facts of the particular case, the jury has no basis on which to use the knowledge except to speculate whether it could have played a role in the case. *See* 31A Am. Jur. 2d *Expert and Opinion Evidence* § 22 (2012) ('Expert opinion which is speculative, conclusory, or unsubstantiated by facts in the record is of no assistance to the jury in rendering its verdict and therefore is inadmissible.'). In such an instance—as here—the knowledge will not assist the trier of fact, and is therefore not admissible.

See State v. Galloway, No. 28225, 2024 S.C. LEXIS 122, at *12-13 (July 31, 2024). Mr. Teague's testimony is mere speculation that cannot support a jury's verdict.

For the foregoing reasons (and in the event the Court rules in Plaintiff's favor on her own appeals), the Court should reverse the trial judge's denial of a directed verdict to DESC because Plaintiff did not present sufficient evidence for the jury to find causation in fact.

3. <u>The Cases Plaintiff Relies on in Her Brief as Respondent Are Inapposite.</u>

In her Brief as Respondent, Plaintiff discusses several cases in detail in support of her argument that there was sufficient evidence of causation for the issue to go to the jury. For the following reasons, Plaintiff's reliance on those cases is completely misplaced.

Plaintiff first discusses *Vinson v. Hartley*, 324 S.C. 389, 477 S.E.2d 715 (Ct. App. 1996). (*See* Pl.'s Resp. Br., at 9-10). In *Vinson*, the plaintiff felt fine when he left the scene of an accident and did not seek medical attention until after he consulted with an attorney more than a week later. Among other things, more than a week after the accident, two teeth chipped. The plaintiff admitted

that he did not hit his mouth or do anything during the accident that would have injured his teeth. The defendant admitted her fault but contested causation and damages. The plaintiff and his dentist testified about the cause of the mouth injury; the evidence that the plaintiff was injured was uncontradicted. Nevertheless, this Court affirmed a defense verdict, ruling that the jury could find that the plaintiff's proffered evidence and testimony on damages were not credible and could decide not to award damages. In other words, the jury could find that the plaintiff—bearing the burden of proof—had not carried his burden even in the absence of contrary evidence, if it found that the plaintiff's evidence was incredible. In this case, DESC did not have the burden of proof, Plaintiff did. She was obligated to present affirmative evidence showing that the Poles caused the accident. She did not. Her reliance on *Vinson* does not support her argument on DESC's cross-appeal.

Plaintiff's Brief as Respondent next discusses *Tobias v. Carolina Power & Light Co.*, 190 S.C. 181, 2 S.E.2d 686 (1939). (*See* Pl.'s Br. as Resp., at 10). In that case, Mr. Tobias sued an electric company for injuries sustained when a car struck and threw him against exposed guy wires of a pole that the defendant installed and maintained near the center of a highway. The Supreme Court held that:

> We do not believe that the position maintained by the appellant is tenable in this day of freakish traffic accidents; or that the accident which occurred was of such an unusual and extraordinary character that it could not have been foreseen that some such occurrence might probably take place. Certainly the appellant might reasonably have anticipated that its negligence would probably result in injury of some kind to someone.

See id. at 187-88, 2 S.E.2d at 688. *Tobias* is not applicable here for two reasons. First, as discussed above, DESC does not argue "legal cause" in its cross-appeal; rather, it focuses only on cause in fact, which the *Tobias* court did not discuss. Second, in *Tobias* the poles' guy wires clearly had injured the plaintiff. There was no disputing that, if the poles had not been in the location, Plaintiff would not have sustained those specific injuries. Here, as DESC has repeatedly shown, there is no evidence that the accident would not have occurred in the absence of the Poles. Instead, the only evidence is that the Poles did not obstruct Mr. McJunkin's vision.

C. Plaintiff Does Not Refute That the Trial Judge Should Have Granted a Directed Verdict as to the Breach of a Duty of Care.

DESC's Brief of Appellant argues that the trial judge should have granted a directed verdict for it because Plaintiff did not present sufficient evidence to create a jury question in connection with her "burden of proving that DESC owed Mr. Rash a duty of care with regard to the placement of the Poles and breached that duty." (*See* DESC's Brief of Appellant, at 19). Plaintiff's Brief as Respondent does not refute DESC's argument that the trial judge should have directed a verdict in DESC's favor because there is no evidence from which the court could find the existence of a duty or a breach thereof.

1. Plaintiff Has Not Presented Sufficient Evidence to Support the Existence and Breach of a Duty of Care Under Common Law.

In her Brief as Respondent, Plaintiff first argues that " Dominion . . . had a duty to Bronson Rash at common law, which Dominion does not seem to contest." (*See* Pl.'s Br. as Respondent, at 5). Respectfully, Plaintiff has failed to present sufficient evidence of the existence of a duty of care under negligence *per se* and has not based her claims on a common law duty. To the contrary, when DESC moved for a directed verdict (which is the issue in this cross-appeal), Plaintiff argued to the trial judge that "this is a negligence – **a negligence *per se* case**." (*See* R. p. 713:24-25 (emphasis added)). This case has always been litigated as one involving claims of negligence *per se*, *i.e.*, duties of care arising under (and defined by) statute or ordinance. It would be inappropriate to now inject common law negligence claims in this case, as the directed verdict motions presented to the trial judge did not involve such issues.

More importantly, even if Plaintiff presented evidence supporting a common law duty of care, she had not presented any evidence of the extent of that duty or DESC's breach thereof. Plaintiff argues that: "Clearly, a utility company must use care when its sets up utility poles. Dominion owed a duty of care to those who would be affected by the placement of its poles, including drivers." (*See* Pl.'s Br. as Respondent, at 5). She contends that whether DESC breached that duty is a fact question for the jury. (*See id.*). However, Plaintiff cites no legal authority defining the nature of the duty of care. Moreover, she presents no evidence defining that duty.

She presented no expert witness testimony about the common law duties allegedly owed by a utility company installing poles. Plaintiff provided no evidence upon which a jury could base a decision that DESC breached a common law duty of care.

For the foregoing reasons, if necessary, the Court should reverse the trial court's denial of DESC's directed verdict motions, because there is no evidence of a breach of a common law duty of care.

2. Plaintiff's Brief of Respondent Does Not Set Forth a Basis for a Breach of a Duty of Care Under the Doctrine of Negligence *Per Se.*

Plaintiff's Brief as Respondent argues that there is evidence of a breach of a duty of care under the negligence *per se* doctrine. Specifically, Plaintiff argues that DESC violated North Charleston Ordinances 4-13 and 9-67. North Charleston Ordinance 4-1 provides:

> ***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 N. Charleston Ordinance § 4-13 (emphasis added). Ordinance 9-67 states, in part:

> 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;

See N. Charleston Ordinance § 9-67. It is indisputable that neither of these ordinances created a duty of care that DESC breached.

First, Ordinance 9-67 is inapplicable to DESC, on its face. The cited portion of that ordinance only prohibits "[g]rass, noxious weeds, vegetable growth, briars, brush and plants more

than one foot in height." There is no evidence or claim that DESC did anything with regard to plants that caused the accident. The cited portion of Ordinance 9-67 does not address utility poles in any way. Ordinance 9-67 cannot be a basis for a finding that DESC breached a duty of care.

Second, Plaintiff has not disputed that DESC complied with the requirements of Ordinance 4-13. As set forth above, that ordinance expressly allows the placement of utility poles of a diameter of 12" or less in the area at issue in an intersection. Plaintiff does not contend that DESC placed a Pole of more than 12" in diameter in a forbidden area. It is beyond dispute that DESC complied with Ordinance 4-13. Plaintiff seems to now argue that DESC violated the "spirit" of Ordinance 4-13 because there were two poles and the sum of their width was greater than 12". This ignores the language of the ordinance itself, which refers to "*poles*" in the plural. If North Charleston wanted to additionally specify and limit the number of poles or support structures placed in a given area, it would have said so. This Ordinance, however, does not do that. Moreover, only one of the Poles was located at the intersection; the second Pole was 138 feet down the road. (*See* R. pp. 521:13-16, 637:10-17, 777:11-13, 840:11-17). Because the second Pole is not at the intersection, the ordinance does not even apply to it. Not only is Plaintiff wrong in arguing based on an alleged "intent" outside of the plain language of the ordinance, but she is factually mistaken because the second pole was not located at the intersection with the first pole.

For the foregoing reasons, there is no evidence that could support a violation of a duty of care under negligence *per se*. DESC fully complied with the applicable North Charleston ordinance.

CONCLUSION

For all of the foregoing reasons (in the event it becomes necessary due to the Court's ruling on Plaintiff's appeal), the Court should reverse the trial court's denial of DESC's directed verdict motions. Plaintiff's Brief as Respondent does not identify any evidence that would support a jury verdict against DESC.

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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 Reply Brief as Appellant complies with Rule 211(b), SCACR.

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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

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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 REPLY 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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