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THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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

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Appellate Case No. 2023-000718

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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,..... Respondents-Appellants.

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# APPELLANT-RESPONDENT DARLEEN RASH'S FINAL BRIEF AS RESPONDENT

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I. Did the trial court err in denying Akbar's and Dominion's motions for directed verdict where Akbar did have a duty to the Plaintiff as a matter of law?

**Suggested Answer: No**

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

**Suggested Answer: No**

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

**Suggested Answer: No**

## STATEMENT OF THE CASE

On the evening of February 19, 2017, Bronson Rash was traveling north on Meeting Street Road in North Charleston, South Carolina, on his 2017 BMW motorcycle heading to work at Charleston County EMS. (R. p. 39). Around the same time, Daniel McJunkin and his family were traveling on Hedgewood Street after leaving his father's house. (R. p. 39). McJunkin was operating a 2014 Toyota Tundra. (R. p. 41). McJunkin stopped at the stop bar and looked both ways before turning left onto Meeting Street Road. (R. p. 39, 41). Unfortunately, McJunkin did not see Bronson Rash. McJunkin's truck collided with Bronson Rash's motorcycle, causing him to be thrown from the motorcycle. (R. p. 41-42). Rash ultimately passed away from injuries sustained during the accident. (R. p. 41-42).

On the left-hand side of Meeting Street, there were multiple items that obstructed McJunkin's view as he proceeded to make a left turn. These obstructions included the property

located at 3891 Walnut Street, owned by Anthony Akbar, and the property at 3895 Walnut Street, owned by Paul Quattlebaum. (R. p. 42-47). Both lots contained fences with overgrown vegetation. Additionally, Dominion Energy's two power poles on Meeting Street Road served to block McJunkin's view. (R. p. 45). While the individual poles met the regulation of being 12 inches in diameter, when viewed from the vantage point of the stop bar, the poles lined up and created an obstruction over 12 inches wide. (R. p. 578, lines 11-14; p. 586, lines 22-23).

On January 4, 2019, Appellant-Respondent brought negligence, wrongful death, and survivorship claims against Respondent-Appellants for Bronson Rash's death. (R. p. 26). On March 20, 2023, trial began and last until April 4, 2023. (R. p. 180). Appellant-Respondent's expert witness Paul McCullough was excluded from giving expert testimony in the case. (R. p. 643, lines 13-14). Dominion's expert Mark E. Sutton was able to provide testimony at trial and to present a computer-generated reconstruction as evidence. Without being able to hear McCullough's testimony, the jury was not made aware of material issues of fact concerning the possible obstructions affecting Mr. McJunkin's vision at the time of the collision. A defense verdict was rendered on April 4, 2023. (R. pp. 1466, line 7 – p. 1467, line 5).

Appellant promptly requested the customary ten days for post-trial motions, which the trial court denied. (R. p. 1470, lines 9-14). Appellant then submitted post-trial motions in open court, which included Plaintiff's Motion for Judgment Notwithstanding the Verdict and a Motion to Invoke the 13th Juror Doctrine, in addition to other motions. (R. p. 1470, line 6 – p. 1475, line 17). All of Appellant's motions were denied by the trial court. (R. p. 1481, line 4 – p. 1485, line 19). A written denial on Plaintiff's Motion for Judgement Notwithstanding the Verdict was issued on April 13, 2023, by way of a Form 4 Order. (R. pp. 1-3). A formal written order denying both the Motion for Judgment Notwithstanding the Verdict and the Motion to Invoke the 13th Juror Doctrine

was issued on December 5, 2023. (R. pp. 4-10). Appellant filed a Notice of Appeal on May 1, 2023 and submitted its initial brief to this Court on January 5, 2024. Dominion and Akbar Cross-Appealed in their briefs filed on January 5, 2024.

## STANDARD OF REVIEW

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

## ARGUMENT

### I. BOTH DOMINION AND AKBAR OWED A DUTY OF CARE NOT TO OBSTRUCT THE INTERSECTION AT COMMON LAW AND UNDER THE NEGLIGENCE PER SE DOCTRINE

The trial court correctly denied Akbar and Dominion's directed verdict motions because both owed a duty of care to not obstruct the intersection and factual questions existed concerning breach, causation, and damages. Duty is a question of law and arises when one party should exercise reasonable care to protect others. *Miller v. City of Camden*, 317 S.C. 28, 31, 451 S.E.2d 401, 403 (Ct. App 1994), *aff'd as modified*, 329 S.C. 310, 494 S.E.2d 813 (1997). "An affirmative legal duty to act exists only if created by statute, contract, relationship, status, property interest, or some other special circumstance." *Id.* at 33, 451 S.E.2d at 404. South Carolina case law provides that at common law a duty existed for both Akbar and Dominion.

In urban areas, landowners have a duty to move fallen trees that block streets and to inspect their property to make sure that their trees do not present a hazard. *Israel v. Carolina Bar-B-Que, Inc.*, 292 S.C. 282, 288, 356 S.E.2d 123, 127 (Ct. App. 1987) (citing Prosser and Keaton, On the

Law of Torts, Chapter 10, Section 57, at 391 (5th ed. 1984)). In *Israel*, this court adopted the rule that "a landowner in a residential or urban area has a duty to others outside of his land to exercise reasonable care to prevent an unreasonable risk of harm arising from defective or unsound trees on his premises, including trees of purely natural origin." *Id.* at 288, 356 S.E.2d at 127. There, Charlotte Israel sued Carolina Bar-B-Que, Inc. and Andrew Berry after a limb from a "bushy" tree on Berry's property fell on Ms. Israel's car, which was parked in Carolina Bar-B-Que's lot. *Id.* at 284, 356 S.E.2d at 125. Berry was aware of the dangerous limbs that hung over Carolina Bar-B-Que's property. *Id*. at 285, 356 S.E.2d at 126. After a reasonable inspection, this Court found that Berry should have known that a dangerous and decaying tree limb was hanging over Carolina Bar-B-Que's property and that the trial court did not err in denying a directed verdict in favor of Berry. *Id*. at 289, 356 S.E.2d at 127. This rule applies here.

### A. AKBAR AND DOMINION OWED A DUTY OF CARE TO AVOID OBSTRUCTING THE INTERSECTION UNDER COMMON LAW

In this instant case, Akbar knew of the danger presented by the overgrown vegetation on his property, and that he had a responsibility to maintain not only the vegetation on his property, but also the fence. (R. p. 663, line 14 – p. 665, line 25; p. 684, line 16 – p. 687, line 10). Akbar also had constructive notice of the need to trim his hedges because of Ord. Nos 9-42 and 9-67, City of N. Charleston Code of Ord. Akbar knew that his bushes created a danger like the tree limb in *Israel*. 292 S.C. at 285, 356 S.E.2d at 126. Since Akbar was aware of the danger presented by the bushes and had constructive notice through the ordinances of the City of North Charleston, a duty under the common law was established and it would have been improper to grant a directed verdict or JNOV in his favor. *Id*. at 289, 356 S.E.2d at 127.

Before the trial court, Akbar and Dominion argued that *Underwood v. Coponen*, 367 S.C. 214, 218, 625 S.E.2d 236, 238 (Ct. App 2006) controlled, but that case is inapposite. There, the

landowner did not owe a duty to the drivers when his tree limbs partially obstructed a stop sign since the driver was not even looking for a stop sign and she believed she was on a different road that had no stop signs. *Id.* at 218, 625 S.E.2d at 238. Therefore, the rule in *Israel* did not apply. *Id.* Here, the city municipal code places residents of North Charleston on constructive notice that landowners owe a duty to not allow their vegetation to obstruct the road, and there was no dispute that McJunkin knew he had to stop at the intersection and look for oncoming traffic before turning left. Thus, *Israel* is directly on point.

Dominion also had a duty to Bronson Rash at common law, which Dominion does not seem to contest.[1] A duty is created at law "by statute, contract, relationship, status, property interest, or some other special circumstance." *Miller*, 317 S.C. at 33, 451 S.E. at 404. 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. Whether Dominion breached that duty (by allowing poles to conflict with surrounding obstructions or to obstruct traffic) was a question of fact for the jury.

### B. AKBAR AND DOMINION OWED A DUTY OF CARE TO AVOID OBSTRUCTING THE INTERSECTION UNDER THE NEGLIGENCE PER SE DOCTRINE

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

[1] Indeed, Dominion's arguments address breach and causation, which are only relevant if a duty of care exists.

question for the jury. *Id*.

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

In this instant case, a question of fact existed as to whether Akbar and Dominion violated the ordinances at issue. The trial court correctly acknowledged that "ordinances can create a duty…And while I agree it does not create a private cause of action, it can be evidence of negligence," and the trial court effectively charged the jury on negligence per se. (R. p. 1194, lines 4-7; p. 1420, lines 12-17).

Ordinance 4-13, which was charged to the jury, (R. p. 1418, lines 15-19), states:

> 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.

There existed a question of fact as to whether Akbar violated the ordinance, since his bushes, which

are a planting, obstructed the visibility of the intersection. Additionally, Dominion's utility poles created an obstruction greater than the twelve inches allowed in the ordinance. Both violations should be for the jury to decide.

There is also a potential violation of Ord. 9-67:

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

Ord. No 9-67, City of N. Charleston Code of Ord.[2] Akbar maintains that these ordinances do not trigger negligence per se under *Whitlaw*, which arises when: "(1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and (2) that he is a member of the class of persons the statute is intended to protect. *Whitlaw v. Kroger Co*., 306 S.C. 51, 53, 410 S.E.2d 251, 252 (1991)." The ordinances at issue here satisfy the *Whitlaw* test.

Just as the ordinances in *Nguyen* were similar to the ordinances related to the present case, the "ordinances were obviously enacted" to protect neighboring property owners and designed to protect the health and safety of the residents of the North Charleston Community. *Nguyen*. 312 S.C. at 421, 440 S.E.2d at 890. The precedent set in *Nguyen* is not limited to just rodents, as it contemplates a broad range of possible injuries that pose "substantial risk of danger to health and/or safety through disease, fire, safety hazards or other means." *See also Tobias v. Carolina Power & Light Co.,* 190 S.C. 181, 186, 2 S.E.2d 686, 688 (1939) (the injury suffered does not have

[2] Rash requested the trial court charge the jury on Ord. No. 9-67, but the court erroneously concluded that the ordinance did not apply. (R. p. 1375, lines 5-14).

to be the exact injury anticipated). South Carlina case law and the ordinances require a broader reading. The essential purpose of the ordinance is to protect the "health, safety, and welfare" of the residents of North Charleston from danger caused by "unhealthy and unsightly conditions." Ord. No. 9-67, City of N. Charleston Code. Certainly, the health and safety of Bronson Rash were affected since he tragically died, and it should have been a question of fact for the jury as to whether the violation of Ord. 9-67 proximately caused his death.

Additionally, the second part of the *Whitlaw* test is met under Sec. 9-67, as the ordinance is designed to protect the "health, safety, and welfare of the entire community." Ord. No. 9-67, City of N. Charleston Code. The language of the statute does not limit the right to bring a cause of action to only the city. The decedent was, and the Appellant is, a member "of the entire community" of North Charleston. *Id*. The same rationale also applies to Ord. No. 4-13 under the *Whitlaw* test since this ordinance is clearly established to prevent drivers from crashing at intersections, as it states that nothing should be built or planted "in such a manner as to obstruct visibility at intersections." Ord. No. 4-13. This ordinance also applies to utility poles that create an obstruction greater than 12 inches. "Poles and support structures less than twelve (12) inches in diameter may be permitted in such areas" *Id.* Since the place where the harm occurs is specified in that ordinance as a road intersection, the second requirement is also met. Naturally, the class of people who would most often be affected by obstructions at intersections would be drivers. Both Rash and McJunkin were driving motor vehicles at the time of the collision. Under the *Whitlaw* test rationale, Ord. No. 4-13 was properly submitted to the jury and supported the conclusion that Dominion owed a duty of care.

## II. THE EVIDENCE AT TRIAL, AS WELL AS THE VIOLATIONS OF ORDINANCES OF THE CITY OF NORTH CHARLESTON, CREATE A REASONABLE QUESTION OF FACT THAT SHOULD BE RESOLVED BY THE JURY AND NOT ON A DIRECTED VERDICT.

Akbar and Dominion erroneously contend that the trial court should have directed a verdict on the grounds that there was insufficient evidence to establish causation as to Akbar's shrubs as well as Dominion's light poles. (Akbar B. at 23 and Dominion B. at 10). However, when the evidence is viewed along with wrongly excluded expert testimony by McCullough, there is a reasonable question of fact as to whether the light poles and/or the shrubbery obstructed McJunkin's view and contributed to the cause of the collision. As a result, these quintessential factual issues were for the jury to resolve rather than by the court through a directed verdict or following trial through JNOV in favor of Respondent-Appellants.

It is elementally that to prevail on a claim of negligence, the plaintiff must establish four elements: duty, breach, causation, and damages. *Babb v. Lee Cnty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013). Causation is proven by legal cause and causation in fact. *Vinson v. Hartley*, 324 S.C. 389, 400, 477 S.E.2d 715, 721 (Ct. App. 1996), and encompasses principles of foreseeability. *Wickersham v. Ford Motor Co.*, 432 S.C. 384, 390, 853 S.E.2d 329, 332 (2020) ("In most cases, foreseeability ends up being addressed as a question of fact for the jury."). Importantly, foreseeability is not determined by whether the defendant could have foreseen the injury sustained by the plaintiff, but whether the injury is the natural and probable consequence of an act or omission. *Tobias*, 190 S.C. at 186, 2 S.E.2d at 688. Overall, issues of causation are inherently factual, and thus, are typically reserved for the jury to decide. The court's only function is to determine the rare occasions where only one conclusion can be reached; otherwise, the issue is properly submitted to the jury. *Oliver v. S.C. Dep't of Highways & Pub. Transp*., 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992) ("[L]egal cause is ordinarily a question of fact for the jury. Only when the evidence is susceptible to only one inference does it become a matter of law for the court.").

The trial court correctly followed the wealth of case law that required submitting the issue of breach and causation to the jury. In *Vinson v. Hartley,* the Appellant was denied a new trial because all the evidence supported a conclusion that the motor vehicle collision did not cause dental damage to the Appellant. 324 S.C. 389, 410, 477 S.E.2d 715, 726 (Ct. App. 1996). The damage to Vinson's car was so minor that he did not know his car had collided with Hartley's. Vinson also admitted that nothing occurred in the accident that would have caused a mouth injury, and none of the testimony from medical doctors supported Vinson's injury was caused by the accident. *Id.* at 477, 2 S.E.2d at 726. However, unlike in this instant case, there was no evidence to support the fact that the collision caused the injury, so a directed verdict was appropriate. *Hennes*, 397 S.C. 398, 725 S.E.2d 505.

Conversely, in *Tobias v. Carolina Power and Light Company,* the Supreme Court found that the injury to Tobias was foreseeable and that Carolina Light and Power Company was negligent in how they installed an electric light pole and guy wires. 190 S.C. at 187, 2 S.E.2d at 688. Tobias was walking along a public highway and was hit by an automobile, causing him to be thrown against the exposed wires of an electric light pole installed by Carolina Light and Power. Tobias went blind in his left eye and sustained a leg injury. *Id.* at 181, 2 S.E.2d. at 687. The Court held that it was not unreasonable for the jury to find that South Carolina Light and Power should have reasonably anticipated that installing an electric light pole in the middle of a public highway would cause injury to a pedestrian. *Id*. at 181, 2 S.E.2d at 688. The Court found that the collision, even "in this day of freakish traffic accidents," "was not of such an unusual and extraordinary character that it could not have been foreseen that some such occurrence might probably take place." *Id*. at 187. 2 S.E.2d at 688. The specific injury to Tobias did not need to be foreseen; rather, South Carolina Light and Power only needed to anticipate that an injury would occur due to their

negligent installation of the electric light pole and guy wires. *Id*.

Based on the evidence presented at trial, it was foreseeable that the utility poles and overgrown vegetation could have contributed to this accident. First, the curvature of the road enhanced the need to ensure that the light poles and bushes did not obstruct a driver's line of sight. A nearby resident, Shirley Richardson, testified "you don't have really good clearance when they're coming around that curve…so it's not safe." (R. p. 606, lines 5-6). She continued, "[t]here was some shrubbery on the fence, and there's a pole there that, you know, it obstructs your view making the left turn…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." (R. p. 606, lines 20-25). In fact, Richardson testified that she had called Dominion on multiple occasions and told them the intersection was "unsafe" and 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." (R. 631, line 15 – p. 633, line 7).

In addition to Richardson's testimony, there was expert testimony that the light pole and shrubbery created an obstruction. Dr. Rushton Hunt testified, "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…we had these poles, bushes, fencing that blocked the view of the vehicles that were coming around the curve." (R. p. 528, lines 4-10). Hunt testified the poles are "right out there where you want it to be a clear visual." (R. p. 541, lines 1-2). He also noted that for a moment in time, the two poles "would have been a solid wall." (R. p. 532, lines 18-19). Specifically, Hunt testified to a reasonable degree of certainty:

> Q. 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, that's a game-changer. That's mitigation. We didn't eliminate the possibility, but we've tremendously reduced the likelihood by giving people two extra seconds.

(R. p. 558, lines 1-10).

Mark Teague, an expert who analyzed the sight distance at the intersection, testified "there was a sight-distance restriction with the utility poles, a fence, and vegetation." (R. p. 577, lines 8-9). Teague stated:

> I really have three major opinions. Number 1, the two utility poles that we've been discussing in the case did block the sight distance for a vehicle coming out of Hedgewood. The fence also caused a sight-distance blockage. And the vegetation that was growing up around the fence caused a blockage.

(R. p. 578, lines 11-16).

Even the at-fault driver acknowledged that he did not see the motorcycle when he pulled into the intersection. (R. p. 206, lines 20-21; p. 207, lines 15-17). While McJunkin disputed the reason why he did not see the motorcycle, the testimony from Rash's witnesses created a factual question for the jury to resolve. In other words, evidence existed to support Rash's theory that the light poles and the bushes obscured McJunkin's vision, which contributed to the collision. The two utility poles, the shrubbery, and the fencing collectively obstructed the line of sight, and presented a factual issue on causation for the jury to resolve. Thus, the evidence in this record was more than enough to survive Akbar's and Dominion's directed verdict motions.

Moreover, as stated in *Tobias,* foreseeability is not predicated on whether the specific injury suffered could have been anticipated but rather whether an injury could be anticipated based on the act. *Tobias* at 181, 2 S.E.2d at 688. The Court in *Tobias* believed it was foreseeable that an injury would occur due to the improper placement of a light pole on a highway. *Id.* Using the Court's logic, the idea that two utility poles placed on a curve in a residential area could obstruct a driver's vision and cause an injury is not so remote "that it could not have been foreseen that

some such occurrence might probably take place." *Id.* at 188, 2 S.E.2d at 688. Had it been permitted at trial, McCullough's testimony would have armed the jury with even more evidence that a collision at this intersection was foreseeable due to the obstruction created by the poles, shrubbery, and fencing.

Akbar also should have been able to foresee that an injury would occur due to the overgrowth of the vegetation on his property and conditions around the intersection. Akbar was placed on constructive notice by the city of North Charleston through its ordinances. Sec. 9-42 of chapter 9 Article II of the North Charleston South Carolina Code of Ordinances states:

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

Further, Akbar was aware or should have been aware of the danger that the overgrown vegetation presented from his many years of living near the intersection, and because he was provided notice of an ordinance violation from the city of North Charleston given that his vegetation blocked motorists' view of the intersection. Akbar should have foreseen that a collision would occur if he let his vegetation continue to be unkempt. Thus, the evidence created a factual dispute that justified submitting the case to the jury.

## CONCLUSION

Based on Appellant's arguments in the principal appeal, this Court should order a new trial. As to the arguments Akbar and Dominion raise in this cross-appeal, the trial court correctly submitted the case to the jury, as both Akbar and Dominion owed a duty of care and there were factual issues for the jury to resolve.

Respectfully submitted,

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