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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Deadra L. Jefferson, Circuit Court Judge

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

DARLEEN RASH, Individually and as
Personal Representative for the ESTATE
OF BRONSON HARLEY RASH……..Appellant-Respondent,

v.

DOMINION ENERGY (formerly SOUTH
CAROLINA ELECTRIC & GAS COMPANY);
ANTHONY M. AKBAR; and
PAUL QUATTLBAUM……Respondents-Appellants.

FINAL BRIEF OF APPELLANT-RESPONDENT DARLEEN RASH

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STATEMENT OF ISSUES ON APPEAL

I. Did the trial court err in allowing the Respondents to offer a video demonstration of the accident through expert Mike Sutton?

II. Did the trial court err in failing to qualify Paul McCullough as an expert in civil and structural engineering, accident reconstruction, and project management?

III. Did the trial court err in denying the Appellant's Motion for Judgment Notwithstanding the Verdict (JNOV) and the Appellant's Motion to Invoke the Thirteenth Juror Doctrine?

IV. Did the trial court err in failing to enter the City of North Charleston Citations written to Mr. Akbar and Mr. Quattlebaum into evidence?

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). At or about the same time, Daniel McJunkin and his family were leaving his father's house and traveling on Hedgewood Street. (R. p. 39). Mr. McJunkin was driving a 2014 Toyota Tundra. (R. p. 41). He stopped at the stop bar on Hedgewood Street and looked both ways before taking a left-hand turn onto Meeting Street Road. (R. pp. 39, 41). Mr. McJunkin did not see Bronson Rash traveling down Meeting Street Road. (R. p. 41). Mr. Rash's motorcycle and Mr. McJunkin's truck collided, causing Rash to be thrown from the bike. Rash ultimately passed away from injuries sustained during the accident. (R. pp. 41-42).

Two lots on the left-hand side of Hedgewood Street contained fences and vegetation that impeded the line of sight from Hedgewood Street looking down Meeting Street Road. (R. pp. 42-45). One property, 3891 Walnut Street was owned by Anthony Akbar. (R. p. 46). The other, 3895 Walnut Street, was owned by Paul Quattlebaum. (R. p. 47). Specifically, their fences were in the right-of-way, and their bushes and vegetation had grown uncontrolled.

In addition to the fence and vegetation blocking the line of sight, SCE&G, now known as Dominion Energy, erected two power poles along Meeting Street Road at this intersection in the right-of-way. (R. p. 45). Although the individual poles were within regulation of under 12 inches in diameter, when viewed from certain angles, particularly from the vantage of a driver stopped at the stop bar, the poles would line up next to each other creating an obstruction in a motorist's line of sight that was greater than 12 inches wide. (R. p. 578, lines 11-14; p. 586, lines 22-23).

On January 4, 2019, Appellant brought negligence, wrongful death, and survivorship claims against Respondents arising from Bronson Rash's death. (R. p. 26). Respondents asserted general denials of Appellant's claims. (R. pp. 62, 69).

Trial on this matter began on March 20, 2023. (R. p. 180). Appellant had nineteen witnesses including Daniel McJunkin, Paul McCullough, Marshall White, Sarah Shearer, Valeria Pacheco Rubi, Christopher Bragg, Robert Edgerton, Michael Johnson, Krista Venesky, Jamison Spencer, Joey Svendsen, Ruston Hunt, Amanda Henderson, Robert Madison, Jr., J. Mark Teague, Kendrick Richardson, Shirley Richardson, Arthur Rash, and Darleen Rash. (R. pp. 180-85). Respondents had seven witnesses including Christine Holmstedt, Anthony Akbar, Michael Sutton, Marie Wearing, Cindy Hux, Joel Knight, and Paul Quattlebaum. (R. p. 185-86). Appellant elicited testimony from two rebuttal witnesses – Kendrick Richardson and Marshall White. (R. p. 186). At the conclusion of the matter, a verdict was rendered for the Respondents on April 4, 2023. (R. pp. 1466, line 7 – p. 1467, line 5).

On April 4, 2023, Appellant requested ten additional days for post-trial motions, which was denied by the trial court. (R. p. 1470, lines 9-14). As a result, Appellant made post-trial motions in open court, immediately after the verdict was rendered. (R. p. 1470, line 6 – p. 1475, line 17). The

motions included Plaintiff's Motion for Judgment Notwithstanding the Verdict and a Motion to Invoke the 13th Juror Doctrine, as well as other various motions. (R. p. 1470, line 6 – p. 1475, line 17). *Toole v. Toole*, 260 S.C. 235, 239–40, 195 S.E.2d 389, 390–91 (1973) (noting "magic words" are not required to make a proper motion for new trial). All motions were denied in Court. (R. p. 1481, line 4 – p. 1485, line 19).

On April 13, 2023, the Court issued a written denial of Plaintiff's Motion for Judgment Notwithstanding the Verdict in a Form 4 Order. (R. p. 1-3). On December 5, 2023, the Court filed a formal written Order denying the Motion for Judgment Notwithstanding the Verdict and the Motion to Invoke the 13th Juror Doctrine. (R. pp. 4-10). The Appellant filed a Notice of Appeal on May 1, 2023, which is the subject of this appeal. (R. p. 161).

ARGUMENT

I. THE TRIAL COURT ERRED IN ALLOWING THE DEFENSE TO OFFER A VIDEO DEMONSTRATION OF THE SIGHT DISTANCE AT NIGHT THROUGH EXPERT MIKE SUTTON BECAUSE THE VIDEO WAS (A) NOT RELEVANT UNDER SCRE 401 AND 402, (B) NOT A FAIR AND ACCURATE REPRESENTATION OF THE EVIDENCE TO WHICH IT RELATES, AND (C) WAS MORE PREJUDICIAL THAN PROBATIVE UNDER SCRE 403.

During the testimony of defense expert, Mike Sutton, two videos were played to the jury, over the objection of the Appellant, to allegedly demonstrate the line of sight from Mr. McJunkin's viewpoint. On February 19, 2023, Mr. Sutton's team went to the accident site and created a video to demonstrate what the sight distance at the scene would look like "if you're sitting in a Toyota Tundra on Hedgewood and a motorcycle comes around the curve." (R. p. 843, lines 13-15).

To create the video, Mr. Sutton used a 2011 Toyota Tundra and a 250 Suzuki motorcycle. Mr. Sutton had a driver ride the motorcycle around the curve in the direction Rash was traveling

prior to the collision. Mr. Sutton took three shots – at 6:35 pm, 6:37 pm, and 6:39 pm with two cameras at the eye level of the driver of the Tundra. (R. p. 890, lines 22-25; p. 939, lines 16-18).

The video was edited in post-processing to adjust certain aspects of the video. First, the speed of the motorcycle was adjusted to represent 35 mph and 55 mph. (R. p. 941, lines 3-4, p. 942, lines 20-22). Vegetation was added to the video from a photo taken at the scene the night of the accident by a state trooper, which was offered at trial as Dominion #2, because at the time the video was created, the vegetation had been removed. (R. pp. 801, line 16 – p. 802, line 4; p. 941, lines 3-4, p. 942, lines 20-22, p. 851, lines 23-24). Additionally, a light post was superimposed into the video. (R. p. 885, lines 7-12).

The trial court's reason for allowing the video to be played was that it was a "demonstrative video that was created to aid the testimony of the witness." (R. p. 926, lines 1-2).

A. THE VIDEO WAS NOT RELEVANT UNDER RULES 401 AND 402, SCRE.

i. STANDARD OF REVIEW

Under Rules 401 and 402, SCRE, "an animation is relevant when it has a direct bearing upon and tends to establish or make more or less probable the matter in controversy. [It] may be relevant when it relates to other admissible, material evidence and it will aid the trier of fact in understanding the related evidence." *Clark*, 339 S.C. at 386, 529 S.E.2d at 537 (internal citations omitted).

ii. ARGUMENT

The videos are based, to a great degree, on speculation, and are not relevant without a proper factual underpinning. The videos were "offered to elucidate his testimony regarding speed and sight line from Mr. McJunkin's perspective." (R. p. 929, lines 9-10). During the testimony of

Mr. McJunkin, he was able to mark on Plaintiff's Exhibit 1 where he stopped at the intersection. (R. p. 206, line 7). He further testified he "believes" he pulled forward after stopping, but does not clarify how far forward he moved. (R. p. 206, lines 20-22). Mr. McJunkin's testimony was that he did not see any oncoming traffic, and never heard nor saw Rash coming. (R. p. 206, lines 3-17; p. 209, line 25 – p. 210, lines 1-8).

B. THE VIDEO WAS NOT A FAIR AND ACCURATE REPRESENTATION OF THE EVIDENCE TO WHICH IT RELATES.

i. STANDARD OF REVIEW

Under *Clark*, the animation "need not be exact in every detail, but the important elements must be *identical or very similar to the scene as described in other testimony and evidence presented by the animation's proponent* in order to constitute a fair and accurate representation." *Id*. (emphasis added). "In an animation reconstructing a vehicle accident, for instance, *the animation must be technically correct on details such as distance, terrain, relative speed, path of travel, and surroundings*." *Id.* (emphasis added).

ii. ARGUMENT

As an initial matter, the vehicles used in the reconstruction were not identical to the vehicles involved in the accident. A 2011 Tundra was used in place of a 2014 Tundra, and a 250 Suzuki was used in place of the 2017 BMW Scrambler. (R. pp. 937, line 14 – p. 938, line 2). The Suzuki is a smaller bike than the BMW. (R. p. 938, line 2).

Additionally, the placement of the Tundra, and the sight line of the driver, does not coincide with the trial testimony of Mr. McJunkin. Mr. McJunkin marked on Exhibit 1 that he stopped behind the stop bar. (R. p. 206, line 7). When asked by Mr. Thoensen, "[d]id you pull forward at all?", Mr. McJunkin states "I believe I did." (R. p. 206, lines 21-22). No testimony as to how far

he pulled forward was offered. Mr. McJunkin also testified that he "never saw Mr. Rash coming." (R. p. 207, line 17).

During his proffer, Mr. Sutton was asked by Mr. Ford, "how did you decide where to place the pickup truck, and what did you base it on?" (R. p. 860, lines 16-17). Sutton responded by stating "[s]o I based it on, in my opinion, this is where a driver would pull up so they can see at the intersection. It puts their head at the position of the old stop bar" (R. p. 860, lines 18-21). He further states, "I don't know exactly where Mr. McJunkin stopped. But if you stop at this position, it's where a driver would stop if they wanted to have a clear sight line of the curve." (R. p. 861, lines 2-5).

The Tundra portrayed in video demonstration pulled forward from stop bar in order to have a clear line of sight– this is not where Mr. McJunkin testified that he stopped, and also pure speculation of the part of Mr. Sutton. Mr. McJunkin testified that he pulled forward, without any indication of how far.

The intersection itself has changed since 2017. A crosswalk was added in March of 2018, and in January of 2019, South Carolina Department of Transportation moved the stop bar forward. (R. 850, lines 9-14). The placement of the head of the driver at the position of the old stop bar, is not accurate. Most drivers stop their car before the stop bar, not with their vehicle halfway over the stop bar so that their head is lined up with it.

The vegetation on Quattlebaum's property had been removed by the time of Mr. Sutton's reconstruction. In order to compensate for the vegetation being removed, Mr. Sutton used a photograph of the vegetation taken the night of the accident and placed it into the video. In order to account for the gaps in the vegetation that a person would be able to see through, he made the

vegetation in the video 90% opaque. (R. p. 907, lines 2-6). However, this is not an accurate representation of the visibility through that vegetation, as leaves and sticks are 100% opaque. It is especially problematic in that the video was created to show the jury how the light approaching from the oncoming headlight of the motorcycle would appear to Mr. McJunkin, so a 90% opaque bush would show much more light coming through it than the vegetation in reality, making the motorcycle purporting to be Mr. Rash more visible in the video animation.

The video is also misleading to the jury in that it shows much better visibility than what has been testified to. Mr. McJunkin clearly testified he never saw Mr. Rash coming – a demonstration of what may have been his line of sight depending on how far forward he pulled up and how fast Mr. Rash was going is misleading for the jury because the fact remains Mr. McJunkin never saw him.

South Carolina courts have generally held that issues of distance and speed are of crucial importance in automobile accidents. *Blanding v. Hammell*, 267 S.C. 352, 288 S.E.2d 271 (1976). The video animations played for the jury failed to be "technically correct on details such as distance, terrain, relative speed, path of travel, and surroundings." *See Clark*, 339 S.C. at 386, 529 S.E.2d at 537.

"The fact the animation is inconsistent with testimony or evidence presented by the opposing party should not necessarily lead to its exclusion, provided it fairly and accurately portrays the proponent's version of events." *Id.* at 386, 529 S.E.2d at 537. The video animations do not fairly and accurately portray the proponent's version of the events in several aspects. First, the animations place McJunkin's truck in a position that is pure speculation on the part of Sutton; "[s]o I based it on, in my opinion, this is where a driver would pull up so they can see at the

intersection. It puts their head at the position of the old stop bar" (R. p. 860, lines 18-21). "I don't know exactly where Mr. McJunkin stopped. But if you stop at this position, it's where a driver would stop if they wanted to have a clear sight line of the curve." (R. p. 861, lines 2-5).

Second, there is no testimony about the path of travel Mr. Rash took as he approached the Tundra. There are not even brake marks in the roadway to determine where his motorcycle was traveling. Again, the path of travel is pure speculation on the part of Mr. Sutton.

The *Clark* court noted other courts have found accuracy to be a crucial aspect of admitting computer generated animation. In *Hinkle v. City of Clarksburg, W. Va*., the court explained that a computer-animated videotape is essentially like a real-life re-creation and thus it must be sufficiently close to actual facts. 81 F.3d 416, 424-25 (4th Cir. 1996). In *Hutchinson v. American Family Mut. Ins. Co*., the appellate court upheld the trial court's ruling refusing to admit animation generally illustrating how a closed-head injury occurs because it was not based on particular facts of the plaintiff's case and the witness was not familiar with specific speeds and forces in the case. 514 N.W.2d 882, 890 (Iowa 1994). In *Sommervold v. Grevlos*, the appellate court upheld the trial court's refusal to admit animation of colliding bicycles because the speed of the bicycles, the street lights, and the location of the accident did not match the witness' testimony. 518 N.W.2d 733, 738 (S.D. 1994). *See Clark*, 339 S.C. at 386-87, 529 S.E.2d at 537.

As shown, the video animations were not accurate and should not have been admitted, as much of the recreation was not corroborated by any witness testimony, but simply speculation on the part of Mr. Sutton.

C. THE VIDEO IS MORE PREJUDICIAL THAN PROBATIVE UNDER RULE 403, SCRE.

i. STANDARD OF REVIEW

Under Rule 403, SCRE relevant evidence is excluded if its "probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." "Unfair prejudice means an undue tendency to suggest [a] decision on an improper basis." *State v. Spears*, 403 S.C. 247, 253, 742 S.E.2d 878, 881 (Ct. App. 2013).

ii. ARGUMENT

The computer animation prepared by Mr. Sutton was highly misleading and based on Mr. Sutton's opinion of how Mr. McJunkin turned, not on testimony. There is no evidence of the route Mr. Rash was driving, as the only eyewitness, Mr. McJunkin, testified he never saw Mr. Rash coming. (R. p. 207, lines 15-17; p. 210, line 6).

The videos are not a fair and accurate representation of the evidence to which it relates. In *Clark*, the Supreme Court of South Carolina held:

> [T]hat computer-generated video animation is admissible as demonstrative evidence when the proponent shows that the animation is (1) authentic under Rule 901 SCRE; (2) relevant under Rules 401 and 402, SCRE; (3) a fair and accurate representation of the evidence to which it relates, and (4) its probative value substantially outweighs the danger of unfair prejudice, confusing the issues, or misleading the jury under Rule 403, SCRE.

339 S.C. at 384, 529 S.E.2d at 536. Because of the unique nature of computer animation, the Supreme Court of South Carolina noted "a computer animation can mislead a jury as easily as it can educate them. An animation is only as good as the underlying testimony, physical data, and engineering assumptions that drive its images. The computer maxim 'garbage in, garbage out' applies to computer animations." *Id.* at 383-84, 529 S.E.3d at 536 (quoting G. Ross Anderson, Jr., *Computer Animation: Admissibility and Uses*, South Carolina Trial Lawyer Bulletin 9 (Fall 1995)) (emphasis added). The trial court improperly analyzed and admitted the video animation under the *Clark* standard.

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

A. STANDARD OF REVIEW

Paul McCullough was offered as an expert for the plaintiff, and the admission of his testimony is governed by Rule 702, SCRE. Expert testimony admissibility depends on the satisfaction of a three-prong test as determined by the trial judge. To be admitted, the "trial judge must find the evidence will assist the trier of fact, the expert witness is qualified, and the underlying science is reliable." *State v. Council*, 335 S.C. 1, 20, 515 S.E.2d 508, 518 (1999). Even if this test is satisfied, the testimony may be excluded if its probative value is substantially outweighed by the risk of unfair prejudice, confusion of the issues, etc. *Wilson v. Rivers*, 357 S.C. 447, 452, 593 S.E.2d 603, 605 (2004) (citing Rule 403, SCRE). This three-prong analysis is a threshold test and may not be circumvented by arguing that any defects in the test go to the weight of the testimony and not its admissibility. *Watson v. Ford Motor Co.*, 389 S.C. 434, 447, 699 S.E.2d 169, 175 (2010).

The qualification of an expert witness and the admissibility of his or her opinion are matters resting within the discretion of the trial judge. *Manning v. City of Columbia*, 297 S.C. 451, 453, 377 S.E.2d 335, 336-37 (1989); *Pope v. Heritage Communities, Inc.*, 395 S.C. 404, 423, 717 S.E.2d 765 (Ct. App. 2011). On appeal, the trial court's ruling will not be disturbed absent an abuse of that discretion and a showing of prejudice. *Strange v. S.C. Dep't of Highways & Pub. Trans*., 307 S.C. 161, 163, 414 S.E.2d 138, 139 (1992). "An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion that is without evidentiary support." *Fields v. Reg'l. Med. Ctr. Orangeburg*, 363 S.C. 19, 26, 609 S.E.2d 506, 509 (2005), overruled in part on other grounds by *State v. Wallace*, 440 S.C. 537, 542 n.3, 892 S.E.2d 310, 312 (2023). "A trial court's ruling on

the admissibility of an expert's testimony constitutes an abuse of discretion when the ruling is manifestly arbitrary, unreasonable, or unfair." *Id.* Prejudice is "a reasonable probability that the jury's verdict was influenced· by the challenged evidence or lack thereof." *Fields v. Haynes*, 376 S.C. 545, 557, 658 S.E.2d 80, 86 (2008).

B. ARGUMENT

Paul McCullough was retained as an expert for the Appellant. He completed a detailed scan of the accident location three days after the crash. His testimony was being elicited to 1) set the foundation for subsequent testimony, and 2) provide his own expert opinion regarding the crash, specifically that the sight distance at the intersection was insufficient due to the obstructions present in the laser scan taken three days after the crash. (R. p. 219, lines 1-21, p. 303, lines 19-21).

Pursuant to an objection from the Respondents regarding Mr. McCullough's qualifications, Mr. McCullough was not admitted as an expert as the trial court found that he lacked the specialized training or other expertise to testify regarding line-of-sight. (R. p. 643, lines 13-16). Additionally, the Court found no prejudice to the Appellant because "they have already had two witnesses that have testified to as to line of sight who were qualified as experts." (R. p. 645, lines 1-3).

Mr. McCullough is a civil engineer with a bachelor's degree from the University of Florida in civil engineering, and a master's degree also from the University of Florida in civil structural engineering. (R. p. 313, lines 6-25). He has worked at S-E-A, which is a forensic engineering firm, for the past fifteen years. (R. p. 313, line 11). Throughout his years at S-E-A, he has worked on a variety of investigations, including those regarding damage assessments, scene documentation,

line-of-sight evaluation, and calculations as it relates to deflections, displacements, and damage to structural members. (R. p. 232, lines 14-25). He holds professional engineering licenses in a multitude of states, from California to South Carolina. (R. p. 263, lines 4-14).

In determining a witness's qualifications as an expert, the trial court should not have a solitary focus, but rather should make an inquiry broad in scope. *Fields*, 376 S.C. at 555, 658 S.E.2d at 85. To be competent to testify as an expert, "a witness must have acquired by reason of study or experience or both such knowledge and skill in a profession or science that he is better qualified than the jury to form an opinion on the particular subject of his testimony." *Gooding v. St. Francis Xavier Hosp*., 326 S.C. 248, 253, 487 S.E.2d 596, 598 (1997).

To exclude Mr. McCullough as an expert was contrary to Rule 702 of the South Carolina Rules of Evidence, which states that if "scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Rule 702, SCRE. Mr. McCullough has sufficient knowledge, skill, experience, education, and training to be qualified as an expert in this case. It is clear from Mr. McCullough's credentials that he has the requisite level of knowledge and skill and is better qualified than the jury to form an opinion on the subject matter. Any issue concerning the amount of Mr. McCullough's training and experience affects the weight, not the admissibility of his testimony. *Wilson*, 357 S.C. at 453, 593 S.E.2d at 605; *Gooding v. St. Francis Xavier Hosp*., 326 S.C. at 254, 487 S.E.2d at 598; *Watson v. Ford Motor Co*., 389 S.C. 434, 447, 699 S.E.2d 169, 175 (2010); *Lee v. Suess*, 318 S.C. 283, 286, 457 S.E.2d 344, 346 (1995) (finding trial court erred in failing to qualify plastic surgeon as an expert in the field of family practice because surgeon's

"limited exposure to the field of family practice merely goes to the weight of his testimony and not its admissibility.") The trial court erred in refusing to qualify Mr. McCullough as an expert in civil and structural engineering, accident reconstruction, and project management.

The qualifications test consists of two parts: 1) whether the proposed expert has "sufficient" qualifications, and 2) whether the proposed expert's testimony will be reliable. *State v. Chavis*, 412 S.C. 101, 106-07, 771 S.E.2d 336, 229 (2015) (citing *State v. White*, 382 S.C. 265, 273, 676 S.E.2d 684, 688 (2009)).

First, the "sufficiency" standard is a substantive threshold requirement not met by de minimums experience, knowledge or training. *State v. Andrews*, 424 S.C. 304, 316-17, 818 S.E.2d 227, 234 (Ct. App. 2018). It is not enough that the proponent offers any suggestion of the proposed expert's knowledge. Courts must make a broad, searching inquiry to determine whether the witness has the requisite level of skill or knowledge. *Fields*, 376 S.C. at 556, 658 S.E.2d at 86. A proposed expert must know enough to effectively guide the jury on a disputed issue and should not be designated as an expert without first demonstrating substantial knowledge. *State v. Henry*, 329 S.C. 266, 274, 495 S.E.2d 463, 467 (Ct. App. 1997).

Second, the qualification standard is dependent on the field of study of the expert as qualifications vary from one field to another. *Watson*, 389 S.C. at 447, 699 S.E.2d at 175 (citing *Wilson*, 357 S.C. at 452, 593 S.E.2d at 605). It is important to consider how experts obtained their qualifications in the field when determining whether the proposed witness should be qualified as an expert.

Third, the qualifications should not be evaluated generally. A witness who intends to offer opinions on a specific issue within his profession must demonstrate his expertise on that issue, and not just his profession in general. *Watson*, 389 S.C. at 447-48, 699 S.E.2d at 176.

The Appellant was prejudiced by the exclusion of Mr. McCullough, in that, no other expert testified as to the matters that Mr. McCullough was going to testify to and his testimony regarding the laser scan taken three days after the accident directly contradicted the testimony that was allowed from Mr. Sutton's eye-ball experiment ran six years after the accident.

In *Bramlette v. Charter-Medical Columbia*, 302 S.C. 68, 74, 393 S.E.2d 914, 917 (1990), the Court determined that the defendant was prejudiced by the exclusion of their expert witness, as the testimony of plaintiffs expert remained uncontradicted. Appellant was prevented from presenting any expert testimony that would contradict the testimony of Respondent's expert, Mike Sutton, in rebuttal. The exclusion of Mr. McCullough's expert testimony was highly prejudicial. By excluding Mr. McCullough as an expert, the plaintiff was denied the ability to present expert testimony on the issue of line of sight. *Id.*

The Court's error in excluding Paul McCullough as an expert in this case was highly prejudicial and therefore warrants reversal.

III. THE TRIAL COURT ERRED IN DENYING THE APPELLANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT (JNOV) AND MOTION TO INVOKE THE THIRTEENTH JUROR DOCTRINE.

A. Standard of Review

i. Judgement Notwithstanding The Verdict

A trial court's decision to grant or deny a motion under Rule 50(b), a Motion for a New Trial pursuant to the Thirteenth Juror Doctrine, or a Rule 59 motion, should be overturned on

appeal when the trial court abuses its discretion. *See (respectively)*, *Dunn v. Dunn*, 298 S.C. 488, 381 S.E.2d 734 (1989); *Downey v. Dixon*, 294 S.C. 42, 362 S.E.2d 317 (Ct. App. 1987); *Davis v. Parkview Apts*., 409 S.C. 266, 762 S.E.2d 535 (2014); *Weeks v. Drawdy (In re Estate of Weeks)*, 329 S.C. 251, 495 S.E.2d 454 (Ct. App. 1997). "An abuse of discretion occurs when the judgment is controlled by some error of law or when the order, based upon factual, as distinguished from legal conclusions, is without evidentiary support." *Regions Bank v. Owens*, 402 S.C. 642, 647, 741 S.E.2d 51, 54 (Ct. App. 2013).

When reviewing the trial court's ruling on a motion for a directed verdict or JNOV, this Court must apply the same standard as the trial court by viewing all the evidence and all reasonable inferences in the light most favorable to the nonmoving party. *Elam v. S.C. DOT*, 361 S.C. 9, 27, 602 S.E.2d 772, 782 (2004).

A trial judge's order granting or denying a new trial upon the facts will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law. *Howard v. Roberson*, 376 S.C. 143, 152, 654 S.E.2d 877, 882 (Ct. App. 2007). The appellate courts will reverse the lower court's ruling when there is no evidence to support the ruling or when the ruling is controlled by error of law. *Steinke v. S.C. Dep't of Labor, Licensing, & Regulation*, 336 S.C. 373, 386, 520 S.E.2d 142, 148 (1999).

ii. THIRTEENTH JUROR DOCTRINE

"The thirteenth juror doctrine is a vehicle by which the trial court may grant a new trial absolute when he finds that the evidence does not justify the verdict." *Folkens v. Hunt*, 300 S.C. 251, 254, 387 S.E.2d 265, 267 (1990). "[D]iscretion is founded upon the facts, the evidence the witnesses, the trial circumstances, the verdict, and the judge's view of them." *S.C. State Highway*

Dep't v. Townsend, 265 S.C. 253, 258, 217 S.E.2d 778, 781 (1975) (citing *Fallon v. Rucks*, 217 S.C. 180, 60 S.E.2d 88 (1950)). The trial judge's decision "will not be disturbed unless his decision is wholly unsupported by the evidence, or the conclusion reached was controlled by an error of law." *Folkens*, 300 S.C. at 254-55, *S.C. State Highway Dep't v. Clarkson*, 267 S.C. 121, 126, 226 S.E.2d 696, 697 (1976).

B. ARGUMENT

The trial court erred in denying Appellant's JNOV motion because the expert testimony in the case showed that the poles and bushes at the intersection of Hedgewood and Meeting Street Road obstructed visibility. Evidence was excluded that would show that the homeowners were aware of the overgrowth of the bushes, and Mr. McCullough was excluded as an expert and therefore not permitted to rebut the testimony of Mike Sutton and his video demonstration of the accident.

IV. THE TRIAL COURT ERRED IN FAILING TO PERMIT THE CITY OF NORTH CHARLESTON CITATIONS WRITTEN TO MR. AKBAR AND MR. QUATTLEBAUM TO COME INTO EVIDENCE BECAUSE THE CITATIONS WERE TOO REMOTE.

A. STANDARD OF REVIEW

Evidence that may otherwise be relevant may lose its probative value when it becomes too far removed from the event in question. *See generally State v. Du Bose*, 288 S.C. 226, 231, 341 S.E.2d 785, 788 (1986). There is no set rule as to what lapse of time will make evidence too remote to be probative. The determination of remoteness is a matter of discretion with the trial court whose discretion will not be disturbed absent an abuse of discretion. *State v. Tyner*, 273 S.C. 646, 653-54, 258 S.E.2d 559, 563 (1979).

B. ARGUMENT

In the City of North Charleston, code enforcement is responsible for the enforcement of the health and sanitation ordinances. Both Mr. Akbar and Mr. Quattlebaum received multiple code violations in regards to their properties prior to the accident.

The violations range in date from as early as May 9, 2013 to violations that occurred after the accident occurred, issued by various code enforcement officers. Mr. Akbar received violations for his property on May 9, 2013; June 12, 2013; September 24, 2014; and April 6, 2015. Mr. Quattlebaum received violations for his property on September 24, 2014; March 10, 2016; and October 18, 2016. (R. pp. 1487-96).

While violations that occurred three years prior to the accident could potentially be determined to be too remote, the September 2014 violations put the homeowners on notice that the bushes created a hazard and blocked the line of sight down Meeting Street Road, and thus would not be too remote to admit into evidence to show that the homeowners were aware of the vision impediment and did nothing to correct it. Importantly, as time passes bushes continue to grow, so any purported remoteness as to the bushes' growth blocking the line of sight at the intersection actually works in the inverse here and in favor of admissibility.

Even if the violation notice itself was not allowed to come into evidence, the trial court should not have prohibited Appellant from questioning Mr. Akbar and Mr. Quattlebaum about the violations.

CONCLUSION

Wherefore, based on the aforementioned, the trial court's decision should be reversed because: (1) the trial court erred in allowing the defense to offer a video demonstration of the accident through expert Mike Sutton; (2) the trial court erred in failing to qualify Paul McCullough

as an expert in civil and structural engineering, accident reconstruction, and project management; (3) the trial court erred in denying Appellant's JNOV and Motion to Invoke the Thirteenth Juror Doctrine; and (4) the trial court erred in failing to permit the City of North Charleston Citations written to Mr. Akbar and Mr. Quattlebaum to come into evidence because the citations were too remote. Therefore, the Appellant respectfully requests that the Court reverse the trial court's ruling.

Respectfully submitted,

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