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

Hon. 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 (formerly South Carolina Electric & Gas Company), Anthony M. Akbar, and Paul Quattlebaum ..... Respondents/Cross-Appellants.

CROSS-APPELLANT ANTHONY AKBAR'S FINAL BRIEF AS APPELLANT

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STATEMENT OF ISSUES ON CROSS-APPEAL

I. Did the trial court err in denying Akbar's motions for directed verdict where Akbar had no duty to Plaintiff, as a matter of law?

II. Did the trial court err in denying Mr. Akbar's motions for directed verdict where the only fact witness testimony was that the driver's view was not obstructed by Mr. Akbar's property?

STATEMENT OF THE CASE

This case went to a lengthy and hard-fought jury trial in the Circuit Court of Charleston County, in which the ultimate result was a defense verdict. This Brief is on behalf of Defendant Akbar, who has *cross*-appealed to preserve and assert certain issues—solely in the event that this Court finds merit in plaintiff's appeal.

Before the trial judge submitted this case to the jury, she wrongly denied Respondent-Appellant Anthony Akbar's ("Mr. Akbar's") motions for directed verdict—which were premised on lack of duty as a matter of law, as well as the failure of Plaintiff Darlene Rash ("Mrs. Rash"), individually and as Personal Representative of the Estate of Bronson Harley Rash ("Mr. Rash"), to present any evidence supporting the elements of her claims. Ultimately, the jury returned a verdict in Mr. Akbar's favor as to all claims. Mrs. Rash then filed post-trial motions, which the trial judge denied. Mrs. Rash subsequently filed a Notice of Appeal. Mr. Akbar filed the instant Notice of Cross-Appeal, relating solely to the denial of his motions for directed verdict.

Even *if* this Court believes that any of Mrs. Rash's arguments on appeal have merit, this Court should nonetheless find that a new trial is not warranted as to Mr. Akbar, because the trial judge should have entered a directed verdict in Mr. Akbar's favor.

A. Factual Background

This case involves a tragic collision between a motorcycle and a pickup truck, both driven by adult drivers. The motorcyclist, Mr. Rash, did not survive the accident. The accident occurred in the early evening, in February of 2017, at an intersection in the City of North Charleston:

(*See* R. p. 1486) (annotations added). Mr. Rash, who was driving north on his motorcycle down Meeting Street Road, had the right-of-way. The pick-up truck, driven by Daniel McJunkin ("Mr. McJunkin") was turning left, out of Hedgewood Street and into the intersection. Unfortunately, Mr. Rash's motorcycle collided with Mr. McJunkin's truck as it turned left into the intersection. (R. pp. 200-231).

Plaintiff Mrs. Rash (Mr. Rash's Estate and his mother, individually) filed a Complaint with claims for wrongful death and survival against numerous defendants, including: (a) the truck driver, Daniel McJunkin ("Mr. McJunkin"); (b) South Carolina Department of Public Safety; (c) South Carolina Department of Transportation; (d) Snyder Event Services, Inc. (corrected to Snyder Party Rental, Inc.) ; (e) City of North Charleston; (f) Respondent-Appellant Dominion Energy (formerly South Carolina Electric & Gas Company) ("Dominion"); (g) Respondent-Appellant Mr. Akbar; and

(h) former[1] Respondent-Appellant Paul Quattlebaum ("Mr. Quattlebaum").

While this is a tragic case, the facts relevant to Mr. Akbar's cross-appeal are straightforward. Mr. Akbar was not present at the accident, and he was not aware of the accident until he was sued years later in this lawsuit. Mr. Akbar owns a house, which is not on the corner where the accident occurred. Instead, Mr. Akbar's property is an interior lot, located one lot down the road from the intersection where the accident occurred. Mr. Quattlebaum owns the property at the corner where the crash occurred:

(*See* R. p. 1486) (annotations added).

The only claim Mrs. Rash made against Mr. Akbar was that his chain-link fence and vegetation purportedly blocked the view of Mr. McJunkin as he attempted to turn left from Hedgewood Street onto Meeting Street Road heading south. Mrs. Rash claims the chain link fence, tree, and shrubs (which were deciduous and thus sparse, in February) somehow prevented Mr. McJunkin from seeing Mr. Rash's motorcycle, which

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

was traveling north on Meeting Street Road. Significantly, Mrs. Rash did not ever claim that Mr. Akbar's fence and shrubs blocked *Plaintiff's* view. Mr. Rash, on his motorcycle, passed Mr. Akbar's house without incident as he traveled north toward the intersection.

Daniel McJunkin was driving his Toyota pick-up truck on Hedgewood Street. He came to a stop sign where Hedgewood Street intersected with Meeting Street Road. He attempted to turn left onto Meeting Street Road, but the motorcycle that Mr. Rash was operating northbound on Meeting Street Road struck his vehicle. Mr. Rash sustained fatal injuries in the accident.

The photograph[2] below depicts Mr. Rash's view heading north on Meeting Street Road, where he was operating his motorcycle around the curve toward the scene of the accident (Hedgewood Street can be seen on the right-hand side of Meeting Street Road in the picture, beyond the utility pole):

(R. p. 1504). Mr. Akbar's property is to the immediate right of the utility pole on the

[2] These photographs are from Google Earth and are dated February 2017—the same month as the accident. As such, they depict the condition of the road, fences, vegetation, and intersection at the time of the accident.

righthand side of the road (with the large tree back in his yard). Mr. Quattlebaum's property is beyond Mr. Akbar's, at the corner of Meeting and Hedgewood streets.

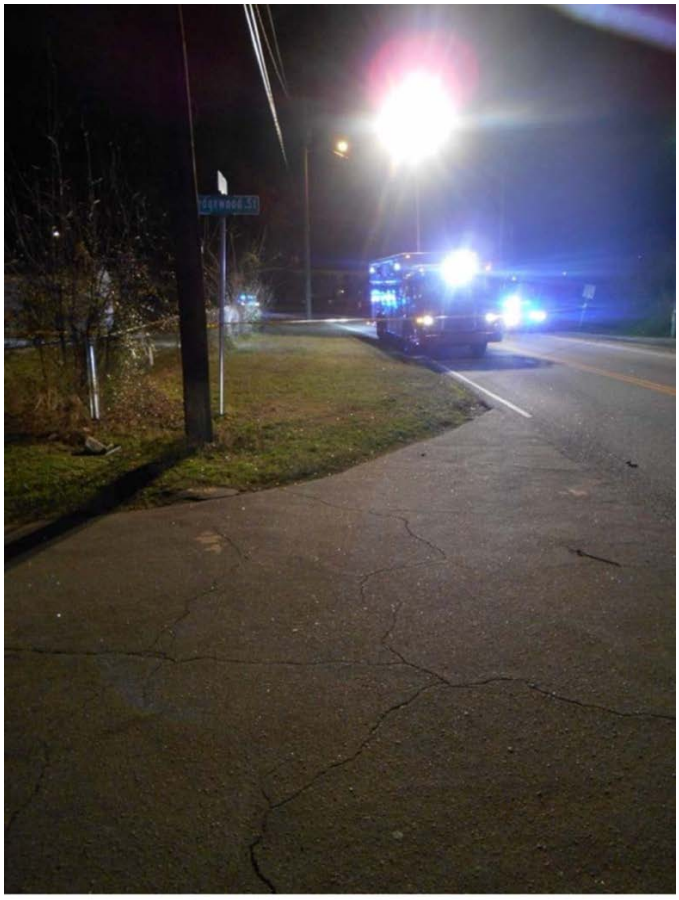
The following picture depicts the view from Hedgewood Street (where Mr. McJunkin was attempting to turn left) looking southbound down Meeting Street Road:

(R. p. 1501). Mr. Quattlebaum's property is on the immediate left (with the chain link fence and bush). Mr. Akbar's property is near the red car in the photo.

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

(R. p. 1498). The photograph above was taken looking down Hedgewood Street; Mr. McJunkin's vehicle would be heading toward the viewer, while Mr. Rash's motorcycle would have been approaching from the right-hand side of the picture. The property on the corner, with the white sheds and gray house, belongs to Mr. Quattlebaum, *not* to Mr. Akbar.

Here is a photograph from the night of the accident:



(R. p. 1497) From the corner location where the photo was taken, oncoming vehicle lights are visible from the intersection—well beyond Mr. Akbar's property.

The issues relating to Mr. Akbar's motions for directed verdict concern whether the chain-link fence and vegetation on Mr. Akbar's property improperly obstructed Mr.

McJunkin and prevented him from seeing Mr. Rash approaching on his motorcycle. Mr. McJunkin, however, has never claimed that anything on Mr. Akbar's property obstructed his view in any way. Mr. McJunkin did not file any claim against Mr. Akbar.

B. Procedural History

On March 3, 2023, Mr. Akbar filed his Motion for Summary Judgment. (*See* R. p. 93). On March 13, 2023, Mr. Akbar filed his Memorandum in Support of Motion for Summary Judgment. (R. pp. 98-119). Mr. Akbar quoted testimony from Mr. McJunkin, the driver of the truck and only living witness to the accident:

> The only eyewitness to the accident was Mr. McJunkin, the driver of the pickup truck. At his deposition, Mr. McJunkin testified that nothing related to Mr. Akbar's property caused or contributed to the accident:
>
> Q. **Then I'll ask a straight-up question. Did anything related to that property cause or contribute to this accident?**
>
> MS. McCUMBER: Object to the form.
>
> Q. You can answer.
>
> A. **No, sir.**
>
> (*Id.*, D. McJunkin depo. p. 88, lines 17–23 (emphasis added)).

(*See* R. p. 102). Mr. Akbar argued that he was entitled to summary judgment for the following reasons:

1. Plaintiff failed to establish that Mr. Akbar owed a duty to Bronson Rash;
2. Even if Mr. Akbar owed Bronson Rash a duty, which was denied, Plaintiff failed to establish that Mr. Akbar breached that duty; and
3. Plaintiff failed to establish that Mr. Akbar caused or contributed to the accident.

(*See id.* at 103 - 108). By Form 4 Order dated March 15, 2023, the Court denied Mr. Akbar's Motion for Summary Judgment because "genuine issues of material fact exist and the motion is premature at this time." (R. pp. 17-18).

The case went to a jury trial from March 20 to April 4, 2023, with the Honorable Deadra Jefferson presiding. At the close of Mrs. Rash's case, and again at the close of all evidence, Mr. Akbar moved for a directed verdict in part because Mrs. Rash did not present any evidence from which the jury could infer that Mr. Akbar's property caused or contributed to the accident:

> We'd like to highlight that there's no facts in evidence that Mr. Akbar's fence or bushes actually caused the accident in question. The plaintiff has never identified Mr. Akbar's property lines. He's never pointed to an object on that property that somebody with knowledge has testified caused or contributed to this accident. The only fact witness, as my friend Mr. Cooke said, to testify who was present at the time was Mr. McJunkin, and he did not testify that Mr. Akbar's fence or vegetation blocked his view in any way that night.

(R. pp. 697, line 19 – 698, line 3; p. 1158). Mr. Akbar also argued that the existence of a duty is a question of law for the Court, not a question for the jury, and that he owed no duty to Mr. Rash, who was a traveler on the highway. (*Id.* p. 698, lines 4–11; p. 1158, line 19—p. 1170, line 12). Among other things, Mrs. Rash had identified two City of North Charleston ordinances which she claimed were the source of a *per se* negligence duty by Mr. Akbar. The first was a zoning ordinance pertaining to "Visibility at Intersections," which by its plain language did not apply to Mr. Akbar's lot (which is not located at the intersection). (*See* R. p. 1226, lines 23-25) (THE COURT: "So I think it goes without saying that Mr. Akbar's property is not at the intersection so it couldn't be applicable to him."). The second ordinance asserted by Mrs. Rash was a City nuisance ordinance, the purpose

of which was to protect property from rodents and other "unhealthy and unsightly conditions," which expressly was not designed to give rise to private tort liability (*Id.* p. 698, line 12 – p. 707, line 23). Mrs. Rash also argued a common-law duty exists, despite case law to the contrary. (R. p. 1196, line 4—p. 1201, line 24). The trial court denied Mr. Akbar's motions, stating: "Everything in the arguments are questions of fact whether there was negligence, duty, breach, and causation." (R. p. 1204, lines 19-20; p. 723, line 14 – p. 727, line 10; p. 729, line 12). The trial court went on to hold, "[Plaintiff] has to prove by a preponderance of the evidence that there was a duty. . . . [Plaintiff] has to establish four elements by the preponderance of the evidence. And duty is one of them." (R. pp. 1274 – 1275, line 7).

The case was submitted to the jury. The jury returned a verdict in favor of all Defendants. (R. pp. 1466 - 1469).

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

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[3] Mr. Akbar will address Mrs. Rash's arguments on her Notice of Appeal at the appropriate time. This Brief is limited to arguing that the Court should conclude that the trial court erred in denying Mr. Akbar's motion (and renewed motion) for directed verdict. If the Court correctly determines that Mrs. Rash's appeal lacks merit, the issues in this cross-appeal will be moot.

STANDARD OF REVIEW

On review, this Court's task is clear: to correct error of law, and to reverse "when no probative evidence exists to support the factual findings of the lower court." Jean Hoefer Toal *et al*., *Appellate Practice in South Carolina* (3rd ed. 2016), at page 225, *citing Simpson v. Moore*, 367 S.C. 587, 627 S.E.2d 701 (2006).

An action in negligence is an action at law. *Hartman v. Jensen's, Inc.*, 277 S.C. 501, 289 S.E.2d 648 (1982). On appeal from a case tried before a jury in a law action, this Court has authority to correct errors of law. *Townes Assoc. v. City of Greenville*, 266 S.C. 81, 221 S.E.2d 773 (1976). The trial court here erred in finding that the questions of the existence and scope of duty were questions of fact for the trial court. **The existence and scope of duty are questions of law** for the trial judge. *Underwood v. Coponen*, 625 S.E.2d 236, 367 S.C. 214 (Ct. App. 2006). Appellate courts "review[] questions of law de novo," without deference to the trial court. *Town of Summerville v. City of N. Charleston*, 378 S.C. 107, 110, 662 S.E.2d 40, 41 (2008).

In addition to its error of law on duty, the trial court erred in failing to direct a verdict in favor of Mr. Akbar—there was no evidence of causation because the truck driver explicitly testified that nothing on Mr. Akbar's property obstructed his view. "When reviewing the denial of a motion for directed verdict or JNOV, this Court applies the same standard as the trial court." *Fettler v. Gentner*, 396 S.C. 461, 722 S.E.2d 26 (Ct. App. 2012). **A directed verdict should be granted when the evidence raises no issue for the jury**. *Evans v. State Farm Mut. Auto. Ins. Co.,* 269 S.C. 584, 239 S.E.2d 76 (1977). Moreover, a "directed verdict motion is properly granted if the evidence as a whole is

susceptible of only one reasonable inference." *Chakrabarti v. City of Orangeburg*, 403 S.C. 308, 313, 743 S.E.2d 109, 112 (Ct. App. 2013) (citation omitted).

ARGUMENT

The trial court erred when it denied Mr. Akbar's motions for directed verdict for two reasons. First, the trial court wrongly found the existence of a duty to be a question of fact for the jury. This was error: the question of the existence (and scope) of a duty is strictly one of law for the court. As a matter of law, Mr. Akbar had no duty to insure visibility for roadway travelers. Second, the trial court erred in finding there was *any* evidence to support the element of causation.

To prevail on her theory of negligence, Mrs. Rash was obligated to establish three essential elements: "(1) that defendant owed a plaintiff a duty of care; (2) that by some act or omission, defendant breached that duty; and (3) that as a proximate result of the breach, the plaintiff suffered damage." *Underwood v. Coponen*, 625 S.E.2d 236, 238, 367 S.C. 214 (Ct. App. 2006); *accord Babb v. Lee Cty. Landfill SC, LLC*, 405 S.C. 129, 153, 747 S.E.2d 468, 481 (2013) ("To prevail on a negligence claim, a plaintiff must establish duty, breach, causation, and damages."). The trial judge erred in allowing this case to go to the jury in the first instance, because neither the law nor the evidence supports the elements of Mrs. Rash's claim for negligence. While the jury ultimately arrived at the correct result, the trial court should not have placed the jury in the position of answering a question of law, nor allowed it to speculate—when the evidence was clear and subject to only one reasonable inference. Even if this Court finds merit in Mrs. Rash's appeal, it should

nonetheless reverse the trial court's denial of Mr. Akbar's motion for directed verdict and hold as a matter of law that the cause of action for negligence against him fails.

I. The trial court erroneously found the existence of duty to be a question of fact. As a matter of law, Mr. Akbar has no duty to roadway passerby, and he therefore was entitled to a directed verdict in this case.

The question of whether Mr. Akbar has a legal duty here—an essential element of the negligence claim against him—is strictly a question of law. *Simmons v. Tuomey Reg'l Med. Ctr.*, 341 S.C. 32, 39, 533 S.E.2d 312, 316 (2000) ("The court must determine, as a matter of law, whether the law recognizes a particular duty."). Mrs. Rash failed to identify—and the trial court did not find—any cognizable duty by Mr. Akbar that would support a negligence claim. Mr. Akbar was therefore entitled to a directed verdict. *Id.* ("If there is no duty, then the defendant in a negligence action is entitled to a judgment as a matter of law.").

A. The existence of a duty is a question of law for the trial court.

The trial court erroneously believed that the existence of a duty is a fact question for the jury. The trial judge was utilizing (apparently incorrect!) standardized jury charges and trial handbook materials, and she mistakenly relied on a misstatement that those materials contain—that duty is an evidentiary matter. (*See* R. p. 1273:12 – 1274:4). This fundamental error reverberated throughout the case:

- The error was the improper basis for the trial court's denial of Mr. Akbar's directed verdict motions (*e.g.* R. p. 1194:17-25; p. 1204:19-20; 1227:5-8; 1274:5 — 1275:7);

- The error resulted in an improper charge to the jury ("The plaintiff must prove by a preponderance or greater weight of the evidence that the defendants owed the plaintiff a duty of care.") (R. p. 1336:22-24); and
- The error culminated in the improper submission of a question of law (*i.e.* whether a duty exists) (to which the answer was "No") to the jury. The trial court wrongly held: "The case law is very clear. They have to establish four elements by a preponderance or greater weight of the evidence. And duty is one of them." (R. pp. 1274:17—1275:3).

But South Carolina jurisprudence is unequivocal that the question of duty is one of law for the court. Properly, the question of the existence of a duty is a gateway question of law in a negligence action, the answer to which is dispositive on the viability of a plaintiff's claim. *See Ellis by Ellis v. Niles,* 324 S.C. 223, 479 S.E.2d 47 (1996) ("Whether the law recognizes a particular duty is an issue of law to be determined by the court."); *Simmons*, 341 S.C. at 39; *Shelton v. Ls & K, Inc.*, 648 S.E.2d 307, 374 S.C. 294 (Ct. App. 2007) ("In deciding whether a defendant acted negligently, '[t]he court must determine, as a matter of law, whether the defendant owed the plaintiff a particular duty.'") (citations omitted); *see also Rogers v. South Carolina Dept. of Parole and Community Corrections*, 464 S.E.2d 330, 320 S.C. 253 (1995) (If there is no duty, then the defendant in a negligence action is entitled to a directed verdict). In sum, the determination of the existence of a duty is solely the responsibility of the Court, and whether the law recognizes a particular duty is an issue of law that the court should decide. *Spence v. Wingate*, 395 S.C. 148, 160, 716 S.E.2d 920, 926 (2011).

This Court should correct the trial court's error and hold that the existence and scope of a duty is a matter of law, and the question should never be submitted to a jury. Next, this Court should hold that Mr. Akbar, as a matter of law, had no duty to ensure the safety of highway travelers passing by his house.

B. Mr. Akbar did not have a duty as a matter of law.

"Without a duty, there is no actionable negligence." *Doe v. Greenville Cty. Sch. Dist.*, 375 S.C. 63, 72, 651 S.E.2d 305, 309 (2007); *accord Hurst v. East Coast Hockey League, Inc.*, 371 S.C. 33, 37, 637 S.E.2d 560, 562 (2006) ("If there is no duty, then the defendant in a negligence action is entitled to judgment as a matter of law.").

Mrs. Rash attempted to argue two sources of duty: common law and *per se* under various City of North Charleston ordinances. As discussed below, both arguments fail.

1. The common law imposes no duty on Mr. Akbar.

South Carolina law does not impose a duty on a landowner to ensure that vegetation on their property does not visually obstruct the view of roadway travelers. *See Shelton v. Ls & K, Inc.*, 648 S.E.2d 307, 374 S.C. 294 (Ct. App. 2007) (no duty by Burger King as to its Bradford pear tree that allegedly blocked view of driver who hit pedestrian); *Underwood v. Coponen*, 625 S.E.2d 236, 367 S.C. 214 (Ct. App. 2006) (no duty by landowner to keep tree limbs from obscuring visibility of stop sign), *quoting Adame v. Munoz*, 287 Ill. App. 3d 181, 222 Ill. Dec. 619, 678 N.E.2d 26, 29 (1997) ("**no duty 'on the part of landowners to maintain their property in such a way that it does not obstruct the view of travelers on an adjacent highway, and this refusal to find such a duty applies even where the obstruction is an artificial condition.**'").

Indeed, our Court of Appeals has recognized that by **not** imposing such a duty of care on private landowners, it was promoting "good public policy." In *Underwood*, plaintiff claimed he was injured in an auto accident when a driver ran a stop sign because tree limbs on defendant's property blocked the stop sign's visibility to traffic. The *Underwood* Court rejected the idea that landowners have a duty to maintain vegetation in a way that does not obstruct the vision of drivers on an adjacent roadway, and that even by periodically trimming branches a landowner does not undertake such a duty. 625 S.E.2d at 238–239. "If we extended the duty to require private landowners to ensure that their trees do not hinder traffic control devises, we would be discouraging private landowners from voluntarily maintaining vegetation on their property which adjoins a public roadway or highway in an effort to shield themselves from unwarranted liability." *Id.* at fn. 3.[4]

The South Carolina Court of Appeals reiterated this lack of duty in the *Shelton* case. There, a motorist was turning out of a Burger King parking lot and struck a pedestrian. The pedestrian claimed that the driver's view was obstructed by a large Bradford Pear tree on the Burger King grounds. The Court rejected the idea that Burger King had a legal duty "to prevent the obstruction caused by the Bradford pear tree in this case." *Shelton* 648 S.E.2d at 309.

As a matter of South Carolina common law, Mr. Akbar has no common law duty

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[4] *Underwood* was Mrs. Rash's key case in support of her argument for a common law duty. Oddly, the trial judge seemed to find—on several occasions—that the case did not apply and that Mr. Akbar did not have a duty. This was the correct decision, but the trial judge erroneously believed that the question was nonetheless an evidentiary one which needed to be submitted to the jury. (*See* R. pp. 1201:16-20; 1206:7-12)

to motorists on upper Meeting Street Road to ensure that vegetation does not obstruct their vision. This Court should so hold, and it should grant judgment as a matter of law in Mr. Akbar's favor.

2. No ordinance imposes a duty on Mr. Akbar that would sustain Mrs. Rash's negligence claim.

Mrs. Rash also tried to argue negligence *per se* based on several City of North Charleston ordinances.[5] (R. p. 1150: 12-18). The trial court erred when it failed to find that the North Charleston ordinances did not impose a duty on Mr. Akbar as a matter of law. This Court should correct this error by holding that no duty exists under the ordinances on the part of Mr. Akbar, as a matter of law under this State's established framework for finding a private tort duty imposed by statute.

Negligence *per se* is a doctrine under which a court may find a duty of care, based on a statute, and breach of the duty by violation of the statute. "Negligence *per se* is a doctrine, used in tandem with a negligence claim, to establish two of the elements of negligence—duty and breach." *Denson v. Nat'l Cas. Co.*, 439 S.C. 142, 886 S.E.2d 228 (2023). A plaintiff must first establish that a duty of care, sufficient to support a private negligence claim, arises from the statute. *Whitlaw v. Kroger Co.*, 306 S.C. 51, 410 S.E.2d 251 (1991).

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[5] One of the ordinances asserted by Plaintiff was a zoning ordinance entitled "Visibility at Intersections." The trial court correctly found that this ordinance, which by its plain language applied only to corner lots, was inapplicable to Mr. Akbar's interior lot. (R. p. 1226:23-25). Because the trial court held that this ordinance did not apply to Mr. Akbar, this Brief does not discuss that ordinance. However, Mr. Akbar preserves and reserves all of his previous arguments on the "Visibility at Intersections" ordinance, including those made at summary judgment, directed verdict, renewed directed verdict, and during the charge conference. (*See, e.g.* R. pp. 140-142).

The City of North Charleston's ordinance, asserted by Mrs. Rash as a basis for imposing a private tort duty on Mr. Akbar to maintain his vegetation for the benefit of passerby on the highway, is a "Health and Sanitation" ordinance found in Chapter 9 of the City's Code of Ordinances. The ordinance declares certain conditions on property to be "public nuisances" because of their potential to create a "breeding place" for rodents and thereby create a danger to the health of the community. The ordinance states:

> **Sec. 9-67. - Nuisances declared.**
> 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. Chas. Code of Ord.

The trial court should have found, as a matter of law, that this health and sanitation ordinance did not impose a tort duty on Mr. Akbar to motorists on the highway. South Carolina courts recognize **two criteria necessary** "in order to show that the defendant owes [plaintiff] a duty of care arising from a statute:

> (1) that the essential purpose of the statute is to protect from the kind of harm the plaintiff has suffered; and
>
> (2) that [plaintiff] is a member of the class of persons the statute intended to protect."

Whitlaw at 252, *citing Rayfield v. S.C. Dep't of Corr.*, 297 S.C. 95, 103, 374 S.E.2d 910, 914 (Ct. App. 1988); *see also Denson* at 157, 886 S.E.2d at 236.

In this case, the ordinance relied upon by Mrs. Rash does not meet either of the above required elements. *See Denson* at 157, 886 S.E.2d at 236. ("Those two elements ensure that the statute proposed as a basis of duty and breach is being used properly. Both elements are designed to limit negligence *per se*'s use to actions where the plaintiff is owed a duty arising from the statute."). The "Health and Sanitation" nuisance ordinance is tailored to protecting the residents of the city against unsanitary conditions. Its origin is nuisance law, which is tied to the protection of property and property values. Moreover, the City of North Charleston's ordinances—particularly those pertaining to sanitation and health—are for the benefit of residents of the City of North Charleston and not for motorists passing through on SCDOT's highways.

(1) The nuisance ordinance fails the first element of the *Whitlaw* test.

As to the first element identified by *Whitlaw*, the "essential purpose" of the "Nuisance" ordinance at Sec. 9-67 is not to protect motorists on the highways. The context of the ordinance is its location in Chapter 9 of the City's Code, which chapter is entitled "Health and Sanitation."[6] The Chapter governs **exactly what it says that it does**. It contains articles on the appointment and duties of a city health officer. *See* Art. II, Sec. 9-16. It governs "Garbage, Trash, and Refuse" by instituting provisions on litter control, trash collection, scavenging, and waste management. *See* Art. III. The Chapter also governs "Rat Control in Business Buildings" as well as "Escort Services" and consort businesses. *See* Art. V; Art. VI. Within this context, it is clear that the "Nuisance"

[6] The Chapter in the City of North Charleston's Code of Ordinances may be viewed here: https://library.municode.com/sc/north_charleston/codes/code_of_ordinances?nodeId=COOR_CH9HESA

ordinance relied on by Mrs. Rash does not have the "essential purpose" of "protecting from the kind of harm that plaintiff suffered"—which was a motorcycle accident at an intersection where the motorcycle collided with a left-turning pickup truck.

The plain language of the particular ordinance relied upon by Mrs. Rash has the essential purpose of identifying certain enumerated conditions, which are "declared to be unhealthy and unsightly conditions." Based on this clear purpose, as well as the context of the ordinance, this Court should hold that the ordinance fails the first element of the *Whitlaw* test (the "essential purpose" element). It therefore does not establish a tort duty by Mr. Akbar to Mr. Rash on his motorcycle, as a matter of law.

(2) The nuisance ordinance fails the second element of the *Whitlaw* test.

The second element of the *Whitlaw* test is that plaintiff must be "a member of the class of persons the statute intended to protect." *Whitlaw* at 252, *citing Rayfield,* 297 S.C. 95, 103, 374 S.E.2d 910. On this element, the case of *Overcash v. South Carolina Elec.*, is highly instructive on the limitations of nuisance laws. 364 S.C. 569, 614 S.E.2d 619 (2005). The *Overcash* Court held that a plaintiff had no private tort claim for personal injury under a nuisance statute. The basis for this holding is that nuisance law is property law—it is designed to protect against damage to property and property values, and not against personal injury to individuals.

The Court first looked to English common law, observing that "an action for nuisance was reserved for an interference with the use or enjoyment of rights in land." *Overcash* at 620. The Court then examined South Carolina law, and it noted:

> The cases in South Carolina concerning a private action for a public nuisance have involved an alleged damage to an individual's real or

> personal property as the "special injury" required to maintain an action for public nuisance. *See e.g., Burrell v. Kirkland*, 242 S.C. 201, 130 S.E.2d 470 (1963) (abutting landowner requested injunction for neighbors' obstruction of public road); *Huggin v. Gaffney Dev. Co.*, 229 S.C. 340, 92 S.E.2d 883 (1956) (plaintiff sues for damages on alleged obstruction of public road alleging he was unable to obtain agricultural labor from a source at the opposite end of the road); *Crosby v. Southern Ry. Co.*, 221 S.C. 135, 69 S.E.2d 209 (1952) (plaintiff alleged diminution in value of real property cause by blocked street).

Overcash at 621.

The *Overcash* analysis, which emphasized and concluded that nuisance law is designed to protect property—and not persons—is dispositive, here. This Court must find that the City of North Charleston's ordinance is not designed to protect "persons" of the class of Mr. Rash (i.e. highway motorcyclists). Instead, it is designed to protect **property** in North Charleston from unhealthy and unsanitary conditions.

(3) In addition to the *Whitlaw* test, the ordinance cannot support a private tort duty because the City establishes the penalty for violation as a misdemeanor.

The general rule in this State is that private rights of action do not spring from statutes designed to allow a municipality to secure societal welfare or safety:

> The legislative intent to grant or withhold a private right of action for violation of a statute or the failure to perform a statutory duty, is determined primarily from the language of the statute.... In this respect, the general rule is that a statute which does not purport to establish a civil liability, but merely makes provision to secure the safety or welfare of the public as an entity is not subject to a construction establishing a civil liability.

Dorman v. Aiken Communications, Inc., 303 S.C. 63, 398 S.E.2d 687 (1989). Here, the City of North Charleston never intended for its nuisance ordinances to give rise to civil tort liability—the ordinances are solely designed to secure the public welfare.

Significantly, if Mr. Akbar has any duty under the ordinance, it is exclusively to the City of North Charleston, and not to private individuals passing by on the roadway. The Code of Ordinances establishes a health officer and the director of code enforcement, as well as the police chief of the city, as being charged with enforcing "all nuisances and violations of the health regulations of the City of North Charleston." *See* Sec. 9-1, City of N. Chas. Code of Ord.

Moreover, the City of North Charleston expressly imposes the criminal penalty of misdemeanor as the punishment for violation of the ordinance. Sec. 9-66 ("Any person who creates a common nuisance, shall be guilty of a misdemeanor."); Sec. 9-68 ("Causing, contributing to, or permitting nuisance a misdemeanor."); Sec. 9-85 ("It shall be unlawful for any person, individually or as the representative of any person, to violate any of the terms or provisions of this article, and any person doing so shall be guilty of a misdemeanor."). This penalty leaves no question that the City of North Charleston did not intend for its ordinance to give rise to civil liability in tort.

For this additional reason, under the precedent of *Dorman*, this Court should hold that the nuisance ordinance cannot support Mrs. Rash's negligence action, as a matter of law. In the absence of any cognizable duty by Mr. Akbar to highway motorists, **Mrs. Rash's claim against Mr. Akbar fails as a matter of law.**

In addition to its errors of law as to duty, the trial court also erred in submitting the question of causation to the jury when there was no probative evidence in the record to support it.

II. Mr. Akbar was entitled to a Directed Verdict because Mrs. Rash presented no evidence of causation in fact.

There is no evidence that anything Mr. Abkar did with regard to his property contributed *in any way* to the accident. Because Mrs. Rash presented no such evidence, the trial judge erroneously allowed the jury the opportunity to *speculate* that Mr. Akbar's chain link fence and bushes somehow caused the accident. Fortunately, the jury diligently listened to the facts and the law, and it returned a correct verdict in favor of Mr. Akbar and the other Defendants. Should this Court find any merit in Mrs. Rash's appeal, it should reverse the trial court's denial of Mr. Akbar's well-founded directed verdict motion because there was no evidence that Mr. Akbar's chain link fence and bushes had *any* relationship to this accident. *Evans v. State Farm Mut. Auto. Ins. Co.*, 269 S.C. 584, 239 S.E.2d 76 (1977) (reversing trial court's failure to grant directed verdict because "where the evidence was susceptible of only one reasonable inference, the question was no longer for the jury but one of law for the court.").

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

S.E.2d 910, 914 (Ct. App. 2001) (citation omitted); *accord Vinson*, 324 S.C. at 401, 477 S.E.2d at 721 ("Proximate cause is the efficient or direct cause of an injury.").

A plaintiff may not carry the burden of proving proximate cause via surmise, speculation, or conjecture. *See Messier v. Adicks*, 251 S.C. 268, 270, 161 S.E.2d 845, 845-46 (1968) ("It is elementary that in order for plaintiff to recover it was necessary for him to prove that his fall and resulting injuries were the proximate result of some negligent or wanton conduct on the part of the defendant. These are basic to recovery and cannot be left to surmise, speculation, or conjecture."); *accord Thomas v. South Carolina Dep't of Highways & Pub. Transp.*, 320 S.C. 400, 402, 465 S.E.2d 578, 580 (Ct. App. 1995) ("To establish causation in fact, Thomas was required to present evidence that showed the accident would not have occurred had the Department complied with the statute in question."); *Accordini v. Security Cent., Inc.*, 283 S.C. 16, 320 S.E.2d 713 (Ct. App. 1984) (plaintiff must plead and prove causation in fact to prevail in negligence) ("There is no evidence at all that even if the Department had taken Green's license tag and car registration, Green, who had a valid driver's license, would not have been negligently operating either the uninsured vehicle or some other vehicle at the time he ran over Thomas. We can only speculate about what he would or would not have done had the Department recovered his license tag and car registration.").

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

have directed verdict in favor of Mr. Akbar because there was no evidence from which the jury could infer or conclude that Mr. Akbar's property proximately caused the accident.

There was only one witness with direct knowledge of the potential impact of Mr. Akbar's fence and bushes on the accident: Daniel McJunkin. Mr. McJunkin was driving the truck involved in the accident with Mr. Rash. No other witness could—or did—testify that Mr. Akbar's property caused this tragic accident. As a result, the trial court should have granted Mr. Akbar a directed verdict to prevent the jury from engaging in conjecture about the cause of the accident.

Notably, Mr. McJunkin was once a defendant in the case. Mr. McJunkin had every motivation to blame someone else for this tragic accident. He had every opportunity to claim that he did not see Mr. Rash because of Mr. Akbar's fence and bushes or some other obstruction. Only he knows what he saw or could not see. However, even though it was in his self-interest to blame others, he did not. Instead, he truthfully accepted responsibility and denied that Mr. Akbar's fence, vegetation, or any other object obstructed his view. As Mrs. Rash's first witness at trial, Mr. McJunkin unequivocally testified on direct examination:

> Q: Mr. McJunkin, do you recall having your deposition taken in December of 2019?
>
> A: I do.
>
> Q: And when you had your deposition taken in December of 2019, did you swear an oath to tell the truth at that time?
>
> A: I did.

Q: And during that December 2019 deposition, **do you recall saying that nothing obstructed your view at that intersection on February 19, 2017?**

A: **I did.** . . .

Q: Let me ask you this. During your deposition in December of 2019, was your testimony **true and accurate** to the best of your recollection at that time?

A: Yes, sir.

Q: **And is your testimony here today true and accurate to the best of your recollection today?**

A: **Yes, sir.**

(*See* R. p. 212:3–11; p. 214:13–19) (emphasis added). Again, despite having the opportunity to be dishonest or change his testimony and blame Mr. Akbar and others for this fatal accident, Mr. McJunkin honorably told the truth *twice* and admitted that *nothing* blocked or obstructed his view at the time of the accident. This is particularly notable, as Mr. McJunkin did not alter his testimony even though he revisited the scene of the accident and noticed the fences and vegetation there at that time:

Q. Mr. McJunkin, when you returned to this intersection after your deposition had been taken in 2019, tell us what you observed there.

A. When I returned, there are utility poles. There are fences or vegetation in or about that area.

Q. Did returning to that intersection after your deposition had been taken, did that refresh your recollection as to what that intersection looked like?

A. It – I don't know that any condition changed.

(R. p. 214: 4-12). Again, Mr. McJunkin *never* testified that Mr. Akbar's chain link fence or vegetation obstructed his vision in any way at the time of the accident.

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

Mrs. Rash cannot cite any South Carolina authority upholding a verdict against a defendant for blocking sight lines where, as here, the driver(s) involved in the accident testified that his vision was not actually obstructed. She cannot cite any case denying a directed verdict under such circumstances. The trial court committed reversible error when she denied Mr. Akbar's directed verdict motion, because there was simply no factual evidence that Mr. McJunkin's vision was obstructed by anything on Mr. Akbar's property. The trial court's denial of those motions would have allowed the jury to speculate—contrary to the *only* evidence in the record—that Mr. McJunkin's view was blocked when he testified under oath (and without dispute) that it was not. There is no authority allowing for a finding of proximate cause under the unique facts of this case.

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

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

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

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

See id., at *4 (emphasis added); *accord Gibson v. Gross*, 280 S.C. 194, 198-99, 311 S.E.2d 736, 740 (Ct. App. 1984) ("[T]here is no evidence in this case that Edwards struck Gibson because the highway was blocked, or because warning devices failed to warn him of the highway's condition. In fact, the evidence suggests that Gross' car blocked only one lane of a four lane highway. In short Gibson failed to establish that his injuries were proximately caused by Gross' negligence.").[7] Like the *Bessinger* plaintiff, Mrs. Rash here asked the jury to speculate about a mere ***possibility*** that Mr. Akbar's chain link fence and

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[7] *Cf. Vaughn v. South Carolina Department of Transportation*, 2013-UP-008 (S.C. App. Jan 09, 2013) (*citing Oliver v. S.C. Dep't of Highways & Pub. Transp.*, 309 S.C. 313, 317, 422 S.E.2d 128, 131 (1992)): "We find Vaughn failed to establish a prima facie case of negligence against DOT because he offered no evidence to show that DOT's failure to maintain the vegetation within the median was the proximate cause of his injuries."

bushes blocked Mr. McJunkin's view—a possibility that his testimony indisputably refuted.

Even if Mrs. Rash could show that Mr. Akbar's fence and bushes were improperly placed on his property along Meeting Street Road (which, at trial, was never proven)[8], the uncontradicted evidence shows only that the *accident* did *not* happen because Mr. McJunkin's view down Meeting Street Road was obstructed. Mr. McJunkin does not know why he did not see Mr. Rash's motorcycle. Consequently, the evidence is insufficient for a reasonable jury to conclude that the accident most probably would not have occurred "but for" the condition of Mr. Akbar's property. Proximate cause is an essential element of Mrs. Rash's burden of proof. However, rather than present competent causation evidence, Mrs. Rash asked the jury to speculate that Mr. Akbar's fence and bushes blocked Mr. McJunkin's view in Mr. Rash's direction.

Moreover, the photographic evidence makes clear that Mrs. Rash's suggestion that Mr. Akbar's chain link fence and bushes prevented Mr. McJunkin from seeing Mr. Rash is illogical. The photograph of Mr. McJunkin's view from Hedgewood Street definitively refutes Mrs. Rash's claim that the Mr. Akbar's property was a visual obstruction:

[8] In fact the trial judge correctly found that the visibility at intersection zoning ordinances asserted by Mrs. Rash were inapplicable to Mr. Akbar's property. (R. p. 1226: 23-25)

(R. p. 1501). Mr. McJunkin denied that the Mr. Akbar's property blocked his view, and the physical evidence shows that he is correct. Instead, the photographs make clear that from the position just behind the stop bar or moving forward, Mr. McJunkin could see all the way to the point where Meeting Street curves behind the distant fence line. Mr. Akbar's fence and bushes are simply not a factor in Mr. McJunkin's ability to see around the curve—the curve in the roadway itself is the limiting factor. Even viewing the evidence in the light most favorable to Mrs. Rash, she did not present enough evidence to allow the jury to conclude that the accident most probably would not have occurred if Mr. Akbar's fence and bushes were not there.

Lacking direct evidence, Mrs. Rash may instead try to argue that her expert witness testimony was sufficient to create a jury question on causation. However, it is insufficient for Mrs. Rash's experts to opine that Mr. Akbar's fence and bushes partially blocked the views of motorists or "did not help" the situation. It is not enough for them

to opine—in the teeth of Mr. McJunkin's first-hand testimony—that all of the obstructions were causative factors in the accident or that the intersection would have been safer without Mr. Akbar's fence and bushes. None of Mrs. Rash's experts opined that—but for Mr. Akbar's fence and bushes—Mr. McJunkin would have seen Mr. Rash's motorcycle. *See Harris Teeter v. Moore & Van Allen*, 390 S.C 275, 701 S.E2d 742 (2010) ("Instead of stating that the Respondents' conduct most probably caused the outcome, [plaintiff's expert] said, 'had [Respondents] done these things, the percentage of success would have been greater.' Thus, [plaintiff's expert]'s deposition did not establish that the Respondents' actions were the 'but for' cause of Harris Teeter's loss."). Mrs. Rash failed to present proper evidence that Mr. Akbar's fence and bushes *actually* caused the accident.

In addition, Mrs. Rash's experts testified that the *curvature* of Meeting Street Road afforded inadequate stopping distance, even without Mr. Akbar's fence and bushes. This further supports that the accident was likely to happen even if Mr. Akbar's fence and bushes were not present. "[W]here the cause of plaintiff's injury may be as reasonably attributed to an act for which defendant is not liable as to one for which he is liable, plaintiff has failed to carry the burden of establishing that his injuries were the proximate result of defendant's negligence." *Fowler v. Coastal Coca-Cola Bottling Co.*, 252 S.C. 579, 167 S.E.2d 572 (1969) (*citing Messier*, 251 S.C. at 271, 161 S.E.2d at 846 (reversing trial court's refusal to grant defendant judgment n.o.v. in trip-and-fall case, even though evidence showed stairs were too steep, the lighting was inadequate, and railing was improperly constructed, because plaintiff could not say why he tripped)).

For the foregoing reasons, the evidence presented would require the jury to speculate to conclude that Mr. Akbar's fence and bushes—which were never clearly identified by Mrs. Rash—blocked Mr. McJunkin's view of Mr. Rash's motorcycle at the precise instant he was looking in that direction. Instead, there are numerous other causes of equal or greater probability: the curvature in the road or another obstruction; that Mr. McJunkin simply failed to look in Mr. Rash's direction at the right time; the darkening conditions at twilight; the narrow profile of Mr. Rash's motorcycle; the location of the motorcycle in its lane of travel; or simple inattention at the critical moment.

As set forth above, Mrs. Rash has not presented any factual evidence that would allow a jury to find that Mr. Akbar's fence and bushes proximately caused the accident. To the contrary, the actual evidence permits only one inference: that Mr. Akbar's fence and bushes did not obstruct Mr. McJunkin's view. This was a failure of the essential element of causation. Therefore, the trial court erred in denying Mr. Akbar's motion for directed verdict. This Court should find that Mr. Akbar was entitled to judgment as a matter of law on the negligence claim.

CONCLUSION

The trial court erred when it denied Mr. Akbar's Motions for Directed Verdict. Mrs. Rash failed to satisfy essential elements of her negligence claim, which was a mixed questions of law and fact. This Court should hold, as a matter of law, that Mr. Akbar had no duty that would support the negligence claim against him. Moreover, it should hold that there was no evidence of causation, and that directed verdict in Mr. Akbar's favor was therefore proper.

Respectfully submitted,

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